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Articles

Current Developments in International Law

Current Sovereign Debt Crisis and Financial Crisis

GoJIL Focus: Human Rights and Their Impact on Various Fields of the Law

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Editorial

We are proud to present our first issue of 2012. After the successful issues of last year, GoJIL can now turn to its new and exciting projects of 2012! Since our last issue in January 2012 several events with global impact have filled the newspapers and confronted us with the need for new judicial and political solutions.

The Arab Spring movement is still continuing, with the situation in Syria aggravating further, which has led to the UN Security Council authorizing the establishment of the United Nations Supervising Mission in Syria (UNSMIS). One topic heavily discussed in the context of the Arab Spring was the Libya intervention in 2011, which ultimately led to the Pre-Trial Chamber of the International Criminal Court (ICC) issuing arrest warrants for Muammar al-Gaddafi.

In his article "The Status and Future of International Law after the Libya Intervention" *Pierre Thielbörger* addresses the Libya intervention in order to discuss three general claims about international law. He examines whether international law has overcome its post-9/11 crisis by the intervention relying on the mechanisms of collective security under the UN Charter. Furthermore he explores whether the emerging right to democratic governance has received new emphasis and examines whether the international attitude towards States violating fundamental human rights has changed through the case of Libya.

Besides the intervening forces in the Libyan conflict, the African Union (AU) played an important role in the conflict's resolution. *Tom Kabau* tackles the subject of the AU in his article "The Responsibility to Protect and the Role of Regional Organizations: an Appraisal of the African Union's Interventions", examining its dilemmas and opportunities in the implementation of the concepts of the responsibility to protect. He is of the opinion that the AU failed to implement Article 4(h) of its Constitutive Act and argues that this may have been aggravated due to the AU not institutionalizing the concept of responsible sovereignty within its legal framework.

The arrest warrants for members of the Gaddafi family by the ICC also raised questions of international criminal law. *Jens M. Iverson*, under the title "The Continuing Functions of Article 98 of the Rome Statute", demonstrates said functions with a look to the African Union Commission's vehement objections to the ICC's reading of Article 98 of the Rome Statue. This includes a demonstration of immunities resulting from agreements under Article 98(2), as well as customary immunities of property, persons, diplomatic immunity, and State immunity.

In April 2012 the Office of the Prosecutor at the ICC decided to reject Palestine's attempt to accept the ICC's jurisdiction pursuant to Article 12(3) of the Rome Statute.[1] Not only Palestine struggles with its recognition as a State, Kosovo too is still no Member State of the United Nations due to not being recognized as State by a number of other States, including China and

1 The Office of the Prosecutor, 'Situation in Palestine' (3 April 2012) available at http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf (last visited 2 May 2012).

Russia.[2] *David I. Efevwerhan,* in his article "Kosovo's Chances of UN Membership: A Prognosis", examines the case of Kosovo applying for admission into the membership of the United Nations after the International Court of Justice ruled that Kosovo's unilateral declaration of independence neither violated the general rule of international law nor *lex specialis*. He reviews the rules and practice of UN membership admission, assesses Kosovo's chances of success and argues that under normal circumstances, Kosovo would meet the requirements for admission into the UN, but political considerations of the permanent members of the Security Council stand in the way of a successful application of Kosovo. He then offers four ways out of the seemingly gridlocked situation which Kosovo finds itself in.

Meanwhile, the concurrent financial crisis has been holding the world in a tight grip. A number of the Mediterranean Member States of the EU continuously struggles with the impending risk of insolvency. *Matthias Goldmann* and *Maximilian Hocke* take a look at the impact of financial crises on States. In his article "Sovereign Debt Crises as Threats to the Peace: Restructuring under Chapter VII of the UN Charter?", Goldmann states that following sovereign debt crises the population in affected States might suffer a significant loss of socio-economic rights. According to him the resolution of the debt crises is not only impeded by so-called vulture funds, but also by legal obstacles, which exist due to the lack of a statutory, obligatory bankruptcy procedure for States. He then discusses whether the UN Security Council might seize matters, when debt crises constitute a threat to the peace, as they are correlated to the outbreak of civil war. This includes an assessment of the concept of peace in Art. 39 UN Charter.

[2] List of recognitions available at http://www.mfa-ks.net/?page=2,33 (last visited 4 May 2012).

Hocke examines how measures against the Global Financial Crisis, such as the acquisition of shares or the refusal to help particular financial institutions, affected the protection guaranteed by International Investment Law, in his article "Have Measures adopted by States to Cope with the Global Financial Crisis Been in Accordance with their Obligations under International Investment Law?". The article argues that due to public policy reasons the measures have been in accordance with all protection standards.

Despite the magnitude of current developments our GoJIL Focus is dedicated to a less visible, but equally relevant development in International Law: "The Impact of Human Rights in various fields of Law". The topic is based on the 4th annual Legal Research Network Conference held in Göttingen on 15-16 September 2011. After a thorough analysis and discussion, it is revealed that there is hardly any branch of law that is beyond the reach of human rights.

In his article "Human Rights and International Investment Law: Investment Protection as Human Right" *Nicolas Klein* argues that certain material standards of International Investment Law can be conceptualized to be human rights-like guarantees of a minimum standard of protection. Furthermore, he explains that such an approach may serve as an important concept to restrict the interpretation of investment treaties and to balance economic rights with other fundamental human rights in case of norm conflicts.

Moreover, *Laurens Lavrysen* highlights certain areas of concern in the European Asylum System from the viewpoint of the European Convention on Human Rights. In his article "European Asylum Law and the ECHR: An Uneasy Coexistence" he particularly focuses on the "Dublin II" system of responsibility for examining asylum applications, the reception conditions and the detention of asylum seekers.

In her article “Re-Thinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation” *Maria Victoria Cabrera Ormaza* expresses the necessity to reassess the definition of ‘indigenous peoples”. In doing so she points out that a human rights-based approach to the definition of indigenous peoples is being overtaken by a rather functional one.

Subsequently, *Sebastiaan Vandenbogaerde* analyses the relevance of human rights in Belgian juridical periodicals in his article “They Entered without any Rumor. Human Rights in the Belgian Legal Periodicals” His main focus is on how much importance was given to human rights by Belgian legal practitioners. He assesses this by examining the most influential periodical in Flanders: the *Rechtskundig Weekblad*.

Finally, *Herman Voogsgerd*’s article “The EU Charter of Fundamental Rights and Its Impact on Labor Law: A Plea for a Proportionality-Test ‘Light’” treats the clash between fundamental (labor) rights and the four “fundamental” economic freedoms of the European Union. Firstly, *Voogsgerd* takes a closer look on the “fundamental” nature of the four economic freedoms. Then, he examines the effect of the entering into force of the Lisbon Treaty with respect to fundamental rights by analyzing case law in the field of European labor law since December 2009.

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 Status and Future of International Law after the Libya Intervention

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Abstract

This article uses the case of the Libya intervention to address three general claims about international law. Firstly, it examines whether the reliance of the intervention on the mechanisms of collective security under the UN Charter suggests that international law relating to peace and security has finally overcome its post-9/11 crisis. It concludes that the resolution's vague wording – which makes the distinction between what is "legal" under the resolution, and what is not, hard to draw – undermines such an assumption. Secondly, it explores whether the Libya intervention has put new emphasis on what has been termed the "emerging right of democratic governance". In spite of the underlying democracy-enhancing spirit of the execution of the intervention, Resolution 1973 was exclusively written in the language of human rights. It did little to indicate a changed attitude of States towards a norm of democratic governance. Finally, the article examines whether the case of Libya shows a renewed international attitude towards States which violate the most fundamental human rights of their citizens. The article concludes by suggesting that, in this third respect, a more muscular liberalism is indeed on the rise again in international law, challenging the formerly almighty concept of State sovereignty. In contributing to this subtle transformation, the Libyan case has made a genuine contribution to the development of the international legal order.

A. Introduction

In a speech in Cairo in 2009, US President Barack Obama stated: "No system of government can or should be imposed upon one nation by another. […] America does not presume to know what is best for everyone".[1] Two years later, in April 2011, that same president, alongside his French and British colleagues, changed course. Commenting on the situation in Libya, President Obama insisted that only after regime change in Libya could "a genuine transition from dictatorship to an inclusive constitutional process [...] really begin" and that "in order for that transition to succeed, Colonel Gaddafi must go, and go for good".[2]

1 Obama's Speech in Cairo', *The New York Times* (4 June 2009).

2 B. Obama, D. Cameron & N. Sarkozy, 'Libya's Pathway to Peace', *The New York Times* (14 April 2011).

The purpose of contrasting the two accounts above is not to criticise the inconsistency of the American government. Instead, it is to note that the parameters of international politics have dramatically shifted over the course of the preceding months. Not only the Arab world, but the wider community of nations, has been shaken by the 2011 popular uprisings in Northern Africa and in the Middle East. Democracy seemed to forge its way in places where democracy seemed unthinkable just a few years, or even months, before. The world marvelled at revolutions that in a domino-effect seemed to overturn one autocratic dictatorship after the other. This development, however, came to a sudden halt when one domino for a long time refused to fall: Colonel al-Gaddafi stood firm, leaving the international community in no doubt that he would not, under any circumstances, step down.

With this democratic wind beneath their wings, Western fighter jets, acting on a UN mandate, started to bomb the State of Libya, carrying out what is called an intervention on humanitarian and human rights grounds. However, in the weeks after the first air strike by this Western coalition, the humanitarian grounds as laid down in Resolutions 1970 and 1973,[3] which had originally justified the intervention, seemed quickly forgotten and were merged with wider commitments. The initial aim of the intervention – the protection of civilians – and its underlying aim as subsequently phrased by the UK, France and the US – regime change – were conflicting at best, irreconcilable at worst. By intervening in Libya the way it did, the international community has also re-ignited the fervent discussion on a right to democratic governance[4] and the idea of liberal interventionism[5] in international law.

Much has been said in countless op-eds, editorials and articles on the Libya intervention - on its moral imperatives and shortcomings, and its meaning for peace and security.[6] While these are all praiseworthy and

3 SC Res. 1970, 26 February 2011; SC Res. 1973, 17 March 2011.

4 Groundbreaking on this topic, T. M. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 1, 46-91.

5 Already pointing in that direction since the 1980s and 1990s, W. M. Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)', 78 *The American Journal of International Law* (1984) 3, 642, 645; A. D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny', 84 *The American Journal of International Law* (1990) 2, 516-524; F. R. Téson, 'Collective Humanitarian Intervention', 17 *Michigan Journal of International Law* (1996) 2, 323-371 [Téson, Michigan Journal of International Law].

6 Some of the most captivating contributions include M. Dowd, 'In Search of Monsters', *The New York Times* (12 March 2011); J. M. Fly, 'Libya is a problem from

important contributions, this article turns its attention to quite another question: it uses the Libya example to consider the current state of international law. The focus is thus converse to the usual one: the article does not ask what international law has to say about the Libya intervention; rather it asks what the Libya intervention has to say about international law.

After an examination of the most remarkable elements of Resolution 1973, the article addresses three far-reaching and, in some cases, contentious claims about international law. Firstly, the essay raises a rather general question: does the case of the Libyan intervention demonstrate a resurgence of international law? Given the reliance of the North Atlantic Treaty Organization (NATO) intervention on the mechanisms of collective security laid down in the UN Charter, is international law "after Libya" shining in renewed splendour? Such a thesis would suggest that the deep and prolonged identity crisis caused by the 2001 attacks on the World Trade Center has finally been overcome. The article concludes, however, that such an assumption would be premature, if not foolish. With a wording as spongy and vague as that of Resolution 1973, it is hardly possible to judge whether the intervention in all its forms was "within", on the edges, or even outside of international law. The case of Libya thus represents more of a small success for international law than its glorious comeback.

The article, secondly, examines whether the developments surrounding the Libya intervention have lead international law in a more democratic direction. Does the case of Libya emphasize an emergent norm of democratic governance? The article shows, however, that the case of Libya – in spite of its underlying democracy-enhancing spirit – cannot tip the scales in favour of such a norm: Resolution 1973 is clearly written in the spirit of an intervention to prevent gross human rights violations, not one

hell', *Foreign Policy* (16 March 2011); L. Vinogradoff, 'L'intervention en Libye critiquée sur le fond et sur la forme', *Le Monde* (26 March 2011); N. Mills; 'The power behind Obama's Libyan intervention', *The Guardian* (8 May 2011); R. Merkel, 'Die Militärintervention gegen Gaddafi ist illegitim', *Frankfurter Allgemeine Zeitung* (22 March 2011); C. Tomuschat, 'Wenn Gaddafi mit blutiger Rache droht', *Frankfurter Allgemeine Zeitung* (23 March 2011); R. Geiß & M. Kashgar, 'UN Maßnahmen gegen Libyen: Eine völkerrechtliche Betrachtung', *Vereinte Nationen* (2011) 3, 99-104; M. Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya', 52 *Virginia Journal of International Law* (2012) 2, 355-403 [Payandeh, Virginia Journal of International Law]; M. Payandeh 'Die Militärintervention in Libyen zwischen Legalität und Legitimität', 87 *Die Friedenswarte* (2012) 1, 59-84 (forthcoming; on file with author) [Payandeh, Friedenswarte].

which attempts to enforce the democratic rights of the Libyan people (even if this was the conflict's eventual outcome).

Thirdly, does the Libya intervention illustrate how – in international law – it is always a case of "*plus ça change, plus c'est la même chose*"; that the more things change, the more they stay the same? The article suggests the opposite: the case of Libya has shaken two of the most fundamental principles of international law to their core: the concepts of State sovereignty and international liberalism.[7] The traditional, rather liberal, understanding of the international legal framework assumes that State sovereignty only requires a sovereign State to hold an effective and independent government within its territory. The case of Libya, however, shows again that this is not always the case. Where States have proven their preparedness to systematically violate their citizens' human rights, the international community is less prepared to accept them on equal grounds. A more muscular liberalism that challenges the formerly almighty concept of State sovereignty is on the rise. It is in the observance of this development that the intervention in Libya finds its true legal meaning.

B. The Course of the Democratic Revolutions in the Arab World

In December 2010, a cascading and historic series of events in the Arab world was sparked in a small city near Tunis, where a young street vendor publicly set himself on fire, protesting against public harassment.[8] In the following weeks, Tunisia was flooded by a wave of street protests against democratic suppression, high unemployment and State corruption. Just a few weeks later, the Tunisian people had forced the downfall of their authoritarian president Zine el-Abidine Ben Ali: a president who had reigned over their country with an iron fist for more than 20 years. The "Jasmine Revolution",[9] which had just sparked, had quickly claimed its first

7 The notion of "liberalism" in international law is subject to controversial debate. For the purposes of this article I do not consider it necessary to engage with these debates in depth. I will restrict myself to introducing two conceptions of liberalism as it relates to international law, see under section D.III. of this article.

8 Without mention of author, 'How a fruit seller caused a revolution in Tunisia', *CNN* (16 January 2011); Y. Ryan, 'How Tunisia's revolution began', *Al Jazeera* (26 January 2011).

9 Writer Z. E. Hani gave the movement the name of Tunisia's national flower, Jasmine; see F. Frangeul, 'D'où vient la "révolution du jasmine"?', *Europe 1* (17 January

scalp. The "democratic virus" rapidly spread by contagion to nearby Egypt. By the end of January 2011, thousands of Egyptians protested with marches on the streets and labour strikes against rigged elections, police brutality, uncontrollable corruption and their lack of civil and political rights.[10] In the course of only a few weeks, the democratic uprising had grown to include millions of Egyptians from across the country[11] – bringing demands that Mubarak's authoritarian reign of 30 years be brought to an immediate end. Compared to Tunisia, the protests in Egypt received more State resistance, with reportedly 850 people killed and more than 6000 injured,[12] and fights continuing until the summer of 2011.[13] Nevertheless, as the external pressure grew, and internal support further disintegrated, President Hosni Mubarak had no choice but to resign from office, handing over power to the military until new elections could be held.

This "domino effect" did not, as we know, end in Egypt. Protests in Yemen, Bahrain and notably Syria soon followed.[14] Democracy's great triumphs in Tunisia and Egypt led some observers to announce the end of the age of autocracies in the Middle East:[15] democracy had finally taken

2011); and without mention of author, '"Révolution du jasmine": une expression qui ne fait pas l'unanimité', *Le Monde* (17 January 2011).

10 K. Fahim & M. El-Naggar, 'Violent Clashes Mark Protests Against Mubarak's Rule', *The New York Times* (25 January 2011); R. Hermann, 'Revolution nach Plan', *Frankfurter Allgemeine Zeitung* (15 February 2011).

11 Without mention of author, 'Egypt News Today: Protesters Prepare For "March of A Million People"', *The Huffington Post* (1 February 2011).

12 Office of the UN High Commissioner for Human Rights (OHCHR), 'Report of the OHCHR Mission to Egypt 27 March – 4 April 2011', 10 June 2011, para. 11, available at http://www.ohchr.org/Documents/Countries/EG/OHCHR_MissiontoEgypt27March_4April.pdf (last visited 22 April 2012).

13 A. Dietrich, 'Die arabische Revolution stockt', *Die Welt* (27 May 2011); I. Gilmore, 'Egypt erupts into new violence as dozens injured during Cairo protest', *The Guardian* (24 July 2011).

14 S. Raghavan, 'Inspired by Tunisia and Egypt, Yemen is joining in anti-government protests', *The Washington Post* (27 January 2011); without mention of author, 'Thousands march in Syria, as fresh wave of protests erupts', *The Telegraph* (21 March 2011); M. Chulov, 'Bahrain protests: "The regime must fall, and we will make sure, it does", *The Guardian* (18 February 2011).

15 See, for instance, Germany's Minister of Foreign Affairs G. Westerwelle, 'Tunisia – now is the time to lay the foundations for a stable democracy' (speech of 27 January 2011) available at http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Reden/2011/110127-BM-BT-Tunesien.html?nn=424204 (last visited 22 April 2012); for a voice from the media, see J. Rubin, 'After the Jasmine Revolution in Tunisia', *The Washington Post* (16 January 2011).

route, not through external coercion but through the will of the Arab citizens themselves. History, it seemed, was on the march.

The democratic enthusiasm, however, suffered a violent setback, when the revolution spilled over to another neighbour: Libya. The dreams dreamt during the peaceful revolutions in Tunisia and Egypt rapidly turned into ugly nightmares in the face of Colonel Muammar al-Gaddafi: the dictator was willing to fight the rebels back, through all necessary means.

In the course of the following weeks, these means became increasingly hard for the West to ignore, with mercenaries being drafted in from neighbouring countries and soldiers being widely reported to engage in torture, murder, rape and the use of cluster bombs against civilians.[16] Despite repeated calls for military assistance, the international community engaged in a lengthy period of collective foot-dragging – in particular with regard to a "no-fly-zone".[17] The adoption of Resolution 1970, imposing sanctions against the Gaddafi regime including the freezing of bank accounts, a weapons-embargo, and a travel ban for the entire Gaddafi clan,[18] did little, if anything at all, to resolve the crisis.

The situation was aggravated on the night of the 17th of March 2011. Gaddafi's troops stood dangerously close to conquering the last remaining rebel stronghold, the city of Benghazi. As Gaddafi laid bare his chilling plans to unleash mass killings on those who opposed him,[19] public demand that something be done to avert imminent bloodshed in Benghazi reached its peak. Backed by the support of the Arab League,[20] UK Prime Minister David Cameron and French President Nicolas Sarkozy convened an emergency meeting in the UN, seeking a resolution under Chapter VII of the

16 C. J. Chivers, 'Captive Soldiers Tell of Discord in Libyan Army', *The New York Times* (13 May 2011); without mention of author, 'After Libyan Woman's Rape claims, methods of Gaddafi government put on display', *The Washington Post* (26 March 2011); H. Sherwood, 'NATO must send in troops to save Misrata, say rebels', *The Guardian* (16 April 2011).

17 See for instance J. M. Broder, 'U.S. and Allies Weigh Libya No-Fly Zone', *The New York Times* (27 February 2011); J. Kerry, 'A No-Fly Zone for Libya', *The Washington Post* (13 March 2011).

18 SC Res. 1970, 26 February 2011, paras 9-10, 15, 17.

19 K. Kirkpatrick & D. D. Fahim, 'Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears', *The New York Times* (17 March 2011); T. Heneghan, 'Gaddafi Tells Rebel City, Benghazi, "We Will Show No Mercy"', *The Huffington Post* (17 March 2011).

20 R. Leiby & M. Mansour, 'Arab League asks U.N. for no-fly zone over Libya', *The Washington Post* (12 March 2011); E. Bronner & D. E. Sanger, 'Arab League Endorses No-Flight Zone Over Libya', *The New York Times* (12 March 2011).

UN Charter. In a last-ditch triumph of diplomacy, Resolution 1973 was adopted by the Security Council – with China, Russia, Brazil, India and Germany abstaining.[21] Immediately after the resolution, the French-Anglo coalition started the bombardment of Gaddafi's troops, later on joined – as a matter of necessity as well as desire – by other NATO forces such as the US.[22]

Yet, in the weeks following, the bombing campaign seemed only to establish a bloody stalemate. One the one hand, small in number and without advanced weapons, the rebels seemed to be no match for Gaddafi's soldiers and mercenaries – and were hence unable to march on Tripoli; on the other, Gaddafi's armies – held back by the Western coalition's military bombardment – seemed to be unable to wipe out the rebellion in Benghazi and elsewhere. A catch-22 situation without any obvious escape route was set in stone for a long time. Only by the end of August, almost six month after the intervention had started, did the rebels win the upper hand, marching on Tripoli, storming Gaddafi's fortified compound and calling for new elections. The culmination of these efforts was the bloody assassination of Muammar al-Gaddafi himself, in the full view of the world's media.

C. Resolution 1973 – Observations and Critique

The cornerstone of the Libyan intervention was Resolution 1973. Given that the main aim of the following sections is to consider the impact the Libyan conflict may have had on the current condition of international law, a legal analysis of the resolution itself is an important first step. As will be argued below, three important observations flow from the resolution's agreement – first, the very broad language employed in the resolution, second, the mismatch of the intervention's rationale expressed in the text of the resolution as opposed to the one which shone through its execution, and

21 Press Release, Security Council, 'Security Council approves "No Fly Zone" over Libya, Authorizing "All Necessary Means" to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions', U.N. Press Release SC/10200, 17 March 2011, available at http://www.un.org/News/Press/docs/2011/sc10200.doc.htm (last visited 22 April 2012).

22 NATO, 'NATO and Libya - Operation Unified Protector' (13 January 2012) available at www.nato.int/cps/en/SID-3B3D9776-8831BA53/natolive/topics_71652.htm? (last visited 22 April 2012); on more recent NATO bombardments, see S. Denyer, 'Silence in Tripoli after day-long NATO bombardment', *The Washington Post* (8 June 2011).

third, the historic first time use of the responsibility to protect as an underlying concept for action taken under Chapter VII of the UN Charter.

I. The Resolution's Starting Points: "Threat to Peace" and "All Necessary Measures"

Most importantly, in Resolution 1973 the Security Council condemned the actions of the Gaddafi regime as constituting a "threat to international peace and security".[23] In making a 'threat to international peace and security" out of what started rather clearly as an internal State conflict,[24] the Council extended the language of Art. 39 of the UN Charter considerably. Such a broad interpretation of a threat to peace and security is not easily in compliance with the way the collective security system was initially meant to function:[25] to eliminate cross border aggression and threats to regional security interests.

Nonetheless, the Libya intervention is nothing new in that respect. Already by the 1990s, after its paralysis during the Cold War, the Security Council had single-handedly extended its mandate audaciously. In various interventions – for instance in Iraq, Somalia and Haiti – determinations of a "threat to peace and security" under Article 39 of the UN Charter were also read very expansively to include internal humanitarian crises without any credible threat to the security of surrounding States.[26] As a consequence, some scholars indicated their doubt as to the seemingly limitless powers of the Council to auto-determine its own competence over issues of peace and security.[27] While Chapter VII of the UN Charter had always provided the Security Council with a flexible interpretative competence[28] to identify a

23 SC Res. 1973, 17 March 2011, 22nd consideration of the preamble.

24 H. J. Heintze, 'Anwendung des humanitären Völkerrechts in Libyen? – UN-Sicherheitsrat lässt die Frage offen', *Bofaxe: Short Commentaries on International Humanitarian Law* (Bofaxe) (2011) No. 369D; D. Banaszewska & R. Frau, 'Volle Breitseite – VN-Sicherheitsratsresolution 1970 zur Lage in Libyen', *Bofaxe* (2011) No. 371D.

25 H. Fischer, 'Kollektive Sicherheit und Verteidigungsbündnisse', in K. Ipsen (ed.), *Völkerrecht*, 5th ed. (2005), 1007, 1111.

26 SC Res. 688, 5 April 1991, 3rd consideration of the preamble; SC Res. 794, 3 December 1992, 3rd consideration of the preamble*;* SC Res. 940, 31 July 1994, 10th consideration of the preamble.

27 J. A. Frowein, 'Article 39', in B. Simma (ed.), *The Charter of the United Nations – A Commentary* (2002), Art. 39, paras 7, 18-20.

28 Fischer, *supra* note 25.

threat to international peace and security, even the minimal requirement to demonstrate such an effect outside the borders of a particular State seems to be steadily eroded.

Thus, even if arguably the conditions for a Chapter VII resolution were present,[29] it would have been preferable if the Security Council had found a few more words or explanations with regard to the reasons why the situation in Libya had an international dimension. The Council only briefly mentioned in the preamble trans-border refugees[30] and human rights,[31] the latter being assumed to be obligations "*erga omnes*" and thus having *per se* an international dimension.[32] This is a truly sub-par effort to demonstrate a trans-border effect.

Alongside the very generous subsumption of the situation in Libya under the term of a "threat to peace and security", the resolution also employed remarkably open-ended language in reference to its legal consequences. It was very indistinct and "extraordinarily wide"[33] in determining which actions it permitted: it authorized "all necessary measures [...] to protect civilians and civilian populated areas under threat of attack". It was in this way similar to other resolutions, for instance Resolution 678, with which the Council authorized "all necessary means" in Iraq in 1990.[34] The plain text of the resolution ruled out only one thing in absolute terms, "any foreign occupation force of any kind".[35]

The haphazard circumstances under which the resolution was adopted – negotiated in the twilight hour in the face of a humanitarian disaster in Benghazi – created a regrettable example of diplomatic "fudging". The wording reflects a trade-off between States like Britain and France, who

29 See for instance Geiß & Kashgar, *supra* note 6, 99, who conclude that it is "without doubt" that the Security Council was allowed to intervene; also see Payandeh, Friedenswarte, *supra* note 6, 72.

30 SC Res. 1973, 17 March 2011, 16th consideration of the preamble.

31 *Id*., at 5th and 10th considerations of the preamble.

32 *Barcelona Traction Case (Belgium v. Spain)*, Judgment, ICJ Reports 1970, 3, 32, para. 33.

33 M. Shaw, quoted after 'Our Panel of legal experts discuss UK's basis for military action in Libya', *The Guardian* (21 March 2011) available at http://www.guardian.co.uk/law/2011/mar/21/international-law-panel-libya-military (last visited 22 April 2012).

34 SC Res. 678, 29 November 1990, para. 2.

35 SC Res. 1973, 17 March 2011, para. 4.

sought a mandate authorizing maximal military action,[36] and those States, like China and Russia, who would invoke their right to veto had the resolution not put a ceiling on the authorized measures.[37]

The result is mushy and vague wording. Many questions remained unanswered. Did the resolution, for instance, enable the coalition allies to supply the rebels with weapons, as explicitly assumed by France,[38] yet explicitly refused by others?[39] Could the coalition establish ground forces if their task was not occupation, but to give military training to the rebels[40] or to deal with a particular threat to the civilian population?[41] Were targeted attacks on senior Libyan officials such as Colonel Gaddafi and his family justified if there appeared to be no other way to protect civilians?[42] One can, of course, not expect the same linguistic clarity in the resolutions of the Security Council, which is a largely political organ, as in judgments by international courts like the International Court of Justice. However, what is the worth of a Security Council resolution if its wording reaches a level of

36 UK Prime Minister D. Cameron, 'Prime Minister's statement on Libya' (28 February 2011) available at http://www.number10.gov.uk/news/speeches-and-transcripts/2011/02/prime-ministers-statement-on-libya-61450 (last visited 22 April 2012); Statement by Mr. A. Juppé, Minister of Foreign and European Affairs before the SC (17 March 2011) available at http://www.franceonu.org/spip.php?article5448 (last visited 22 April 2012).

37 Statement by Li Baodong, Permanent Representative of China to the UN (17 March 2011) available at http://www.china-un.org/eng/hyyfy/t824183.htm (last visited 22 April 2012); Statement by Vitaly Churkin, Permanent Representative of the Russian Federation to the UN (17 March 2011) available at http://www.rusembassy.ca/node/546 (last visited 22 April 2012).

38 First reports on French arms delivery by P. Gelie, 'La France a parachuté des armes aux rebelles libyens', *Le Figaro* (28 June 2011); also see Geiß & Kashgar, *supra* note 6, 103-104.

39 Russia's Foreign Affairs Minister, S. Lavrov called the French practice a 'flagrant violation' of Resolution 1970, quoted after 'Libya: Russia criticises France over Libya arms drop', *Al Jazeera* (30 June 2011); also see H. J. Heintze & J. Hertwig, 'Waffenlieferungen an libysche Rebellen', *Bofaxe* (2011) No. 380D.

40 See R. Somaiya, 'Britain Will Send Military Advisers to Libya, Hoping to Tip Balance for Rebel Forces', *The New York Times* (19 April 2011); A. Cowell, 'France and Italy Will Also Send Advisers to Libya Rebels', *The New York Times* (20 April 2011).

41 In favour of such an interpretation M. Shaw, A. Aust and, to a lesser degree, R. Piotrowicz, quoted after 'Our Panel of legal experts discuss UK's basis for military action in Libya', *supra* note 33; also Payandeh, Friedenswarte, *supra* note 6, 66; Geiß & Kashgar, *supra* note 6, 104.

42 *Id*., both Piotrowicz & Shaw support such an interpretation; Payandeh, Friedenswarte, *supra* note 6, 68-69.

ambiguity and vagueness whereby deciding what is authorised by a resolution, and what is not, is a difficult business, if not a "mission impossible"?

II. The Resolution's Rationale: Humanitarian Cause versus Regime Change

A second element of note in the resolution is its underlying purpose and rationale. Two rationales for intervention were muddled – a muddling which confused rather than clarified the legal and political justification for the intervention.

Firstly, there is the humanitarian rationale, which assumed that the mandate for the intervention was limited to pre-empting an imminent humanitarian crisis and to preventing future armed attacks on civilians. This rationale is reflected strongly in the language of Resolution 1973: it expresses grave concern at the escalation of violence and the heavy civilian casualties; it considers the attacks against the civilian population as potential crimes against humanity; it demands the immediate end to violence and all attacks against, and abuses of civilians; and it authorizes States to take all necessary measures to protect civilians under threat of attack.[43] The historical parallel that comes to mind here is the Kosovo intervention in 1999:[44] an intervention which also grew from an urgent moral sense that something had to be done to prevent possible crimes against humanity.[45] In the case of Kosovo, the intervening States failed to achieve a resolution authorizing the use of force. In the case of Libya, States did reach an agreement. The important question then is less whether the military intervention was generally lawful; the question is rather what limits it needed to adhere to in order to remain within the confines of legality.

Yet, there was also another rationale for the intervention, hardly to be found in the text of the resolution,[46] but more in its surrounding

43 SC Res. 1973, 17 March 2011, 3rd and 6th considerations of the preamble, and paras 3-4. The resolution mentions the term "humanitarian" altogether twelve times.

44 SC Res. 1244, 10 June 1999.

45 L. Henkin, 'Kosovo and the Law of "Humanitarian Intervention"', 93 *American Journal of International Law* (1999) 4, 824-828.

46 See Payandeh, Virginia Journal of International Law, *supra* note 6, 387-388, who suggests that some formulations in the resolutions imply regime change, e.g. "the legitimate demands of the population" (SC Res. 1970, 26 February 2011, para. 1) or the "legitimate demands of the Libyan people" (SC Res. 1973, 17 March 2011, para. 2). However, what is considered "legitimate" cannot easily be determined from the

circumstances and execution. If the prevailing "*raison d'être*" for the intervention had been purely humanitarian, as the language of Resolution 1973 suggests, the manner and form of the intervention would have needed to be a military engagement from a respectful distance, in which the intervening States maintained their respect for Libyan sovereignty. The military intervention would have needed to be stopped once the humanitarian disaster was averted.

In the course of the intervention, however, it became evident that the aim of the intervention was not just humanitarian purposes, but regime change.[47] It might be difficult to draw the line where several rationales for one intervention are at stake. However, by attacking regime troops while fighting rebel forces on the ground, the NATO governments were intervening in a civil war, with the aim of tilting the balance of force in favour of the rebels. US officials made clear that establishing a democratic regime in Libya had become the main force driving the intervention.[48] What had started as an intervention to protect human rights became a crusade against a tyrant who had for many years been a thorn in the Western community's side.

Thus, there is little international agreement over the intervention's ultimate rationale. This puts its standing under international law in doubt. The reasons that first had given rise to the intervention were replaced by wider political goals. Any pretence of "peace-keeping" neutrality was abandoned in favour of an urgent desire to remove the perceived root of the humanitarian problem. As the French-Anglo-American "*trio infernale*" explicitly confirmed, "Gaddafi ha[d] to go, and go for good."[49]

III. The Resolution's Underlying Doctrine: The Responsibility to Protect

A final remarkable feature of Resolution 1973 is its novel reference to the "responsibility to protect"[50] in a Security Council resolution in order to

resolution; see the more relevant ambassadors' statements alongside the adoption of the resolution at section D.II. of this article.

47 Payandeh, Virginia Journal of International Law, *supra* note 6, 396.

48 For instance 'Hillary Clinton: Libya may become democracy or face civil war', *BBC Report* (1 March 2011).

49 Obama, Cameron & Sarkozy, *supra* note 2.

50 See most notably R. J. Hamilton, 'The Responsibility To Protect: From Document to Doctrine – But what of Implementation?', 19 *Harvard Human Rights Journal* (2006),

justify an action under Chapter VII of the UN Charter. Secretary General Ban Ki-moon emphasized the historic dimension of Resolution 1973, as it "affirms, clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government".[51]

According to the "responsibility to protect" doctrine, first developed by the International Commission on Intervention and State Sovereignty (ICISS) in 2001[52] and accepted in rudimentary form in the World Summit Outcome Document in 2005,[53] it is the States that have the primary responsibility to protect their population from the worst of all crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. If a State, however, is unable or unwilling to protect its population, the international community has a secondary responsibility to intervene diplomatically, and as a last resort, with military force. The strengths of the doctrine are obvious: while recognizing the primary obligation of the state of nationality to protect people's rights, it also affirms that protection from the most severe crimes must be ensured under all circumstances. Thus, it endeavours a balance between the notion of State sovereignty and the utmost importance of human rights protection.

289-297; A. L. Bannon, 'The Responsibility To Protect: The UN World Summit and The Question of Unilateralism', 115 *Yale Law Journal* (2006) 5, 1157-1165; E. Strauss, *The Emperror's New Clothes?: The United Nations and the Implementation of the Responsibility to Protect* (2009), and C. Verlage, *Responsibility to Protect. Ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit* (2009). For the case of Libya, see A. J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', 25 *Ethics & International Affairs* (2011) 3, 263-269; and J. Pattison, 'The Ethics of Humanitarian Intervention in Libya', 25 *Ethics & International Affairs* (2011) 3, 271-277.

51 Press Release, Secretary-General Ban Ki-moon, 'Secretary-General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence', SG/SM 13454, SC/10201, AFR/2144, 17 March 2011, available at http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm (last visited 2 May 2012).

52 International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty (December 2001) available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (last visited 22 April 2012).

53 GA Res. 60/1, 24 October 2005, paras 138-139.

Although the Council did not use the responsibility to protect as a legal basis in the operative paragraphs of Resolution 1973,[54] it referenced this doctrine in the preamble as one of the guiding motives;[55] a similar statement had already been included in the preceding Resolution 1970.[56] Although the Council's reliance on the doctrine of the responsibility to protect is of major importance,[57] and has been a "trend-setter" for the subsequent resolution in the case of the Ivory Coast,[58] the way the Council referenced the responsibility to protect is ambivalent.

Firstly, the doctrine was initially laid out only for specific cases of the worst of all crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. Resolution 1973, however, without stated reason, ignored this high threshold, rather broadly referring to "gross and systematic violation of human rights" instead.[59] Whether this omission was wilful or merely an example of negligence does not really matter: both are quite unflattering for the Council (in the first case, indicating an unexplained diversion from the existing doctrine; in the second, displaying a concerning ignorance of it).[60] Secondly, the Security Council made no mention of the "precautionary principles"; those principles that were developed in the ICISS Report to limit the use of the doctrine in an attempt to prevent its abuse.[61] Regardless of their similar omission in the 2005 World Summit Outcome Document, it is clear that some criteria are needed in order to limit the scope for arbitrary interventions waged on dubious human rights impulses and imperatives, while in truth serving other goals.[62] These criteria to limit the scope of arbitrary intervention might be of a lesser importance where a Security Council resolution mandates the intervention, as the procedures and voting rules within the Security Council are additional

54 Banaszewska & Frau, *supra* note 24; M. C. Kettemann, 'UN-Sicherheitsrat beruft sich in Libyen-Resolutionen erstmals auf Responsibility to Protect', *Bofaxe* (2011) No. 377D.

55 SC Res. 1973, 17 March 2011, 4th consideration of the preamble.

56 SC Res. 1970, 26 February 2011, 9th consideration of the preamble.

57 Kettemann, *supra* note 54.

58 SC Res. 1975, 30 March 2011, 9th and 12th considerations of the preamble.

59 SC Res. 1973, 17 March 2011, 5th consideration of the preamble.

60 Kettemann, *supra* note 54, also remarks that this lower threshold is 'not without dangers'.

61 ICISS, *supra* note 52, XII, para. 2.(A)-(D).

62 See for an intriguing non-Western position, M. Ayoob, 'Third World Perspectives on Humanitarian Intervention and International Administration', 10 *Global Governance* (2004) 1, 99, 115.

safeguards against arbitrariness. However, given the largely political character of Security Council decisions and its huge margin of discretion, the Council should not simply disregard the "precautionary principles" in order to make its decisions more transparent and make them appear more legitimate.

Some Council members, such as Russia and China, pointed to the shortcomings of the resolution in this respect prior to the vote: the scope of the intervention was poorly defined, and the criteria limiting the intervention's scope were underdeveloped.[63] Whether the situation in Libya would have in fact satisfied these criteria remains open to debate. Specifically the question whether all diplomatic measures were exhausted so that the authorisation was a "last resort" and whether there were "reasonable prospects" for success, remains unresolved. It is nevertheless remarkable that none of these considerations even found mention in the text of the resolution: something that ironically enough had to be pointed out by two States with relatively poor records in respecting international human rights norms.

While one may see the Security Council's commitment to the emerging doctrine of the responsibility to protect in positive terms, it would have been preferable if the Council had done so in a more nuanced and balanced way. Resolution 1973 in fact may have been an opportunity to finally apply the responsibility to protect doctrine within its defined criteria and restrictions[64] in a given scenario; an opportunity that was, once again, declined.

D. The Broader Meaning of the Libya Intervention for International Law

With these observations in mind, the Libya intervention may be a useful barometer in identifying some of the most important contemporary developments in international law. In particular, it helps us to answer three questions: Firstly, is international law currently experiencing a renaissance, overcoming the crisis that the "war on terror" and other developments in the

63 See statements of Russia and China on the occasion of the vote, *supra* note 37.

64 M. Payandeh has argued that later endorsements of the originally clear concept of the responsibility to protect have remained vague, see for instance, M. Payandeh, 'With Great Power Comes Great Responsibility? The Power of the Responsibility to Protect within the Process of International Lawmaking', 35 *Yale Journal of International Law* (2010) 2, 469, 497-499 [Payandeh, Yale Journal of International Law].

2000s had inflicted upon it? Secondly, does Libya, alongside the other Arab revolutions, finally make the case for an emerged right to democratic governance, which some authors have claimed already for some 20 years? And thirdly, has the case of Libya changed the underlying parameters of international law as a whole, in particular two concepts central to its development: State sovereignty and liberalism?

It should be mentioned that, of course, a single event can hardly be a "proof" for an entire development in international law. However, what, if not an event of such global importance that triggered widespread and far-reaching discussions in international law and politics, could be a better indicator of traceable trends in international law?

I. International Law – a New Moment in the Sun?

International law, as far as it concerns the Charter provisions relating to peace and security,[65] has a tendency in recent history of being assumed to be either in crisis,[66] putting its *raison d'être* into doubt, or surfing a wave of glory, stylizing it as one of the solutions to the world's biggest problems. Let us briefly recall the last two of these phases: the end of the Cold War era and the post-9/11 era: the first an example of euphoria; the second a time of significant scepticism as to international law's global place and relevance.

As is well known, in 1989, the world witnessed a historic moment – for some even a moment that ended traditional history: the triumph of liberalism over communism in a century-long war of ideas.[67] This moment would later prepare the ground for a wave of democratic reforms across Central and Eastern Europe. In 1989, the General Assembly declared the period of the 1990s to be the United Nations' "Decade of International

65 Of course, as far as international law as a whole is concerned, the picture is far more diverse. Fields like international economic law might continue to be flourishing, regardless of the events on September, 11, 2001.

66 The word 'crisis', often employed with various meanings, is used here to describe a time of intense difficulty or danger [see 'Crisis', Oxford Dictionaries available at http://oxforddictionaries.com/definition/crisis (last visited 22 April 2012)]. As for the case of international law, a crisis implies some degree of disrespect from the relevant actors, e.g. States and International Organizations. While disrespect is always a matter of degree and while sporadic cases of non-compliance might not be seen as a sufficient indicator of a crisis, such disrespect must at least be seen as turning into a crisis when it becomes systematic and prevalent within a variety of the relevant actors.

67 See, most famously, F. Fukuyama, 'The end of history?', *The National Interest* (1989); also see F. Fukuyama, *The End of History and the Last Man* (1992).

Law", during which the UN's main goals should be, *inter alia*, to promote acceptance of and respect for the principles of international law, and to develop methods for the peaceful settlement of disputes between States.[68] Indeed, in the course of the 1990s, several humanitarian crises were explicitly attempted to be settled with the help of, and not against or without, international law.[69] The discipline of international law was becoming "*en vogue*" again; it started to appear as a real and credible system of dispute resolution and sanctions, backed, in the final instance, by the threat of force. Suddenly, international relations theorists, as well as many international lawyers of the age, began to reconcile their approaches.[70] Their perception seemed to be that collective intervention was somehow more "legitimate" than the unilateral interventions of the Cold War because it was being exercised through international institutions, reinforced by the presumption that the Council had assumed the responsibility of enforcing community morality, e.g. through the protection of human rights.

It was also a time where States and their people strongly expressed their wish to belong to the international community and solve global problems together, to accede to international treaties and institutions, and to agree to universal principles, such as through inserting human rights guarantees into their own constitutions, be it in Eastern Europe or in South Africa. The 1992 United Nations Conference on Environment and Development,[71] the establishment of the two *ad hoc* international criminal tribunals for Yugoslavia and Rwanda in 1993 and 1994,[72] the adoption of the Rome Statute of the International Criminal Court in 1998[73] as well as the codification of the rules of State responsibility[74] might serve as examples of

68 GA Res. 44/23, 17 November 1989, paras 2(a), (b).

69 See for instance the case of East Timor, SC Res. 1264, 15 September 1999; SC Res. 1272, 25 October 1999; and the case of Somalia, starting with SC Res. 794, 3 December 1992. However, the case of Somalia remained a rather unsuccessful attempt.

70 A. M. Slaughter, A. S. Tulumello & S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *American Journal of International Law* (1998) 3, 367-397.

71 Report of the UN Conference on Environment and Development, UN Doc A/CONF.151/26 (Vol. I), 3-14 June 1992.

72 SC Res. 827, 5 October 1993; SC Res. 955, 8 November 1994.

73 *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, 17 July 1998.

74 Draft Articles on Responsibility of States for internationally wrongful acts, Annex to GA Res. 56/83, 28 January 2002; also see GA Res. 59/35, 16 December 2004.

this successful era for international law. At the end of the decade, the General Assembly recognized the achievements in the development and promotion of international law during the 1990s, and emphasized that the rule of international law had been significantly strengthened during this period.[75]

By contrast, at the beginning of the 2000s, international law relating to international peace and security experienced a severe crisis. The post-9/11 period was a time which came to accept a kind of Schmittian exceptionalism:[76] an *à la carte* approach whereby international law had to step aside wherever it stood in the way of a fundamental national political goal.[77] The Bush administration and Tony Blair's UK government dispensed with legal niceties, demonstrating outright hostility to the institutions of, and the obligations owed under, international law, declaring a "war on terror" "whatever the technical or legal issues about the declaration of war" were.[78] In these times, international law had to turn a blind eye to its own breaches; a "legal vacuum" thereby emerged.[79] The rampant imperialism of other States like China, Russia and India worsened international law's historical crisis during this time.[80] The increased use of torture and rendition, the refusal of the Bush administration to abide by the terms of the Geneva Conventions in Guantanamo Bay and in the Afghan

75 GA Res. 54/28, 21 January 2000, para. 2.

76 C. Schmitt argues famously in his early works *Die Diktatur* (1921) and *Politische Theologie* (1922) that the sovereign is he who decides on the exception. On the case of exceptionalism and terrorism, see A. W. Neal, *Exceptionalism and the Politics of Counter-Terrorism: Liberty, Security and the War on Terror* (2010).

77 A. Roberts, 'Righting Wrongs or Wronging Rights? The US and Human Rights Post-September 11', 15 *European Journal of International Law* (2004) 4, 721, 739; also see A. Cassese, 'The International Community's "Legal" Response to Terrorism', 38 *International and Comparative Law Quarterly* (1989) 3, 589-608.

78 See T. Blair, 'Prime Minister's Interview with CNN: "We are at War with Terrorism"', *CNN* (16 September 2001); and T. Blair, 'At War with Terrorism', *BBC News* (16 September 2001); also see G. W. Bush, 'Address to a Joint Session of Congress Following 9/11 Attack' (20 September 2001), transcript available at http://articles.cnn.com/2001-09-20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens?_s=PM:US (last visited 22 April 2012).

79 Roberts, *supra* note 77, 742.

80 R. Domingo, 'The Crisis of International Law', 42 *Vanderbilt Journal of Transnational Law* (2009) 5, 1543, 1544.

War,[81] the failure of the Copenhagen summit,[82] the refusal of the US and others to ratify neither the Kyoto Protocol nor the Rome Statute, might all serve as examples to underline this crisis of international law. The sidelining of the UN during the Iraq conflict[83] and the refusal of two of the world's foremost Courts – the ECJ and US Supreme Court – to fully accept the primacy of the UN Charter in the *Kadi*[84] and *Medellin*[85] cases arguably even deepened this crisis. It almost seemed that international law and the UN system found themselves in their death throes; without serious and far-reaching reform, they seemed likely to meet a sudden death.[86]

The intervention in Libya might suggest another turning point in the development of international law. The intervention in Libya has been considered a "success"[87] – unlike the involvements in Kosovo and Iraq, this was a conflict which many of the principal actors were attempting to solve through law, rather than without it. Resolution 1973 could in this sense be perceived as a triumph for the rule of international law.[88] The Western coalition had accepted that a legal basis for the intervention was needed, and vigorously pursued it. In contrast with the before mentioned gung-ho relish of the Bush administration towards armed intervention overseas, the current US-administration has been clear to distance itself from the policies of its predecessor. Long gone are the blunt references to the "war on terror" and the "axis of evil".[89] Debates over the Libya intervention have re-introduced

81 S. D. Murphy, 'Contemporary Practice of the United States Relating to International Law: Decision not to regard Persons Detained in Afghanistan as POWs', 96 *American Journal of International Law* (2002) 2, 461, 477; Roberts, *supra* note *77*, 731.

82 Only few authors consider the Copenhagen summit a success, see R. L. Ottinger, 'Copenhagen Climate Conference – Success or Failure?', 27 *Pace Environmental Law Review* (2010) 2, 411-419.

83 C. Tomuschat, 'Iraq – Demise of International Law?', 78 *Die Friedenswarte* (2003), 141-160; M. J. Glennon, 'Why the Security Council failed', 82 *Foreign Affairs* (2003) 3, 16-35.

84 Joined Cases 402/05 and 415/05, *P. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, [2005] ECR II-3649.

85 *Medellin v. Texas*, 552 U.S. 491 (2008).

86 Domingo, *supra* note 80, 1544.

87 See, for instance, Payandeh, Virginia Journal of International Law, *supra* note 6, 402.

88 Obama, Cameron & Sarkozy, *supra* note 2, called the resolution a 'historic decision'; some other observers even proclaimed the 'victory for humanity', see P. Hipold, 'Ein Sieg der Humanität, der auch Österreich fordert', *Der Standard* (22 March 2011).

89 Term first used by President G. W. Bush in his State of the Union Address (29 January 2002) available at http://millercenter.org/president/speeches/detail/4540 (last visited 22 April 2012).

the language of humanitarianism and human rights protection. Arguably this was then the starting point for international law's vindication: breathing new life into the UN Charter system and its collective security system – a system which had been reduced to a shadowy presence in the post-9/11 era.

However, the previous analysis of Resolution 1973 indicates that such a conclusion is not entirely correct. Is international law really "back in the game"? There is reason for scepticism; scepticism that rests on three arguments.

A first reason for scepticism can be discerned from the wider history of international law. International law has, as I have argued before, recently moved from glory to disenchantment. Only one decade separates international law's "moment in the sun" following 1989 and its "shadowy existence" past 2001. Just because another decade has passed, it is not worth worshipping at the shrine of international law just yet. One should rather see how the aftermath of the Libya intervention and potential other interventions in the Arab world develop in the future. The aggravating situation in Syria, and the inability of the international community to react to it, suggests that the "success" of the Libya intervention did not last very long. To the contrary, it seems that the way Resolution 1973 was executed has provided Russia and China with further arguments corroborating their position with regard to the case of Syria. A single resolution is thus not sufficient to salvage international law. Whether international law has re-assumed a front seat in international politics is something that only time can answer. In this respect, whether the Libya intervention was *initiated* in accordance with international law is secondary to the question of whether it will be *carried out* until the very end in accordance with international legal standards.

Secondly, the appeal to international law in the case of Libya occurred just because such an appeal was possible. What would have happened if China or Russia had vetoed the resolution? Would the Western coalition have abstained from any intervention in Libya? A unilateral intervention without a Security Council resolution *à la* Kosovo and Iraq appears at least within the realm of realistic scenarios. Will international law be obeyed where it is not a practical tool to justify an intervention, but an annoying obstacle to be overcome? The recent targeted killing of Osama bin-Laden, for instance, has indicated that international law is, still today, boldly ignored at times: here we have an operation in the territory of another country without the permission of that country's government as well as the

shooting of an unarmed civilian: clear violations of general international law and international humanitarian law.[90] This is only one incident, yet coupled with other continued operations in pursuit of the fight against terrorism – such as the prevalence of attacks by un-manned drones in Pakistan[91] – it shows that the Obama administration, like its predecessor, will comply with international law where possible, yet is prepared to disregard it where international law conflicts with a key national security interest.

Lastly, and most importantly, although the Libya intervention received the general blessing of international law in Resolution 1973, it is not at all clear whether all strands of its execution do so. As the analysis has shown, what exactly was possible and impossible within the resolution is open to debate. This, however, is decisive in answering the question of whether the intervention was ultimately in compliance with international law or not. The French have in the meantime admitted to having provided the rebels with weapons – for some this is exactly in accordance with the resolution, for others it is a clear breach.[92] Thus, where the wording of a Council resolution allows for nothing, but also forbids (almost) nothing at the same time, how can we credibly call the adoption of this resolution a significant success for international law? It is easy to be in compliance with a law with ambiguous boundaries; boundaries which should be able to hold international actors to account. In order to celebrate the start of a new rule of international law, the law would have needed to lay down clear guidelines as to what it rules in, and what it rules out.

The given legal situation was nonetheless more preferable to the one in Kosovo or in Iraq, where there was no resolution to justify the initial use of force at all. The different actors have turned *to* international law to find a solution, not *against* it. However, the above mentioned reasons indicate that this is not yet a time when international law's next moment in the sun can be celebrated. Resolution 1973 and the Libya intervention have placed international law back in the spotlight, but they lack the precision and

90 In the view of the author, the former constituted a violation of Art. 2(1) and (4) of the UN Charter and the latter was in breach of Art. 51(3) of Additional Protocol I to the Geneva Conventions (while the USA is not a member to the Protocol, the Protocol is undoubtedly also part of international custom).

91 On recent incidents, see without mention of an author 'Suspected US Drones kill 38 in Pakistan', *The Guardian* (12 July 2011); F. Boor, 'Der Drohnenkrieg in Afghanistan und Pakistan', and W. Richter, 'Kampfdrohnen versus Völkerrecht? Zum „Drohnenkrieg" in Afghanistan und Pakistan', both in 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 97-104, and 105-113.

92 See the different views presented at *supra* note 38 and 39

consistency of practice to fully rehabilitate international law's uncertain reputation following the post-9/11 era.

II. Democratic Governance – finally a fully-fledged right?

A second question arising from Libya with respect to general international law is to what extent the current events have finally paved the way for a "right to democracy"?[93]

International lawyer Thomas Franck famously proposed an emerging norm of democratic governance some 20 years ago.[94] The right to democratic governance, according to Franck, is embodied and instantiated in a variety of developments, such as the widespread acceptance and ratification of human rights instruments which recognize democracy enhancing provisions, such as the provisions on free speech of the International Covenant on Civil and Political Rights (ICCPR).[95] Membership in the international community for Franck is grounded in the legitimacy of a State's authority; an authority which, in turn, is derived from the peoples' right to self-determination.[96] In order to constantly renew this legitimacy, so Franck argues, an entitlement to periodic elections is on its way to becoming a customary legal norm.[97] Making democracy an entitlement, according to Franck, would also be the best way to promote global non-aggression and peace.[98]

93 Finding an exact definition of 'democracy', which would be a pre-condition to effectively assume such a right (see T.J. Farer, 'Elections, Democracy and Human Rights: Toward Union', 11 *Human Rights Quarterly* (1989) 4, 504-521) is difficult, if not impossible. However, this should not lead one to exclude the discussion altogether.

94 Franck, *supra* note 4.

95 *Id*., 61.

96 *Id.*, 57.

97 *Id*., 64.

98 *Id.*, 88. A short critique must be permitted: Franck bases his claim on empirical evidence, yet the empirical evidence is evidently conflicting: undemocratic practices are frequently permitted or endured (see for instance E.-U. Petersmann, 'Constitutionalism, International Law and "We the Peoples of the United Nations"', *Festschrift für Steinberger* (2001), 291, 311). Even more, membership rules of the UN do not require States to prove any democratic credentials (different from the ECHR; S. Marks, 'The European Convention on Human Rights and its Democratic Society', 66 *British Yearbook of International Law* (1995) 1, 209-238 [Marks, British Yearbook of International Law]).

Franck's work has been commented on by various authors, most recently for instance by Susan Marks and Jean d'Aspremont.[99] While, in combination, these essays leave little to add to the general question "What has become of the Emerging Right to Democratic Governance?", as Susan Marks phrases it, both comments were written before the Arab spring and the Libya intervention. Both authors seem to remain rather sceptical about a fully emerged right to democratic governance;[100] however, they would agree, I would think, that it is worth re-evaluating this question after the recent historic events. I will limit my considerations to this specific sub-question in order not to repeat what Marks and d'Aspremont have already skilfully explained. Thus, could Libya potentially be the "breakthrough" in favour of an emergent customary right to democratic governance?

As is laid down in Art. 38 I lit. b. of the ICJ Statute, a customary norm requires evidence of general practice ("State practice") accepted as law ("*opinio iuris*"). Modern approaches suggest a more flexible interplay between these two elements, or the need to "reconcile" them;[101] however, a minimum level of both elements remains required to establish the existence of such a norm.

99 See for instance a comment at the time, M. H. Halperin, 'Guaranteeing Democracy', 91 *Foreign Policy* (1993), 105-122; for a recent comment, see S. Marks, 'What has Become of the Emerging Right to Democratic Governance?', 22 *European Journal of International Law* (2011) 2, 507-524 [Marks, European Journal of International Law]; J. d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks', 22 *European Journal of International Law* (2011) 2, 549-570. For an intriguing modern approach to democratic governance rather as a teleological principle than as a right, see N. Petersen, 'The Principle of Democratic Teleology in International Law', 34 *The Brooklyn Journal of International Law* (2008) 1, 33-84.

100 Marks expressed her severe criticism also previously in J. Crawford & S. Marks, 'The Global Democracy Deficit: an Essay in International Law', in D. Archibugi *et al.* (eds), *Re-imagining political community: Studies in Cosmopolitan Democracy* (1998), 72, 85. D'Aspremont does not seem to deny a right to democratic governance in its entirety, but must certainly also be taken as a skeptic with regard to its role and purpose.

101 A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* (2001) 4, 757-791; F. L. Kirgis, 'Custom on a Sliding Scale', 81 *American Journal of International Law* (1987) 1, 146-151; J. Tasioulas, 'In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* (1996) 1, 85-128.

Turning to the case of Libya, were there any signs inherent in the international reaction to the Libyan case to assume that a customary norm of democratic governance is emerging at an accelerated pace?

As has been argued before, no reference is made to democracy in the text of the resolution itself. Mehrdad Payandeh has recently argued that democratic regime-change should not be seen as excluded by Resolution 1973, as it was the only means to achieve the resolution's goal, namely to protect human rights.[102] Also, some statements[103] of different UN ambassadors alongside the vote on Resolution 1973 seem to speak in pro-democratic language. The UN ambassadors from the United Kingdom, Lebanon and Colombia for instance claimed in the debate that the Libyan government had lost all its legitimacy;[104] did this implicitly presuppose that only governments supported by the will of their people are legitimate, just the way Franck suggested? The ambassador from South Africa stated that the conflict in Libya must be resolved "in accordance to the will of the Libyan people", and that a "holistic political solution must be found which would need to respect democracy […]".[105] The ambassador from Brazil emphasized that the Libyans were claiming their "legitimate demands for better governance" and "more political participation".[106] The German ambassador affirmed that "aspirations for democracy, human and individual rights merit our full support" and that "the people of Libya who have so clearly expressed their aspirations for democracy should be supported."[107] The US ambassador added that "[t]he United States stands with the Libyan

102 Payandeh, Virginia Journal of International Law, *supra* note 6, 388.

103 It is contested whether voting behavior constitutes either State practice or *opinio iuris*. In the opinion of the author, it should be seen as the latter; see also Roberts, *supra* note 101, 758; for the opposite opinion, see A d'Amato, *The concept of custom in international law* (1971), 89.

104 A summary of all statements is available at: Report of the 6498th Meeting of the SC, S/PV.6498 (17 March 2011). Full texts can be found on the respective webpages of the missions to the UN.

105 Statement by H.E. Ambassador B. Sangqu of South Africa, full text available on the mission's website.

106 Statement by H.E. Ambassador M. L. Ribeiro Viotti of Brazil, full text available on the mission's website.

107 Statement of H.E. Ambassador Dr. P. Wittig of Germany. His country, however, abstained, because it would 'not contribute to such a military effort with its own forces'. Where this logic – a positive vote on a resolution as an obligation to provide troops – comes from, is unclear. It has no bearing in international law.

people in support of their universal rights" and "the future of Libya should be decided by the Libyan people".[108]

However, does this indicate that a right to democratic governance has been born or is in the last stages of being born ("*in statu nascendi*")?[109] Two important reasons stand against such an assumption as far as the Libya intervention is concerned.

Firstly, even if one wanted to find a "democracy enhancing" spirit in the resolution, five countries did not vote in favour of Resolution 1973. All of them are of major global significance: Russia, China, Brazil, India and Germany. One might disagree on the motives of the respective states behind the vote, and on the general question of whether the opinions and actions of larger and more powerful States count more than those of smaller and less powerful States in determining custom.[110] However, whatever stance one takes on these issues, it is safe to say that without a positive statement from all of these major States, whatever their underlying motives, a sufficiently widely accepted custom cannot be considered as newly born.[111] This is even more true given the high threshold that needs to be passed for the modification of a *ius cogens* norm as the principle of non-intervention is considered to be[112] – a principle which is implicated if democracy is to be imposed on a State.

108 H.E. Ambassador S. E. Rice of the USA, full text available on the mission's website.

109 Georges Abi-Saab outlined many years ago how a right can be in a phase between 'existing' and 'non-existing', namely '*in statu nascendi*'. Although the suggestion concerns the right to development, it seems appropriate also for the formation of other 'new' rights; see G. Abi-Saab, 'The Legal Formulation of the Right to Development', in R-J Dupuy (ed.), *Le droit au développement au plan international* (1980), 159, 170.

110 M. Bedjaoui, *Towards a new international economic Order* (1979), 51-52; O. Schachter, *International Law in Theory and Practice* (1991), 6; J. Kelly, 'The Twilight of Customary International Law', 40 *Virginia Journal of International Law* (2000) 2, 449, 469.

111 Two caveats must be acknowledged to this argument. Firstly, it is hard to prove a causal link between voting behavior and a legal conviction. There are often several legal and political reasons influencing a voting decision, some of which might be purely domestically motivated. Secondly, abstentions do not always bar the emergence of new custom. However, firstly, voting behavior is one of the few means to identify legal convictions and we cannot afford to disregard it just because it is not always unambiguous. Secondly, a vote of 15 States whereby five abstained cannot be considered a sufficiently broad acceptance of a new norm. This does not contradict the assumption that single abstentions cannot bar the emergence of new custom.

112 ILC Report on the work of its eighteenth session, Yearbook of the International Law Commission (1966), Vol. II, 247-248.

Secondly, the very premise of this first argument is that on the day of the vote of Resolution 1973, the pro-democratic rationale of the intervention was clear for all to see. It was not. In fact, it was only in the aftermath of the resolution that the pro-democratic dimension came fully to the surface. The text itself, on which the vote is based, abstains with almost clinical care, as I have argued, from references to an intervention supporting democracy or promoting regime-change. Otherwise, Russia or China would have most likely vetoed the resolution. When the execution of the intervention later on moved more and more in the direction of regime change, the support for the intervention disintegrated drastically: within a short timeframe, the African Union called for an end to the Libya intervention,[113] while South Africa, which had originally voted in favour of Resolution 1973, criticized NATO air raids accusing the West of seeking regime change in Libya.[114] Even the Arab League – whose support had been crucial for legitimating the intervention in the eyes of the Arab world – started to backtrack from the mission.[115] Thus, the claim that Resolution 1973 indirectly justifies regime change[116] is hard to maintain; at least, it is not maintained by many States nor by other actors involved.

Altogether, a custom establishing or giving new force to an entitlement to democratic governance is not observable. The case of Libya has not altered this in the least. To the contrary, when – if not in the case of Libya – will States ever show their willingness to agree on a resolution recognizing the right of a people so desperately striving for democracy?

113 Statement by E. Mwencha, Deputy Chairperson of the Commission of the African Union during the 4th meeting of the Libya Contact Group (15 July 2011).

114 See for instance remarks by RSA President J. Zuma at the meeting of the AU High Level Ad Hoc Committee on Libya, 26 June 2011 ('*The […] bombing by NATO […] is a concern […] because the intention of Resolution 1973 was […] not to authorize a campaign for regime change or political assassination.*'), available at http://www.thepresidency.gov.za/pebble.asp?relid=4367&t=79 (last visited 22 April 2012).

115 Arab League Secretary-General A. Moussa criticised that 'what is happening in Libya differs from the aim of imposing a no-fly zone' (quoted after 'Arab league condemns broad Western bombing campaign in Libya', *The Washington Post* (20 March 2011)).

116 M. Payandeh's point to distinguish between aims and means, *supra* note 102, is well-argued. The international coalition necessarily (as a 'necessary means') had to weaken Gaddafi's regime while preventing a massacre in Benghazi. However, the intervention continued even when the bloodshed in Benghazi was long averted and when Gaddafi's troops were no longer in a position to commit human rights violations of a similar gravity. Thus, it is hard to see the manner in which the intervention sought regime change as being in compliance with Resolution 1973.

Instead, Libya is a case of an intervention whose *legal basis* could only be phrased in humanitarian and human right terms, while its *execution* was increasingly driven by pro-democratic regime change. This constellation gives little hope for the idea that Libya may blow wind into the sails of the "emerging right to democratic governance"; for such a right, stormy prospects remain.

III. Outlaw States – Liberal towards the Illiberal?

So, if the case of Libya has not instigated a significant turn towards international law, and if it has also not brought the emergence of a right to democratic governance to its conclusion – has it done anything of significance for international law at all? In the opinion of the author, the answer is a clear yes: the intervention in Libya suggests a renewed readiness of the international community to deal with States which trample that community's utmost values.

International law is not an abstract entity set in stone. It is better understood as a formation of ideas and conceptions, assumptions and convictions of States and other international actors which are in permanent flux. To see any change in international law's architecture, its building blocks need to change first: to use a simple analogy, only if the puzzle pieces themselves change, can the overall picture of the puzzle evolve.

One of the most important puzzle pieces of international law is certainly that of sovereignty. The analysis here will again limit itself to the question of what the case of Libya has added, and what trend, if any, currently emerges. Do States, without reservation, respect the equal sovereignty of other States that fundamentally disagree with the ideals of liberty and human rights on which the system of international law is increasingly based?

In 2001, Gerry Simpson wrote a captivating article in which he described two overall approaches to the sovereignty of outlaw States in international law: an article which is once again, more than 10 years later, becoming as topical as ever. Simpson called those two approaches "Two Liberalisms".[117] The one, "charter-based liberalism", heavily relies on a classical idea of sovereignty, on a black-letter reading of the UN Charter.[118]

[117] G. Simpson, 'Two Liberalisms', 12 *European Journal of International Law* (2001) 3, 537.

[118] *Id.*, 541.

It accords equal weight to each State,[119] regardless of any qualifying internal conditions such as democratic legitimisation, respect for human rights or the rule of law. In this view, even if governments conduct themselves in ways inimical to the most fundamental values safeguarded in international law, they are still entitled to full and equal membership in the international community, regardless of their political or social ideology.[120] In an extreme sense, "a fascist dictatorship is entitled to as much respect as the government of a social democracy."[121] This approach was predominant in international law for most of the 20th century.[122] The means through which a government establishes and maintains its authority, as long as it does so, lie outside the scope and concern of international law – and do not give grounds to withhold its protections and recognitions. Consequently, charter-based liberalism governs the relations between an anarchy of internally sovereign States: it is a liberalism that is both ideology-immune and morality-agnostic.[123]

However, Simpson suggests there is also an alternative approach to the outlaw State in international law – he calls it "liberal anti-pluralism". Under this form of liberalism, prevalent at other times in the history of international law,[124] democratic consent, human rights and the rule of law are conceived of as conditions for equal sovereignty. Only a State which obeys essential basic principles can rely on the full respect of the international community for its sovereignty.[125] The normative structure of the internal State construct thereby becomes the subject of serious

119 An important inequality is, of course, the distinction between the Permanent Members of the Security Council and all other States. However, this favouritism is clearly not based on internal (democratic) credentials, with States like China (being an openly authoritarian regime) and Russia (being a democracy only in the minimal sense of Schumpeter, as recent elections have shown) being Permanent Members.

120 W. Friedman, 'Intervention, Civil War and the Role of International Law', in R. Falk (ed.), *The Vietnam War and International Law* (1968), 151.

121 A. X. Fellsmeth, 'Feminism and International Law: Theory, Methodology and Substantive Reform', 22 *Human Rights Quarterly* (2000) 3, 658, 703; but see, e.g., GA Res. 36/162, 16 December 1981, and GA Res. 38/99, 16 December 1983.

122 Simpson argues that this is particular true from the founding of the United Nations onwards (1945) until the end of the Cold War, *supra* note 117, 549-556.

123 Simpson, *supra* note 117, 539; also see Friedman, *supra* note 120, 151.

124 Simpson, *supra* note 117., 544-549 and 557-559. Simpson suggests this to be the late Victorian era on the one hand, and, to a lesser degree, the times after the Cold War.

125 *Id.*, 541. It was famously Anne-Marie Slaughter suggesting a distinction between different 'categories of states', see A.-M. Slaughter, 'International Law in a World of Liberal States', 6 *European Journal of International Law* (1995) 1, 503-538.

international scrutiny, or even a pre-condition for entering the international community as a full and equal partner. Under this reading, the international order, with its explicit respect for human rights and liberal ideas, is transcending State voluntarism by giving voice to Neo-Kantian or liberal internationalist ideals.[126] It places more emphasis on the individuals behind the State than on the State itself.[127] It is a liberalism that favours, and views as equals, only those States that are in themselves liberal, both in their internal attitudes towards the basic human rights of their citizens, and in their external commitment to aiding the spread of liberal ideals throughout the international order.

Simpson, in concluding his article, suggested that the interplay of both of these approaches – charter-based liberalism and liberal anti-pluralism – has inspired the development of international law in the past, and would continue to do so in the future.[128] This picture resembles a pendulum swinging from one liberalism to the other: in doing so, the interaction between these visions "keeps the time" of international law. The true meaningfulness of the Libya intervention may similarly be in helping us to identify in which direction this pendulum is currently moving: which vision of liberalism currently dominates the international legal order?

Gaddafi's Libya was clearly what Simpson would call an illiberal outlaw State, regardless of which exact definition of an outlaw State one follows.[129] Libya's government had not only been denying its people any civil and democratic rights for decades; it had shown its preparedness to go further, violently suppressing civil society movements of any form and using some of the worst military means thinkable against its own population.

If charter-based liberalism was prevalent, the international community would (at least) have needed to withdraw its forces the moment the most imminent threat of a massacre in Benghazi was overcome. A systematic and

126 Simpson, *supra* note 117, 541.

127 *Id.*, 542; also see F. R. Téson's thesis on 'normative individualism' expressed in 'The *Kantian Theory* of International Law', 92 *Columbia Law Review* (1992) 1, 53, 54 [Téson, Columbia Law Review].

128 Simpson, *supra* note 117, 571.

129 Simpson, *supra* note 117, 560-565, suggests different ways how outlaw States have been identified by different authors. They include 'tyrannical governments' (Téson), 'rejecting the rules of internal relations altogether' (Franck) or 'gross violators of human rights' (Rawls). Two observations are important: a 'merely' undemocratic State is not automatically an outlaw State; and States that have not engaged in military interventions against other States can still be outlaws.

continued targeted bombing of governmental facilities is irreconcilable with this approach to international law. Instead, the international community was seeking regime change in order to pave the way for a regime respecting liberal ideas and human rights. Libya is thus an example of the pendulum moving in the direction of what Simpson described as liberal anti-pluralism: the international community of States seems increasingly less willing to accept violations of human rights and liberal ideas by outlaw States.

Two possible reactions from the international community towards these States are exclusion and coercion. For Simpson, this distinction divides anti-pluralists into mild anti-pluralist liberals (who remain sceptical about exclusion and even more about intervention) and strong anti-pluralist liberals (who have fewer qualms about these actions).[130]

Mild anti-pluralists, for Simpson, are scholars like Thomas Franck and Anne-Marie Slaughter:[131] they declare a favouritism in international law for States obeying principles of democracy and the rule of law, but remain more sceptical about all forms of enforcement towards States that choose otherwise. The most prominent scholars in the more contentious strong anti-pluralist line are Fernando Téson and Michael Reisman. Téson, coming from a Kantian tradition, argues that democracy and human rights ultimately have a superior moral standing in international law than the States' claim to sovereignty, and that the use of force can be the last resort in the defence of these rights.[132] Reisman takes the standpoint that sovereignty does not belong to States in the first place, but to their peoples; thus, sovereignty is not violated where an intervention aims to enforce the will of the people against its government.[133] However, the dangers of abuse, and the populist potential, of such a line of argument remain substantial. Most scholars have thus refused to follow the logic of the strong anti-pluralist liberals.[134]

I want to argue that the case of Libya indicates that international law is currently caught exactly in between these two forms of liberal anti-pluralism that Simpson suggested 10 years ago (mild and strong). This

130 *Id*., 571.

131 Franck, *supra* note 4; Slaughter, *supra* note 125.

132 Téson, Columbia Law Review, *supra* note 127, 53; and Téson, Michigan Journal of International Law, *supra* note 5, 323.

133 Reisman, *supra* note 5, 642.

134 For a comprehensive analysis of State practice and academic writing on this issue, see M. Byers & S. Chesterman, '"You the people": Pro-democratic intervention in International Law', in G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000), 259-292.

"middle" position rests on the assumption that exclusion from the international community is almost fully accepted as a means for dealing with outlaw States, while intervention in order to impose respect for human rights and liberal ideas upon States by means of regime change – i.e. any intervention that lies outside the concrete prevention of an imminent humanitarian disaster – is not accepted under international law.

Let me explain this thesis in two steps: firstly, by explaining what factors might lead us to believe that the exclusion of outlaw States is by now broadly accepted within the international community; and secondly, why the right to intervention remains limited to preventing imminent humanitarian crisis, without permitting interventions necessary to establish sustainable value-driven alternative regimes.

Firstly, the States' willingness to exclude a State from the international community if it subscribes to illiberal practices which severely compromise human rights standards, might not be entirely new, but it has been remarkably reaffirmed in the case of Libya. This was emphasized by two events in 2011. Firstly, on 1 March 2011, the General Assembly unanimously temporarily suspended Libya's membership in the Human Rights Council.[135] This is a remarkable first time event in the history of the Human Rights Council (and its predecessor, the Human Rights Commission). It is important to note that the suspension of Council membership was not linked to the imminent massacre in Benghazi but happened on the 1st of March, two weeks before Resolution 1973. It was rather a protest against Gaddafi's suppression of the pro-liberal movement in his country. Secondly, and even more significantly, for only the second time in its history, the UN Security Council in Resolution 1970 mandated the ICC chief prosecutor with jurisdiction to examine the situation in Libya, thereby overruling Libya's earlier decision not to become a member of the Rome Statute of the ICC.[136] On the basis of this referral, the ICC issued an arrest warrant against Colonel Gaddafi (prior to his later demise).[137] This was not only an affront against Libyan sovereignty (given that State immunity, which the arrest warrant sought to overcome, is a right of the State, not the individual), but the ultimate signal that Colonel Gaddafi would

135 GA Res. 65/265, 1 March 2011, para. 1.

136 SC Res. 1970, 26 February 2011, para. 4. The only previous case had been the one of Sudan in the event of the Darfur-crisis in 2005, SC Res. 1593, 31 March 2005, para. 1.

137 *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Arrest Warrant, ICC-01/11, Pre-Trial Chamber I, 27 June 2011, 7.

be from now on excluded from the circle of accepted heads of States.[138] Thus, the international community seems prepared to exclude the outlaw State, and its government, if it disregards liberal ideas in a sufficiently extreme way; a threshold that the Gaddafi regime seemed to have comfortably reached.

As a second step, I want to argue that the community of States, however, is not at all prepared to accept any imposition of liberal ideas upon States by military intervention, bar the minimal intervention necessary to avert immediate bloodshed and humanitarian catastrophe.

For one, there are no convincing examples of interventions before Libya which promoted liberal and democratic ideas with the blessing of international law. In the case of Grenada, where the US overthrew a Marxist junta and re-instated an elected government in 1983, as well as in the case of Panama, where the US forced military un-democratic leader Manuel Noriega out of power in 1989, the intervening force (the US) claimed that the main reasons for the interventions were not to support liberal or democratic ideas, but rather the invitation to invade made by parts of the government, the protection of US nationals and the enforcement of existing treaties.[139] Even more importantly, the General Assembly explicitly condemned both interventions as clearly illegal, making it apparent that a norm of international custom to justify such interventions had not emerged.[140]

The case of Haiti is even more intriguing.[141] The Security Council had given its blessing for an intervention under Chapter VII; a rather unconvincing move given that an international dimension of the conflict was not apparent. Precisely because of this, the Council wanted to ensure that the Haitian intervention was not understood as an emerging trend. It

138 Jurisdiction can only be established by assuming a customary norm equivalent to Art. 27(2) of the Rome Statute, see P. Thielbörger, 'Haftbefehl gegen Muammar al-Gaddafi – Keine Immunität vor dem IStGH?', *Bofaxe* (2011) No. 387D.

139 Byers & Chesterman, *supra* note 134, 272, 274 - 279.

140 GA Res. 38/7, 2 November 1983, in the case of Grenada and GA Res. 44/240, 29 December 1989, in the case of Panama; also see J. Wouters, B. de Meester & C. Ryngaert, 'Democracy and International Law', 34 *Netherlands Yearbook of International Law* (2003), 139, 169.

141 For a comprehensive and recent analysis: Marks, European Journal of International Law, *supra* note 99, 519-522.

claimed that these had been "unique and exceptional circumstances".[142] For the Security Council, Haiti was, rightly or wrongly, a case of a humanitarian intervention rather than one aimed at regime change to promote a liberal government.[143] There had also been an "invitation" from the toppled President Aristide.[144] Thus, while part of the UN's motives to act in Haiti in 1993 were surely to promote liberal democracy, it would still be hard to assume a generally accepted trend pointing in this direction.

However, could the case of Libya be a game-changer, the tipping point where the international community, with the blessing of international law, has finally managed to overturn a ruler which had become too illiberal for the world to bear? After all, the international coalition *did*, in fact, intervene in Libya, and *was*, in fact, eventually successful in promoting regime change.

In answering this question it is crucial to keep the previous analysis of Resolution 1973 in mind: the resolution the Security Council agreed upon is strictly termed in human rights and humanitarian language. It calls for preventing an imminent massacre, not the construction of a liberal government in a country calling for freedom and democracy. Even the use of the concept of the responsibility to protect shows the reluctance of the international community to go beyond the boundaries of prior practice: it is a concept which generally *accepts* rather than *undermines* the sovereignty of States and the responsibility of the State for its citizens, while allowing the international community to intervene only in the most extreme of scenarios. While it is a significant achievement that the international community has re-characterised "sovereignty as responsibility",[145] the concept does not suggest a breach of the idea of State sovereignty by justifying the replacement of one regime by another.

The lesson then from Libya about the direction of the liberal pendulum of international law is therefore twofold: the concept of State sovereignty does still protect the illiberal dictators of the world from military intervention as long as they abstain from the most violent acts of suppression and violence. Beyond that – when they either seek to engage the

142 SC Res. 841, 16 June 1993, 14th consideration of the preamble. It had, however, used the same term already in SC Res. 794, 3 December 1992, 2nd consideration of the preamble.

143 Byers & Chesterman, *supra* note 134, 287; Wouters, de Meester & Ryngaert, *supra* note 140, disagree with this conclusion, 173.

144 Wouters, de Meester & Ryngaert, *supra* note 140, 173.

145 ICISS Report, *supra* note 52, paras 2.14 & 2.15.

international community as full partners in bodies such as the Human Rights Council, or take a course towards serious human rights violations – they face increasing marginalisation and exclusion from the international community. The ongoing and violent attempt by the Syrian government to supress the pro-democracy and human rights movements in that country is likely to test this increased willingness of the international community to repeat its Libyan experiment. However, the execution of the intervention in Libya, as so far as it went beyond the clearly defined mandate of Resolution 1973, will provide sceptics such as Russia and China with significant arguments to oppose such a future intervention in Syria.

E. Conclusion

This article has, on a micro-level, examined the most relevant legal problems of the Libya intervention, in particular the instrument used to justify it, Resolution 1973. While it is favourable for the status and place of international law more broadly that the Libya intervention was undertaken in accordance with, not in contrast to, international law, Resolution 1973 itself shows some flaws, if not major defects. Firstly, the determination of a threat to international peace and security by the Security Council is, once again, anything but convincing. It remains insufficiently explained why the conflict, in particular at the early stages of Resolution 1970 and 1973, had any international dimension. Even more, the array of actions legitimized by Resolution 1973 ("all necessary measures to protect civilians") is blurry. Inevitable diplomatic compromise mashed what could otherwise have been clear language. Secondly, the ultimate aim of the intervention remains unclear. There is a mismatch between the humanitarian language of the resolution itself ("to protect civilians") and the pro-regime-change attitude of the triumvirate of States that have most fiercely advocated, and carried-out, the intervention ("Gaddafi must go, and go for good"). At least so much is clear – that much of the intervention's final execution corresponded more with the latter motivation than with the first. Thirdly, the reference to the responsibility to protect as an underlying motivation for the intervention is remarkable and welcome, and the first of its kind. However, there is still a drop of bitterness: the reference is incomplete. Instead of using the concise and well-balanced recommendations developed by the ICISS in 2001 and re-formulated in rudimentary form in the World Summit Outcome Document in 2005, the resolution rather bluntly referred to the concept without considering its exact aims or limitations.

On the macro-level, this article has used the case of Libya as a snap-shot to identify the current condition of international law, considering recent events in light of some broader debates in international law. It is the opinion of the author both that the practice of international law needs the over-arching parameters of theory to be understood, and that broader debates in international law need to be measured against contemporary developments if they are to maintain their relevance. Looking beyond the narrow question of the legality of the intervention, this article has addressed three broader questions about international law. Firstly, in the aftermath of the attacks on the World Trade Center on 11 September 2001, international law was in danger during the "war on terror" of degenerating into a decorative decoy: if handy, it was considered; if not, it was ignored. Those who now announce the "success" of Libya seem to suggest that this crisis that lasted a decade is (almost) overcome. There is some reason to agree with this statement: Resolution 1973 proves the serious attempt of international actors to comply with, rather than avoid, the system of collective security under international law. However, there are also some grave caveats: the highly vague language of Resolution 1973 and the continued stretch of the term "threat to international peace and security" temper any rush to suggest that international law is in a State of wider ascendancy. International law seems to be making a respectable comeback in the international arena, but we do not know yet whether this will be anything more than a "one hit wonder".

Secondly, I have raised the question of whether the case of Libya is an indicator, or even game-changer, in favour of a norm of democratic governance. As a recent analysis of Susan Marks and others suggests, such a right remains "emergent" rather than "existent" in international law. The case of Libya has not altered this finding. Any reference to democracy has been carefully avoided in Resolution 1973; had it not, there is sound reason to assume that the resolution would have been vetoed. The overarching motivation for many States to agree to Resolution 1973 was to prevent the imminent massacre in Benghazi, a macabre event that Colonel Gaddafi had threatened to schedule the day after the resolution was agreed. Only in the aftermath did the intervention start to seek broader democratic goals – to eliminate the West's former favourite bête noire, Colonel Gaddafi. It became, thus, an intervention that followed its own logic and own rules, beginning to emancipate itself from its original mandate. This, however, does not mean that a majority of States still approved of this new line of action.

Finally, I have examined the renewed attitude in international law towards outlaw States which to a high degree disregard human rights and liberal

ideas in their internal sphere. In allusion to a distinction Gerry Simpson suggested in 2001 – between charter-based liberalism which does not question a State's internal credentials, and liberal anti-pluralism which fully accepts States only if they are themselves liberal in their interior order – the analysis suggests that Libya has, indeed, invoked a further shift towards the latter model. The international liberal order has reaffirmed its preparedness to withhold full respect to a State's equal sovereignty where this State rides roughshod over liberal ideas in its own territory. This move, from one liberalism to another, is of course a subtle one, but other States might need to be prepared that future acts of international law may bear more of the marks of this liberal anti-pluralist approach.

I have though argued that the case of Libya shows that not all means to deal with the outlaw State suggested by the liberal anti-pluralist literature are in fact accepted under international law. While branding and excluding the outlaw is becoming more and more accepted and prominent (e.g. Libya's suspension of the Human Rights Council and even more so the release of the arrest warrant against Colonel Gaddafi), invasion is still not. Those interventions sometimes considered as pro-liberal or pro-democratic interventions in the past – Grenada, Panama and Haiti – all had at the same time other motivations apart from promoting liberal ideas; many of them were even condemned by the UN General Assembly as breaches of international law. The case of Libya is not ground-breaking in this respect:[146] by referencing the responsibility to protect (for the first time), the Security Council made clear that *only* in extreme cases – namely in the case of continued and gross human rights violations that need to be stopped immediately – would it stand up against an outlaw State with military force by declaring a situation a threat to international peace and security.

However, the case of Libya teaches us one more lesson, or provides one more question to ponder upon. What is the distinction between interventions with different rationales worth, where these rationales are hopelessly inter-mingled?[147] International actors in the case of Libya have shown themselves to be prepared to exchange (if not to hide) the rationale really driving military intervention. What was begun as an intervention designed to protect human rights can easily be turned into a resolution to seek regime change,

[146] See S. Chesterman, 'Leading from Behind: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya', 25 *Ethics and International Affairs* (2011) 3, 279-285, who concludes (more broadly) that the Libya intervention is altogether "interesting, but not exactly groundbreaking".

[147] Pointing also in this direction, Geiß & Kashgar, *supra* note 6, 103.

once international law has given its formal blessing in the form of a Security Council resolution. Sometimes an intervention may even have different rationales from the beginning (humanitarian and regime change), depending on the viewpoints of the different actors involved: how do we distinguish between the dominant motivation[148] of the international community to intervene and ancillary motives; and what are the implications for international law when the contours of an international intervention change? Villains and evildoers amongst State leaders will at least need to understand that their protection under the Charter system – a protection that many have abused for so long in order to preserve their own power – is degenerating. Admittedly, it is a grotesque idea that it was out of all people Colonel Muammar al-Gaddafi – a perverted "prince charming" – who has kissed away a spell keeping international law asleep for such a long time.

148 Geiß & Kashgar, *supra* note 6, suggest to judge each action according to its dominant aim ('*vorrangiger Zweck*'), 103; Payandeh, Friedenswarte, *supra* note 6, 68, however, suggests that it makes no difference whether an intervention's rationale of regime change is secret or explicit, as interventions should be judged along their objective meaning and effects, not by the intentions of the acting parties.

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The Responsibility to Protect and the Role of Regional Organizations: an Appraisal of the African Union's Interventions

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Abstract

This article examines the dilemmas and opportunities of the African Union, a regional organization, in implementing the responsibility to protect concepts in respect to forceful intervention to prevent or stop the occurrence of genocide, crimes against humanity and war crimes. Article 4(h) of the Constitutive Act of the African Union specifically mandates the Union to forcefully intervene in a Member State in such circumstances. Although the African Union has successfully resolved some situations where peaceful negotiations or consensual military intervention was sufficient, there has also been failure by the Union where such means fail or are inadequate. Such instances include the Darfur conflict where peacekeeping was insufficient, and recently in Libya where the African Union openly opposed enforcement of no fly zones to protect civilians. This article is of the view that the African Union's failure to implement Article 4(h) of the Constitutive Act, even in deserving situations, may have been aggravated by the failure to institutionalize the concept of responsible sovereignty within the Union's legal framework and processes. Despite the forceful intervention mandate, there are also provisions that affirm the principles of non-interference. The AU system therefore fails to resolve the dilemma between sovereignty and intervention. Sovereignty preservation remains as an effective legal and political justification for non-intervention by the AU. This has promoted a subsequent trend of greater sovereignty concerns by the Union. Institutionalization of the concepts postulated under the emerging norm of responsibility to protect within the AU framework and processes can contribute to the elimination of the legal and political dilemmas of forceful intervention by the Union.

A. Introduction

The concept of responsibility to protect was comprehensively formulated in 2001 by the International Commission on Intervention and State Sovereignty (ICISS).[1] Forceful intervention for humanitarian purposes has been problematic due to the principles of State sovereignty and non-intervention. The traditional conceptualization of sovereignty was an

[1] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (last visited 24 April 2012).

effective shield for a State in respect of its domestic affairs, despite its misconduct or atrocities towards its citizenry.[2] As a way of resolving intervention difficulties associated with the traditional approach, the Commission used a rhetorical strategy by conceiving sovereignty as responsibility rather than control.[3] The Commission also sought to address the dilemmas and undesirability of intervention for humanitarian purposes by changing the perspective of action from that of a *right to intervene* to the more acceptable and less controversial *responsibility to protect*.[4] Intervention for humanitarian purposes under the ICISS Report was premised on a continuum of obligations that extend beyond coercive action.[5] It included *responsibility to prevent* and *responsibility to rebuild*.[6]

B. The Legal and Political Value of the Concept and its Implementation Mechanism

There have been significant endorsements of the responsibility to protect concept, especially within the General Assembly. Although General Assembly resolutions are not binding per se upon States, they constitute an important part of the fabric of State practice.[7] State practice and *opinio juris sive necessitates* are essential in the evolution of customary international law.[8] The responsibility to protect norm has been endorsed in the 2004

2 J. Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect', 53 *Journal of African Law* (2009) 1, 1, 4.

3 C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', 101 *American Journal of International Law* (2007) 1, 99, 102. See, International Commission on Intervention and State Sovereignty, *supra* note 1, paras 2.14 - 2.15.

4 International Commission on Intervention and State Sovereignty, *id*., para. 2.29.

5 E. McClean, 'The Responsibility to Protect: The Role of International Human Rights Law', 13 *Journal of Conflict and Security Law* (2008) 1, 123, 139.

6 International Commission on Intervention and State Sovereignty, *supra* note 1, para. 2.29.

7 R. Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), 435, 435.

8 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), Merits, ICJ Reports 1986, 14, para. 207. In respect of o*pinio juris*, the International Court of Justice pointed out that it infers a belief that certain conduct has become obligatory due to "the existence of a rule of law requiring it […] States concerned must therefore feel that they are conforming to what amounts to a legal

High-Level Panel Report (HLP),[9] the 2005 World Summit Outcome Document,[10] and in September 2009, the General Assembly resolved that States would continue further discussions on the matter.[11] There have been annual deliberations on the concept under the auspices of the General Assembly, such as the July 2011 informal thematic debate.[12] In addition, the concept has also been endorsed by the Security Council.[13]

The responsibility to protect concept focuses on intervention by the international community to stop or pre-empt the commission of genocide, crimes against humanity, war crimes or ethnic cleansing.[14] The international community is deemed to have a residual responsibility to intervene where a State is the author of such atrocities, or is manifestly unable to protect its population.[15] Although peaceful means of intervention may be involved, it includes enforcement action in a timely and decisive manner where other means fail or are inadequate.[16] The use of the phrase *enforcement action* in this article, in reference to *forceful intervention* in a State, is consistent with

obligation." *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), Judgment, ICJ Reports 1969, 3, para. 77.

9 High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', GA Res. 59/565, 2 December 2004, para. 203.

10 World Summit Outcome Document, GA Res. 60/1, 24 October 2005, paras 138-139.

11 United Nations News Centre, 'General Assembly Agrees to Hold More Talks on Responsibility to Protect' (14 September 2009) available at http://www.un.org/apps/news/story.asp?NewsID=32047&Cr=responsibility+to+protect&Cr1= (last visited 24 April 2012).

12 See United Nations General Assembly Department of Public Information, '"For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers No Relief", Secretary-General Cautions in General Assembly Debate' (12 July 2011) available at http://www.un.org/News/Press/docs/2011/ga11112.doc.htm (last visited 24 April 2012) [United Nations General Assembly Department of Public Information, General Assembly Debate].

13 SC Res. 1674, 28 April 2006.

14 World Summit Outcome Document, *supra* note 10, paras 138-139.

15 The HLP Report affirms the emerging norm of "collective international responsibility to protect." High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203. The 2005 Outcome Document also notes that the international community has responsibility to use appropriate mechanisms to ensure protection of populations from atrocities. World Summit Outcome Document, *supra* note 10, para.139.

16 High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203; World Summit Outcome Document, *supra* note 10, para. 139.

the use of the term in the UN Charter and international law.[17] In the responsibility to protect discourse, execution of enforcement action is preserved within the UN collective security, meaning authorization by the Security Council.[18] In addition, intervention may be undertaken by regional organizations such as the African Union (AU), including enforcement action where necessary.[19]

The responsibility to protect concept is based on existing law and institutions, in addition to some of the past experiences within the international community.[20] The concept "pulls pre-existing norms together and places them in a novel framework."[21] The normative element and value of the concept has however been questioned by some scholars. For instance, it has been alleged that there lacks any clear consequences for the failure to implement the responsibility to protect concept, in addition a lack of will to implement it, and it is therefore inappropriate to classify the concept as an emerging norm.[22] Orford acknowledges that some scholars are of the mistaken view that the concept lacks any normative value or significance due to the assumption that it does not impose any new binding obligations

17 Article 2(7) of the Charter exempts Chapter VII "enforcement measures" from the prohibition on intervention in domestic affairs of a State. Article 42 of the Charter empowers the Security Council to authorize the necessary "action" by air, sea or land forces. In addition, Article 53(1) of the Charter allows regional agencies to undertake "enforcement action" provided they have authorization by the Security Council. According to the ICJ, enforcement action is intervention that is not based on the consent of the territorial State. *Certain Expenses of the United Nations,* Advisory Opinion, ICJ Reports 1962, 151, 170.

18 HLP Report asserts that military action may be resorted with authorization by the Security Council. High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203. See also World Summit Outcome Document, *supra* note 10, para. 139.

19 World Summit Outcome Document, *id*. Regional organization's role in the maintenance of international peace and security is recognized in Chapter VIII of the UN Charter. Under Article 53(1) of the Charter, regional organizations may undertake enforcement action but with the authorization of the Security Council.

20 L. Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice', 34 *Review of International Studies* (2008) 3, 445, 447-448. An example is the Genocide Convention, which in Article VIII obligates States to prevent the occurrence of genocide. *Convention on the Prevention and Punishment of the Crime of Genocide***,** 9 December 1948, 78 U.N.T.S. 277.

21 A. Peters, 'The Security Council's Responsibility to Protect', 8 *International Organizations Law Review* (2011), 1, 15, 23 [Peters, Responsibility to Protect].

22 A. Kapur, 'Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters', 20 *European Journal of International Law* (2009) 3, 560, 562.

on States or regional organizations.[23] Orford instructively points out that the responsibility to protect concept raises significant legal issues, even if it does not translate into binding legal obligations.[24] She correctly observes that the concept represents a form of law that grants powers and provides jurisdiction to the international community for intervention purposes.[25] Although it is still doubtful that the concept can be classified as a proper norm of international law, it has previously been endorsed by the General Assembly and the Security Council,[26] and qualifies to be regarded as an emerging norm. The legal and political value of the concept may also be discerned from the fact that the concept establishes a framework for complementarity between State sovereignty and intervention for humanitarian purposes, thereby eliminating the problematic tension between the two fundamental principles. The UN Secretary General acknowledges the normative value of the concept, stating that it "is now well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit crimes relating to the responsibility to protect."[27]

The concept limits the convenience by which sovereignty may be used as a convenient legal or political justification for non-intervention by the international community, or as a shield from external action by the territorial State. As Falk observes, extra sensitivity to the traditional concept of sovereignty provides States within the international community with an effective mechanism to avoid the problems associated with intervention, even where it involves a collapsed government within the subject State.[28] In addition, Carty astutely opines that sovereignty provides an effective veil for articulating State interests and security concerns in a manner that is legally acceptable.[29] He cites the case of the 1990s peace-enforcement in Bosnia, where States contributing troops (like the United Kingdom) argued that

23 A. Orford, *International Authority and the Responsibility to Protect* (2011), 22-23.

24 *Id*., 25.

25 *Id*.

26 High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 203; World Summit Outcome Document, *supra* note 10, paras 138-139; SC Res. 1674, *supra* note 13.

27 Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc A/63/677, 12 January 2009, para. 54.

28 R. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (2000), 78.

29 A. Carty, 'Sovereignty in International Law: A Concept of Eternal Return', in L. Brace & J. Hoffman (eds), *Reclaiming Sovereignty* (1997), 101, 116.

forceful action would amount to an intervention, thereby actively undermining the mandate that had been issued by the Security Council.[30] The responsibility to protect concept seeks to eliminate the convenience with which the concept of sovereignty may be used as an affective legal and political justification for non-intervention by States and regional organizations.

The continuing evolution of the responsibility to protect into a legal norm does not imply the abandonment of the principle of non-intervention, and is not an infringement on territorial integrity. The responsibility to protect concept is actually an endorsement of the principle of sovereignty, rather than its opposition.[31] The protection of State sovereignty and prohibition of intervention within the international community has the purpose of safeguarding international stability, and therefore protecting natural persons from catastrophes.[32] This is due to the fact that interventions and imperialist wars may lead to global instability and humanitarian catastrophes.[33] The emerging norm is not a justification for forceful intervention in any situation, but only in circumstances of stopping or pre-empting genocide, crimes against humanity, war crimes and ethnic cleansing.[34] The concept only seeks to ensure that the protective purpose of sovereignty is maintained by the international community when a State is unable or unwilling to provide it. The State is endowed with both international and domestic responsibilities by the principle of sovereignty, which includes the duty to protect populations within its territory.[35] The international community is continually attaching important value to the protection of populations from such gross violations of human rights and humanitarian law, which are also international crimes.[36] In addition, in order

30 *Id*., 115.

31 D. Kuwali, *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (2011), 97.

32 A. Peters, 'Membership in the Global Constitutional Community', in J. Klabbers *et al.* (eds), *The Constitutionalization of International Law* (2009), 153, 186 [Peters, Global Constitutional Community].

33 *Id*.

34 World Summit Outcome Document, *supra* note 10, para. 139.

35 Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary General, UN Doc A/65/877, 27 June 2011, para. 10.

36 Genocide, crimes against humanity and war crimes are international crimes. See, Articles 6-8 of the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90.

to avoid subjectivity and unregulated forceful interventions, the concept advocates that such action be maintained within the collective security system of the UN, with the Security Council providing authorization.[37] The concept is a mechanism of ensuring that sovereignty serves its purpose, that of protecting the citizens of the State, and is not abused to provide a justification for subjecting them to avoidable humanitarian catastrophes.

C. The Role of Regional Organizations

Although the responsibility to protect concept provides a conceptual basis through which political and legal dilemmas of forceful intervention may be addressed, including by regional organizations, such organizations are also expected to provide mechanisms through which the concept is to be implemented. Regional organizations can provide the mechanisms for the implementation of the concept through various approaches, including peaceful negotiations and consensual interventions. The central focus of this article is however on implementation of the concept through forceful intervention, since it is often the most legally and politically problematic to implement. In addition, it is often the only viable solution for the protection of populations within a State where other mechanisms such as peaceful negotiations and consensual interventions are inadequate, or inappropriate.

The 2005 Outcome Document reaffirmed that the responsibility to protect may be implemented through forceful intervention where other peaceful means are inadequate, and that such action may include co-operation with the relevant regional organization.[38] Under Article 52 of the UN Charter, regional organizations may undertake actions aimed at the maintenance of international peace and security. Article 53(1) of the Charter specifically provides that regional organizations may undertake enforcement action, provided they have Security Council authorization. Intervention by regional organizations or their co-operation with the United Nations is important since they may be situated in the theatre of the conflict, and therefore their Member States are the most affected by the negative consequences of the war. Second, for political convenience, it is necessary that the Security Council considers the views of regional organizations since they may have more detailed information and a better appreciation of the

37 World Summit Outcome Document, *supra* note 10, para. 139.
38 *Id.*

conflict given their proximity to the events on the ground.[39] The United Nations Secretary General has emphasized the need for greater partnership between the UN and relevant regional organizations with regard to gathering and assessing information on conflict situations of common concern.[40] Third, timely and decisive intervention and effective protection of civilians is likely to occur where both the UN and relevant regional organization favour similar course of action.[41] Fourth, institutional mechanisms for intervention by regional organizations have promoted the development of the responsibility to protect concept. According to the UN Secretary General, the roots to the emergence of the concept can be traced to declarations by the Economic Community of the West African States and the spirit of non-indifference espoused in the African Union.[42] Fifth, regional organizations have a crucial role in the establishment of measures aimed at preventing the occurrence or escalation of conflicts. The UN Secretary General has observed that such organizations contribute to the development of regional "norms, standards, and institutions that promote tolerance, transparency, accountability, and the constructive management of diversity."[43] Sixth, since the effects of mass atrocities have an effect on neighbouring States through consequences such as massive refugees flow, they require a cross-border response which can be facilitated by the relevant regional and sub-regional organization.[44] Seventh, the mass atrocity crimes may be committed by transnational non-State actors such as armed groups and terrorists, thereby necessitating collective action by States through regional and sub-regional organizations.[45]

D. The Dilemma of Implementing the African Union's Forceful Intervention Mandate

The Constitutive Act of the African Union, which was adopted in July 2000, in Article 4(h) confers the Union with the right of intervention in a

39 Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 35, para. 6.
40 *Id*., para. 31.
41 United Nations General Assembly Department of Public Information, *supra* note 12.
42 *Id*.
43 Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 35, para. 23.
44 *Id*.
45 *Id*.

Member State in respect of *grave circumstances,* namely; crimes against humanity, war crimes and genocide.[46] Article 4(h) of the Constitutive Act gives the Assembly of the African Union the authority to decide on intervention due to the *grave circumstances*. Therefore, intervention under Article 4(h) of the Constitutive Act is not dependent on a specific request or invitation of the territorial State, and the actual intervention may actually be aimed at the government of a State if it is the author or perpetrator of the atrocities. It may also involve the use of military force, given that according to Article 4(h) of the Constitutive Act, such intervention takes place in situations of genocide, crimes against humanity or war crimes.[47] It is in the form of enforcement action that regional organizations are empowered to undertake in Chapter VIII of the UN Charter.

The formation of the African union has commendably contributed to the maintenance of peace and security in the African region, through peaceful negotiations, peacekeeping and consensual interventions. In addition, as the UN General Secretary observed, the emergence of the responsibility to protect concept, and its eventual adoption in the 2005 Outcome Document, has some of its roots in the spirit of non-indifference postulated within the AU.[48] On the other hand, the African Union has been ineffective in implementing forceful intervention as postulated under the responsibility to protect concept and as provided under Article 4(h) of its Constitutive Act, where peaceful negotiations and consensual interventions are inappropriate or inadequate. Interventions by the African Union so far, like in Burundi,[49] Sudan (Darfur)[50] and Somalia[51] have been of a

46 *Constitutive Act of the African Union*, 11 July 2000, 2158 U.N.T.S. 3.

47 The fact that it may involve the use of military force is affirmed by Article 13 of the African Union Peace and Security Council Protocol which establishes the African Standby Force. Article 13(3) (c) of the Protocol specifically provides that one of the African Standby Force mandate shall be intervention in a Member State due to *grave circumstances*, in accordance with Article 4(h) of the Constitutive Act. *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002, available at http://www.africa-union.org/rule_prot/PROTOCOL-%20PEACE%20AND%20SECURITY%20COUNCIL%20OF%20THE%20AFRICAN%20UNION.pdf (last visited 24 April 2012).

48 United Nations General Assembly Department of Public Information, *General Assembly Debate*, *supra* note 12.

49 See Organization of African Unity, 'Communiqué of the Eighty-Eighth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level' (2003) Central Organ/MEC/AMB/Comm. (LXXXVIII).

peacekeeping nature and were based on the consent of the territorial State. The African Union has been reluctant to undertake or even endorse forceful intervention even where it has been necessary, like the case of Darfur, or recently, in relation to Libya. Therefore, despite the African Union adopting a more interventionist stance in its Constitutive Act unlike under the preceding Organization of African Unity, "the norm of non-interference continues to trump human rights concerns."[52]

The African Union reaction to the widespread and systematic atrocities in Darfur, Sudan, (since 2004) and the 2011 Libyan crisis exemplify the Union's deficiencies in promoting robust forceful intervention where necessary, and therefore ensure effective regional implementation of the responsibility to protect concept. In respect to Darfur, Christine Gray particularly regretted that:

This failure to prevent a major humanitarian crisis demonstrates that the universal acceptance in principle of a 'responsibility to protect' in the *World Summit Outcome Document* cannot guarantee action […] The AU was not willing to intervene in the absence of consent by the government of Sudan. It may be that the World Summit's acceptance of the 'responsibility to protect' has created expectations which will not be fulfilled in practice.[53]

It would have been expected that at the regional level, the African Union, given its "right" of intervention, would have either lobbied for robust and decisive forceful intervention in Darfur, Sudan, as a way of ending both the conflict and mass atrocities, or undertaken such action thereby compensating for the failure of the international community. In the case of Libya, the African Union could have assumed greater responsibility in ensuring protection of civilians from massive and indiscriminate military

50 In the case of Sudan, the African Union had been involved in negotiating ceasefire agreements and the formation of the African Union Mission in Sudan was agreed on by all the parties to the conflict, including the Government of Sudan. See, for example, African Union, 'Press Release' (21 December 2004) available at http://www.africa-union.org/DARFUR/Press%20release%20closing%20Peace%20Talks%2021%2012%2004.pdf (last visited 24 April 2012).

51 See African Union, 'The Commissioner for Peace and Security of the African Union Signed the Status of Mission Agreement (SOMA) for the AU Mission in Somalia with the Ambassador of Somalia' (6 March 2007) available at http://www.africa-union.org/root/UA/Conferences/2007/mars/PSC/06%20mars/Draft%20PR%20SOMA-%20Somlia-%206%20-03-071.doc (last visited 24 April 2012).

52 P. D. Williams & A. J. Bellamy, 'The Responsibility to Protect and the Crisis in Darfur', 36 *Security Dialogue* (2005) 1, 27, 42-43.

53 C. Gray, *International Law and the Use of Force*, 3rd ed. (2008), 55.

attacks (which are elements of crimes against humanity), including supporting the implementation of no fly zones. However, there is now a trend of the African Union failing to implement intervention responsibilities that require robust enforcement action, focusing only on peaceful and consensual approaches even where they are manifestly inappropriate and inadequate. In a sense, the subsequent conduct by the AU contradicts the spirit of the responsibility to protect concept, which envisages appropriate intervention (including enforcement action) in a timely and decisive manner, if peaceful means are inadequate.[54] Forceful intervention is not panacea, but as recognized by the ICISS, it is a crucial option where mass atrocities are being committed.[55] Political settlements proved inefficient in ending conflicts and protecting civilians in places like Darfur in Sudan, resulting in a proliferation of peace agreements between the parties to the conflict and an endless cycle of mass atrocities. Therefore, forceful intervention or its threat is occasionally necessary for negotiations to be successful, and in order to ensure effective protection of civilians.[56] There is need for "a robust and borderless" intervention mechanism in the African region based on the fragile human rights protection record in the continent,[57] which has on some occasions permitted commission of crimes against humanity and war crimes against civilian populations.

Intervention pursuant to invitation or consent of the territorial State (the limit which the African Union has difficulty exceeding) is based on the sovereign right of a State to invite external intervention, and is unlikely to be effective where the government is party to the conflict and atrocities. As Cassese observes, the principle of consent replicates the universally recognized principle of *volenti non fit injuria*, meaning that an otherwise illegal action is precluded from illegality where there is prior consent from the party whose rights have been infringed.[58] Brownlie similarly argues that States may lawfully confer the right of intervention to others, and it may

54 The 2005 Outcome Document reaffirms the role of regional organizations such as the AU in the implementation of the responsibility to protect through forceful intervention, where necessary. See, World Summit Outcome Document, *supra* note 10, para. 139. For the role of regional organizations in the maintenance of international peace and security, including forceful intervention, see Articles 52 and 53 of the UN Charter.

55 T. G. Weiss, 'RtoP Alive and Well after Libya', 25 *Ethics & International Affairs* (2011) 3, 287, 290.

56 *Id*., 289.

57 Kuwali, *supra* note 31, 98.

58 A. Cassese, *International Law* (2001), 316.

involve the use of armed force within the territory of the requesting or consenting State.[59] Consensual intervention and peacekeeping under the African Union is based on Article 4(j) of the Constitutive Act, which allows a Member State to request the Union's intervention for the purposes of restoring peace and security. Where intervention is by consent, the territorial State regulates the limits and modes of the intervention. If the intervening States or regional organization exceeds the limits permitted by the inviting or consenting State, it then becomes a form of forceful intervention.

The African Union's subsequent practice, which demonstrates the existence of legal and political dilemmas in the implementation of its forceful intervention mandate, is enhanced by the Union's failure to institutionalize the concept of responsible sovereignty in its legal framework and processes. There is a failure to effectively address the dilemma between State sovereignty and intervention for humanitarian purposes within the AU legal framework. The tension between sovereignty and intervention is maintained within the African Union legal framework by enumerating the two principles without establishing a framework of complementarity and synergy between them. For instance, while Article 4(g) of the Constitutive Act reaffirms the principle of non-interference in a Member State's internal matters by another, Article 4(h) establishes the right of the African Union to intervene in a Member State due to genocide, crimes against humanity or war crimes. In addition, there are similar opposing provisions in the African Union Peace and Security Council Protocol.[60] Article 4(e) of the Protocol affirms the sovereignty and territorial integrity of Member States and Article 4(f) prohibits Member States from interfering in the domestic affairs of another State. However, on the other hand, Article 4(j) of the Protocol reaffirms the African Union's right of intervention in a Member State due to genocide, crimes against humanity or war crimes.

Failure to establish a synergy and complementarity between State sovereignty and intervention for humanitarian purposes could have promoted a subsequent practice of greater sovereignty concerns over those of humanitarian protection, by providing an elaborate justification for such action within the legal framework. Contrary to the tension within the AU legal and institutional framework, the responsibility to protect concept addresses the problematic dilemma between State sovereignty and

59 I. Brownlie, *International Law and the Use of Force by States* (1963), 317.

60 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 47.

intervention for humanity. Both State sovereignty protection and intervention to stop or prevent genocide and crimes against humanity are conceptualized as complementary responsibilities that the international community has a duty to perform, and which is not a discretionary right. In a sense, despite some progressive provisions in the AU legal framework, there is need to institutionalize some of the concepts postulated in the emerging norm as a way of enhancing the elusive legal and political consensus that is necessary for forceful intervention. Some of the inconsistencies between the AU and the responsibility to protect concept, which are examined in the relevant section in this article, are likely to aggravate legal and political predicaments in the Union's implementation of the concept and its forceful intervention mandate under Article 4(h) of the Constitutive Act.

I. African Union's Success: Consensual Interventions and Peaceful Negotiations

We have observed that one of the ways the responsibility to protect concepts may be implemented is through intervention pursuant to a request or with the consent of the territorial State. The interventions analyzed in this section are not necessarily a case of implementation of responsibility to protect, but have the objective of analyzing the AU's subsequent practice in order to demonstrate the continued constraints of Westphalian concepts of sovereignty in the Union's interventions. It is more of an analysis of the AU's institutional capacity to implement the ideas postulated under the responsibility to protect, through an appraisal of the AU's response to some regional conflicts since its establishment. This is because while the concept of responsibility to protect is expected to help regional organizations such as the AU address dilemmas of intervention, such organizations are also expected to be mechanisms through which the concept is to be implemented. The African Union's subsequent interventions have been pursuant to the consent of the territorial State, or of a peacekeeping nature. However, where such an approach is inadequate to protect civilians or the government is a perpetrator, like the case of Sudan, there may be need to shift from consensual intervention to enforcement action as envisaged in Article 4(h) of the Constitutive Act. It is important to examine some of the successes of the African Union through consensual intervention and peacekeeping, like in the case of the Burundi conflict.

1. The 2003 African Union Peacekeeping Mission in Burundi

The 2003 AU peacekeeping mission in Burundi was successfully implemented by the Union before the formal endorsement of the responsibility to protect concept by the General Assembly in 2005. Despite the peacekeeping mission not having been a direct case of implementation of the emerging norm by the AU, it is a significant precedent in examining the AU's subsequent practice, especially in demonstrating the Union's intervention capacity. It is an important case that should be considered while making a balanced analysis on whether the AU has effectively institutionalized the concept of responsible sovereignty, which is the central concern of the emerging norm. Therefore, as Evans observes, the Burundi intervention is a perfect example of how the responsibility to protect concept can function.[61]

The African Union Mission in Burundi (AMIB), which was predominantly a peace operation, was the first intervention wholly initiated and implemented by African Union members.[62] AMIB was established to supervise the 2 December 2002 ceasefire agreement, including earlier ones, by the Transitional Government of Burundi and the rebels.[63] The African Union intervention was significant since it had the responsibility of establishing peace "in a fluid and dynamic situation in which the country could relapse into violent conflict."[64] Emphasis on an African Mission rather than a United Nations one, and unwillingness of the United Nations to deploy troops in the absence of a comprehensive peace agreement had led to its establishment and deployment.[65] AMIB was successful in plummeting tension in the then potentially volatile State.[66]

61 G. Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come…and Gone?', 22 *International Relations* (2008) 3, 283, 291.

62 T. Murithi, 'The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia', 17 *African Security Review* (2008) 1, 70, 75.

63 Organization of African Unity, *supra* note 49.

64 Murithi, *supra* note 62, 75.

65 E. Svensson, 'The African Mission in Burundi: Lessons Learned From the African Union's First Peace Operations' (Swedish Defence Research Agency, 2008), 11, available at http://www.foi.se/upload/projects/Africa/FOI2561_AMIB.pdf (last visited 24 April 2012).

66 T. Murithi, 'The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur', 6, available at http://www.humansecuritygateway.com/documents/

2. The 2008 African Union Mediation in Kenya

Another commendable success of the African Union, but in the context of peaceful negotiations to resolve a regional conflict, is in respect of the 2008 post election violence in Kenya. The country was engulfed by ethnic violence due to the December 2007 disputed presidential elections.[67] President Kufuor of Ghana, the then Chairman of the African Union, requested Kofi Annan to lead the mediation in the State on behalf of the Union under the auspices of the Panel of Eminent African Personalities.[68] The mediation successfully resolved the conflict. However, the crisis in Kenya and the international community reaction was branded as a responsibility to protect situation only retrospectively.[69] Kofi Annan has subsequently used the phrase, stating that the "effective external response" in Kenya was proof "that the responsibility to protect can work."[70] According to Ban Ki Moon, Kenya was an illustration that an early intervention in a State that was degenerating into violence could forestall its escalation, resulting in the responsibility to protect being implemented without the necessity of using force.[71] He further stated that the Kenyan case represented the first time the UN and regional actors viewed a conflict situation partly "from the perspective of the responsibility to protect."[72]

II. African Union's Failure: Decisive Forceful Intervention

Despite the fact that peaceful negotiations and consensual intervention play a significant role in ending some conflicts, and may be a basis for the implementation of the responsibility to protect concepts, they may be inadequate or inappropriate in other situations. The reality of the potential of

JPCD_AUsForayIntoPeacekeeping_HybridMissionDarfur.pdf (last visited 24 April 2012).

67 International Coalition for the Responsibility to Protect, 'Crisis in Kenya' available at http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya (last visited 24 April 2012).

68 K. Annan, 'Opening Remarks to the Opening Plenary Session - Kenya National Dialogue: One Year Later' (30 March 2009) available at http://allafrica.com/stories/200903301452.html (last visited 24 April 2012).

69 International Coalition for the Responsibility to Protect, *supra* note 67.

70 Annan, *supra* note 68.

71 Implementing the Responsibility to Protect: Report of the Secretary General, *supra* note 27, para. 11(c).

72 *Id*., para. 51.

their inadequacy or inappropriateness in some circumstances demonstrates that the AU should have the capacity to be flexible and respond appropriately as any situation may require, from peaceful negotiations to enforcement action in deserving situations. The UN Secretary General has emphasized that there should be no delay in implementing the responsibility to protect through robust action, including forceful intervention, where diplomacy is ineffective.[73] The forceful intervention may be executed by a regional organization after authorization by the Security Council.[74]

1. The Darfur Conflict and the Necessity for Robust Enforcement Action

It has been argued that Darfur was a "litmus test for the responsibility to protect framework" for both the AU and the UN.[75] However, despite the Darfur crisis providing a splendid example of a government that was both unable and unwilling to protect its nationals, the international community has also been unable and unwilling to assume the residual responsibility envisaged under the responsibility to protect concept.[76] As an analysis of the conflict in Darfur will indicate, implementation of robust enforcement action to protect civilians in accordance with the responsibility to protect was long overdue.

The Darfur conflict commenced in 2003, and by the turn of 2005, there were widespread and systematic atrocities that included killing of civilians, displacements, destruction of villages, rapes and other types of sexual violence that amounted to crimes against humanity.[77] According to the UN estimates in July 2010, an approximated 300,000 people had died in Darfur since the conflict began, with 2.7 million displaced.[78] The responses

73 *Id*., para. 56.
74 *Id*.
75 McClean, *supra* note 5, 142.
76 K. Kindiki, 'Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives', 131 *Institute for Security Studies Monograph Series* (2007), 6 [Kindiki, Intervention to Protect].
77 International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005), 3,available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (last visited 24 April 2012).
78 United Nations News Centre, 'Darfur: UN-African Union Peacekeeping Force Extended as Tensions Rise' (30 July 2010) available at

by both the African Union and United Nations have been criticized as inappropriate for deterring the commission of atrocities. Abass argues that despite widespread gross violations of human rights in June 2004 when the African Union intervention in Darfur began, the Union decided to deploy peacekeepers rather than conduct a humanitarian intervention.[79] He states that consequent actions by the Union have amounted to peacekeeping rather than humanitarian intervention.[80] However, Abass later argues that in any case, the African Union could not be expected to conduct a humanitarian intervention as it lacks such powers, and therefore, the UN was the one that should have intervened in such a manner since it has such powers under Chapter VII of the Charter.[81] This seems to suggest that the African Union could also have sought authorization from the Security Council to undertake forceful intervention in accordance with Article 53(1) of the UN Charter.

It should be noted that the initial involvement of the African Union troops in peacekeeping was with the specific consent of the Government of Sudan, which was consistent with Article 4(j) of the Constitutive Act, not an enforcement action which is premised on the decision of the Union Assembly. The escalation of the civil war eventually led to the formation of a joint United Nations and African Union hybrid operation, the United Nations African Union Mission in Darfur (UNAMID) by Security Council Resolution 1769.[82] The hybrid operation was a compromise between Sudan, which fervently opposed an independent UN operation, and the UN, which, preferred the expansion of the United Nations Mission in Sudan (UNMIS) to 22,000 personnel, with the possibility that it could take over the African Union Mission in Sudan (AMIS) by 31 December 2006.[83]

However, UNAMID was nothing more than a larger peacekeeping force, and not a robust enforcement force despite previous unsuccessful peacekeeping, continued civil war and mass atrocities. It is evident in the fact that United Nations earlier objectives were compromised by the Government of Sudan that would consent only to either peacekeeping by the African Union troops or a hybrid operation comprising both the UN and

http://www.un.org/apps/news/story.asp?NewsID=35493&Cr=%20Darfur&Cr1 (last visited 24 April 2012)

79 A. Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', 54 *Netherlands International Law Review* (2007) 3, 415, 420-423.

80 *Id*., 423.

81 *Id*., 425.

82 SC Res. 1769, 31 July 2007.

83 Abass, *supra* note 79, 433.

AU, and the fact that Security Council Resolution 1769 expressly stated that the forces would be under unified command and "in accordance with basic principles of peacekeeping".[84] The contradictions of peace enforcement by the UN have been evident in Sudan, as mass killings and displacements of civilians continued. Despite the Security Council passing resolutions under Chapter VII powers,[85] it continued to insist its preference for the Government of Sudan to consent to intervention,[86] which indicated preference for permission rather than imposition, a basic feature of traditional peacekeeping.

Although consensual intervention was desirable, thousands continued losing their lives and millions being displaced when it was very clear that the Sudan Government was itself unwilling to end its complicity and support for the *Janjaweed* militia responsible for some of the atrocities.[87] Since both the African Union and United Nations were focusing on Sudan to consent to the deployment of troops and military equipments, its government successfully and severely distracted the deployment and operations of UNAMID, a force which already had a weak peace enforcement mandate *ab initio*.[88] It should also be noted that the legal framework for intervention by both the African Union and United Nations was contradictory, in as much as they have been involved in joint operations. While the African Union intervened on the basis of specific consent of Sudan and never changed its mandate, the Security Council passed resolutions under Chapter VII that permit enforcement action.

84 SC Res. 1769, *supra* note 82.

85 For instance, SC Res. 1590, 24 March 2005.

86 An example is Security Council Resolution 1706 of 2006 that states, in part, that "UNMIS' mandate shall be expanded […] that it shall deploy to Darfur, and therefore invites the consent of the Government of National Unity" for the deployment. SC Res.1706, 31 August 2006.

87 International Commission of Inquiry on Darfur, *supra* note 77, 3.

88 By December 2007, some of the obstructions and obstacles put by the Sudan Government included failure to officially accept the UNAMID troop list for more than two months. It also rejected troop contributions from some States, notably Nepal, Thailand and Nordic countries, insisting on African troops only. In addition, it deliberately delayed for several months before allocating land for military bases. Further, it refused to grant consent for night flights to UNAMID and continued to impose curfews on the "peacekeepers" in certain places. Joint Non-Governmental Organizations Report, 'UNAMID Deployment on the Brink: the Road to Security in Darfur Blocked by Government Obstructions' (December 2007), 1-2, available at http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp09/UNAMIDDeploymentontheBrinkNGOReport.pdf (last visited 24 April 2012).

However, the United Nations further proceeded to contradict its enforcement mandate by seeking the consent of the Government of Sudan, which was an accomplice in the commission of mass atrocities. The participation of the government in mass atrocities is evidenced by the indictment of the President of Sudan by the International Criminal Court on allegations of complicity in the atrocities.[89] In a literal sense, enforcement action cannot be undertaken on the government that is subject to the intervention with its consent. In 1994, the United Nations did not demand or insist on a preference for consent from the Haiti military Government to enforce its Resolution, which had a broad and open mandate.[90] The approach in Sudan was therefore not logical for effective civilian protection.

The failure of the contradictory peace enforcement approach like in the case of Darfur, Sudan may be attributed to the fact that it has evolved as an exception from the traditional peacekeeping[91] and it is therefore restrained by the impartiality, co-operation and consent of territorial State foundations. Noting the likely inefficiencies and inappropriateness of the peace-enforcement approach, Higgins convincingly argues that enforcement action "should remain clearly differentiated from peace-keeping. Peacekeeping mandates should not contain within them an enforcement function. To speak of the need for more 'muscular peace-keeping' simply evidences that the wrong mandate has been chosen *ab initio.*"[92] A more appropriate approach in serious civil conflicts like the case of Darfur seems desirable, constituting a fully fledged and robust enforcement action to achieve a ceasefire and deter the parties to the conflict, thereby creating the peace. After the ceasefire, a peacekeeping force can now be established to

89 *Situation in Darfur, Sudan, in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Second Warrant of Arrest, ICC-02/05-01/09 (Pre-Trial Chamber I), 12 July 2010.

90 In the case of Haiti in 1994, the Security Council authorized enforcement action to oust the military leadership and ensure the return of the legitimately elected President, SC Res. 940, 31 July 1994.

91 The International Court of Justice confirmed that one of the features of peacekeeping operations is that they are established after the consent of the territorial State. *Certain Expenses of the United Nations, supra* note 17, 170. The 2000 Report of the Panel on United Nations Peace Operations described the bedrock of peacekeeping as based on consent, impartiality and non-use of force except in self-defence. Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations', UN Doc A/55/305, August 2000, ix.

92 R. Higgins, 'Peace and Security: Achievements and Failures', 6 *European Journal of International Law* (1995) 1, 445, 459.

monitor, implement and keep the peace. This would provide a better mechanism to ensure civilians are protected and mass atrocities halted, in a manner consistent with the responsibility to protect concept. Higgins proposes that a peacekeeping force be put on the ground only after an agreement on a cease-fire, which is accompanied by commitment of achieving the undertaking.[93]

The HLP Report also noted that one of the greatest failures of the United Nations has been halting ethnic cleansing and genocide since at times "peacekeeping and the protection of humanitarian aid" becomes a "substitute for political and military action to stop" the atrocities.[94] When it became apparent that consensual intervention and peacekeeping was not effective and appropriate for civilian protection in Darfur, the African Union, as the relevant regional organization, and in the spirit of Article 4(h) of the Constitutive Act, should have sought the more appropriate forceful intervention alternative. The African Union could have sought authorization from the Security Council for such action, and requested support from the international community to supplement its resources in the intervention, options which it did not pursue.

2. The Libyan Uprising and the African Union's Non-Intervention Stance

Another case that has further exposed the continuing constraints of the traditional concepts of sovereignty within the African Union system relates to the Union's reaction to the 2011 Libyan conflict. In contrast to the African Union's non-intervention stance, the United Nations was decisive in advocating and authorizing timely forceful intervention, in a manner consistent with the responsibility to protect concept. As Libyan forces continued indiscriminate aerial bombings of both rebels and civilians seeking to overthrow Muammar Gaddafi's regime, the Security Council promptly referred the matter to the International Criminal Court for investigation and possible prosecution, after finding that gross and systematic violations of human right were being orchestrated.[95]

However, as possibilities of the enforcement of a no fly zone were being deliberated by some of the world powers, the African Union issued a

93 *Id.*, 460.
94 High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 87.
95 SC Res. 1970, 26 February 2011.

statement on 10 March 2011 that rejected "any foreign military intervention, whatever its form."[96] This was despite the African Union finding that there had been "indiscriminate use of force and lethal weapons" leading to "loss of life, both civilian and military." [97] The AU actions seem to contradict the spirit of Article 4(h) of the Constitutive Act, which mandates the Union to undertake forceful intervention in such circumstances, which constituted or was leading to crimes against humanity. Departing from the African Union's non-intervention stance, the Council of the League of Arab States on 12 March 2011 called "for the imposition of a no-fly zone on Libyan military aviation," and protection of areas inhabited by civilians from military attacks.[98]

Consequently, on 17 March 2011, the Security Council, concerned that the widespread and systematic attacks against civilians that were taking place in Libya amounted to crimes against humanity, and acting under its Chapter VII powers as provided under the UN Charter, authorized Member States to "take all necessary measures" to protect civilians under the threat of attack.[99] The Resolution however clarified that it excluded any form of a foreign occupation force in any territory of Libya.[100] In addition, the Resolution established a no fly zone, banning all flights in the Libyan airspace for the purposes of protecting civilians.[101] Without delay, the United States, United Kingdom, France and other coalition partners launched attacks against Muammar Gaddafi's forces and military installations with the objective of enforcing the no fly zone.[102] On 25 March 2011, the African Court on Human and Peoples' Rights (ACHPR) commendably issued interim orders against the Libyan Government to stop any action that could result in the loss of lives or amount to violations of the protection granted to Libyans under the relevant international human rights

96 African Union, 'Communiqué of the 265th Meeting of the Peace and Security Council' (10 March 2011) PSC/PR/COMM.2 (CCLXV).

97 *Id*.

98 SC Res. 1973, 17 March 2011.

99 *Id*.

100 *Id*.

101 *Id*.

102 British Broadcasting Corporation, 'Libya: United States, United Kingdom and France Attack Gaddafi Force' (20 March 2011) available at http://www.bbc.co.uk/news/world-africa-12796972 (last visited 24 April 2012).

instruments.[103] However, despite the Court adopting such a progressive approach in issuing the orders, which is consistent with the responsibility to protect concept, it had to rely on the AU for the enforcement of its findings. Article 29 of the Protocol that establishes the ACHPR requires that the judgment of the Court be forwarded to the Organization of African Unity (OAU) which was succeeded by the African Union.[104] Rule 64 (2) of the ACHPR Rules provides that the Executive Council of the African Union shall monitor the execution of the Court's judgment on behalf of the Union's Assembly.[105] Based on the fact that the AU was opposed to any form of military intervention within Libya, it could therefore not enforce the Court orders through forceful intervention.

Considering the drafting and phrasing of Resolution 1973, the Libyan intervention has been described as the "first UN-sanctioned combat operations since the 1991 Gulf War."[106] The appropriateness of the international community intervention in Libya, unlike the earlier approach in Darfur, was that it was no longer about peacekeeping and contradictory peace enforcement in a place where there was no peace to keep. It was clearly about decisive forceful intervention in the form of no fly zones to prevent widespread and systematic attacks on civilians. The international military coalition destroyed Libya's air defense system, and besides patrolling Libya's skies to enforce the no-fly zones, targeted tanks and established a naval blockade.[107]

According to Weiss, the timely forceful intervention in Libya contrasts with collective hesitation to undertake enforcement action in Ivory Coast during the 2010-2011 post election conflict (despite numerous UN

103 *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Order for Provisional Measures, ACHPR Application No. 004/2007, para. 25.

104 *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 9 June 1998, available at http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf (last visited 24 April 2012).

105 African Court on Human and Peoples' Rights, 'Rules of Court' (2 June 2010) available at http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf (last visited 24 April 2012).

106 R.Thakur, 'United Nations Breathes Life into 'Responsibility to Protect'' (*The Star*, 21 March 2011) available at http://www.thestar.com/opinion/editorialopinion/article/957664--un-breathes-life-into-responsibility-to-protect (last visited 24 April 2012) [Thakur, United Nations].

107 *Id*.

resolutions and widespread condemnation) which illustrates the implications (to civilians) of failure to implement a timely robust military option.[108] Weiss argues that the hesitation by the international community to undertake robust forceful intervention in Ivory Coast permitted the unnecessary escalation of the commission of crimes against humanity and war crimes, and explosion of huge refugees flows, and questions why action could not have been undertaken earlier.[109] Welsh is of the view that the request for action by the Arab League contributed to the Security Council's decisive and timely authorization of the Libyan intervention, and the willingness of the North Atlantic Treaty Organization (NATO) to enforce it.[110] This is in addition to the affirmative votes of African States at the Security Council (South Africa, Nigerian and Gabon that were non-permanent members) despite the AU opposing military intervention of any form.[111] NATO had stated that it was ready to intervene in order to protect Libyan civilians if there was strong regional support for such action, in addition to a demonstrable necessity, and a clear legal foundation.[112]

The citation of the responsibility to protect concept in relation to the decisive and timely intervention in Libya is an indication that the concept's continued crystallization into a proper legal norm. The Security Council reaffirmed the Libyan Government's responsibility to protect its population in Resolutions 1970[113] and 1973.[114] As the Libyan Government continued to commit mass atrocities, both the UN Secretary General Special Adviser on the Prevention of Genocide and Special Adviser on the Responsibility to Protect cautioned the Libyan authorities that the 2005 World Summit had resolved protection of populations from such atrocities. [115] The UN

108 Weiss, *supra* note 55, 289.

109 *Id*., 290.

110 J. Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP', 25 *Ethics & International Affairs* (2011) 3, 255, 257-258.

111 *Id*.

112 *Straits Times*, 'NATO Chief Urges Quick UN Deal on Libya' (17 March 2011) available at http://www.straitstimes.com/print/BreakingNews/World/Story/STIStory_646287.html (last visited 24 April 2012).

113 SC Res. 1970, *supra* note 95.

114 SC Res. 1973, *supra* note 98.

115 United Nations Press Release, 'UN Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya' (22 February 2011) available at http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Libya,%2022%20February%202011.pdf (last visited 24 April 2012).

Secretary General asserted that Resolution 1973 reaffirmed the international community's resolve to fulfil its "responsibility to protect" civilians from State sponsored atrocities in a clear and unequivocal manner.[116]

III. The African Union's Framework and Constraints of Traditional Concepts of Sovereignty

The 1648 Peace of Westphalia that ended the Thirty Years War in Europe formed the basis of the present structure and configuration of the international community.[117] The Treaties of Munster[118] and Osnabrück[119] referred to collectively as the Peace of Westphalia, are deemed to have consolidated the principle of sovereignty by creating structures that enabled the emergence of independent and territorially demarcated States.[120] The Westphalian concept of sovereignty "was based on an 'iron curtain like' conception of the state that enshrined the external and internal autonomy of the state."[121] In the period to follow, "state sovereignty was sacred and retained its conception as supreme authority, granting a state exclusive jurisdiction and control over all objects and subjects in its territory, to the exclusion of any other influence."[122] In the case of the AU, it has continued to place a high premium on the consent of the government of the territorial State before any military intervention can be implemented, and therefore acted inconsistently with the spirit of Article 4(h) of its Constitutive Act, which envisages forceful intervention in deserving situations. The unwillingness to implement the AU's forceful intervention mandate where consensual intervention or peacekeeping is inappropriate or insufficient is a

116 United Nations Secretary General, 'Secretary General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence' (18 March 2011) available at http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm (last visited 24 April 2012).

117 Cassese, *supra* note 58, 19.

118 Includes: *Treaty of Peace between Spain and the Netherlands*, 30 January 1648, 1 C.T.S. 1; *Treaty of Peace between France and the Empire*, October 1648, 1 C.T.S. 271.

119 Includes the *Treaty of Peace between Sweden and the Empire*, October 1648, 1 C.T.S. 119.

120 A. Hehir, *Humanitarian Intervention: An Introduction* (2010), 45.

121 J. N. Maogoto, 'Westphalian Sovereignty in the Shadow of International Justice?: A Fresh Coat of Paint for a Tainted Concept' in T. Jacobsen *et al*., (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (2008), 211, 211.

122 *Id*.

demonstration of the continued constraints of some of the traditional concepts of State sovereignty. In addition, the AU's express opposition to any form of military intervention (including imposition of no fly zones) in Libya despite widespread and systematic military attacks on civilians that were in the nature of crimes against humanity was clearly inconsistent with the concept of responsible sovereignty, and the Union's intervention mandate.[123] As the UN Secretary General pertinently observed, paragraph 139 of the 2005 World Summit Outcome Document reflected the hard reality that no strategy of implementing "responsibility to protect would be complete without the possibility of collective enforcement measures, including through sanctions or coercive military action in extreme cases."[124]

Whereas the African Union's legal system does not espouse a traditional model of sovereignty in Africa, and recognizes the necessity for intervention in a Member State in "grave circumstances", it nevertheless creates mechanisms that seek to preserve some of the elements of the traditional model. As Kindiki correctly observes, the AU's legal and institutional framework fails to provide a coherent and orderly relationship between sovereignty and intervention, which buttresses interpretative differences.[125] The interpretative uncertainty has subsequently been constructed to the benefit and supremacy of sovereignty in the traditional sense. According to Adejo, the continued State centric nature of the AU system is indicated by principles that reaffirm the principle of non-interference, which have subsequently compromised implementation of the intervention framework established under Article 4(h) of the Constitutive Act.[126] The principle of non-intervention is reaffirmed by Article 4 (g) of the Constitutive Act, prohibiting interference by a State in the domestic issues of another. In addition, Article 4(f) of the AU Peace and Security Protocol endorses the non-interference principle, while Article 4(e) of the Protocol provides that one of the guiding principles of the Peace and Security Council shall be "respect for the sovereignty and territorial integrity" of

123 Security Council Resolution 1973 found that the continued widespread and systematic attacks on the civilians could constitute crimes against humanity. SC Res. 1973, *supra* note 98.

124 Implementing the responsibility to protect: Report of the Secretary-General, *supra note* 27, para. 56.

125 K. Kindiki, 'The African Peace and Security Council and the Charter of the United Nations', 1 *Law Society of Kenya Journal* (2005) 1, 77, 91 [Kindiki, African Peace].

126 A. M. Adejo, 'From OAU to AU: New Wine in Old Bottles?', 4 *African Journal of International Affairs* (2001) 1&2, 119, 136.

members.[127] According to Adejo, the inconsistency between the two sets of clauses relating to both intervention and non-interference (in the AU context) are an indication of the continued concern for and sensitivity to traditional concepts of State sovereignty.[128] Adejo therefore correctly opines that the establishment of the AU intervention mechanism amounted to the mere repainting of the preceding OAU with a coat of fresh paint, but failed to tackle inner structural issues that are essential for effective intervention.[129] Falk laments the impression that continues to prevail, especially in Africa, that sovereignty is a static principle, and not one which is evolving towards the concept of responsibilities of States. [130] Deng observes that there can be contradictions between the conduct of States within the international community, with some States such as those more vulnerable to intervention continuing to affirm the traditional concept of sovereignty, while the behaviour of others is supportive of the notion of responsible sovereignty.[131]

The concepts postulated within the emerging norm of responsibility to protect are of significant value in addressing some of the continuing legal and political dilemmas in the implementation of the African Union's forceful intervention mandate in deserving situations. It may be argued that since the AU has a legal framework for forceful intervention, the lack of political will is merely the obstacle to its implementation. However, the non-intervention oriented provisions within the same framework have the potential to negate the legal and political impact of the intervention clauses. In addition, it should be taken into account that the concept of responsible sovereignty, coherently articulated in the emerging norm of responsibility to protect, is fundamentally concerned with the generation of such political

127 *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, *supra* note 47.

128 Adejo, *supra* note 126, 136- 137.

129 *Id*., 137.

130 Falk, *supra* note 28, 84.

131 F. M. Deng, 'Sovereignty, Responsibility and Accountability: A Framework of Protection, Assistance and Development for the Internally Displaced' (Brookings Institution-Refugee Policy Group Project, 1995), 5-6, available at http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:1448 (last visited 24 April 2012). He observes that while there has been practice of the international community responding to humanitarian catastrophes in the post-Cold War period, in a manner that has impinged on the traditional notions of sovereignty, there has also been evidence of efforts aimed at reaffirming the traditional concepts of sovereignty by the more vulnerable States. *Id*.

will. As the UN Secretary General observes, the problem of implementing forceful intervention in the international community has partly been conceptual and doctrinal, especially in relation to how the relevant issues and alternatives are understood.[132] The concept of responsibility to protect has the objective of addressing the conceptual and doctrinal challenges in a coherent manner that will contribute to the elimination of legal and political dilemmas of intervention for humanity.

Both the African Union legal framework and subsequent practice indicates some inconsistencies with the emerging norm of responsibility to protect, which indicate the continued failure to institutionalize the concept of responsible sovereignty. First, State sovereignty is protected in the traditional Westphalian model, rather than being postulated in the context of a duty to effectively protect national populations from atrocities. In contrast, the norm of responsibility to protect acknowledges State sovereignty, but also makes it the basis upon which the international community is obligated to intervene. The norm conceptualizes State sovereignty to include a State's duty "to protect the welfare of its own peoples and meet its obligations to the wider international community."[133]

The other inconsistency is that the African Union conceptualizes intervention for humanitarian purposes as a *right*. This conflicts with the emerging norm of responsibility to protect conceptualization of intervention, which is deemed as being a *responsibility*.[134] A *responsibility* implies a duty, which is more helpful than viewing intervention as a right, which implies the discretion of States to either take action or not. The ICISS Report noted that a *rights* approach is unhelpful since it focuses too much attention on the claims and prerogatives of the intervening States rather than on the critical and urgent needs of the beneficiaries of the intervention.[135] As Kindiki points out, conceptualizing the intervention mandate under Article 4(h) of the Constitutive Act as a right means that the AU has the discretion

132 Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 27, para. 7.

133 High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 29. See also, International Commission on Intervention and State Sovereignty, *supra* note 1, paras 2.14-2.15.

134 High-Level Panel on Threats, Challenges and Change, *supra* note 9, para. 201; World Summit Outcome Document, *supra* note 10, para. 139.

135 International Commission on Intervention and State Sovereignty, *supra* note 1, para. 2.28.

to either intervene or not,[136] despite the occurrence or threat of genocide or crimes against humanity. The HLP Report notes that in respect of avoidable catastrophe, the issue is not about the *right* to intervene of *any* State, but rather, it is the *responsibility* to protect of *every* State.[137] The responsibility to protect concept discards a rights approach and its corollary limitations, and therefore adopts "the victims' point of view and interests, rather than questionable State-centred motivations."[138] In contrast, adopting a *rights* approach to intervention for humanitarian purposes, like in the African Union model, renders it theoretically and practically more difficult to attain commitment of States on an issue they deem as discretionary, without an obligation to fulfill. It emphasizes the discretion of the AU to decide whether to intervene or not. In contrast, responsibility implies a duty. A duty generates a feeling of an obligation to its bearer to take action.[139] The UN Secretary General has stated that the problem of intervention has partly been conceptual and doctrinal, including how States appreciate the issues and policy alternatives.[140] Kindiki argues that a contextualization of the AU intervention mandate as a duty is more desirable since "a sense of obligation to intervene is more likely to move the AU into action."[141]

Peters has commended the responsibility approach to both sovereignty and intervention under the emerging norm, and astutely observes that the central focus of intervention is being transformed from being an issue of States' rights to States' obligations.[142] Peters further points out that the approach under the responsibility to protect concept places the needs of humanity as the starting point of the debate on intervention.[143] As Evans correctly observes, the ICISS Report pointed out that generating the required political will for intervention is "also a matter of intelligently and energetically advancing good *arguments*, which may not be a sufficient

136 K. Kindiki, 'The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal', 3 *African Human Rights Law Journal* (2003) 1, 97, 106. [Kindiki, Institutional Framework].

137 High-Level Panel on Threats, Challenges and Change, *supra* note 9 para. 201. See also, World Summit Outcome Document, *supra* note 10 para. 139.

138 Arbour, *supra* note 20, 448.

139 P. Eleftheriadis, *Legal Rights* (2008), 107.

140 Implementing the Responsibility to Protect: Report of the Secretary-General, *supra* note 27, para. 7.

141 Kindiki, *Institutional Framework*, *supra* note 136, 106.

142 Peters, *Global Constitutional Community*, *supra* note 32, 185.

143 *Id*.

condition but are always necessary for taking difficult political action."[144] Based on the dilemmas of intervention, the approach adopted by the AU in respect to the principles of State sovereignty and non-interference, in addition to the "rights" approach to intervention, is unhelpful in generating the elusive legal and political consensus for intervention. There is the necessity of eliminating the continued convenience with which the concept of sovereignty can be used as a convenient legal and political justification for non-intervention within the AU system and in the African region. Although the African States have generally endorsed the responsibility to protect concept in General Assembly deliberations, the African Union remains a significant regional organization through which the African States policy on sovereignty and intervention is shaped and implemented. In a report of the 2009 General Assembly plenary debate on responsibility to protect, only Sudan and Morocco (out of the various African States that participated) are recorded as having been critical of the concept.[145] Similarly, even the AU does not expressly oppose the responsibility to protect, with the problem being the failure to effectively institutionalize the concepts of responsible sovereignty within the system, and a continued higher premium for sovereignty. Despite African States being members of both the UN and the AU, the Libyan case has demonstrated beyond any doubt that the AU and the UN Security Council can adopt radically different policy approaches to a regional conflict, where crimes against humanity are being committed.

Although the UN Secretary General acknowledged that "the spirit of non-indifference that animated the African Union" was among the various factors that provided the roots for the responsibility to protect concept,[146] the emerging norm has developed a more progressive approach to sovereignty and intervention that the AU system can benefit from. From our

144 Gareth Evans, 'From Humanitarian Intervention to R2P', 24 *Wisconsin International Law Journal* (2006) 3, 703, 721.

145 United Nations Department of Public Information, 'Delegates Seek to End Global Paralysis in Face of Atrocities as General Assembly Holds Interactive Dialogue on Responsibility to Protect' (23 July 2009) available at http://www.un.org/News/Press/docs/2009/ga10847.doc.htm (last visited 24 April 2012) [United Nations Department of Public Information, Delegates]. Despite Morocco being an African State, it is not a member of the African Union. See African Union, 'Member States' available at http://www.au.int/en/member_states/countryprofiles (last visited 24 April 2012).

146 United Nations General Assembly Department of Public Information, *General Assembly Debate, supra* note 12.

analysis of the AU's subsequent practice, it is clear that while the AU has the capacity and willingness to protect populations from atrocities through peaceful negotiations and consensual interventions, there is serious difficulty in implementing the forceful intervention mandate provided in Article 4(h) of its Constitutive Act in deserving situations. An examination of the African Union reaction to the Darfur and Libyan conflicts have demonstrated this, indicating the high premium that the AU continues to attach to the traditional concepts of sovereignty. Intervention after the consent of the territorial State and peacekeeping are premised on the sovereign right of the subject State to invite or accept assistance, but they may not provide adequate protection to populations where the government is a perpetrator of the atrocities and requires to be stopped, like in the cases of Darfur and Libya. As already observed, the responsibility to protect concept is clear that where peaceful and consensual means are inadequate or inappropriate, enforcement action may be undertaken to protect populations from genocide and crimes against humanity.

IV. Institutionalizing Responsible Sovereignty Concepts within the AU Processes

Effective institutionalization of responsible sovereignty concepts within the African Union processes, including in its legal and institutional framework, will be helpful in building consensus and reducing the legal and political dilemmas of intervention. The responsibility to protect concept provides a valuable reference point that should inform the AU on the manner in which the principles of sovereignty and intervention for humanity should be conceptualized, as a starting point of addressing the subsequent intervention dilemmas. It may be argued that the greatest obstacle to effective implementation of Article 4(h) of the Constitutive Act by the African Union is the lack of political will. That in essence is an acknowledgement of the necessity for an approach that enhances the generation of the elusive political will, and compliance with the concept adopted under the emerging norm would be an important starting point. The core concerns of the emerging norm of the responsibility to protect include the elimination of political dilemmas of intervention. The responsibility to protect concept is a mobilization tool for timely action.[147]

147 Kuwali, *supra* note 31, 378.

If the African Union's legal and political dilemmas of intervention are to be resolved, it may be necessary to reconceive the meaning and attributes of sovereignty and non-intervention within the Union's legal framework. Values of State sovereignty preservation should be postulated as complementary to those of intervention for humanity. Both sovereignty and intervention should be oriented towards the protection of the population of a State from avoidable catastrophes such as genocide and crimes against humanity, and should be postulated as a fundamental duty of the AU system. The African Union should have the capacity to intervene efficiently "on behalf of the people when their sovereign interests are no longer represented by their own government, or when there is no functioning government at all, or when minorities are subjected to extreme oppression by the government in the name of the majority."[148] State sovereignty would still be preserved and protected, but viewed in a more progressive and valuable manner, that of the responsibility to protect nationals from gross atrocities. Indeed, it is impossible that State sovereignty protection and principles can be done away with altogether. State sovereignty has its benefits; it "provides order, stability and predictability in international relations."[149] However, it can be reconceived in a manner that provides impetus to achieve the greater value of protecting the population of a State from mass atrocities such as genocide and crimes against humanity.

Even if it may not be possible to immediately amend the main African Union treaties such as the Constitutive Act, there is a need to adopt declarations and resolutions on sovereignty and intervention as responsibility which may serve as interpretative tools on the meaning and implications of those core principles within the AU system. Declarations and resolutions can be significant instruments to reforms regional norms, standards of behavior and perceptions on the responsibility of sovereignty and the duty to intervene to stop or pre-empt genocide and crimes against humanity. The success of such reforms and change of approach would be manifested by an alteration in the Union's subsequent practice in relation to intervention to stop or pre-empt genocide, crimes against humanity and war crimes. It would include the willingness to undertake forceful military

148 R. Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (2006), 272-273 [Thakur, United Nations, Peace and Security].

149 R. Thakur, 'Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS', 33 *Security Dialogue* (2002) 3, 323, 329 [Thakur, Outlook: Intervention].

intervention to stop or pre-empt genocide and crimes against humanity in a timely and decisive manner, where consensual intervention and peacekeeping are inadequate or inappropriate. It would therefore entail the implementation of the forceful intervention mandate that is granted under Article 4(h) of the Constitutive Act in deserving situations, by lobbying the United Nations for authorization for robust enforcement action. That way the AU would also contribute to the implementation of the concepts postulated under the emerging norm of responsibility to protect more significantly.

Some factors may offer opportunities for such reforms and more progressive approaches to State sovereignty and intervention to stop or pre-empt mass atrocities. The first is advocacy and pressure from African transnational civil society organizations and other non-State actors. The second is the realities and implications of the continued global interdependence, and the fact that intervention for humanity is increasingly becoming a global concern. The continued evolution of the emerging norm of responsibility to protect is a move towards such a state of affairs within the international community. Therefore, as the case of Libya has illustrated, the AU non-intervention stance may not achieve its objective since the UN disregarded the AU position and proceeded to authorize enforcement action while NATO was willing to implement it. Therefore, in such circumstances, the AU can only remain relevant to the international community concerns on intervention, and prevent external (non-African) intervention in the region through an effective implementation of its forceful intervention mandate under the Constitutive Act.

V. Factors that May Contribute to Institutionalization of the Concept of Responsible Sovereignty within the AU System

1. The Role of Civil Society Organizations

Through focused advocacy and pressure, transnational civil society organizations in Africa may significantly contribute to the institutionalization of responsible sovereignty within the African Union processes, including within its legal and institutional framework. The influence of civil society organizations on States and intergovernmental organizations in the making and implementation of international law is no longer doubtful. The considerable influence of non-governmental

organizations in international law making is already evident, for instance, during the drafting of international agreements.[150] Non-governmental organizations play a significant role in encouraging States to conclude and ratify treaties on various issues, and subsequently monitor States, requesting and advocating for compliance with the treaty obligations and accountability.[151] It has been observed that non-governmental organizations insistence on fulfillment of international obligations, including the "naming and shaming" of States that fail to comply, plays a significant role in the internalization of the international law norms.[152] It has also been asserted that the development of vibrant regional civil society organizations in the international community is a significant blow to sovereignty centered regionalism,[153] which is still a problem within the AU system.

There are various ways in which the civil society organization may lead to the institutionalization of responsible sovereignty and ensure greater concern for the protection of populations in Africa, including forceful intervention for such purposes in appropriate situations by the Africa Union. They may complement the AU in relation to collection and analysis of data and information relating to conflicts and gross violations of human rights within States. They may also publicize the extent of atrocities and push for concrete action from the AU and the international community. Some international organizations that operate in conflict situations in Africa, such as Human Rights Watch and Amnesty International, have a record of effective investigations of grass-roots level violations of human rights.[154] The International Committee of the Red Cross has also proved efficient in investigating adherence to international humanitarian law.[155] The AU may lack institutional capacity to make proper and timely assessments of some situations in order to determine whether they constitute, or are likely to lead to genocide, crimes against humanity or war crimes, the basis upon which it should undertake forceful intervention.

150 E. Suy, 'New Players in International Relations', in G. Kreijen *et al.,* (eds), *State, Sovereignty, and International Governance* (2002), 373, 376.

151 A. Boyle & C. Chinkin, *The Making of International Law* (2007), 81.

152 *Id.*

153 A. Acharya, 'Regionalism and the Emerging World Order: Sovereignty, Autonomy, Identity', in S. Breslin *et al.,* (eds), *New Regionalisms in the Global Political Economy* (2002), 20, 26-27.

154 Thakur, *United Nations, Peace and Security, supra* note 148, 104.

155 *Id.*

Abass has pointed out the likelihood of that institutional limitation, pointing out that the African Union has a weakness of lack of a practice of undertaking prior legal assessments of conditions before commencing action.[156] He is of the view that the lack of an institutional culture of carrying out legal assessments before commencing interventions (such as peacekeeping) was inherited from the preceding OAU, which never developed such practice in its nearly forty years of existence.[157] Abass has also noted that the AU is likely to lack the institutional capacity for efficient evaluation of a condition in a manner that is consistent with the spirit of Article 4(h) of the Constitutive Act.[158] Further, he is of the view that even if there is an assessment of the condition, the AU is unlikely to make a formal announcement of the findings on commission of genocide, crimes against humanity and war crimes.[159] This is unlike the way a judicial or investigative panel would give a formal pronouncement of its findings.[160] Focused advocacy demanding African Union's action, and provision of alternative and complementary information by civil society organizations will be helpful in addressing the aforementioned institutional weaknesses. In relation to the mobilization of political will for the implementation of the AU's intervention mandate, civil societies should push for action, highlight the concerns of victims, and call for accountability of African leaders if they fail to take action.[161] Civil society organizations can also supplement or provide alternative funding and intellectual resources for research on matters relating to intervention for humanity and conflict management. In addition, civil society organizations may provide an important feedback mechanism by monitoring and evaluating the efficacy and appropriateness of the African Union's actions.

Advocating for formal amendments to the existing AU legal framework to conceptualize sovereignty and intervention as fundamental responsibilities, or adoption of resolutions and declarations to that effect is another strategic way through which the civil society organizations can engage the AU for purposes of more effective civilian protection in conflict situations. To be effective in such objectives, African civil society organizations should identify strategic entry points where they would be

156 Abass, *supra* note 79, 426.
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 Kuwali, *supra* note 31, 378.

capable of influencing decision making and policy issues at the Africa Union. They should also push for greater participation and involvement in the African Union decision making processes. Articles 3(g), 3(h), 3(k) and 22 of the Constitutive Act of the African Union has provisions that recognize or provide basis for civil society organizations participation at various levels of the Union. Civil society organizations may also target certain influential but flexible States that are likely to be more open to the ideas of responsible sovereignty, for instance South Africa, to advocate the position of the civil society position at the African Union meetings.

In addition to international organizations such as Amnesty International and Human Rights Watch that are also active in Africa, there are some transnational African non-governmental organizations. Some worth mentioning include the Centre for Citizens' Participation in the African Union (CCP-AU)[162] and the Africa Governance Monitoring and Advocacy Project (AfriMAP).[163] There are, however, some obstacles to effective civil society advocacy within the African Union framework which should be addressed and such organizations should strategically engage the Union in order to eliminate some of the impediments. One of these obstacles relates to funding requirements for a civil society organization to participate in the African Union Economic, Social and Cultural Council (ECOSOCC). Article 22 of the Constitutive Act of the African Union establishes ECOSOCC and provides that its role shall be advisory, and that it shall compromise of "different social and professional groups of the Member States of the Union." However, eligibility criteria for civil society organizations participation in ECOSOCC has seriously been criticized and opposed especially on the basis of the requirement that the funding of any organization seeking membership should have at least 50 *per cent* of its funding arising from the contribution of the respective organization's members.[164] It has been pointed out that the requirement, which has the

[162] CCP-AU, formed in 2007, has the objective of coordinating and facilitating activities of various African civil society organisations in their engagement with the African Union.

[163] AfriMAP objectives include analysis of African States adherence to human rights protection, rule of law and accountable governance, in addition to seeking to complement and engage the African Union on important issues. See, Africa Governance Monitoring and Advocacy Project, 'Mission and Objectives' available at http://www.afrimap.org/ourmission.php (last visited 24 April 2012).

[164] Africa Governance Monitoring and Advocacy Project, 'Towards a People-Driven African Union: Current Obstacles and New Opportunities' (2007), 34, available at

intention of excluding foreign and international organizations from participating in ECOSOCC affairs, "also effectively excludes a large proportion of, for example, human rights organisations, think tanks and other groups likely to be critical of AU activities."[165] Such funding requirements are complicated by the fact that some African non-governmental organizations have weak financial and professional resources base, thereby having to survive on foreign funding.[166]

Another fundamental limitation of African civil society organizations advocacy through ECOSOCC is that although it is the primary organ mandated to facilitate civil society engagements with the African Union institutions, it has an ambiguous role in the decision-making processes of the Union.[167] It has been observed that "ECOSOCC's legal framework as an organ with only advisory status, and without its own treaty, significantly weakens its position" and therefore it cannot "speak credibly as an independent civil society voice."[168] Those are some of the limitations and obstacles that African civil societies and the international community should strategically push for elimination in the African Union and civil society relationship. Already, the African civil society organizations are addressing that obstacle and seeking to directly engage the African Union through the CCP-AU. CCP-AU is an umbrella body of various African civil society organizations, formed in 2007 with the objective of facilitating and coordinating activities of various organisations in their engagement with the African Union.[169] Focussed, strategic and relentless pressure on the AU by various African civil society organizations through the CCP-AU for a more robust role, changes to the ECOSOCC mandate, and amendments to the external funding restrictions seem to be the most appropriate avenue of addressing the advocacy limitations identified.

http://www.soros.org/resources/articles_publications/publications/people_20070124/a-people-20071101-english.pdf (last visited 24 April 2012).

165 *Id.*

166 D. Neubert, 'Local and Regional Non-State Actors on the Margins of Public Policy in Africa', in Anne Peters *et al.* (eds), *Non-State Actors as Standard Setters* (2009), 35, 38.

167 Africa Governance Monitoring and Advocacy Project, *supra* note 164, 33.

168 *Id.*, 6.

169 Centre for Citizens' Participation in the African Union, *supra* note 162.

2. Realities of Increasing Global Interdependence: Relevance of the AU Intervention System

The 2011 French intervention in Ivory Coast[170] in addition to the NATO intervention in Libya indicates that external (non-African) interventions in the region will continue where the AU fails, and mass atrocities on the ground justify such forceful action by the international community. In the case of Libya, the UN and NATO disregarded the AU's express stance against any form of military intervention.[171] It has correctly been observed that implementing an African intervention is the most effective way of avoiding an external (non-African) action.[172] The realization that even with failure by the African Union to intervene in accordance to responsible sovereignty concepts and its mandate under Article 4(h) of the Constitutive Act, the international community is likely to fill the vacuum may lead to action by the AU. The increasing global interdependence and globalization of human rights protection, which implies greater chances for intervention by the international community in Africa in situations of genocide and crimes against humanity, may lead the AU to have a more practical approach to the dictates of the concept of responsible sovereignty. The African Union's desire to remain the focal point and in control of security activities in the African region may provide the impetus for the AU to develop a policy that promotes timely, decisive, and appropriate intervention in situations of mass atrocities. The concept of responsible sovereignty envisages such effective international protection of populations when the State fails or is unable to provide safeguards from genocide, crimes against humanity, war crimes and ethnic cleansing.

170 Laurent Gbagbo, who had illegitimately held on the presidency leading to the post election violence, surrendered and was ousted from power after French forces supported UN troops and Alasanne Ouattara loyalists in launching military attacks. British Broadcasting Corporation, 'Ivory Coast: Gbagbo Held after Assault on Residence' **(**11 April 2011) available at http://www.bbc.co.uk/news/world-africa-13039825 (last visited 24 April 2012).

171 The AU had reaffirmed Libya's sovereignty while opposing any form of intervention. African Union, *supra* note 96.

172 H. Gandois, 'Sovereignty as Responsibility, or African Regional Organizations as Norm-Setters' (British International Studies Association Annual Conference, University of Saint Andrews, 20 December 2005), 16, available at http://citynewyorkstatenisland.academia.edu/HeleneGandois/Papers/10815/Sovereignty_as_responsibility_or_African_regional_organizations_as_norm-setters (last visited 24 April 2012).

E. Complementing the United Nations and Addressing Security Council Inefficiencies

As the case of the 1994 Rwanda genocide illustrates, the Security Council may fail or delay in providing timely authorization for forceful intervention by the AU, despite the occurrence or threat of genocide, crimes against humanity or war crimes taking place. The Security Council may fail or delay due to the actual use of the veto by a permanent member, or threats of its use. In addition, there may be outright lack of interest and urgency in the Security Council especially if the strategic interests of powerful States are not affected by the conflict. The 1994 Rwanda genocide is a clear case where the Security Council lacked interest in authorizing forceful intervention to protect hundreds of thousands of civilians from massacre. Approximately 800,000 people, Tutsis and moderate Hutus, were killed in the Rwanda genocide spanning a mere 100 days, from April to July 1994.[173] If the AU was transformed into an effective regional organization governed by the desire to implement its Article 4(h) mandate of forceful intervention to protect civilians under its Constitutive Act, but the Security Council delays in issuing authorization, or is threatened by a permanent member's veto despite extreme circumstances on the ground, there is the question of how the AU would proceed. It seems that the most appropriate alternative would be for the AU to seek authorization from an emergency session of the General Assembly, as it would still maintain forceful intervention within the UN collective security system. The Uniting for Peace Resolution reaffirmed the primary role of the Security Council in the maintenance of international peace and security, but resolved that where the Council was unable to discharge that duty, due to lack of unanimity of permanent members, the General Assembly could assume that responsibility, including authorization of force where necessary.[174]

The legal viability of the General Assembly alternative has support from eminent scholars. For instance, Brownlie and Apperley argue that rather than act illegally, NATO should have sought a special emergency session of the General Assembly to issue a uniting for peace resolution

[173] Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc S/1999/1257, 15 December 1999, 3.

[174] Uniting for Peace Resolution, GA Res. 377 (V) A, 3 November 1950.

(before invading Kosovo in 1999).[175] Franck specifically proposes that the General Assembly can be a substitute which the African Union can use to avoid the veto prone Security Council.[176] Reisman opines that in circumstances of extreme human rights violations that constitute a threat or breach of the peace, and the Security Council is unable to act, the secondary authority of the General Assembly, substantiated by the Uniting for Peace Resolution, can be brought into operation.[177] While interpreting the intentions of the Charter, it is essential to consider that the Security Council is obligated, under Article 24(2), to "act in accordance with the Purposes and Principles of the United Nations."[178] The Security Council therefore does not have unlimited powers. Its actions must conform with the purposes and principles of the United Nations. Therefore, when the Security Council is unable to either authorize or prohibit an action, which comprises the purposes and principles of the Charter, then the Security Council may be argued to be acting contrary to its responsibilities.[179] Further, by using the phrase "primary responsibility" in Article 24 of the Charter in respect of Security Council powers, a secondary or subsidiary responsibility which may be executed by the General Assembly is implied.[180] It is acceptable to argue that since the United Nations is a construction of States, the States may resolve to issue secondary responsibility to another competent organ where the Security Council is unable to perform its functions.

It has been argued that uniting for peace resolutions "represents an interpretation of Articles 11(2) and 12 that has been accepted and acted upon" by UN members, including those States originally opposed to their adoption such as the Soviet Union.[181] Ten such emergency sessions of the

175 I. Brownlie & C. J. Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', 49 *International and Comparative Law Quarterly* (2000) 4, 878, 904.

176 T. M. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', 100 *American Journal of International Law* (2006) 1, 88, 100.

177 M. Reisman, 'Humanitarian Intervention to Protect the Ibos', in R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973), 167, 190.

178 J. Andrassy, 'Uniting for Peace', 50 *American Journal of International Law* (1956) 3, 563, 564.

179 *Id.*, 565.

180 *Id.*, 564.

181 N.D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (1993), 153.

General Assembly have subsequently been convened.[182] Such resolutions were formally recognized by the Security Council in 1971 when it referred the India and Pakistan issue to the General Assembly for purposes of action in accordance with the Assembly's Resolution 377A(V).[183] Based on the above observations, where the Security Council is unable to discharge its primary responsibility of authorizing intervention and maintaining international security due to the threat of a veto, an emergency session of the General Assembly to authorize intervention in accordance with the uniting for peace resolution provides a viable option for the African Union.

F. Conclusion

The responsibility to protect concept is aimed at addressing the legal and political dilemmas for intervention to stop or pre-empt genocide, crimes against humanity, war crimes and ethnic cleansing. It is premised on a normative framework that establishes complementarity between State sovereignty preservation and intervention for humanitarian purposes, and therefore decreases the tension between the two fundamental principles. It coherently postulates the concept of responsible sovereignty to both the territorial State and the international community. It eliminates the convenience with which the UN, regional organizations and States can use sovereignty as an effective legal or political justification for non-intervention. Forceful intervention is to be undertaken in a timely and decisive manner to protect populations where other peaceful means fail or are inappropriate, and the territorial State is unable or unwilling to provide protection. Although still an emerging norm, it has significant normative and political value in addressing the highly problematic issue of intervention. While the responsibility to protect concept provides the AU with some of the conceptual tools that may be helpful in addressing the continuing legal and political dilemmas of intervention, the Union is one of the regional mechanisms through which the protection concepts of the emerging norm may be implemented.

The African Union has demonstrated the capacity to implement some of the responsibility to protect concepts in some situations where peaceful negotiations or consensual interventions are adequate, like the case of

[182] C. Tomuschat, 'Uniting for Peace' (United Nations Audiovisual Library of International Law, 2008) available at http://untreaty.un.org/cod/avl/pdf/ha/ufp/ufp_e.pdf (last visited 19 March 2012).

[183] SC Res. 303, 6 December 1971.

Kenya and Burundi. However, it has also failed in situations where timely and decisive forceful intervention is necessary, and may be the only viable option to protect civilians, like in the Darfur and Libyan conflicts. In the case of Libya, the AU expressly opposed any form of military intervention. Therefore, despite the AU's right of forcible intervention to stop genocide and crimes against humanity within its legal framework, traditional concepts of sovereignty and non-intervention continue to prevail within the Union's subsequent practice. Consensual intervention, based on the sovereign right of the territorial State to invite or consent to intervention, is inadequate or inappropriate where the government is the perpetrator of the atrocities, or fails to grant the consent.

The contradictory provisions within the AU legal framework that affirm the principles of non-intervention and traditional concepts of sovereignty may have provided the basis for the subsequent practice. The AU's practice, especially in relation to the Libyan crisis, contradicts its legal mandate to forcefully intervene in deserving situations, and is inconsistent with values postulated under the emerging norm of responsibility to protect. It demonstrates that despite the progressive developments within the African Union system such as the Union's forceful intervention mandate, the concept of responsible sovereignty is yet to be effectively institutionalized within the AU. In order to enhance the legal, policy and operational capacities of the AU to forcefully intervene for purposes of civilian protection, effective institutionalization of the concept of responsible sovereignty within the Union processes is necessary. This article has examined the structural deficiencies within the AU system, including analyzing elements of its consistency with the emerging norm of responsibility to protect.

The emerging norm is a comprehensive and coherent articulation of the concept of responsible sovereignty. The article has explored the manner in which addressing the inconsistencies between the AU framework and concepts postulated under the responsibility to protect can contribute to the elimination of the legal and political dilemmas of forceful intervention by the Union. Besides formal amendments to the core AU treaties, this article has highlighted the role of resolutions in modifying regional norms and attitudes, contributing to the effective institutionalization of the concept of responsible sovereignty. The role of African based civil society organizations has been examined. The likelihood of external (non-African) intervention in situations of the African Union's inaction, and the risk of the Union's irrelevance on regional peace and security matters, has been

identified as a factor that could provide an impetus for acceptance of reforms and change of practice within the AU.

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Kosovo's Chances of UN Membership:

A Prognosis

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Abstract

The International Court of Justice has ruled that Kosovo's unilateral declaration of independence neither violated general rule of international law nor the *lex specialis*. As of the time of writing, 86 UN Member States have recognized Kosovo as a State. With the judicial pronouncement in their favour, the authorities in Kosovo are likely to apply for membership in the United Nations. This paper reviews the rules and practice of UN membership admission and assesses Kosovo's chances of success should it apply to the world body for admission. It argues that ordinarily, Kosovo meets the requirements for admission into the UN but political considerations of the permanent members of the Security Council would constitute a clog in Kosovo's ambition to become the 194th member of the United Nations. However, four options are proffered as ways out of the political logjam that is sure to surface if and when, Kosovo puts in an application for admission into the membership of the UN.

A. Introduction

On July 22, 2010, the International Court of Justice delivered its Opinion on the Kosovo secession as requested by the UN General Assembly by virtue of its resolution to that effect.[1] In the Opinion, the Court held that the unilateral declaration of independence by Kosovo neither violated general international law nor the *lex specialis* – Security Council Resolution 1244 (1999); and the Constitutional Framework for Provisional Self-Government in Kosovo (Constitutional Framework).[2] Although an Advisory Opinion of the ICJ is not binding until it becomes the subject of a Chapter VII action of the Security Council, it is expected that Kosovo authorities and its supporters in the international community would want to rely on the Opinion to press for Kosovo's admission into the membership of the UN. One therefore needs to examine the membership provisions of the UN under the UN Charter in order to have a fair assessment of the chances of Kosovo's ascension to its membership.

1 See GA Res. A/RES/63/3, 8 October 2008, endorsing Serbia's request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law.

2 *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, paras. 84, 114, 121 and 122.

B. Membership of the United Nations

The United Nations Organization popularly referred to, as the "United Nations" or "UN" is the body saddled with the responsibility for maintaining international peace and security.[3] Enforcement actions can only be ordered by the Security Council under Chapter VII of the UN Charter, except when such measures are ordered by the General Assembly under the Uniting for Peace Resolution, in matters threatening international peace and security, in which there is no consensus in the Security Council due to veto by any of the permanent members. From a mere 51 members at inception in 1945, the membership of the UN has grown to 193[4] as of today. In fact, the UN is the largest international organization in the world today.

Although, the UN does not recognize States, admission of an entity into its membership, signifies that that entity has been accepted as a State by all its members, notwithstanding opposition by some States, like most Arab States to Israeli statehood. Admission thus, has the effect of recognition and once admitted, the statehood of the entity becomes conclusive even as against States who voted against its admission.[5]

Although it has been argued that recognition is not required for the creation of a State,[6] it has however been admitted that for statehood to be functional, there should be at least some form of recognition from existing States.[7] The above proposition is however controversial and constitutes the

3 Article 24 of the UN Charter charges the Security Council with the maintenance of international peace and security; Under the Uniting for Peace Resolution, GA Res. 377 (V) A, 3 November 1950, para. 1, the General Assembly may take decisions for the maintenance of international peace and security, if the Security Council fails to discharge its responsibility due to lack of unanimity of the permanent members.

4 See full list of UN members showing its growth from inception till date at http://www.un.org/en/members/growth.shtml#2000 (last visited 29 April 2012).

5 T. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization*,(2009), 252-257; J. Dugard, & D. Raic, 'The Role of Recognition in Law and Practice of Secession', in M. Kohen, (ed.), *Secession: International Law Perspectives*(2006), 94, 99.

6 J. Crawford, *The Creation of States in International Law* (2006), 93.

7 Dugard & Raic, *supra* note 5, 98-99; D. Raic, *Statehood and the Law of Self-Determination*, (2002), 427, where the author argues that "recognition does consolidate statehood."; *Caglar v. Billingham* (*Inspector of Taxes*), Special Commissioner's Decision, 7 March 1996, para. 182, where the tribunal stated, "in view of the non-recognition of the Turkish Republic of Northern Cyprus by the whole of the international community other than Turkey we conclude that it does not have functional independence as it cannot enter into relations with other States" see also M.

debate between proponents of the constitutive and declaratory theories of recognition.[8] But due to the fact that many States have achieved recognition as a State by admission to the United Nations,[9] there is no known independent sovereign State today that is not a member of the UN. The only recognized State that remained a non-member was Switzerland due to its neutral State status[10] but it joined the membership in 2002. This is without prejudice to pending applications by entities whose statehood is still in dispute like Taiwan. The fact that such entities have not been admitted into the UN underscores the fact that their statehood has not yet been settled in the opinion of the international community. As a matter of fact, reference to international community is almost a reference to the UN.[11] The collective recognition by the UN minimizes the arbitrariness inherent in unilateral recognition by States. This is perhaps the reason why every newly established State frantically aspires to become a UN member. Such membership is indeed constitutive and conclusive of statehood today.

Shaw, *International Law*, 6th ed. (2008), 448, where the author stated, "[…] if an entity, while meeting the conditions of international law as to statehood, went totally unrecognized, this would undoubtedly hamper the exercise of its rights and duties […] but it would not seem in law to amount to a decisive argument against statehood itself."

8 For a detailed discussion of the constitutive and declaratory theories of recognition, see H. Kelsen, 'Recognition in International Law: Theoretical Observations', 35 *American Journal of International Law* (1941) 4, 605, 609, where the author insists that if no State recognizes a new entity, it ceases to be a State because "there is no such thing as absolute existence."; D. Ijalaye, 'Was Biafra at Any Time a State in International Law?', 65 *American Journal of International Law* (1971) 3, 551, 559, who argues that the recognition of Biafra by five States did not constitute Biafra as a State, though his argument is based on the fact that the recognitions were premature and therefore invalid. But see J. Brierly, *Law of Nations*, 6th ed. (1963), 139; A. Cassese, *International Law*, 2nd ed. (2005), 73-74, for the view that recognition is an acknowledgement of a factual situation that has been in existence and merely declaratory of the readiness of the recognizing State to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.

9 Dugard & Raic, *supra* note 5, 99-100, where the authors insist that "[…] this procedure for recognition co-exists alongside the traditional method of unilateral recognition […] the law of recognition that fails to take account of this development cannot lay claim to be an accurate reflection of State practice."

10 For discussions on Swiss neutrality status and subsequent admission into UN membership, see Grant, *supra* note 5, 244-249

11 R. Zacklin, 'Beyond Kosovo: The United Nations and Humanitarian Intervention', in C. Ku & P. Diehl, (ed.), *International Law, Classic and Contemporary Readings*, (2003), 367, 368.

Besides, the UN is also able to engage in collective denial of recognition to entities that were created from situations in breach of international *jus cogens* rules like the use of force, self-determination, racism or racial discrimination and human or humanitarian rights.[12] The doctrine of collective non-recognition has its origin from the invasion of Manchuria by Japan in 1932, in which a puppet State of Manchukuo was created out of China by Japan. The US Secretary of States, Henry Stimson, then declared the US determination not to recognize the new State on the ground of violation of the Pact of Paris of 1928 on renunciation of war.[13] The Assembly of the League of Nations subsequently called on members not to recognize the new State.[14] The Stimson's doctrine is no longer known by that name in international law as it has since been re-affirmed in the UN Charter, Resolutions and Declarations.[15] States therefore, have a duty not to recognize an entity that is created in violation of *jus cogens* rules of international law as mentioned above and also not to recognize territories acquired by the use of force.[16]

It is pertinent to note that admission by the UN of an entity into its membership irresistibly settles or amounts to recognition of statehood of the said entity[17] and the law seems not to leave any room for political manoeuvre in the admission procedure of the UN.

12 See the cases of Southern Rhodesia for violation of the right to self-determination, SC Res 216 (1965), 12 November, 1965, para. 2; South African Bantustans on grounds of racism and racial discrimination, UNGA Res 31/6A, October 26, 1976, paras 2 and 3; and the Turkish Republic of Northern Cyprus (TRNC) on grounds of the use of force, SC Res 541(1983), 18 November, 1983, paras 6 and 7; SC Res 550 (1984), 11 May, 1984, paras 2, 3 and 4.

13 Art. 1, Pact of Paris (Kellogg-Briand Pact), 27 August 1928, available at http://www.yale.edu/lawweb/avalon/imt/kbpact.htm (last visited 29 April 2012).

14 League of Nations Official Journal (1932), Special Supp. No. 101, 87-88, cited in D. Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law', 2 *Chinese Journal of International Law* (2003) 105, 123, footnote 77.

15 Art. 2(4), UN Charter; Paragraph 10, Principle I, Friendly Relations Declaration 1970. For a fuller discussion of the Stimson's doctrine, see, D. Turns., supra note 14, 114-130.

16 See SC Res 662 (1990), 9 August 1990, para. 2, on Kuwait, enjoining members not to recognize the annexation of Kuwait by Iraq; SC Res 242 (1967), 22 November 1967, preambular para. 2, SC Res 476 (1980) and 478 (1980), annulling the purported annexation of Jerusalem by Israel. For a fuller account of non-recognition in the UN era of situations arising from the use of force or aggression, see Raic, *supra* note 7, 122-127.

17 *Supra* note 5.

I. Law and Practice of the UN Charter

Membership is made up of the original members that "participated in the UN Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present UN Charter and ratify it in accordance with Article 110".[18] Other States however may become members subject to fulfillment of certain conditions.

Article 4 of the UN Charter provides:

- 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.
- The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

From the above provision, it is clear that an entity other than an original member that aspires to the membership of the UN must be a State; and a peace-loving one at that. It is not open to non-State entities. In interpreting paragraph 1 of Article 4, the ICJ in *Conditions of Admission of a State to the United Nations (Charter, Art. 4)*,[19] held that"[t]he natural meaning of the words used [in article 4(1)] leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example."[20] It held further, the paragraph did not admit of extraneous conditions to be demanded nor did it allow for the superimposition of political considerations upon them as to deny membership to an applicant that fulfils them.[21] But the Court however admitted that nothing under the provision of Article 4 prevents either the Security Council or the General Assembly from verifying facts that would establish the fulfilment or otherwise by an applicant of the conditions stated

18 Art. 3, UN Charter.

19 *Conditions of a State to Membership in the United Nations*, Advisory Opinion, ICJ Reports 1948, para. 57.

20 *Id.*, 62.

21 *Id*.

in paragraph 1, for admission.[22] The ICJ emphatically ruled that the request by a member to make its consent to the admission of a State dependent on the admission of other applicants was an extraneous condition, not envisaged under; and therefore incompatible with the letter and spirit of Article 4 of the Charter.[23] While the Court's pronouncement above was commendable, the admission of new members into the UN has not been devoid of extraneous political considerations.

In the period between 1948 and 1954, the Western capitalist permanent members and their Eastern socialist counterparts, especially the United States and the Soviet Union, frustrated each other's admission recommendations by the use of veto until in 1955, when there was the East-West Compromise Package in which 16 States[24] belonging to both axes and some non-aligned states were admitted into the UN. Other compromise admissions were those of East and West Germany in 1973 and South and North Korea in 1991.[25] In the 1960s and the period following, in which there was massive decolonization of territories, more States were admitted into the UN without much objections and any delay in admission was mainly due to delay in application by the emergent States and not as a result of negative votes from the Security Council or General Assembly.[26] The last two admissions by the UN were those of Montenegro, as the 192nd member-State in 2006, having peacefully seceded from the Union of Serbia and Montenegro under a constitutional provision, and South Sudan in 2011.[27]

22 *Id*., 63.

23 *Id.*, 65.

24 Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Laos, Libya, Nepal, Portugal, Romania and Spain. See "Growth in United Nations Membership, 1945-present", available at http://www.un.org/en/members/growth.shtml (last visited 29 April, 2012).

25 E. McWhinney, *Self-Determination of Peoples and Plural-ethnic States in Contemporary International Law: Failed States, Nation-building and the Alternative, Federal Option* (2007), 40. For full details of the political intrigues of UN admission in the cold war era, see Grant, *supra* note 5, 145-202; B. Conforti & C. Focarelli, *The Law and Practice of the United Nations* (2007), 33-38.

26 Grant, supra note 5, 202.

27 South Sudan was admitted as the 193rd member of the United Nations on July 14, 2011. South Sudan's independence on July 9, 2011, followed a referendum in January 2011, secured under the Comprehensive Peace Agreement of 2005 between the Government of Sudan and the Sudan Peoples' Liberation Movement/Sudan Peoples' Liberation Army. The admission met with no opposition. See UN News Service, 'UN Welcomes South Sudan as 193rd Member State', (14 July 2011) available at

An attempt by Taiwan to obtain membership of the UN in 2006 was strenuously blocked by China PRC, a permanent member of the Security Council because China denies Taiwan's statehood, insisting Taiwan is a part of the Peoples' Republic of China.[28] Palestine's attempt to get recognized as a State through UN membership in September 2011[29] did not yield anything much, because the US threatened to veto any recommendation for admission of Palestine as a UN member. The ground for such stance was that Palestinian statehood should come as a result of peaceful negotiations with Israel.[30] This is in spite of the fact that the UN has not been able to do anything concrete on the Israeli-Palestinian conflict for over six decades.

In the days of the Yugoslav break-up, the UN membership of Macedonia was opposed by Greece on the ground that the name "Macedonia" is synonymous with a province in Greece and that a constitutional provision of the Applicant State instilled fears on Greece that the former may be harbouring irredentist ambitions over the affected territory of Greece. This prompted the UN to admit Macedonia under the provisional name, "Former Yugoslav Republic of Macedonia" (FYROM) "for all purposes within the United Nations pending settlement of the difference that has arisen over the name of the State".[31] Efforts at reaching a settlement over the name led Greece and Macedonia to sign the Interim Accord of September 13, 1995, in which Greece agreed to recognize Macedonia as an independent and sovereign State[32]; and not to object to membership application of Macedonia into international or regional organizations of which Greece is a member.[33] Greece later objected to Macedonia's membership application to the North Atlantic Treaty Organization (NATO) on the same name issue. Macedonia instituted a case

http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=South+Su (last visited 29 April 2012).

28 Art. 2, China's Anti-Secession Law 2005, available at http://www.taiwandc.org/aslaw-text.htm (last visited 29 April, 2012).

29 See Note of September 23, 2011, by the Secretary General to the General Assembly and the Security Council, UN Doc. A/66/371 and UN Doc. S/2011/592, 23 September 2011, Annex I and II.

30 See Washington Wire, 'Text of Obama's Speech at UN' (21 September 2011) available at http://blogs.wsj.com/washwire/2011/09/21/text-of-obamas-speech-at-u-n/ (last visited 29 April 2011).

31 SC Res 817 (1993), 7 April, 1993, para. 2, adopted without vote: S/PV.3196, 2-3; GA Res. 47/225, 8 April 1993: A/47/PV.98, 6.

32 Art. 1, para. 1, Interim Accord, 13 September 1993.

33 *Id.*, Art. 11, paragraph 1

at the International Court of Justice, which ruled that Greece was in breach of Article 11 paragraph 1, of the Interim Accord in objecting to Macedonia's admission into NATO membership.[34]

Thus, the admission practice of the UN has become dogged by issues that ordinarily wouldn't have been in contemplation of Article 4 (1) of the Charter. Grant has therefore asserted that right from the East-West Compromise days, the substantive criteria for admission set out in Article 4 are no longer mandatory except one – statehood. The criteria, according to him, have become permissive rather than restrictive; the result, being universal membership and presumed right of membership.[35] Conversely, Crawford asserts that the Cold War era and the strong support for decolonization tended to muffle debates about statehood and a shifting tendency towards universal membership.[36] Crawford's view seems to be based on the massive admissions witnessed in the 1990s following the collapse of the former Yugoslavia and USSR. The issue of statehood was never considered in all the admissions made in the period. Perhaps, it was presumed.

II. UN Membership and Unilateral Secession

It is imperative to discuss another special case of admission, which is quite different from the cold war and decolonization cases already discussed above. It is the case of entities created as a result of secession. Although, the UN is guided by the traditional requirements of statehood in admission of new members, many entities have been denied membership due to their mode of creation rather than failure to meet the requirements of statehood. This is more pronounced nowadays in the cases of entities created out of unilateral secession. The admission of Bangladesh into the UN membership was delayed due to a veto by China in 1972 to the draft resolution[37] to recommend admission, on the ground that Bangladesh failed to comply with General Assembly Resolution[38] calling for troop withdrawal on both sides.

34 *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, ICJ Reports 2011, paras 98, 101, 103 and 113.

35 Grant, *supra* note 5, 251 and 295-297.

36 Crawford, *supra* note 6, 182.

37 SCOR 659th Meeting, August 26, 1972 (11-1 (China) :3 (Guinea, Somalia and Sudan).

38 GA Res 2793 (XXVI), 7 December 1971.

Bangladesh was subsequently admitted in 1974[39] after Pakistan decided to recognize it as a State. Generally, the UN does not admit a new entity that came into existence as a result of unilateral secession[40] unless the parent State acquiesces. This was what happened in the Bangladesh case.

Exceptions however include where the secessionist group has been recognized as a unit entitled to self-determination for purposes of decolonization.An occasion in which the UN recognized an entity as independent (but not by admission), without the consent of the parent State in a colonial context, where the administering State had forcefully prevented the entity from exercising its right to self-determination was in Guinea Bissau, which unilateral declaration of independence was welcomed by the General Assembly of the UN at a time when Portugal was still resisting the forces of the *Partido Africano para a Independência da Guiné e Cabo Verde* (African Party for the Independence of Guinea-Bissau and Cape Verde) (PAIGC) in 1973.[41] Other examples were Indonesia, against the Netherlands and the cases of Eritrea and the Baltic States, which were forcefully annexed by the USSR. It has been suggested that self-determination has developed as an additional criterion of statehood.[42] The violation of the principle of self-determination was a reason for non-recognition of Southern Rhodesia.

III. UN Membership and State Succession

Another important issue that plays out at the UN admission process may be gleaned from membership bids of successor States. When a new State emerges from an already existing State, which is a UN member, does the new State inherit UN membership from its parent State? What of situations of dissolution of States? Does any splinter State have the right to continue the legal personality of the former parent State so as to continue its membership of international organizations?

The issue of succession into membership of an international organization was first tackled by the UN in 1947, following British grant of independence to India and Pakistan. British Raj India was an original

39 SC Res 351 (1974), 10 June 1974; GA Res 3203 (XXIX), 17 September 1974.

40 Shaw, *supra* note 7, 206.

41 See GA Res 3061(XXVIII), 2 November 1973, paras 1 and 2. For a fuller discussion of entities recognized despite non-fulfillment of the traditional requirements of statehood, see Shaw, *supra* note 7, 201-206.

42 Shaw, *supra* note 7, 206; Raic, *supra* note 7, 437.

member of the UN. Upon the partition at independence, Pakistan applied that both Indian and Pakistan become automatic members of the UN. While India was allowed to continue as an original member, the Security Council recommended Pakistan to be admitted as a new member. The issue was then referred to the First Committee by the General Assembly. In order not to delay Pakistan's admission, the First Committee voted to recommend Pakistan's admission to the General Assembly but simultaneously referred the matter to the Sixth Legal Committee, with the question, "What are the legal rules to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject?" The Sixth Committee proffered the following Principles:

- "That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist."

- "That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the *United Nations, it cannot* under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter."

- Beyond that, each case must be judged according to its merits.[43]

[43] U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee to the Chairman of the First Committee dated 8 October, 1947)., available at http://daccess-dds-ny.un.org/doc/UNDOC/DER/NL4/716/51/PDF/NL471651.pdf?OpenElement (last visited 2 May 2012)

The issue was replayed in the botched application of the Federal Republic of Yugoslavia (FRY), later known as Serbia and Montenegro, to continue the UN membership of the Socialist Federal Republic of Yugoslavia (SFRY) as the Rump State; and the successful application by the Russian Federation to continue the membership of the former USSR in the UN. In the two cases, both entities emerged from dissolution of their predecessor States. In fact, in the case of the USSR, the Minsk Declaration of December 8, 1991 clearly stated that the entity known as the USSR "has ceased to exist as a subject of international law and a geopolitical reality."[44] In the Yugoslav case, the Badinter Commission in its Opinion No. 1 found that the SFRY was in the process of dissolution and called on constituent republics to apply for recognition as independent States; and in Opinion No. 8, the Commission ruled that the SFRY "no longer exists". So, one would have thought that both FRY and Russia were new States as their predecessor States had lost their international legal personality; and in accordance with the Sixth Legal Committee Principles above, should have applied afresh for membership. But as it happened, while Russia was allowed to continue the membership of the former USSR in the UN, the FRY was not allowed to continue the membership of SFRY in the UN. It was requested to apply afresh for membership. Grant[45] opines that the reason for the different treatment is that while successor States from the former Yugoslavia denied

[44] The Minsk Agreement, 8 December 1991, preamble para. 1.
[45] Grant, supra note 5, 230.

FRY's claim to continuity of the legal personality of SFRY,[46] those of the USSR agreed that Russia should continue the legal personality of USSR.[47]

Zimmermann asserts that in international law, entities emerging from secession cannot acquire membership of an international organization by succession unless the entity can successfully show that as a predecessor State, from which part of its territory secedes, it continues the international legal personality of the said State and cites the Russian case as an example.[48] This seems to be a rehash of the first principle of the Sixth legal Committee. In order words, the crucial agreement of splinter States at Alma-Ata, that Russia should continue the legal personality of the former USSR was conclusive proof that Russia continued the legal personality as a predecessor State from which entities have seceded; a fact not present in the Yugoslav dissolution, whose constituent States vehemently opposed its continuation in international law by FRY.[49] The consent of constituent States proposition seems to have been applied when Montenegro declared independence in accordance with the Constitution of Serbia and

46 SC Res. 757, 30 May 1992, preamble para. 10, where the SC said that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the membership of the former Socialist Federal Republic of Yugoslavia in the UN has not been generally accepted"; SC Res 777, 19 September 1992, para. 1, where the SC "considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of [SFRY] in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations […]"; GA Res 47/1, 22 September 1992, para.1, where the GA resolved that "the Federeal Rebublic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Social Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations and therefore, should apply for membership in the United Nations […]" For details of opposition to the FRY's claim to continue SFRY's membership in the UN, see Grant, *supra* note 5, 214-227.

47 See Decision of Council of Heads of State of the Commonwealth of Independent States (CIS), Alma-Ata, December 21, 1991, para. 1, Annex V to letter dated December 27, 1991 from the Representative of Belarus to the UN, addressed to the Secretary General, UN Doc. A/47/60-S/23329, 30 December 1991.

48 A. Zimmermann, 'Secession and the Law of State Succession', in M. Kohen, (ed.), *Secession: International Law Perspectives* (2006),, 208, 220;Grant., *supra* note 5, 228, where the author cited the Report of the UN Sixth Legal Committee 1947 on States Emerging from the Territory of a member State as authority for the proposition

49 For fuller discussion of the India/Pakistan and Yugoslav/USSR automatic membership issue, see, M. Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations', 28 Cornell International Law Journal. (1995)1, 29,, 33-64.

Montenegro[50] in 2006. A secession provision in the Constitution had stated that a "member state that implements this right [secession] shall not inherit the right to international personality" of the Union.[51] Upon the independence of Montenegro, Serbia was allowed to continue the legal personality of Serbia and Montenegro in the UN while Montenegro applied afresh for UN membership.

The law applicable to the question of membership of the UN is meshed with political considerations. The same will hold true for the admission process, as the following section demonstrates.

C. Procedure for Admission under Article 4(2)

The political aspect of the admission procedure comes out glaringly under Article 4(2) above. The procedure for admission has already been stated. It requires a favourable recommendation from the Security Council, which is then effected by voting in the General Assembly. The expression, "in the judgment of the Organization" under Article 4(1) must be read in conjunction with this procedure. The judgment is that of individual existing members and this is where political interests and considerations come to play. Permanent members of the Security Council have vetoed or supported membership applications according to their own political interests and inclinations. What amounts to a "peace-loving State", has been subjected to various political interpretations.

At the San Francisco Conference on International Organization in 1945, the USSR opposed the inclusion of Argentina as an original member of the United Nations on the ground that it cannot be classified as a "peace-loving State", having sided with the Axis until the dying days of the second World War, when it shifted support to the Allies obviously on sensing the impending victory of the Allies. Argentina was finally admitted as an original member following a compromise at the Conference that also saw Poland being admitted as an original member. But in 1947, the USSR again opposed the admission of Ireland and Portugal to membership of the United Nations on the ground that the two nations, having remained neutral during the second World War, cannot be deemed to be "peace-loving". This issue in addition to USSR's request that its vote for admission of Italy into the

50 Constitutional Charter of the State Union of Serbia and Montenegro (4 February 2003) available at http://www.worldstatesmen.org/SerbMont_Const_2003.pdf (last visited 1 May, 2012).

51 *Id*., Art. 60.

United Nations membership be predicated on the similar admission of Hungary, Romania, Bulgaria and Finland, led the General Assembly to request an advisory opinion from the International Court of Justice.[52]A single veto by any of the permanent members of the Security Council overrides the majority decision to admit an entity.

An attempt by the General Assembly to circumvent this power of the Security Council in the determination of admission into the membership of the UN was defeated in 1950, when the International Court of Justice held that the General Assembly can only admit a member upon a "favourable recommendation" by the Security Council.[53] But in an Individual Opinion, Judge Alvarez drew attention to an emerging new international law and held:

> "Even if it is admitted that the right of veto may be exercised freely by the permanent Members of the Security Council in regard to the recommendation of new members, the General Assembly may still determine whether or not this right has been abused and, if the answer is in the affirmative, it can proceed with the admission without any recommendation by the Council.
>
> […] a State whose request for admission had been approved by all the Members of the Security Council except one and by all the Members of the General Assembly would nevertheless be unable to obtain admission to the United Nations because of the opposition of a single country; a single vote would thus be able to frustrate the votes of all the other Members of the United Nations ; and that would be an absurdity."[54]

The above Individual Opinion says much about the bottleneck constituted by the use of vetoes in the admission process. While the conditions spelt out under Article 4(1) constitute a legal regulation and should guide the discretion of member States to vote for or against the admission of an applicant without extraneous requirements as the ICJ held in the *Admission Opinion*, the exercise of the discretion in whether the

52 *Conditions of Admission of a State for Membership in the United Nations* (1948), *supra* note 19. For further details of the Argentine controversy and cold war political grandstanding of Permanent members of the Security Council on admission of new members, see Grant, *supra* note 5, chapters 2 and 3.

53 *Competence of Assembly Regarding Admission to the United Nations,* Advisory Opinion, ICJ Reports 1950, 4 and 9-10.

54 *Id*., Individual Opinion of Judge Alvarez, 20-21.

conditions have been met or not, is a fact-finding one which a voting State is at liberty to expound so far as it is done within the legal regulation. The reasons for voting in a particular manner cannot be regulated. In the words of the Court:

> "Although the Members are bound to conform to the requirements of Article 4 in giving their votes, the General Assembly can hardly be supposed to have intended to ask the Court's opinion as to the reasons which, in the mind of a Member, may prompt its vote. Such reasons, which enter into a mental process, are obviously subject to no control."[55]

For there to a be favourable recommendation of an applicant by the Security Council, all the permanent members must concur but since the reasons that prompt the vote of a Member State are not subject to control, it is really at this stage in the Council that considerations other than legal come to play. The politicization of the admission procedure was so acute during the Cold War that members concluded that substantive admission criteria would have to be put aside, if East-West animosities were not to suspend membership in the UN in a deepfreeze.[56] Even with the end of the Cold War, there are other political factors that may present themselves though not of the magnitude witnessed in the Cold War era. Once a permanent member casts a negative vote, the admission ambition of an applicant would have been scuttled because, such a matter will not even get to the General Assembly since the recommendation is not favourable.

For instance, judging from the massive support and ovation that greeted the speech of the Palestinian Authority President, Mahmoud Abbas, at the 66th Session of the General Assembly,[57] it may well be correct to conclude that Palestine would have been admitted as a UN member had the General Assembly had the opportunity to vote but as it is, the issue has never come before the General Assembly because, the Security Council has not deliberated on it due to a US threat of veto. Although the considerations

55 *Conditions of Admission of a State for Membership in the United Nations*, *supra* note 19, 60.

56 Grant, *supra* note 5, 199.

57 The text of Abbas' speech at the 66th Session of the General Assembly of the UN on September 23, 2011, is available at http://mwcnews.net/focus/letters-to-editors/13647-abbas-speech.html (last visited 29 April 2012). The ovation was so intense that Israeli Prime Minister in his own speech was prompted to remark, "I didn't come here to win applause. I came here to speak the truth." See Benjamin Netanyahu's 2011 UN Speech, 23 September 2011, available at http://mwcnews.net/focus/letters-to-editors/13648-netanyahu-un.html (last visited 29 April 2011).

of voting States, sometimes influenced by political motives, are expected to be centred and revolve around the legal regulations in Article 4(1), as it is, there is no mechanism in place to ensure that States comply with this while deliberating on the admission of a new State. So, the admission procedure of the UN is fraught with political considerations. The mere fact that the UN refuses membership is therefore, not conclusive that the unsuccessful entity does not meet the requirements of statehood or the conditions for admission spelt out in article 4(1) of the Charter, but may be due to the political rather than legal considerations involved in the admission process.

D. Kosovo and UN Membership

In the *Conditions of Admission of a State* case[58], the ICJ enumerated the five conditions under Article 4(1) of the Charter, for admission of a new member into the United Nations. From the stated conditions, which have earlier been discussed above, it becomes imperative therefore to examine the case of Kosovo in order to establish whether it has met the conditions for admission as a member of the United Nations.

I. Kosovo as a State

The traditional requirements for statehood are established under the Montevideo Convention on the Rights and Duties of States 1933 as follows:

"(a) A permanent population;
(b) A defined territory;
(c) An effective government; and
(d) Capacity to enter into relations with other States."[59]

The requirement of a permanent population means a stable population inhabiting the territory without reference to their number.[60] Thus, a nomadic population may not qualify for a permanent population.[61] But the Vatican

58 *Supra* note 19.
59 Article 1, Montevideo Convention on the Rights and Duties of States.
60 Shaw, *supra* note 7, 199.
61 *Id*. But note the ICJ Opinion in the Western Sahara case: *Western Sahara*, Opinion, ICJ Reports 1975, para. 152, which held that nomadic peoples have certain rights in respect of the territory which they traverse: "The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes […], and their burial grounds in one or other territory. These basic elements of the nomads' way of life […] were in some measure the subject of tribal rights […]".

City, which population is not permanent, is recognized as a State and a Permanent Observer in the UN. It must be noted however, that this is a peculiar situation.[62] Kosovo's population consists of majority Albanians and minority Serbs and other ethnic groups, which is well recognized by the UN at least since the international administration of the territory by the UN under Security Council Resolution 1244 (1999). The history of the population in Kosovo dates back to pre-Yugoslav era and although, there were persistent feuds between Albanians and Serbs over ownership of the territory, the population has however remained considerably stable.[63] Thus, Kosovo may be said to possess a permanent population.

On the requirement of a defined territory, Kosovo's territory is not in dispute and is well recognized by the UN. Even prior to the international administration, the territory of Kosovo was never in doubt as it was an autonomous region, well defined in all Yugoslav Constitutions including the 1989 Serb-manoeuvred amendment that stripped Kosovo of its autonomous status. The permanent population and the defined territory of Kosovo have never been in dispute and it has continued to be so recognized, even after the unilateral declaration of independence on February 17, 2008. What is in dispute is the *imperium* over it. The Northern part of Kosovo inhabited by Serbs has refused to be part of the new State. But it would seem this may not constitute any great impediment to the statehood of Kosovo, as a State may be recognized in international law despite its undefined and unsettled boundaries. What is important is the presence of a consistent band of territory which is undeniably controlled by the government of the alleged State.[64] An example of such instance is the State of Israel which is recognized by the international community despite the prevalent disputation of its existence and frontiers by its Arab neighbours. Again, Albania was recognized by many States at a time when its borders were still in dispute.[65]

62 For fuller details of the international status of the Vatican City, see Crawford, *supra* note 6, 222-225.

63 For a fuller account of Albanian/Serb relationship in Kosovo, see G. Jansen, 'Albanians and Serbs in Kosovo: An Abbreviated History: An Opening for the Islamic Jihad in Europe', available at http://lamar.colostate.edu/~grjan/kosovohistory.html (last visited 29 April 2012).

64 Shaw, *supra* note 7, 199. At page 200 Shaw observes, that "What matters is the presence of a stable community within a certain area, even though its frontiers may be uncertain."

65 See *North Sea Continental Shelf Cases* (*Germany v. Denmark; Germany v. The Netherlands*), Judgment, ICJ Reports 1969, 3, 32, para. 46, where the Court held, "There is for instance no rule that the land frontiers of a State must be fully delimited

Another requirement of statehood is that of an effective government in place. In the *Aaland Islands* case,[66] the Committee of Jurists observed that Finland could not be considered to have achieved statehood "until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of the foreign troops."[67] Since the declaration, there has been massive foreign military presence in Kosovo in the form of the Kosovo Force (KFOR) and the European Union Rule of Law Mission in Kosovo (EULEX) for the maintenance of peace and security under UN oversight. This was done in order to ensure the maintenance of law and order, the safety of returning refugees and the disarmament of irregular forces. The Northern part of Kosovo, inhabited by Serbs is not under the control of the central government of Kosovo. But the Provisional Institutions of Kosovo in collaboration with the United Nations Interim Administration Mission in Kosovo (UNMIK) institutions have been in control of the territory before and since the declaration. In the light of the above pronouncement, it seems that only when the international forces and administration ceases, Kosovo could be assumed to have a government in place that can effectively control the territory.

However, it would appear that State practice does not support the above position. States have been recognized in circumstances when there was no effective government in place. Normally, this is the case where the entity is an adjudged self-determination unit, being forcefully prevented from exercising that right by the colonial administration. This was what happened in the case of Guinea Bissau, which unilateral declaration of independence was welcomed by the General Assembly of the UN at a time when Portugal was still resisting the forces of the PAIGC in 1973 and the PAIGC was not yet in control of a majority of the population or a substantial part of the territory.[68] Another example was the case of Congo, which was admitted as a member of the UN in 1960, at a time when there was breakdown of government, with two factions claiming to be the legitimate representatives of Congo. Shaw concludes that the evolution of

and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations."

66 League of Nations Official Journal Sp. Supp. No. 4 (1920) 3. The report is available at http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf (last visited 29 April 2012).

67 *Id*., 8-9.

68 See GA Res. 3061(XXVIII), 2 November 1973, paras 1 and 2.

self-determination has affected the standard necessary as far as the actual exercise of authority is concerned and that a lower level of effectiveness, at least in decolonisation situations, seems to have been accepted.[69] It must however be pointed out that Kosovo was not a colonial territory but a part of a sovereign State, Serbia. Although its actions in the unilateral declaration would seem to be in the exercise of the right to self-determination at least in the remedial sense of it, the principle of territorial integrity of a sovereign State, upheld by most States does not seem to make the above situation applicable to Kosovo. As a matter of fact, most States that have not recognized Kosovo do so, on the basis of the inviolability of the principle of territorial integrity.

But recent State practice seems to have extended the application of the above proposition beyond colonial situations. Croatia and Bosnia-Herzegovina were recognized and admitted into UN membership at a time when foreign troops under the auspices of the Dayton Accords 1995 were in control of substantial areas, owing to fratricidal civil wars. Somalia's statehood is not in doubt in the international community despite the fact that there has been no effective government since 1991. Finally, Kuwait's statehood was upheld by the international community even while it was effectively under Iraqi control after the annexation in 1990. It must however be admitted here, that a distinction exists between acquiring statehood and maintaining same. While the Kosovo case has to do with acquiring statehood, the two latter cases have to do with maintaining already acquired and recognized statehood. Nevertheless, the fact that statehood may be maintained in spite of loss of control of territory may still ring true for establishment of same in deserving circumstances like the Bosnia-Herzegovina case.

So, the fact that a minority part of Kosovo is presently not under the control of the Provisional Institutions; or the presence of foreign troops in the administration thereof does not seem to derogate from its statehood. More so, Kosovo in paragraph 5 of the independence declaration, invited NATO and other international security presences to continue to provide

69 Shaw, *supra* note 7, 205. Generally speaking, the same author argues at p. 200, that the requirement of an effective government "is not a pre-condition for recognition of an independent country. It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs." For a fuller discussion of entities recognized despite non-fulfillment of the traditional requirements of statehood, see *Id*., 201-206

security in Kosovo until the national institutions are capable of assuming these responsibilities. This is in consonance with practice even among established recognized States.[70] So, Kosovo's invitation to the international security presences may cure any defect inherent in that argument.

The last criterion for statehood is the capacity to enter into relations with other States. It has been argued that the capacity to enter into relations with other States is a consequence and not a criterion for statehood.[71] Furthermore, it is also asserted that the capacity to enter into relations is not limited to sovereign States; as international organizations, non-independent States and other bodies can enter into legal relations with other entities.[72] It is however necessary for a State to be able to enter into such legal relations with other States. The essence of this capacity lies in the necessity of the independence of the entity in question.[73]

If the entity is not politically or economically independent, it would merely be a puppet State of its sponsors. For example, the South African Bantustans were not recognised as States because it was clear that their budgets and existence were controlled or sponsored by South Africa. It must be conceded that many States are surviving today upon aid donated by richer nations. This has not derogated their political independence. The Bantustans, having been created by South Africa, part of which territory they were, ordinarily would have met the criteria for statehood as there is a presumption of independence of a territorial unit granted independence by its metropolitan State in international law.[74] However, the Bantustans seem not to have been recognised as States, due to the apartheid connotations behind their establishment, which is a violation of *jus cogens* rules of international law.[75]

70 President Camille Chamoun of Lebanon invited the United States to send forces to protect American citizens and to preserve the territorial integrity of Lebanon during a rebellion that had foreign support in 1958. See Lebanon-UNOGIL (United Nations Observation Group in Lebanon) available at http://www.un.org/en/peacekeeping/missions/past/unogilbackgr.html (last visited 29 April 2012).

71 Crawford, *supra* note 6, 61.

72 Shaw, *supra* note 7, 202.

73 *Id*.

74 Crawford, *supra* note 6, 89.

75 See statement of Minister of State at the Foreign and Commonwealth Office, "the very existence of Bophuthatswana is a consequence of apartheid and I think that that is the principal reason why recognition has not been forthcoming". 126 House of Commons Debates, cols 760-761, 3 February 1998, cited in Crawford, supra note 6, 89. See also the case of Southern Rhodesia in 1965, where the UN called on member States not to

Situations capable of derogating independence are substantial illegality of origin, where an entity comes into existence in violation of basic rules of international law; entities formed under belligerent occupation; and substantial external control of the State.[76] Derogation of independence due to illegality of origin by way of violation of basic rules of international law has been exemplified in the South African Bantustans above. An example of a puppet State created under belligerent occupation could be seen in the invasion of Manchuria by Japan in 1932.[77] But the Allied occupation of Iran from 1941 to 1946 in order to forestall fears of impending German control was not treated as a belligerent occupation so as to render the Iranian regime a puppet government. The occupying forces of Britain and Soviet Union had reiterated that they had no intention to tamper with the sovereignty and territorial integrity of Iran and that the occupation will be temporary.[78] It therefore, would seem that the intention of the occupying power is relevant in determining whether the occupied State has lost its independence and has become a puppet State.

For independence to be derogated there must be "foreign control overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a permanent basis."[79] An example of a situation in which substantial external control derogated independence of an entity can be seen in *Loizidou v. Turkey*.[80] Here, the European Court of Human rights held Turkey responsible for acts of officials of the Turkish Republic of Northern Cyprus (TRNC), on the ground that, "[i]t is obvious from the large number of troops engaged in active duties in Northern Cyprus that her [Turkish] army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her [Turkish]

recognize the unilateral declaration of independence on grounds that it was an illegal racist minority regime. GA Res. 2024 (XX), 11 November 1965; SC Res. 216, 12 November 1965, para. 2.

76 Crawford, *supra* note 6, 74-76.

77 Raic, *supra* note 7, 78.

78 See Tripartite Treaty of Alliance (Britain, USSR and Iran), 29 January 1942, 144 British and Scottish Foreign Practice 1017, Art. 1, 4 and 5. For a fuller discussion of the incidents of independence and foreign occupation, see Crawford, *supra* note 6, 74-89.

79 I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), 72-74.

80 *Loizidou v. Turkey* (merits), ECHR, 18 December 1996, 108 *International Law Reports*, 443, 466-467, para. 56.

responsibility for the policies and actions of the "TRNC"". In other words, TRNC was not an independent State but a puppet State of Turkey.

Kosovo has had the presence of foreign troops in its territory both prior to and after the independence declaration but its capacity to enter into international relations may not have been undermined by that fact. This is because the troops are not attributable to individual States as to be able to label Kosovo as the puppet of such State. This seems to be the most important distinction between Kosovo and other States that have been denied recognition on grounds of not being factually independent. The troops are there under the auspices of the United Nations and the EU. In other words, the troops are troops of the international community and are there to maintain the peace until Kosovo authorities are strong enough to take over the entire control of the territory as stated in paragraph 5 of the Independence Declaration. This does not derogate its independence. This is evident from the 86 UN Member States recognitions so far, and Taiwan. Some of these recognizing States have established full diplomatic relations with Kosovo. This is in addition to its admission to the membership of both the World Bank and the International Monetary Fund,[81] all showing that Kosovo has the capacity to enter into international relations. From the foregoing therefore, Kosovo seems to have met the requirements for statehood entrenched in the Montevideo Convention.

Beyond the Montevideo Convention, a regional instrument spells out another set of requirements for recognition of statehood too. In 1991, the European Community adopted Guidelines for the recognition of States that were emerging from the Balkan and Soviet crises.[82] After affirming the EC's commitment to the principle of self-determination and its readiness to recognize new States in accordance with normal standards of international practice and the political realities of each case, the Guidelines stipulated the norms and standards that should be fulfilled as pre-conditions for recognition by the new entities as follows:

> "respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki

[81] US Department of State, "Kosovo Joins the IMF and World Bank", available at http://www.state.gov/r/pa/prs/ps/2009/06a/125489.htm (last visited 29 April 2012).

[82] EC Declaration on Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991, 62 *British Yearbook of International Law* (1991), 559-560, reproduced in D. J. Harris, *Cases and Materials on International Law*, 6th ed. 2004,147-148.

> and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
> guarantees for the rights of ethnic and national groups and minorities in accord with the framework of the CSCE;
> respect for the inviolability of all frontiers which can only be changed by legal means and by common agreement;
> acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation, as well as to security and regional stability;
> commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes."

Kosovo being an entity in Europe, in its declaration of independence, amply undertook to comply with the above; both expressly and by necessary implication.[83] Kosovo virtually accepted to comply with everything under the EC Guidelines in the independence declaration.[84] The adoption of fundamental rights and freedoms as defined by the European Convention on Human Rights[85] is an indication that Kosovo agrees to be bound by the ideals stated in the EC Guidelines. More so, the Independence Declaration was drafted in close collaboration with most key Western powers.[86] Kosovo, in the independence declaration, created self-imposed *erga omnes* obligations which States could rely on; and demand compliance with.[87] This accounts for the almost instantaneous recognition it drew from these States.

83 See text of the Kosovo Independence Declaration, 17 February 2008, para. 2, available at http://www.assembly-kosova.org/?cid=2,128,1635 (last visited 29 April 2012), which states, "We declare Kosovo to be a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes."

84 For instance *id.*, para. 8 of the declaration where Kosovo accepts the *uti possidetis* rule of non-violability of frontiers and the non-use of force; and paras 10 and 11, where Kosovo undertakes to promote peace and stability of South East Europe and to forge good and friendly relationship with neighboring States including Serbia.

85 *Id*., para. 4.

86 M. Weller, *Escaping the Self Determination Trap*, (2008), 141.

87 *Id*.

Weller describes the Kosovo secession as a "supervised independence".[88] Kosovo therefore seems to have met the conditions stipulated in the EC Guidelines above in addition to the traditional requirements discussed earlier. Thus, Kosovo may have met the conditions for statehood, which should entitle it to seek membership of the UN.

II. Kosovo as a Peace-Loving State

As has been revealed above, the failure of an applicant to demonstrate that it is a peace-loving State has been a ground for objecting to its admission into UN membership. This underscores the importance accorded the requirement of an applicant State being "peace-loving", which however, has remained largely political.[89]

On the ground of being a peace-loving State, paragraphs 8, 9 and 10 of the Kosovo Independence Declaration addressed this, when Kosovo undertook to refrain from the use or threat of the use of force in any manner inconsistent with the purposes of the United Nations; seek membership of international organizations in which Kosovo shall seek to contribute to the pursuit of international peace and stability; and declared its commitment to the peace and stability of South East Europe. Such undertakings are only consistent with a peace-loving State. Besides, Kosovo was the victim of violence or the use of force, prior to the events that led to the declaration. This was much acknowledged in the various UN Resolutions[90] and the eventual takeover of the administration of Kosovo from Serbia by the UN under Resolution 1244 (1999). It must however be emphasised that the fact that Kosovo was the victim of violence does not *ipso facto* present it as a

88 *Id*., 142-143; See also D. Efevwerhan, & R. Ahmad, 'Secession: New Trends and Practice after the Cold War', 7 *Soochow Law Journal* (2010) 2,. 1, 30-31, where the authors described the occurrence as an "internationally supervised or assisted secession".

89 See Grant *supra* note 5, regarding the Argentine controversy and other admission crisis.

90 For instance, see SC Res. 1160, 31 March 1998, condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo; and imposing an arms embargo on Yugoslavia. In SC res. 1199 (1998), 23 September 1998, the Security Council declared that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region, and demanded that all parties to the conflict cease hostilities while the security forces of FRY and Serbia withdraw from Kosovo. It should be mentioned however, that Kosovo Liberation Army (KLA) forces were also admonished to cease all forms of terrorist acts in the above Resolutions.

peace-loving State. But in the absence of any contrary facts, Kosovo may be classified as a peace-loving State.

This is fortified in the case of the admission of Siam (Thailand) as a member of the UN in 1946. France and USSR had objected to its admission on the ground that there were territorial disputes and non-maintenance of diplomatic relations with Siam respectively. Siam gave an assurance that the territorial disputes between it and France will be referred to the ICJ, while it promised to establish diplomatic relations with the USSR. Such assurances proved satisfactory that Siam was a peace-loving State and paved the way for its admission. It must however be mentioned that diplomatic relations with other States is not in itself a criterion for admission. Grant opines that Siam may have given such assurances because USSR was a permanent member of the Security Council and its objection could prove fatal to Siam's admission.[91]

III. Acceptance of Charter Obligations

As has been stated while considering the statehood of Kosovo; from the independence declaration, it is clear that Kosovo has accepted UN Charter obligations as these obligations were part of the Ahtisaari Plan referred to in the declaration. Agreement to accept the Ahtisaari Plan[92] is therefore, an acceptance of UN commitments and obligations under the UN Charter. It was also argued that that included the acceptance of EC Guidelines, which themselves include compliance with the UN Charter. The list of States that have recognized Kosovo includes 22 members of the EU. This attests to the above assertion of having accepted the EC Guidelines. Paragraph 8 of the independence declaration overtly puts the issue of acceptance of Charter obligations to rest. It states:

> "We accept […] and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states."

91 Grant, *supra* note 5, 55.

92 Independence Declaration, *supra* note 83, para.3.

From the above, there seems to be nothing on ground to suggest that Kosovo has not accepted UN Charter obligations. On this point again, Kosovo may have satisfied the requirement.

IV. Ability to Carry out Charter Obligations and Willingness to do so

The issue of whether a State is capable of carrying out its obligations under the Charter is again, another thorny one. This is because the phrase "in the judgmentof the Organization, are able and willing to carry out these obligations" in the last part of Article 4(1) portends grave difficulties for Kosovo's ambition to join the membership of the United Nations. The judgment of the organization here is actually the judgment of the individual member States that will undertake the determination as to whether or not Kosovo is capable and willing to carry out Charter obligations, which may not be apolitical. A vivid example of this, albeit in the League of Nations era was Liechtenstein, whose membership application to the League was rejected on the ground that though, it was a State, it was too small to carry out its obligations under the Covenant.[93] This discretion of the members is not subject to control. It may therefore be subject to abuse. Crawford is of the view that where the ability or willingness to observe international law is impaired by lack of responsibility for public order, the question should not be one of ability to obey international law but that of failure to maintain any State authority at all.[94] From all that has been discussed above however, one may also argue that Kosovo has both the ability and willingness to carry out Charter obligations. This is borne out by the invitation in paragraph 12 of the independence declaration on all States "to rely on this declaration [...]". There seems to be nothing to suggest otherwise for now.

In the final analysis, it is submitted that Kosovo seems to have met the conditions required for admission into the membership of the United Nations. However, it needs be noted that mere fulfilment of the requisite

[93] League of Nations, First Assembly, Plenary Meetings, Annex C, 667-668, cited in Crawford, *supra* note 6, 177. A similar concern was expressed by France and US when Maldives was admitted as a member of the UN in 1965. Deliberations on this issue of small States not being capable of carrying out Charter obligations, led to a re-activation of the Security Council Committee on Admission of New Members after 1971, with a view to providing the members and the Security Council with appropriate information and advice. Grant, *supra* note 5, 60-61.

[94] Crawford, *supra* note 6, 91-92.

conditions under Article 4(1) is not conclusive. Whether the admission criteria are permissive or not, the issue of whether Kosovo qualifies as a State to be admitted as a UN member, is still not conclusive. The procedure for admission still has to be fulfilled. It is in this procedure that the crucial issue of statehood will be determined and Kosovo's admission bid will meet with difficulties.

E. Kosovo's Manner of Creation and Recognition

Another issue that deserves discussion here is the manner of creation of the State of Kosovo. This is because of the earlier assertion that entities created as a result of a unilateral secession from a sovereign State, outside a colonial context, usually do not receive recognition by the international community. Kosovo was a region in Serbia and not a colony. From the very day that Kosovo proclaimed its independence, recognitions came pouring in from powerful nations like the United States, Britain, France, Germany and a majority of EU member nations. As of May 2010, 69 UN member States had recognized Kosovo as an independent State. After the ICJ Opinion on Kosovo on July 22, 2010, that the unilateral declaration of independence did not violate any general rule of international law or the *lex specialis*, 17 additional States[95] have since recognized Kosovo thus, bringing the total number of UN Member States' recognition till date to 86[96] – more than thrice the number of recognitions accorded Taiwan since 1971. Taiwan is a non-UN member that has also recognized Kosovo. The Sovereign Military Order of Malta, a non-state entity, but a UN Permanent Observer, also recognises Kosovo as a State. Russia; and Serbia understandably, however oppose the secession of Kosovo as a violation of Serbia's territorial integrity and against the spirit of Resolution 1244 (1999).

Although international organizations do not recognize States in international law, they however have the capacity to make status statements and admit an entity that they think has fulfilled the requirements of statehood. Thus, Kosovo has been admitted into the membership of the

95 Honduras, Kiribati, Tuvalu, Qatar, Guinea Bissau, Oman, Andorra, Central African Republic, Guinea, Niger, Benin, Saint Lucia, Gabon, Nigeria, Kuwait, Cote D'Ivoire and Sao Tome and Principe.

96 List of recognitions available at http://www.mfa-ks.net/?page=2,33 (last visited 29 April, 2012). As of the time of going to press, Ghana, Haiti and Uganda have also recognized Kosovo, bringing the total number of recognitions to 89.

International Monetary Fund and the World Bank.[97] There are very bright hopes that the Council of Europe will admit Kosovo, when the latter applies for membership as more than two-thirds of its member-States have already recognized Kosovo. The Organization of the Islamic Conference has supported and welcomed the independence of Kosovo.[98] It is also hoped that many more States will recognize Kosovo, following the clean slate given its declaration of independence by the ICJ. Does it therefore not look like the recognition accorded Kosovo by the US and EU countries within hours of the declaration were premature, in which case, such recognitions were illegal in international law? One may need to re-examine the antecedents of the Kosovo secession briefly in order to address this issue.

After several efforts by the international community to seek a mutual settlement to the crisis including efforts at the settlement talks based on the Comprehensive Proposal all failed, the UN Secretary General's special representative, Martti Ahtisaari, recommended "supervised independence" for Kosovo when he wrote: "[...] I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community."[99] The Troika, made up of the EU, US and Russia also tried in last minute efforts to reach an amicable settlement. The Troika also reported that no amicable solution could be agreed on by the parties. The above finding from an envoy of the UN Secretary General that the only viable option was independence; coupled with the self-imposed limited sovereignty by Kosovo became the basis upon which the EU and NATO based their support for Kosovo as planning for the "international supervision" appeared to have started soon afterwards.[100]

97 Both effective from June 29, 2009, *supra* note 81.

98 OIC News, 'Secretary General of the OIC declares support to the Kosovo Independence' (18 February 2008) available at http://www.oic-oci.org/topic_detail.asp?t_id=840&x_key=Kosovo (last visited 29 April, 2012), where the Secretary General of OIC, observed, "The Islamic Umma wishes them [Kosovo] success in their new battle awaiting them which is the building of a strong and prosperous state capable of satisfying of its people."

99 Letter dated 26 March 2007 from the Secretary General, addressed to the President of the Security Council and Report of the Special Envoy of the Secretary General on Kosovo's future status UN Doc S/2007/168, 26 March 2007; Comprehensive Proposal for the Kosovo Status Settlement, letter of Secretary General to the President of the Security Council, UN Doc S/2007/168/Add. 1, 26 March 2007, para. 5.

100 C. Warbrick, 'Kosovo: The Declaration of Independence', 57 *International and Comparative Law Quarterly* (2008) 3, 675, 678.

The Ahtisaari Proposal has also been criticised for actually giving Kosovo the leverage to declare independence after the Security Council failed or neglected to adopt a resolution on the Comprehensive Proposal.[101] It must however be stressed that the international community may have tried the best they could in the settlement of the Kosovo-Serbia crisis without success. That prompted the UN Secretary General to appoint his envoy to come forward with a Comprehensive Proposal for the settlement of the crisis. The envoy, having arrived at the above conclusion, which was supported by the Secretary General and recommended for approval to the Security Council, the failure of the Council to reach a decision on the recommendation would have left the situation hanging on indefinitely. That would not have been in the interest of the people of Kosovo nor the entire region that would have been engulfed in the crisis had there been a resumption of hostilities between the parties.As the EU put it in its Memorandum on Resolution 1244, justifying its mission in Kosovo (EULEX) and support for Kosovo's independence:

> "Acting to implement the final status outcome in such a situation is more compatible with the intentions of 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable."[102]

Pleasant and convincing as the above statement of the EU may sound, it is however not so straight forward in the view of Russia. This is where the problem really lies. The above historical and political context seems therefore to be the crux of the recognition and non-recognition Kosovo has received so far.

For example, while it would be agreed that the humanitarian catastrophe that the crisis generated justified the intervention by NATO, the perceived non-compromising stance of Serbia in the negotiations that sought to find a political solution to the crisis, may have made Western powers more determined to ensure a successful secession for Kosovo. It has been stated earlier how key Western powers participated in doctoring the independence declaration in order to give it a legal foundation in international law and to ease likely opposition from the international

101 M. Weller, *supra* note 86, 138.

102 See P. Reynolds, 'Legal Furore over Kosovo Recognition' (16 February 2008) available at http://news.bbc.co.uk/2/hi/europe/7244538.stm (last visited 29 April 2012).

community. Thus, the recognition that flowed in from these States was spontaneous, premature but not unplanned. It was actually done as punishment or sanction for the "political bad behaviour"[103] of Serbia; and this was political.

On the other hand, key States that refused to recognize the secession apart from Serbia, which is the most aggrieved, did so not because of their firm belief in the norms of international law of sovereignty and territorial integrity, but in consideration of the political consequences that await them at home should they decide to recognize the Kosovo secession. Such States like Spain, Russia, China, Argentina, Israel, Indonesia and a host of others, all have some kind of secessionist conflict at home. That is not to say, however, that their insistence on the territorial integrity of Serbia lacks merit in international law. The point being made here is that but for the fear of such consequences at home, these States may not have been too keen on the territorial integrity argument. Instructively, Argentina and Israel overtly referred to the Falklands/Malvinas and the Palestinian crises in their respective domains as reason for not wanting to recognize Kosovo as a State.[104]

From all that has been said, political considerations played a great role in the recognition of Kosovo by some States and the non-recognition by others. As a matter of fact, the traditional criteria for recognition of statehood were not much in consideration in the Kosovo secession. Perhaps, they were assumed or presumed to exist. What was uppermost in the minds of recognizing or non-recognizing States were the national and regional interests of the States concerned. It must however be conceded that since international law is based on State's practice and the consent of States, there is no way the political and economic interests of States can be fully separated from the application of international law norms. In any case, whatever the interests, they have all been beautifully wrapped in one form of legal norm or the other. This is evident in the role played by the Contact

[103] On the doctrine of recognition as a sanction for political bad behavior, see, A. H. Berlin, 'Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors', 31 University of Pennsylvania Journal of International Law (2009), 531.

[104] See B92, 'Argentina rules out recognition' (29 February 2008) available at http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=02&dd=29&nav_id=48079 (last visited 29 April, 2012); The Jerusalem Post, 'Israel won't recognize Kosovo, for now' (19 February 2008) available at http://www.jpost.com/Israel/Article.aspx?id=92481 (last visited 29 April, 2012).

Group and the International Steering Group,[105] both of which Russia belongs, at the initial stage of the Kosovo crisis.

In the Guiding Principles[106] of the Contact Group for a Settlement of the status of Kosovo, which formed the basis of the status talks and virtually the Ahtisaari Comprehensive Proposal for Kosovo Status Settlement, the Contact Group stated its view of what should form the basis of the settlement thus:

> "The settlement of Kosovo's status should strengthen regional security and stability. Thus, it will ensure that Kosovo does not return to the pre-March 1999 situation. Any solution that is unilateral or results from the use of force would be unacceptable. There will be no changes in the current territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any country. The territorial integrity and internal stability of regional neighbours will be fully respected."[107]

The true intention of the above paragraph is in doubt. What situation of pre-March 1999 must not be returned to for instance? Is it the oppressive situation of Kosovo Albanians or the status of Kosovo as a region in Serbia? From the tone of the last two sentences in the above paragraph, talking of non-union of Kosovo with any country or part of any country; and that the territorial integrity of regional neighbors will be fully respected, it would seem that the Contact Group had in mind that Kosovo would never return to be part of Serbia in FRY again. Subsequent paragraphs talking of Kosovo not posing a security threat to its neighbors; fighting organized crime and terrorism; cooperating effectively with international organizations and international financial institutions; and the need for a continued international civilian and military presence to ensure supervision of compliance with the status settlement and implementation of standards,[108] all point to the fact the Contact Group was already preparing Kosovo for an independent statehood.

105 The International Steering Group (ISG) comprises France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO.

106 Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, UN Doc S/2005/709, 10 November 2005, Annex.

107 *Id*., para. 6.

108 *Id*., paras 7-10.

The Principles emphasized that the progress of the status process shall not only be determined by the level of engagement of the parties but also on the conditions on the ground. It however envisaged that the Security Council will remain actively seized of the matter and that the final decision on the status of Kosovo shall be endorsed by the Security Council.[109]

The Ahtisaari Comprehensive Proposal[110] provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement[111] but made the mandate of the ICR subject to full review by the International Steering Group (ISG), "no later than two years after the entry into force of this Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention"[112] and making the mandate of the ICR terminable when the ISG determines that Kosovo has implemented the terms of the Settlement.[113] The only thing missing from the above analysis was a Security Council Resolution for Kosovo's independence. The declaration had to be made without a Security Council resolution when it became clear that Russia would veto a draft resolution that had the effect of implementing the Ahtisaari Plan, sponsored by Belgium, France, Germany, Italy, the UK and the United States, which was accordingly withdrawn before a vote could be held on it.[114] It becomes a bit confusing, at what stage Russia fell out with members of the group. But it clearly establishes the political interest theory earlier propounded.

The political undertones of the recognition or otherwise of Kosovo were also pointed out in the statement of the representative of the Western Sahara on the Kosovo secession:

> "The example of Kosovo clearly shows that the international community exercises the policy of "two weights two measures" when it comes to deal with the process of independence and this is due to the interests to big powers[…] the decolonisation process in Western Sahara, which is on the agenda of the UN's Fourth Committee for Decolonisation since more than 30 years,

109 *Id*., preambular paras 6 and 8.
110 UN Doc S/2007/168/Add. 1, *supra* note 99.
111 *Id*., Art. 12.
112 *Id*., Annex IX, Art. 5.1.
113 *Id*., Annex IX, Art. 5.2.
114 M. Weller, "Kosovo's Final Status", 84 International Affairs (2008) 6, 1223, 1225-1226.

> has still not found solution despite the numerous resolutions of the UN's Security Council that recognise to(sic) the Saharawi people the right to self-determination. We assisted a hurry to support the independence of Kosovo, despite the fact that this case wasn't even registered in the Fourth Committee."[115]]

The foregoing political manifestations are surely going to be replayed at the Security Council whenever the issue of Kosovo's UN membership is on the agenda. Russia has voiced its opposition to the independence of Kosovo, in support of Serbia. It called on an emergency meeting of the Security Council to condemn the declaration but the purpose was defeated due to lack of unanimity of the veto wielding members. So, Kosovo's UN membership is not likely to be in view for now as it is sure to be scuttled by Russia in the Security Council. This is because of the requirement of a "favorable" recommendation from the Security Council before the General Assembly can vote for its admission under Article 4(2) of the Charter, earlier discussed.

China, another permanent member of the Security Council, though refuses to recognize Kosovo may not pose any great threat to Kosovo's UN membership bid. China's opposition is in line with her traditional foreign policy of respecting the territorial integrity of States. China has been calling on Serbia and Kosovo to work out an amicable solution to the problem and does not seem to be as vehemently opposed to Kosovo's independence as Russia.[116] If there were a vote in the Security Council on Kosovo's application, China may at worst abstain from voting. It will not vote in favour so as not to send wrong signals back home and is not likely to veto in order not be seen in bad light by supporters of Kosovo. But Russia is likely to cast a veto unless there are compromises struck. Such potent power of a single State over the wishes of the majority has become the bane of the UN in modern era. Unfortunately, it will continue to be so for the near future, unless there is a reversal or a pre-determined abandonment of the ICJ's

115 See *Union de Periodistas y Escritores Saharaui* (UPES), 'Process of Independence: POLISARIO Front denounces the policy of 'two weights two measures' (21 February 2008) available at http://www.upes.org/bodyindex_eng.asp?field=sosio_eng&id=819 (last visited 29 April, 2012).

116 See Xinhuanet News, 'China calls upon Serbia, Kosovo to continue to solve differences through dialogue' (30 November 2011) available at http://news.xinhuanet.com/english2010/china/2011-11/30/c_131277944.htm (last visited 29 April 2012).

Competence of Assembly Regarding Admission to the United Nations Opinion, which is not likely.

However, in the long run, should the Kosovo UN membership issue be presented at the UN, the political or economic interests of member States, especially in the Security Council, may lead to certain compromises being struck among contending stakeholders that may result in the final admission of Kosovo as the 194th member of the United Nations. Such compromises have always been there even at the formation of the United Nations as evidenced in the Argentine controversy[117] and the East-West Compromise Package.

F. The Prognosis

A prognosis of events to come in the long run would however present the following options and likely compromises. Serbia has applied for membership of the EU. That application has not received a favourable response. It is believed that its application is being treated with disinterest due to its violation of key EC rules and practice, like human rights and respect for minorities' rights. If Serbia is desperate to obtain membership of the EU, it may be persuaded to recognize Kosovo, as a requirement for admission.[118] As it is well known, about 22 out of the 27 member States of the EU have recognized Kosovo. Such a trump card from the EU, if successful, would render Russia practically incapable of exercising its veto. Russia's insistence on not recognizing Kosovo has been on the ground that the territorial integrity of Serbia must be respected. If Serbia recognizes Kosovo, Russia would not be able to object again – a situation similar to what happened when Pakistan recognized Bangladesh.[119] This much can be

117 Grant, *supra* note 5, 25-27.

118 See I. Traynor, 'Serbia's Road to EU may be Blocked as Checkpoints Return to Balkans', (4 December 2011), available at http://www.guardian.co.uk/world/2011/dec/04/serbia-kosovo-eu (last visited 29 April 2012). The British Foreign Secretary, William Hague was quoted as saying, "We do want to see a very strong [Serbia] commitment to the dialogue with Kosovo", as Britain joined Germany, Austria and The Netherlands in threatening to veto a decision on Serbia's admission to the EU.

119 It would seem that Serbia is already working in that direction as it has signed an agreement with Kosovo to allow the latter to participate in international conferences and to manage their joint borders. See The New York Times, "Kosovo and Serbia Reach Key Deal", (24 February, 2012) available at

borne out from the statement of Russia's ambassador to Serbia, "Russia's stand is rather simple – we are ready to back whatever position Serbia takes."[120] It means if Serbia decides to recognize Kosovo, Russia will back it. If this happens, it will then pave the way for Kosovo's admission into the membership of the UN.

Perhaps, another option would be to excise the Serb majority areas from Kosovo in order to join them to Serbia. It may be easier to placate Serbia if the Serb minority areas of Northern Kosovo were excised from Kosovo and be made part of Serbia. With this done, Serbia would not have much moral justification to insist on having Kosovo since Kosovo Serbs will now be among their own kith and kin in Serbia. Serbian President has said, "I will continue convincing my colleagues in the EU that Serbia has legitimate interests in Kosovo that we will not renounce."[121] But this is most unlikely as this was not envisaged under UN Resolution 1244. Other instruments including the Ahtisaari Comprehensive Proposal for Kosovo Status Settlement, talk of Kosovo as an "undivided multi-ethnic society".[122]

A further likely option will be a compromise deal to be brokered between Russia and the United States and its allies similar to the East-West Compromise Package of 1955. This will be for the Western allies and their permanent members to agree to the admission of South Ossetia and Abkhazia into UN membership in return for Russia's consent to Kosovo's admission to the same body – a situation already criticized in the *Admissions Opinion*. But given the Western nations condemnation of Russia's involvement in the two secessions and their support for Georgia, whose territorial integrity has been violated by Russia's conduct, this is most unlikely as the West would not want to betray Georgia's confidence.

Closely related to this, is the fact that Russia is currently requesting the EU to accord its citizens the right to visa-free travel and movement

http://www.nytimes.com/2012/02/25/world/europe/25iht-kosovo25.html?_r=1 (last visited 29 April 2012).

120 See B92 'Ambassador Underlines Russian Backing', (12 June 2009) available at http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=06&dd=12&nav_id=59780 (last visited 29 April 2012).

121 See B92 'Tadić: EU Requests Should Serve as Incentive' (16 December 2011) available at http://www.b92.net/eng/news/politics-article.php?yyyy=2011&mm=12&dd=16&nav_id=77838 (last visited 29 April, 2012).

122 UN Doc S/2005/709 s*upra* note 106, Annex para. 6; UN Doc S/2007/168/Add. 1 *supra* note 99, Art. 1.1.

within the Union.[123] This is a right accorded only to citizens of member States of the EU. Russia is not an EU member but its desire to benefit from EU policies without necessarily being a member may also be the bait that the EU may dangle before Russia to coax it to support Kosovo's UN membership bid, given earlier stance of the EU that Russia embraces democracy and human rights in order to be able to join the Union.[124] This will however depend on whether or not the EU has other more pressing issues to settle with Russia than the recognition of Kosovo. But such request for recognition of Kosovo may prove to be a formidable addition to other conditions in view of the part the EU has played in Kosovo so far. Russia, however, due to sovereignty sake may not give in to such requests from the EU. But in all, the EU's option of membership for Serbia, discussed above, is therefore, the most potent alternative for achieving Kosovo's UN membership.

G. Conclusion

The Kosovo situation will linger on for some time to come but it is suggested here that a consideration of the Individual Opinion of Judge Alvarez, in the *Competence of Assembly Regarding Admission to the United Nations, Advisory Opinion*, to the effect that the General Assembly should be able to determine whether a veto has been abused or not in the admission of a new member, deserves some consideration. In this way, obvious abuse could be check-mated. However, this would entail an amendment of the UN Charter and may not be easy to attain.

But perhaps, a suggestion may be made here that a Uniting for Peace Resolution be invoked in the case of disagreement among the Permanent Members in the Security Council over Kosovo's admission. This is due to the fact that the Kosovo situation was brought about or aided by the UN itself under Chapter VII as a measure to maintain international peace and security, when Serbia's *imperium* over Kosovo was suspended under Resolution 1244 (1999). It is conceded that the final status or independence

123 See Rianovosti, 'Medvedev urges EU to work with Russia on scrapping visa regime' (1 June 2010) available at http://en.rian.ru/world/20100601/159252066.html (last visited on 29 April 2012).

124 See European Alternatives, 'EU-Russia Relations: a chance not to be missed' available at http://www.euroalter.com/2010/eu-russia-relations-a-chance-not-to-be-misse (last visited 29April 2012).

was not approved by the Security Council but judging by the wide support Kosovo has received in terms of recognition and the fact that the UN is still ably represented there, there is no denying the fact that Kosovo will not be rejoined with Serbia again. To continue to deny such an entity UN membership is counter-productive and will continue to endanger international peace and security, which was the basis of the adoption of Resolution 1244 in the first place. The same applies to Taiwan, which continuous denial of statehood could trigger a conflict that will endanger regional and international peace should China decide to forcefully reclaim the island. This is in view of the fact that the Taiwan issue has been left hanging since Japan surrendered it to Allied powers as part of the peace terms after the Second World War.

As the EU Representative has correctly put it in respect of Kosovo, "Acting to implement the final status outcome in such a situation is more compatible with the intentions of [Resolution] 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable."[125] Besides in an era of universality of the UN, there seems to be no justifiable reason to continue to deny admission to an entity, which independence was aided, supported and recommended by the UN Secretary-General; and further preserved in an ICJ Opinion requested by the General Assembly. If a veto prevents Kosovo from becoming a UN member, Kosovo may choose to remain a non-member State of the UN but such veto will be an indirect encouragement to oppressive regimes to violate the human rights of their people in the guise of territorial integrity. Furthermore, remaining a non-member of the UN will be quite contrary to the aims and objectives of the UN as well as its status as a universal organization.

125 Reynolds, *supra* note 102.

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The Continuing Functions of Article 98 of the Rome Statute

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Abstract

According to the current jurisprudence of the International Criminal Court, Article 98 of the Rome Statute does not forbid the issuance of an arrest warrant for a sitting head of state. The African Union Commission vehemently objects to this reading of Article 98. Because it viewed the function of Article 98 as forbidding such arrest warrants, it views the current jurisprudence as effectively reading Article 98 out of the Statute, with no continuing function. This article demonstrates the continuing function of Article 98. This continuing function includes immunities resulting from agreements under Article 98(2), as well as customary immunities pertaining to property, persons, diplomatic immunity, and state immunity. Countering the rhetoric and providing a close analysis of the current state of Article 98 in ICC jurisprudence is useful, both with respect to understanding the current operation of Article 98 and to reflect on balancing multiple maximands of criminal law, human rights law, and the international law of immunity.

A. Introduction

On 9 January 2012, the African Union Commission issued a press release (AU Press Release) on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) on the "alleged" failure by Chad and Malawi to comply with the cooperation requests with respect to the arrest and surrender of President Al Bashir of Sudan.[1] The press release asserts that the decision has the effect of "Rendering Article 98 of the Rome Statute redundant, non-operational and meaningless[.]"[2] The African Union Commission believed that Article 98 provided for the immunity of President Al Bashir.

To the African Union Commission, the answer to the question "what remains of Article 98 after the Pre-Trial Chamber's ruling" is simple: nothing. The African Union is hardly alone in this opinion. But is this accurate?

1 African Union Press Release Nº 002/201 (9 January 2012) available at http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf (last visited 2 May 2012).

2 *Id*., emphasis removed.

This article assesses the claim that, should the Pre-Trial Chamber's ruling become the consensus jurisprudence of the ICC, Article 98 has been effectively read out of the Rome Statute that it has been rendered redundant, non-operational, and/or meaningless. Fundamentally, this article asserts that the discrete immunities addressed by Article 98 must be analyzed individually to understand the effect of the recent decisions of the Pre-Trial Chamber I. Once this analysis is done, it seems likely that many of the immunities provided for in Article 98 remain intact. Countering the rhetoric and providing a close analysis of the current state of Article 98 in ICC jurisprudence is useful, both with respect to understanding the current operation of Article 98 and to reflect on larger issues of incorporating the demands of conflicting legal traditions into international criminal law.

The structure of this article is as follows. It begins with a brief procedural history to provide the immediate context of the key findings of the Pre-Trial Chamber I in Part B. Part C provides an initial textual analysis of Article 98. Article 98(2) is analyzed in Part D. Parts E, F, and G address Article 98(1), discussing immunities pertaining to property, diplomatic immunity, and state immunity respectively. The nuanced approach to the power of international tribunals arguably exemplified in the Blaskić decision is noted in Part H. Part I discusses the omission of the term "arrest" in the text of Article 98. The article concludes with Part J reflecting on the issue of balancing multiple maximands of criminal law, human rights law, and the international law on immunity.

This article is more descriptive than normative. It analyzes the likely continuing function of Article 98 given current jurisprudence, without attempting to suggest the ideal solution for how the goals of international law on immunity can best be reconciled with the goals of criminal law or human rights law. While closely examining current jurisprudence, it does not seek to relitigate it.

Describing the continuing function of Article 98 is in part achieved by dissecting the Article and taking a micro-level view of how it may operate, clause by clause, and subject by subject. This approach is emphasized earlier in the article, particularly in Parts D-G. At another level, describing the continuing function of Article 98 allows for an analysis of the more general phenomenon of resolving disputes between various conflicting areas of law. This approach is emphasized later in the article, particularly in the conclusion in Part J. The fact that Article 98 has a continuing function is demonstrated with both approaches.

B. Procedural History and Key Findings

The Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir[3] (Malawi Decision) includes a section entitled "Background and submissions by the Republic of Malawi".[4] This background will not be recapitulated in full here, but a brief introduction to the procedural history will be provided for the convenience of the reader. For the sake of simplicity, the emphasis in this study will be on the Malawi Decision, given that the decision regarding Chad is largely analogous.

Malawi became a State Party to the Rome Statute on 1 December 2002. The United Nations Security Council Resolution 1593 (2005)[5] referred the situation in Darfur, a region in Sudan, to the ICC, allowing the exercise of jurisdiction under Article 13(b) of the Rome Statute. Almost four years later, on 4 March 2009, Pre-Trial Chamber I issued the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.[6] The Pre-Trial Chamber issued warrants of arrest against President Al Bashir on 4 March 2009[7] and 12 July 2010.[8] The Registry sent cooperation requests to all States Parties, including Malawi, on 6 March 2009[9] and 21 July 2010.[10]

3 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87 (7) of the Rome Statute, ICC-02/05-01/09-139 (Pre-Trial Chamber I), 12 December 2011 [Malawi Decision].

4 *Id*., 3-8.

5 SC Res. 1593, 31 March 2005.

6 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Decision Requesting Observations, ICC-02/05-01/09-3 (Pre-Trial Chamber I), 4 March 2009.

7 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Warrant of Arrest, ICC-02/05-01/09-1 (Pre-Trial Chamber I), 4 March 2009.

8 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Second Warrant of Arrest, ICC-02/05-01/09-95 (Pre-Trial Chamber I), 12 July 2010.

9 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-7 (Pre-Trial Chamber I), 6 March 2009.

Pursuant to Rule 195(1), Malawi (and any concerned third State or sending State) had the option of notifying the Court "that a request for surrender or assistance raises a problem of execution in respect of article 98." To the knowledge of this author, no such notification was provided. The Malawi Decision reports that Malawi did not respond to the Court.[11]

According to the Registry's 18 October 2011 Report on the visit of Omar Al Bashir to Malawi,[12] President Al Bashir visited Malawi on 14 October 2011. In response to the request of the Pre-Trial Chamber,[13] as reflected in the Registry's Transmission of the observations from the Republic of Malawi,[14] Malawi submitted that President Al Bashir was not arrested due to domestic and international law pertaining to the immunities accorded to President Al Bashir as a sitting Head of State.

The Malawi Decision's critical finding is that "customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes."[15] The Malawi Decision ultimately finds that Malawi "failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination"[16] and "failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court"[17] and orders the Registrar to transmit the decision to the United Nations Security Council and to the Assembly of State Parties.

10 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-96 (Pre-Trial Chamber I), 21 July 2010.

11 Malawi Decision, *supra* note 3, 8, para. 10.

12 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Report on the visit of Omar Al Bashir to Malawi, ICC-02/05-01/09-136-Conf and Conf Anx 1 to 4 (Pre-Trial Chamber I), 18 October 2011.

13 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Decision requesting observations about Omar Al-Bashir's recent visit to Malawi, ICC-02/05-01/09-137 (Pre-Trial Chamber I), 19 October 2011.

14 *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir,* Transmission of the observations from the Republic of Malawi, ICC-02/05-01/09-138 with confidential annexes 1 and 2 (Pre-Trial Chamber I), 11 November 2011.

15 Malawi Decision, *supra* note 3, 20, para. 43.

16 Malawi Decision, *supra* note 3, 21.

17 *Id*.

While the purpose of this article is not to evaluate the Malawi Decision as such, it is reasonable to presume that the Pre-Trial Chamber was not seeking to contest the maxims that each provision in a treaty should be given real effect[18] or that interpretation cannot rewrite provisions of a treaty,[19] but rather that Article 98, if correctly understood, neither preserves nor denies immunities. Rather, Article 98 withdraws the power of the ICC to issue demands to States that create a conflict with the law of immunities, but does not determine when those immunities (and resultant conflict) exist.

C. Initial Textual Analysis

In *Does President Al Bashir Enjoy Immunity from Arrest?*[20] Paola Gaeta observes that it is important to distinguish between the question of what is legal for the ICC under the Rome Statute (i.e., Is the ICC authorized to issue to States Parties a request for surrender of the President of Sudan?)[21] and the question of whether it is legal for States other than Sudan to enforce the warrant against Al Bashir under customary international law (i.e., Would a State commit a wrongful act *vis-à-vis* Sudan should it decide to arrest and surrender President Al Bashir?).[22]

Prof. Gaeta argues forcefully that the ICC is not authorized to issue such a request for surrender, and that a State would commit a wrongful act should it decide to honor the request. The authors of the African Union press release clearly concur, although in part for different reasons.

It is necessary to review the text of Article 98 in order to provide an initial textual analysis. It states in full:

> "(1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or

18 *See Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution* 276 (1970), Advisory Opinion, ICJ Reports 1971, 16, 35, paras 66-67.

19 *Quark Fishing Limited v. United Kingdom* (dec.), ECHR No. 15305/06, 19 September 2006.

20 P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *Journal of International Criminal Justice* (2009) 2, 315-332.

21 *See id*., 329.

22 *See id*., 327.

> property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
>
> (2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

Clearly, Article 98 is on the face of it concerned with Prof. Gaeta's first question—what is legal for the ICC under the Rome Statute. Article 98(1) and Article 98(2) both concern themselves with what the Court may not do, not what States Parties may do.

Read together, it is clear that Article 98(1) pertains to certain aspects of the customary international law of immunity, while Article 98(2) refers to certain international agreements. Article 98(1) mentions two types of immunity: diplomatic or State immunity. Article 98(2) only mentions in general agreements that require cooperation of a sending State. Article 98(1) indicates two types of request: for surrender or assistance. Article 98(2) indicates only one type of request: for surrender. Article 98(1) specifies two types of entities: a person or a piece of property. Article 98(2) specifies one type of entity: a person.

D. The Function of Article 98(2) Remains Unaffected For Now

The discussion in the Malawi Decision is clearly focused on Article 98(1) to the exclusion of Article 98(2). The Malawi Decision notes an "inherent tension" between Articles 27(2) and 98(1), but decides that Article 98(1) cannot be relied on to justify refusing to comply with the cooperation requests for the arrest of President Al Bashir.[23]

Article 98(2) does not discuss customary law but instead "obligations under international agreements pursuant to which the consent of a sending

[23] Malawi Decision, *supra* note 3, 18, para. 37.

State is required to surrender a person of that State to the Court[.]" The language implies explicit agreements, in contrast with the customary law norms addressed in Article 98(1).[24] Article 98(2) has no applicability to the customary law norms regarding head of State immunity. Neither Chad nor Malawi has a specific agreement with Sudan requiring the consent of Sudan before honoring their obligations to the Court.

The Malawi Decision identifies two arguments in raised by Malawi.

i. Al Bashir is a sitting Head of State not Party to the Rome Statute and therefore Malawi accorded him immunity from arrest and prosecution in line with "established principles of public international law" and in accordance with the "Immunities and Privileges Act of Malawi" (the "First Argument");
ii. The Republic of Malawi, being a member of the African Union, decided to fully align itself with "the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute" (the "Second Argument").[25]

The Malawi Decision noted various African Union resolutions[26] requiring its members not to cooperate with the warrant of arrest against President Al Bashir.[27] The Pre-Trial Chamber summarizes these resolutions as based on Article 98(1), and thus applies the same response to both the "First Argument" and the "Second Argument". Thus, by its own terms, the

24 *See generally*, C. Kress & K. Prost, 'Article 98', in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article,* 2nd ed. (2008), 1601-1629.

25 Malawi Decision, *supra* note 3, 9, para. 13.

26 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)', African Union Assembly/AU/Dec.245(XIII) Rev.1, 3 July 2009, para. 10; 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)', African Union Assembly/AU/Dec.296(XV), 27 July 2010, paras 5-6; 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC)', African Union Assembly/ AU/Dec.334(XVI), 30-31 January 2011, para. 5; 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court', African Union Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, para. 5.

27 Malawi Decision, *supra* note 3, 10, para. 15.

Malawi Decision does not address the immunities of Article 98(2). Without a specific challenge to a request for surrender based on and considered under Article 98(2), there is no clear reason to suggest that Article 98(2) has been nullified, or indeed affected, by the ICC's current jurisprudence.

The Pre-Trial Chamber could conceivably have addressed the matter with an explicit consideration of Article 98(2). To this author's knowledge, Malawi has not suggested Article 98(2) was implicated by the African Union resolutions. It is perhaps interesting to consider whether it might have done so. Article 98(2) states in full:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

It is reasonable to suspect that the authors of Article 98(2) did not have the Constitutive Act of the African Union specifically in mind when referencing "international agreements," or more specifically "obligations under international agreements[.]" This author cannot find support for such a suggestion in the preparatory documents to the Diplomatic Conference at Rome or commentaries upon the Rome Statute. Nonetheless, it is unclear whether the agreement to abide by resolutions of an intergovernmental organization, combined with resolutions that conflict with a request for surrender, could be reasonably used as a basis to object to a request for surrender under Article 98(2). In particular, it is unclear that the Constitutive Act of the African Union is an agreement "pursuant to which the consent of a sending State is required to surrender a person of that State to the Court", even with the subsequent resolutions, although consent of the sending State would clearly remove the conflict in this instance.

It is at least questionable whether all member States of the African Union must comply as a matter of law with all decisions and policies of the African Union as asserted in the AU Press Release. The argument for the applicability of Article 98(2) might admit that obligations flowing from the decisions of the African Union do not enjoy any inherent superiority from obligations under the Rome Statute (being neither *jus cogens* nor bearing the weight conferred by Article 103 of the United Nations Charter), but would assert that any relevant legal obligation created as a result of an agreement

will activate the restrictions in Article 98(2). It is true that the African Union was created in part to strengthen the structures provided by the Organization of African Unity and the African Economic Community, adding weight to the argument that the decision in question was legally binding. That said, it is unclear whether all African Union decisions create the sort of legally binding obligations that might occur from European Union decisions, for example. Rule 33 of the Rules of Procedure of the Assembly of the Union indicates that while some Decisions are binding, other Decisions are mere recommendations, declarations, resolutions, or opinions intended to guide and harmonize the viewpoints of Member States. Other controversies regarding Article 98(2) have questioned whether Article 98(2) was meant merely for agreements already in existence when the Rome Statute was agreed upon.[28] It is perhaps worth noting that Member States could make reservations to the decision, as evidenced by Mali's reservation.

This issue ultimately requires resolution under Article 119(1) of the Rome Statute, which states in pertinent part "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court." The existence of Article 119(1) and the Court's resulting *compétence de la compétence* does not exclude others opining on these issues, but it is critical to resolving any dispute as to the actual continuing function of Article 98.

E. The Function of Article 98(1) with Respect to Property Remains Presumably Unaffected

The discussion on Article 98(1), including the Malawi Decision, has focused on immunity of a person of a third State. Article 98(1), however, clearly discusses more than immunity of a person. Article 98(1) states in full:

> "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

[28] See e.g. *Amnesty International, 'INTERNATIONAL CRIMINAL COURT: US efforts to obtain impunity for genocide, crimes against humanity and war crimes'*, IOR 40/025/2002, August 2002.

What sort of immunity of property of a third State was considered at the Rome Diplomatic Conference? Kimberly Prost and Claus Kress, delegates at the Rome Conference, write in Otto Triffterer's Commentary that "it was the inviolability of diplomatic premises that was at the heart of the debate on article 98 para. 1".[29] One can imagine how an overzealous State might use the pretext of a request for assistance from the Court to trespass on the inviolability of diplomatic premises.

Article 98(1) does not refer to all "obligations" or all "obligations under international law" but rather specifically "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State[.]" The phrase "with respect to the State or diplomatic immunity of a person or property of a third State" must have had meaning, or it would not have been included. One aspect of that meaning is readily explainable, even without the question of arrest of high state officials. For example, one might suggest that the ICC may not order that the bank accounts and other property of States and diplomats would be subject to seizure, if that violated the specific obligations under international law in question. Again, Article 119(1) clearly indicates that such questions must ultimately be resolved by the ICC itself.

F. The Continuing Function of Article 98(1) with Respect to Diplomatic Immunity is Unclear

The Malawi Decision is not clear as to whether, in analyzing head of State immunity of President Al Bashir, it is considering the "State […] immunity of a person" or the "diplomatic immunity of a person". The only specific reference to diplomatic immunity is the brief mention of the decision of the International Military Tribunal for the Far East denying the relevance of diplomatic immunity to the prosecution of Hiroshi Oshima, the Japanese Ambassador in Berlin.[30] This is in a list of citations intended to settle the question "whether, under international law, either former or sitting heads of States enjoy immunity in respect of proceedings before

29 C. Kress & K. Prost, *supra* note 24, 1607.

30 Malawi Decision, *supra* note 3, 14, para. 27, citing The Tokyo Judgment, The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948, Volume I, Röling and Rüter (eds), (1977), 456.

international courts".[31] Head of State immunity is not specifically mentioned in Article 98, requiring those looking for a head of State immunity to find it by implication somewhere else in the text. "State immunity" and "diplomatic immunity" are often used in a somewhat loose manner, so a specific look at each is helpful.

To determine whether President Al Bashir is covered by diplomatic immunity, one can look at Article 1 of the Vienna Convention on Diplomatic Relations,[32] specifically Article 1(e) ("A 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission")[33] and Article 31(1) ("A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.").

Any attempt by the Court to request the arrest or surrender of accredited diplomatic agents of a third state (widely interpreted as a non-State Party) would be subject to a legitimate objection under Article 98(1).

What is the purpose of diplomatic immunity? There are a variety of potential answers,[34] but perhaps the most widely accepted answer is present in the Chapeau of the Vienna Convention on Diplomatic Relations, namely: "the purpose of such privileges and immunities is not to benefit individuals *but to ensure the efficient performance of the functions of diplomatic missions*" (emphasis added).

There is no evidence that President Al Bashir was formally recognized as a diplomat by Chad or Malawi. This is unsurprising, as his presence would not be necessary to ensure the efficient performance of the functions of diplomatic missions. The accredited Sudanese diplomatic corps can do that for Sudan without President Al Bashir's personal presence. Neither the letter nor the spirit behind diplomatic immunity supports lending President Al Bashir such immunity.

31 Malawi Decision, *supra* note 3, 12, para. 22.

32 Vienna Convention on Diplomatic Relations, UN Doc. A/Conf.20/13; 500 U.N.T.S, 95; 55 *American Journal of International Law* (1961) 4, 1062; U.K.T.S. No. 19, (1965). The Convention is widely considered to codify customary international law on diplomatic immunity.

33 Further specifying in Article 1.a "The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity" and in Article 1.d "The "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank".

34 See L. J. Shapiro, 'Foreign Relations Law: Modern Developments in Diplomatic Immunity', *New York University Annual Survey of American Law* (1989), 281-306, 282-283.

Because there is no explicit claim of diplomatic immunity, one may reasonably assert that diplomatic immunity remains relatively untouched by the Malawi Decision. That said, there are a few potential problems with this assertion.

First, there is the reference to the diplomatic immunity of Ambassador Hiroshi Oshima. This may have only been intended as relevant by analogy, if head of State immunity is considered to be purely an aspect of state immunity. Alternatively, and counter to the analysis above, head of State immunity could be seen as an aspect of diplomatic immunity. A third possibility is that head of State immunity is somehow an amalgam of the two. One influential monograph states on head of State immunity that "Former simple certainties gave way to more complex considerations, leading to the emergence of a body of rules which is in many respects still unsettled, and on which limited State practice casts an uneven light."[35] Or, as Hazel Fox notes in *The Law of State Immunity* on head of State immunity, "[T]here have been differences as to whether these immunities are special to the holder or merely aspects of State or diplomatic immunity."[36] While this author does not believe diplomatic immunity is directly implicated by the Malawi Decision, given the contested and ambiguous status of head of State immunity, others may disagree.

Second, one could assert that the power to find the immunity attached to the head of State inapplicable necessarily includes the power to disregard the immunity of mere diplomats. There is widespread support for the proposition that while the scope of head of State immunity may be contested, it is at least the equivalent of the immunities attached to diplomats. From a perspective limited to the question of the power to interfere with sovereignty, one might say that the power to order the arrest of a sitting head of State is such a great intrusion on sovereignty, that not also being able to disregard diplomatic immunities would be absurd. While this is an understandable perspective, it does fail to concern itself with the particular emphasis of modern international criminal law in general and the ICC in particular on prosecuting senior leadership. This will be explored further in Part J of this article (regarding the balancing of maximands).

Due to the lack of clarity with respect to the Malawi Decision and the unsettled nature of the law on head of State immunity, the effect of Article

[35] A. Watts, 'The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers', Recueil de Cours, 247 (1994-III), 52.

[36] H. Fox, *The Law of State Immunity*, 2nd ed. (2008), 686.

98(1) after the Malawi Decision on diplomatic immunity is ultimately unclear. As described in Part E, immunity regarding property, whether through diplomatic immunity or State immunity, is probably unaffected by this decision. The Malawi Decision could be read as implying that diplomatic immunity of a person is not a constraint on the ICC when it requests cooperation or surrender. The better reading, however, is that the Malawi Decision leaves diplomatic immunity untouched, although hardly reinforced.

G. The Continuing Function of Article 98(1) with Respect to State Immunity of a Person Aside from Heads of State or Government is Unclear

The Malawi Decision does not precisely identify the source of head of State immunity in Article 98(1), and indeed Article 98(1) does not explicitly mention head of State immunity. As described in Part F, diplomatic immunity is not a promising source for head of State immunity in Article 98(1). That leaves State immunity as a source for head of State immunity.

As described in Jürgen Bröhmer's article *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*,[37] State immunity, diplomatic immunity, and head of State immunity can be (and to Bröhmer, should be) considered separate concepts.[38] Bröhmer continues in his later article, *Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three*: "Diplomatic immunity is enjoyed by (former or present) diplomats only, head of State immunity is tied to being or having served as head of State and State immunity is tied to being a State." [39] Similarly, Oppenheim's International Law states "The law relating to the position of Heads of State

37 J. Bröhmer, 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator', 12 *Leiden Journal of International Law* (1999) 2, 361-371.

38 *See also* e.g. J. L. Mallory 'Resolving the Confusion Over Head of State Immunity: The Defined Rights Of Kings' (particularly "Head of State Immunity Distinguished from Sovereign and Diplomatic Immunity"), *86 Columbia Law Review* (1986) 1, 169-197.

39 J. Bröhmer, 'Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three:', 13 *Leiden Journal of International Law* (2000) 1, 229, 233.

abroad has affinities with, but is now separate from, that relating to State immunity (which has a common origin in the identification of a sovereign with his State) and the treatment of diplomatic envoys (who also represent sovereign States)."[40]

That said, there is a widespread view that head of State immunity is implicated by Article 98(1), even though it is not specifically listed. Perhaps Article 98(1) could have been written more explicitly to clearly indicate that it did or did not include head of state immunity. It is possible that the ambiguity on this point and other points was by design, given the unsettled state of the law on this issue.

The Malawi Decision implies, however, that under the ICC's jurisprudence thus far head of State immunity is implicated by Article 98(1). Otherwise, Article 98(1) would not be considered in tension with Article 27(2) with respect to head of State immunity.[41] If head of State immunity is considered an aspect of State immunity, does it naturally follow that all State immunity referenced by Article 98(1) has been made ineffective with respect to requests from the ICC?

This question raises similar questions as the question of the impact of the Malawi Decision on diplomatic immunity. One might assert that issuing an arrest warrant against a sitting head of State is such an infringement of sovereignty that it would be absurd to cavil at lesser violations of sovereignty. However, if the jurisprudence develops in a manner that focuses on a balance between the multiple goals of preserving diplomatic intercourse while convicting the most culpable and providing a right to remedy, one can imagine a differentiated approach to diverse claims of State immunity. Immunity attached to being a member of a special mission might also be considered part of State immunity, but might be protected for the same reason diplomats and diplomatic premises might be protected even while head of state immunity is essentially disregarded.

H. A Note on Prosecutor v. Tihomir Blaskić

When considering the interaction between immunities related to property and those related to persons, it is interesting to reflect on the 29 October 1997 decision regarding, *inter alia*, the power of the International

40 R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (1992), Vol. I, Part 3, para. 447, 1034.

41 Malawi Decision, *supra* note 3, 18, para. 37.

Criminal Tribunal for the former Yugoslavia (ICTY) to issue binding orders and requests to States and individuals regarding evidentiary materials (Blaskić Decision).[42] It does not directly address the power to arrest. Nonetheless, in context, this decision demonstrates that the power to act against traditional notions of sovereignty in a profound, high-profile manner (e.g. demand the arrest of a sitting head of State and government) does not imply the power to act in what might be considered a low-profile, minor impingement upon sovereignty (e.g. require a government agent directly to produce a document). The Blaskić Decision was well-known at the time, and the issues raised therein would likely have been in the minds of those crafting Article 98 as well as Article 72 (regarding the "Protection of National Security Information").

Despite the supremacy of the ICTY over national judiciaries, the Appeals Chamber found that the ICTY could not address binding orders to a State official acting in their official capacity under Article 29 of the ICTY Statute (regarding "Co-operation and judicial assistance").[43] State immunity did not prevent the ICTY from ordering binding orders and requests to States, nor could States withhold documents and other evidentiary materials, yet nonetheless the Appeals Chamber found it crucial to quash a *subpoena duces tecum* addressed to the Croatian Defense Minister and Croatia, allowing only a binding order addressed to Croatia alone.[44]

By 1999, it was shown that the ICTY considered that it had the authority to indict a sitting head of State and head of government,[45] despite the ban on addressing binding orders under Article 29 to State officials acting in their official capacity. While both an indictment for sitting head of State and an order addressed to a State official acting in their official capacity might be considered interferences with sovereignty, the Blaskić Decision demonstrates the capacity of international tribunals to take nuanced approaches to the questions of how the demands of the customary international law of immunity can interact with a functioning international criminal tribunal.

42 *Prosecutor v. Tihomir Blaskić*, Judgment, IT-95-14-108bis: Blaskic (Interlocutory), 29 October 1997.

43 *Id.*, 57.

44 *Id*., 58.

45 Slobodan Milosević had not yet been removed from power when the initial indictment ('Kosovo') was issued on 22 May 1999.

I. The Absence of the Term "Arrest"

Article 98 does not mention arrest. One might reasonably wonder whether this was merely an oversight, and ask what conclusions may be drawn from the absence of this term. Amnesty International places significant emphasis on this absence, suggesting that given a warrant for an arrest, the proper procedure is to object under Rule 195(1), but until a decision is made on that objection, the State Party is obliged to arrest the individual involved.[46]

Prof. Gaeta's framework is helpful in analyzing this suggestion. Article 98 is first and foremost binding upon the ICC itself. The obligations of the receiving State are a separate question. The ICC is bound not to issue requests that violate Article 98. While the text of Article 98 does not mention arrest, an arrest warrant that required the arrest and surrender of an individual to the ICC necessarily involves consideration of Article 98, as an arrest warrant issued by the ICC does not simply suggest that the suspect is arrested without being surrendered. Therefore, for the purposes of analyzing the restrictions on the ICC, the absence of the term "arrest" does not make a material difference. The Office of the Prosecutor should not pursue, and no Pre-Trial Chamber should permit, any request for surrender that in their own estimation would violate Article 98 regardless of the absence of the term "arrest."

For the State who objects to a warrant for an arrest, however, the situation may be slightly different. While the State may consider a warrant for arrest to constitute a violation of Article 98, Amnesty International's argument is plausible that the absence of the term "arrest" may have been intentional, and implies that a State Party must obey even an arrest warrant that the State believes violates Article 98, at least to the degree of arresting the subject of the warrant and filing an objection to surrender under Rule 195(1). This is buttressed by the ultimate finding of the Malawi Decision, that the failure to submit the issue of President Al Bashir's immunity to the Chamber was a separate failure from the failure to arrest and surrender President Al Bashir.[47]

One might imagine that, should such a Rule 195(1) objection be ultimately successful after an arrest was carried out, the sending State would

[46] Amnesty International, 'Bringing Power to Justice: Absence of Immunity for Heads of State Before the International Criminal Court (2010)', IOR 53/017/2010, 52.

[47] Malawi Decision, *supra* note 3, 21.

not be satisfied with the analysis that the ICC made the receiving State act against its own evaluation of international law of immunities. This might particularly be the case in the somewhat unlikely scenario that an ICC arrest warrant against a sitting head of State was sealed and the arrest came as a surprise to the sending of State. That said, much as the International Military Tribunals at Nuremburg and in the Far East put potential war criminals on greater notice that they might be held to account on an individual basis, so might sending States be said to be on greater notice that State officials indicted by the ICC are subject to the ICC's own interpretation of the international law of immunities.

With the growing jurisprudence on this subject, those who have reason to believe they may be arrested despite a colorable claim of immunity are at least on somewhat better notice that their claim of immunity may not always succeed. The greater the possibility that such claims will not be honored, the greater the detrimental effect on the goals behind the international law of immunity. The potentially chilling effect on face-to-face high-level diplomatic discourse and traditional notions of sovereignty may be weighed against the international law norms and human rights norms, as well as eventually the general legal norm towards certainty and clarity.

J. Conclusion: Balancing Multiple Maximands

Article 98 does not purport to provide a definitive answer to the current state of the international law of immunity. International criminal law faces the difficult problem of integrating and making meaningful multiple conflicting traditions, particularly the universality of human rights (and to some degree the law of armed conflict) with the restrictions of classical public international law on immunities and criminal law, not to mention the idea from human rights law to a right to a remedy.[48] Implementing the international law of immunity in a modern international criminal law context is a difficult issue, which the International Law Commission cannot come to a consensus on. Broadly speaking, it is an issue the Institute of International Law has had to revisit repeatedly, in 1891, 1954, 1991, 2001,

[48] For an intriguing analysis of these tensions, see D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* (2008) 4, 925-963.

and 2009.[49] The House of Lords of the United Kingdom, when faced with the extradition of Augusto Pinochet, was wrestling with a difficult related conundrum in which reasonable people (including the Lords themselves) disagree.[50] Article 98 provides the contours of how the ICC must evaluate the international law of immunity in the context of its requests. In determining the legality of its own requests and the responses to those requests, the ICC must evaluate the current state of the international law of immunity and how it applies to the situations before it. Different institutions, such as the International Court of Justice, may resolve the tensions between various traditions in ways that conflict with the ICC.

In evaluating the effect of Article 98, the judges of the ICC may be faced with surprising possibilities. For example, is it possible that heads of State may receive less protection under the international law of immunity than diplomats or mere property? The suggestion, at first glance, may seem absurd. Head of State immunity is arguably of a longer pedigree than State immunity and diplomatic immunity. Heads of State enjoy privileges ordinary diplomats lack. Interference with the head of State has traditionally been seen to have been of an attack on sovereignty of a higher magnitude than interference with the immunity of a diplomat. From the perspective of protecting the sovereignty of States, one might ordinarily begin and end with an emphasis on protecting the "sovereign," or head of State. But there are other perspectives – that of the demand of international criminal law to punish the culpable, and that of the right to a remedy under human rights law. ICC judges may wish to look towards the initial impetus for including Article 98—the inviolability diplomatic premises.[51]

[49] *See* Institute of International Law, 'Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crime' (2009) available at http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf (last visited 2 May 2012). ("Mindful that the Institute has addressed jurisdictional immunities of States in the 1891 Hamburg Resolution on the jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the 2001 Vancouver Resolution on immunities from jurisdiction and execution of heads of State and of Government in international law").

[50] E.g. 'Regina v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet', 37 International Legal Materials (1998) 6, 1302-1339.

[51] C. Kress & K. Prost, *supra* note 24, 1607.

As with the ICTY Appeals Chamber in the Blaskić Decision, the ICC must take into account and be restrained by considerations of sovereignty while still seeking to pursue the object and purpose of the Rome Statute and of the larger tradition of international criminal law. Some, like Dapo Akande,[52] believe the conflicts between various traditions can be elided, at least in this case, by reading a requirement to waive immunities into the command from the United Nations Security Council to cooperate with the ICC. Others may believe that such cooperation does not necessarily imply a waiver of the relevant immunities.

It is unclear how this might play out with respect to cross-border crimes that do not rely on a United Nations Security Council referral. For example, these issues may be raised with respect to a prosecution regarding the crime of aggression once the amendments to the Rome Statute regarding that crime enter into force. The Review Conference at Kampala, Uganda did not clarify the contours of the law to be applied under Article 98, nor did they support a robust immunity regime. To the contrary, the *Historical review of developments relating to aggression* (2002)[53] clearly supported (following *America v. Ernst von Weizsäcker et al.*) that heads of State had been historically prosecuted for aggression, unshielded by immunity.

The emphasis on holding the leadership of organizations and States accountable in international criminal courts and tribunals is not limited to the crime of aggression at the ICC. It is echoed in the choices of Prosecutors, the language surrounding the completion strategy of the ICTY and of other tribunals, and in the logic of holding those most culpable to account. Article 98, and the ICC jurisprudence thus far, leave many areas of ambiguity as to the application of the international law of immunity. The absence of such terms as "arrest" (as well as "assistance" or "property" in Article 98(2)) leave open questions as to the applicability of Article 98 in various situations not yet before the ICC. Should the ICC in the future make

52 *See* e.g. D. Akande and S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *21 European Journal of International Law* (2010) 4, 815–852; '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, 333-352; D. Akande, 'International Law Immunities and the International Criminal Court', *98 American Journal of International Law* (2004) 3, 407-433; D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *Journal of International Criminal Justice* (2003) 3, 618-650.

53 *Historical review of developments relating to aggression,* Preparatory Commission for the International Criminal Court, PCNICC/2002/WGCA/L.1, 24 January 2002, 56.

decisions at odds with others views on immunity, the answer may be found in the traditions informing international criminal law, as an important addition to the language of the Rome Statute itself.

Multiple maximands in competition with one another cannot each be fully realized. They must be balanced. Each honoring of an existing immunity may be seen as an ongoing violation of the right to a remedy. Each depreciation of an immunity in the name of punishing the culpable will be seen by some as an attack on the foundations of the international system. It will often be impossible to fully realize the objectives of multiple legitimate legal traditions. Under Article 119(1) of the Rome Statute, the ICC will have to resolve the continuing function of Article 98 as disputes continue to emerge.

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Sovereign Debt Crises as Threats to the Peace: Restructuring under Chapter VII of the UN Charter?

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Abstract

Sovereign debt crises might significantly decrease the level of socio-economic rights enjoyment for the population in the affected state. According to recent data, they even increase the risk of civil unrest. However, the resolution of sovereign debt crises is compromised by legal obstacles which result from the absence of a statutory, obligatory bankruptcy procedure for states. On the one hand, creditors might refuse to accept an exchange of their debt instrument in the frame of a workout and choose to litigate against the state. On the other hand, states might worsen their situation by unnecessarily delaying inevitable workouts. This article explores whether and to what extent the powers UN Security Council could be deployed in order to mitigate these problems. This requires a reconsideration of the concept of peace in Article 39 UN Charter. The article concludes that, at the request of the International Monetary Fund (IMF), the Security Council might put a stay on the enforcement of creditors' claims or order workout negotiations.

A. Introduction

"Right behind the German tank / drive the trucks of Dresdner Bank"[1]. This is how a saying went in Germany during the Second World War. As cynical as it may have been, there was some truth in it. Arguably, sovereign debt constrains played a role in the outbreak of the Second World War. In recent years, more and more data has become available which reveals a correlation between sovereign debt crises and the outbreak of civil wars. Hence, excessive debt seems to be a potential threat to peace, if peace is understood in a negative sense as the absence of armed conflict. Moreover, excessive debt might reduce the ability of the State to provide basic services to its population such as health and education. This might threaten peace as understood in a more positive sense, such as the enjoyment of basic socio-economic rights. To safeguard peace in a negative and positive understanding, debt crises require timely, efficient and fair debt workouts, including possible debt relief, in order to stabilize the financial situation of the affected State (B.).

[1] Original: "Nach dem ersten deutschen Tank kommt sofort die Dresdner Bank" (transl. by the author).

However, several factors might delay such workouts. They result from the informal and voluntary character of the international legal framework for sovereign debt workouts. First, private creditors may opt to sue the State for the full amount of the debt. Indeed, so-called vulture funds have repeatedly initiated court proceedings in order to reclaim the nominal value of bonds purchased at much lower market prices. This disrupts indebted countries' efforts to restructure their debt and achieve a timely settlement. Second, the indebted State might miss the opportunity to avoid a debt crisis or mitigate its effects by a workout at an early stage. Since workouts usually entail adjustment measures, they are costly for the government of the indebted State. This might lead to unnecessary delays which increase a potential threat to the peace in both its negative and positive meaning (C.).

International organizations, and in particular the United Nations Security Council, are charged with the maintenance of peace and security. Ultimately, the correlation between sovereign debt crises and threats to the peace raises the question of whether and to what extent international organizations have the power to take action in sovereign debt crises. This article proposes that the powers of the UN Security Council should be used in order to overcome the mentioned lacunae in the legal framework before a situation aggravates and leads to the outbreak of civil unrest or compromises the realization of socio-economic rights. The proposal entails some intricate legal questions. First, conflicts of competence might arise between the Security Council and the IMF. The Security Council should not develop its own debt policy, but work in close cooperation with the IMF. Second, this proposal requires a reconsideration of the concept of peace stipulated in Article 39 of the UN Charter, the threshold for the power of the Security Council to adopt binding resolutions. Third, the rights of sovereign debtors need to be respected. They should not find themselves in a less favorable situation than in a "normal" debt workout. Otherwise, States might find their measures implementing a Security Council Resolution restructuring sovereign debt challenged before domestic courts (D.).

B. Correlations between Sovereign Debt Crises, Armed Conflict, and the Realization of Socio-Economic Rights

A growing literature claims that there is an intrinsic connection between situations of economic distress, in particular sovereign debt crises, and the likelihood of domestic or international armed conflict. Timothy

Mason has argued that, although Nazi Germany had been determined to wage war on its neighbouring States at some point in any case, economic and fiscal constraints were crucial for the timing of the Second World War. Germany's pre-war economy was organized around massive government expenditures on rearmament and infrastructure that required price and wage controls and piled up huge deficits, which led to a "flight into war"[2] in order to squeeze the occupied territories economically.[3]

While Nazi Germany is certainly an extreme case which cannot (and should not) be compared with contemporary armed conflicts, data about recent conflicts unfolds a certain propensity of economic crises to trigger civil wars. A recent study by the UN Development Programme reveals a significant negative correlation between declines in Gross Domestic Product (GDP) and the outbreak of civil wars.[4] Although most of the literature focuses on economic conditions in general,[5] or the availability of natural resources and their likelihood to lead to civil unrest,[6] Chapman *et al*. have studied the impact of the financial situation of governments on civil unrest. Analyzing government bond spreads and government credit ratings for 19 countries, and government credit ratings in an additional set of 41 countries, they observe a negative correlation between exogenous shocks on a country's creditworthiness or weak domestic economic performance, and the outbreak of internal violence. Thus, maintaining access to foreign capital

2 T. Mason, 'The Primacy of Politics. Politics and Economics in National Socialist Germany', in S. Woolf (ed.), *The Nature of Fascism* (1968), 165-195.This view is not uncontroversial, see T. Mason & R. Overy, 'Debate: Germany, 'Domestic Crisis' and War in 1939', 122 *Past and Present* (1989) 1, 205-221. In any case, with the beginning of the war, Germany suspended payments on external debt. K. Reinhart & K. Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (2009), 96 (table 6.4) list Germany as defaulting in 1939.

3 On the latter aspect G. Aly, *Hitlers Volksstaat. Raub, Rassenkrieg und nationaler Sozialismus*, 2nd ed. (2006).

4 N. Kim & P. Conceição, 'The Economic Crisis, Violent Conflict, and Human Development', *UNDP/ODS Working Paper* (2009); see also E. Miguel, S. Satyanath & E. Sergenti, 'Economic Shocks and Civil Conflict: An Instrumental Variables Approach', 112 *Journal of Political Economy* (2004) 4, 725-753.

5 E.g. V. Koubi, 'War and Economic Performance', 42 *Journal of Peace Research* (2005) 1, 67-82.

6 E.g. P. Collier & A. Hoeffler, 'Greed and Grievance in Civil War', 56 *Oxford Economic Papers* (2004) 4, 563-595.

seems crucial for conflict prevention.[7] A case in point is Rwanda, which saw a tremendous increase in sovereign debt followed by harsh and probably belated austerity measures in the early 1990 which fuelled ethnic tensions until the outbreak of violence in 1994.[8] In line with these findings, the 2009 European Report on Development reveals that the debt burden of fragile countries stands at 73.9% and that of non-fragile countries at 18.9% of GDP.[9] Further, Azam as well as Addison and Murshed identify a lack of resources for redistribution as a main source of civil war.[10]

Certainly, domestic and international armed conflicts may have many causes, not all of which relate to economic or financial conditions. Fragile States with rich natural resources may have a low level of sovereign debt.[11] And high levels of sovereign debt might be more likely to trigger civil wars in States with pre-existing divides in society. For example, without a predisposition for ethnic tensions, genocide of such a scale would have been unlikely in Rwanda. But ethnic divisions alone do not explain the occurrence of internal conflicts, either. A model developed by Collier and Hoeffler and tested with data from conflicts in African countries between 1960 and 1992 reveals that a country's ethno-linguistic fractionalization does not significantly correlate with the likelihood of civil war, while per capita income does.[12]

Thus, contemporary research suggests that the situation that existed during the 19th century has been reversed: While debt crises formerly exposed a State to the risk of *foreign* intervention geared towards reclaiming debts, threats to the peace now originate from within the affected society. This might be the result of changed expectations about public welfare and

7 T. Chapman & E. Reinhardt, 'International Finance, Predatory States, and Civil Conflict' (29 October 2009) available at http://userwww.service.emory.edu/~erein/research/finance-conflict.pdf (last visited 2 May 2012).

8 H. Hintjens, 'Explaining the 1994 Genocide in Rwanda', 37 *Journal of Modern African Studies* (1999) 2, 256-8; M. Chossudovsky, 'Economic Genocide in Rwanda', 31 *Economic and Political Weekly* (1996) 15, 938-941.

9 G. Giovannetti *et al.*, 'Overcoming Fragility in Africa', European Report on Development (2009), 47.

10 J.-P. Azam, 'The Redistributive State and Conflits in Africa', 38 *Journal of Peace Research* (2001) 4, 429-444; T. Addison & S. Murshed, 'Debt Relief and Civil War', 40 *Journal of Peace Research* (2003) 2, 159-176.

11 Giovannetti *et al.*, *supra* note 9, 47.

12 P. Collier & A. Hoeffler, 'On Economic Causes of Civil War', 50 *Oxford Economic Papers* (1998), 563-573.

increasing dependency on public services.[13] Today, citizens expect their State to provide some essential welfare services. This seems to constitute a major source of legitimacy of the State as well as of peace.[14] The rioting unfolding at the height of the Argentinean and Greek debt crises in 2001 and since 2010, respectively, demonstrates that such expectations of governmental public welfare are not unique to the developing world.

Short of civil wars and rioting, debt crises might entail dreadful consequences for socio-economic rights enjoyment. As the ongoing European sovereign debt crisis aptly demonstrates, there is a strong correlation between sovereign debt and GDP decline. Although successful workouts might have beneficial long-term effects for growth in the affected economies, they tend to lead to a sharp GDP decline during the first year.[15] This is to some degree the result of austerity measures, such as layoffs in the civil service, cuts in government spending, and similar measures of contractarian fiscal policy which all contribute to GDP decline in the short term. In a certain sense, what is at work here is a reversed version of the Keynesian government expenditure multiplier.[16] Further, according to the so-called "debt overhang hypothesis", a high level of official debt decreases the rate of return of private investments because of increasing taxes and interest rates. This hypothesis emerged from observations in the aftermath of the sovereign debt crises of the 1980s, and, though not uncontroversial, has found affirmation in some studies.[17] The result is a further decline in GDP. In the end, debt crises tend to lead to declines in economic output, whether through austerity programs or taxes. The ensuing reduction in government financial capacity threatens the enjoyment of socio-economic rights.[18] The realization of education, health, and other basic social services

13 See M. Foucault, 'Governmentality', in G. Buchell & P. Miller (eds), *The Foucault Effect. Studies in Governmentality* (1991), 87-104.

14 Cf. F. Scharpf, *Regieren in Europa* (1999), 20-28.

15 E. Borenzstein & U. Panizza, 'The Costs of Sovereign Default', *IMF Working Paper* (2008) No. 238, 8.

16 J. Keynes, *The General Theory of Employment, Interest and Money* (1936), Book III, Chapter 10.

17 Defending the hypothesis: A. Deshpande, 'The Debt Overhang and the Disincentive to Invest', 52 *Journal of Development Economics* (1997), 169-187; against the hypothesis: B. Hofman & H. Reisen, 'Debt Overhang, Liquidity Constraints and Adjustment Incentives', *OECD Development Centre Working Paper* (1990) No. 32.

18 On the effects of austerity programs on socio-economic rights, see R. T. Hoffmann & M. Krajewski, 'Staatsschuldenkrisen im Euro-Raum und die Austeritätsprogramme von IWF und EU', 45 *Kritische Justiz* (2012) 1, 2, 10-13.

depends to a large extent on the financial capacity of the State. Cuts in spending on these issues tend to disproportionately affect the least well-off segments of society.[19]

Timely workouts seem to be crucial for the prevention of both internal conflicts and declines in the enjoyment of certain socio-economic rights enjoyment. Addison and Murshed emphasize the importance of prompt debt workouts in order to mitigate the risk for domestic conflict.[20] Other studies confirm that timely and effective restructurings which break the vicious circle of increasing sovereign debt and economic slowdown might reduce the likelihood of war.[21] Timely resolutions of debt crises reduce uncertainty and prevent a situation where domestic creditors buy up more and more government bonds in order to prevent default, just to be hit even harder when default finally occurs.[22] Also, the enjoyment of socio-economic rights enjoyment might benefit from timely workouts. For example, Greek government debt has experienced an almost exponential rise since 2008 with debt levels of 113% of GDP in 2008, of 129% in 2009, of 144.9% in 2010 and over 160% in 2011.[23] The later the workout, the greater the hurt is for the creditors *and* the remaining debt level.[24] Thus, one may expect early workouts to cause less severe austerity and lower decline in GDP.[25] The following section will therefore examine obstacles to timely debt workouts under the current legal framework for sovereign debt.

19 M. Dowell-Jones & D. Kinley, 'Minding the Gap: Global Finance and Human Rights', 25 *Ethics and International Affairs* (2011) 183, 190-193; instructive on the dependency of human rights enjoyment on economic preconditions is the capabilities approach, see A. Sen, 'Human Rights and Capabilities', 6 *Journal of Human Development* (2005) 2, 151-166.

20 Addison & Murshed, *supra* note 10.

21 Kim & Conceição, *supra* note 4, 9.

22 Borenzstein & Panizza, *supra* note 15, 20.

23 Data retrieved from Eurostat, available at http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsieb090&plugin=1 and http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-23042012-AP/EN/2-23042012-AP-EN.PDF (last visited 2 May 2012).

24 D. Benjamin & M. Wright, 'Recovery Before Redemption: A Theory of Delays in Sovereign Debt Renegotiations', Centre for Applied Macroeconomic Analysis Working Paper (2009) 15.

25 This idea underlies the call for prompt restructurings in Principle 15 of the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing (January 2012) available at http://www.unctad.info/upload/Debt%20Portal/Principles%20drafts/SLB_Principles_English_Doha_22-04-2012.pdf (last visited 2 May 2012).

C. Sovereign Debt Restructurings and Holdouts

I. The International Legal Framework for Sovereign Debt Workouts

Currently, there is no comprehensive, obligatory international mechanism for sovereign debt workouts.[26] At the beginning of this century, the IMF proposed a comprehensive Sovereign Debt Restructuring Mechanism which would have included an automatic stay of all claims, those of private as well as those of public creditors, as well as procedures for the negotiation of workout plans subject to the approval of a qualified majority of creditors. However, the project failed because of the reluctance of the United States to change the current system in which every creditor fights for herself.[27] Therefore, sovereign debt restructuring continues to be dominated by voluntary, informal ad-hoc arrangements: Among others, the Paris Club arranges workouts of bilateral government debt, while the London Club provides a venue for commercial banks and their sovereign debtors. The International Monetary Fund (IMF) provides various lending facilities for countries facing different needs.[28] Other arrangements like the Heavily Indebted Poor Countries Initiative (HIPC) make debt relief dependent upon *ex-ante* conditionalities, i.e. the fulfilment of multilaterally agreed policy reform plans.[29] Thus, defaulting States have no legal guarantee to get a timely, efficient, fair, and sustainable workout in case of an acute crisis. Similarly, no creditor or international institution could oblige a State to implement adjustments when default has occurred or seems unavoidable. The voluntary, consensual nature of debt workouts is the root cause of both creditor and debtor holdouts, which may delay necessary workouts (II. and III.).

[26] The existing frameworks are incomplete and need to be further developed, cf. A. v. Bogdandy & M. Goldmann, 'Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law', in C. Esposito & J. Bohoslavsky, *Responsible Sovereign Financing: The Search for common Principles* (2012), forthcoming.

[27] J. Kämmerer, 'State Bankruptcy', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), margin notes 17-19.

[28] Cf. http://www.imf.org/external/about/lending.htm (last visited 29 April 2012).

[29] For a detailed analysis of this regime see L. Guder, *The Administration of Debt Relief by the International Financial Institutions – A Legal Reconstruction of the HPIC Initiative* (2009), 131-190.

II. The Problem of Private Creditor Holdout Litigation

Not every private creditor has an interest in holdout litigation. Indeed, commercial banks usually have an interest in continuing their sovereign lending business. The syndicated loans which they often extend to sovereign borrowers are multiparty agreements. Commercial banks which do not agree to workouts affecting such loans but sue the defaulting State for the full amount of their debt might be excluded from the next deal by their peers. In terms of game theory, they participate in a repeated, highly transparent prisoner's dilemma, which mitigates the incentive to free ride.[30]

However, other investors play different games, which increase their incentive to free ride. Vulture funds usually do not participate in repeated games. They only search for singular occasions to earn exceptional returns at high risks. Usually, they buy sovereign debt at huge discounts from the nominal value. Instead of agreeing to a workout plan, they sue the debtor State for the nominal amount plus interest.[31] This might trigger, intensify or prolong a debt crisis and cause the above-mentioned consequences. The case of Zambia is illustrative of this. In 1979, Romania borrowed Zambia 15 million USD for agricultural equipment. More than 20 years later, Zambia saw itself unable to service this debt. It negotiated a settlement with Romania that would have reduced the outstanding debt to 3 million USD. However, Romania sold the loan to a vulture fund before the conclusion of the settlement. The fund sued Zambiain English courts for 40 million USD for the full amount of the debt plus costs. The court recognized Zambia's liability in principle.[32] Payment of this amount would have eliminated the positive effects of official debt relief and might have compromised

30 G. Norman & J. Trachtman, 'The Customary International Law Game', 99 *American Journal of International Law* (2005) 3, 541, 558-560.

31 H. Scott, 'A Bankruptcy Procedure for Sovereign Debtors', 37 *The International Lawyer* (2003) 1, 103, 116-117.

32 *Donegal International Ltd. v. Republic of Zambia et al.*, 15 February 2007, [2007] EWHC 197 (Comm.); M. Waibel, 'Elusive Certainty – Implications of Donegal v. Zambia', rightly points out that it would have come worse for Zambia had the High Court recognized not only its liability in principle, but also the plaintiff's entitlement to full damages. The Court's imprecise findings regarding the amount of damages due might have incentivized the parties to settle at a relatively low sum compared to other holdout litigation, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566490 (last visited 2 May 2012).

Zambia's social services.[33] The parties eventually settled for 15.5 million USD.

Today, at least five legal developments facilitate holdout litigation by private creditors, which has become a frequent phenomenon.[34] First, much sovereign debt today is in the form of bonds, not syndicated loans. While developed economies have long had a preference for treasury bonds, developing and emerging economies have been issuing bonds in particular since the inception of the Brady plan in the late 1980s.[35] This plan allowed them to exchange their non-performing loans into bonds backed by American or German government securities. As exchange-traded securities, bonds have more liquidity than syndicated loans and therefore became an attractive investment for different groups of investors.[36] The other side of the coin is that the relationship between sovereign debtors and their bondholders is more bilateral. Without syndicates, there is no group pressure or potential sanctioning power to prevent individual debtors from free riding and undermining a workout.[37] But even without vulture funds, bonds increase the practical difficulties of organizing consensual workouts because of the sheer number of creditors.[38]

Second, sovereign immunities are usually inapplicable to modern sovereign debt instruments. Virtually all of them contain provisions waiving jurisdictional immunities.[39] In addition, debt instruments are considered to be commercial transactions (*acta iure gestionis*), to which jurisdictional immunities no longer apply under customary international law.[40]

33 Oxfam, 'Oxfam and Jubilee call for action as Vulture swoops on Zambia's cash' (15 February 2007) available at http://www.oxfam.org/en/node/128 (last visited 2 May 2012).

34 For an overview of notable cases see U. Panizza, *et al*, 'The Economics and Law of Sovereign Debt and Default', 47 *Journal of Economic Literature* (2009) 3, 651, 655-659.

35 J. Fisch & C. Gentile, 'Vultures or Vanguards? The Role of Litigation in Sovereign Debt Restructuring', 53 *Emory Law Journal* (2004) Special Edition, 1043, 1063ff.

36 *Id*., 1067. The table in Scott, *supra* note 28, 104, shows a massive move from loans to bonds in the sovereign debt of developing and emerging economies during the 1990s.

37 Scott, *supra* note 31, 115.

38 M. White, 'Sovereigns in Distress: Do They Need Bankruptcy?' *Brookings Papers on Economic Activity* (2002) 1, 287, 305-306.

39 M. Waibel, *Sovereign Defaults before International Courts and Tribunals* (2011), 157; Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

40 P.-T. Stoll, 'State Immunity', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011), marginal notes 6 and 22.

Third, some vulture funds succeeded in enforcing their contractual rights. A particularly infamous example is the case of *Elliott Associates v. Republic of Peru*. Elliott had bought Peruvian loans at a discount price and refused to agree to exchange them into bonds as part of a restructuring agreement. It was granted the full amount by a US court. The court did not consider it abusive to buy debt with the intention to sue for payment.[41] A Belgian court allowed *Elliott* to enforce the US judgment by intercepting Peru's interest payments destined for creditors which had accepted the exchange offer when the funds were channeled through Belgium for settlement.[42] Another vulture fund which sought enforcement of claims arising from defaulted Argentinean bonds recently succeeded in obtaining attachments to Argentina's reversionary interest in US and German government securities pledged as collateral to Brady bonds. The securities are to be returned to Argentina by the Federal Reserve Bank of New York as part of a negotiated debt restructuring.[43]

Fourth, international investment dispute settlement opens up new avenues for holdout litigation and effective enforcement. The International Center for the Settlement of Investment Disputes (ICSID) offers a new avenue for holdout litigation. Most bilateral investment treaties are applicable to sovereign debt instruments.[44] The avalanche of cases filed against Argentina since 2001 provides ample evidence of the interest of investors to seek awards for which sovereign immunity from enforcement might not create an insurmountable obstacle.[45] Although some of the plaintiffs are retail investors which might have lost their fortune by Argentina's unilateral default, not a few of them belong to the group of "usual suspects".

Fifth, although the aforementioned developments illustrate that, from the creditors' point of view, sovereign debt is increasingly becoming "normal debt" for which no special rules apply, the legal situation of debtor States has not kept pace with this development. Sovereign debtors have

41 *Elliott Associates, L.P. v. Banco de la Nacion and The Republic of Peru*, 194 F.3d 363 (US Court of Appeals, 2nd Circuit, 1999).

42 Fisch & Gentile, *supra* note 32, 1086; L. Buchheit & J. Pam, 'The *Pari Passu* Clause in Sovereign Debt Instruments', 53 *Emory Law Journal* (2004) Special Edition, 869.

43 *Capital Ventures International v. Republic of Argentina*, 652 F.3d 266 (US Court of Appeals, 2nd Circuit, 2011).

44 K. Gallagher, 'The New Vulture Culture: Sovereign Debt Restructuring and Trade and Investment Treaties', IDEAs Working Paper (2011) 2.

45 Waibel, *supra* note 36, 318-319.

insufficient remedies available in order to fend off suits in courts. First, the defense of necessity is recognized by most courts as a possible defense in a suit by private creditors against sovereign debtors.[46] However, it may not be invoked in case the sovereign debtor has contributed to the situation of necessity; a condition which has received diverging interpretations by different tribunals.[47] Also, the defense may only be invoked as long as the state of necessity endures. Once it ceases, for example with the progressive implementation of a workout plan, free riders might litigate again.[48] Second, collective action clauses, which have become highly popular since the rejection of the IMF proposal for a sovereign debt restructuring mechanism, prevent individual investors from suing defaulting sovereign debtors unless 25% of all holders of the respective bond agree, and facilitate restructurings by majority votes of only 75% or 85%. However, large vulture funds may be in a position to buy sufficiently large amounts in order to sue or prevent restructurings, since the percentages of votes required for such moves refer only to the holders of one particular bond, not to the holders of all outstanding bonds.[49] Third, one might argue that there is at least an emerging general principle of law obliging domestic and international tribunals to stay attachments and other enforcement proceedings up to the conclusion of restructuring negotiations.[50] While such stay enjoys universal recognition in domestic insolvency law,[51] some courts have applied this rule in sovereign default cases as well.[52] Courts which at present do not stay

46 But see the decision of the German Federal Constitutional Court in its judgment of 8 May 2007, cases 2 BvM 1/03 *et al*., BVerfGE 118, 124.For a critical analysis see S. Schill, 'Der völkerrechtliche Staatsnotstand in der Entscheidung des BVerfG zu Argentinischen Staatsanleihen – Anachronismus oder Avantgarde?' 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008), 45-67.

47 See only C. Binder 'Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis', in C. Binder *et al*. (eds.), *International Investment Law for the 21st Century* (2009), 608-630.

48 M. Waibel, 'Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*', 20 *Leiden Journal of International Law* (2007) 3, 637.

49 Gallagher, *supra* note 44, 12; Fisch & Gentile, *supra* note 32, 1094-1095.

50 We make this point in v. Bogdandy & Goldmann *supra* note 23.

51 International Law Association, 'State Insolvency: Options for the Way Forward', Report of the Sovereign Insolvency Study Group, The Hague Conference (2010), 23.

52 Supreme Court of New York, *Crédit francais, S.A. v. Sociedad financiera de Comercio, C.A.*, 128 Misc.2d 564 (1985); US Court of Appeals, Second Circuit, *EM Ltd. v. Argentina*, Summary Order, 05-1525-cv, 13 May 2005 (this decision lacks precedential value).

proceedings in order to protect workout negotiations might be more willing to do so if all creditors had the right to participate in workout negotiations in the Paris and London Clubs and similar venues. But as long as this does not change, it might be necessary to have more effective legal remedies available against holdout litigation which triggers, deepens or prolongs a debt crisis with all its consequences. Anne Krueger described the risk of holdouts as one of the reasons why sovereign debtors delay restructurings longer than it is healthy for their economy.[53] Since States provide essential public services to billions of people every day, they should not be prevented from necessary, timely, and efficient restructurings by formally legal, but morally questionable creditor holdouts.

III. The Problem of Debtor Holdouts

Unlike bankruptcy proceedings under domestic law, negotiations about sovereign debt workouts require the consent of the debtor State. This facilitates debtor holdouts. Governments of heavily indebted States have a number of incentives to avoid negotiations about workouts at an early point in time, before they actually have to suspend payments on their outstanding debt. There is no free lunch in debt workouts. They almost invariably require adjustment programs, whether in the form of IMF conditionalities or in other aspects. As a consequence, the government of the debtor State will have to implement policy reforms which might create hardship for parts of the population or economy at least in the short run. They might have to cut back public services or lay off public employees and will face restricted access to international capital markets for a considerable period of time.[54] In addition, an impending workout might lead to capital flights from the defaulting State in anticipation of currency depreciation or higher inflation in order to deplete domestic debt (including private savings), or both. For these reasons, governments might be less inclined to tackle their debt problem at the earliest possible occasion and rather postpone it until after the next election. In the meantime, however, things might worsen, resulting in a much more dramatic debt crisis.

53 A. Krueger, *A New Approach to Sovereign Debt Restructuring* (2002)

54 C. Richmond & D. Dias, 'Duration of Captial Market Exclusion: An Empirical Investigation' (2009) available at http://ssrn.com/abstract=1027844 (last visited 2 May 2012), report a median of 7 years until countries regain full access to capital markets. The period is shorter if natural disasters were the cause of default.

This incentive structure is not mere theory. Recent empirical research revealed the unwillingness of governments to default on sovereign debt as the main cause for delays in sovereign debt restructurings.[55] Other research which emphasizes positive effects of protracted debt negotiations does not necessarily contradict these results. It finds that delays in restructurings might allow a State to wait with the workout until the economy has regained strength and thereby mitigate the adverse effects of adjustment programs and the market reactions described above.[56] However, this presupposes that States still have sufficient resources in order to bridge the time between the first signs of a debt crisis and economic recovery. Economic recovery is difficult to forecast. In the worst case, a State might default at the height of a recession. By contrast, timely workouts might require less adjustment and cause less turbulence on the markets. Therefore, the present international legal framework for sovereign debt workouts appears to be insufficient in that it leaves it to the discretion of the debtor State to decide whether and when to restructure. This is another reason for looking into the possibility of Security Council action.

D. The UN Security Council: Sovereign Debt Crises as Threats to the Peace?

I. Security Council Action as Legal Assistance for the IMF

Certainly, the Security Council is not the first organization one might expect to resolve sovereign debt crises. The resolution of debt crises falls squarely within the powers of the IMF, which has the necessary competence, experience, and funds to intervene in most debt crises. However, the IMF lacks the competence to take decisions against creditor or debtor holdouts which bind all States. IMF lending facilities require the consent of the debtor State, and it would be difficult to use the proceeds to

55 C. Trebesch, 'Delays in Sovereign Debt Restructuring. Should we really blame the creditors?' (2008) available at http://www.cid.harvard.edu/Economia/papers/Rio%202008/Trebesch%202.pdf (last visited 2 May 2012). Identifying democratic government as a factor contributing to debtor holdouts: H. Enderlein, *et al*, 'Sovereign Debt Disputes. Testing the role of politics and institutions in financial crisis resolution', *paper presented at the Political Economy of International Finance (PEIF) Conference in Claremont* (2008).

56 R. Bi, 'Beneficial Delays in Debt Restructuring Negotiations'. *IMF Working Paper* (2008) No. 38.

pay holdout creditors. At least, this would have to be part of the loan agreement, and the IMF might be unwilling to use loans to pay back holdout creditors, since it usually claims the highest priority as a *de-facto* lender of last resort. It therefore seems worthwhile to think about other mechanisms in the present international legal order which might lend themselves to emergency actions against creditor or debtor holdouts.

In contrast to the IMF, the Security Council not only has the necessary powers to take binding decisions pursuant to Chapter VII of the UN Charter.[57] For example, in order to mitigate the effects of creditor holdouts, the Security Council could oblige States to implement appropriate legislative or administrative acts in order to reach a stay of ordinary and enforcement proceedings against a particular State up to the conclusion of ongoing negotiations. The Council could also impose a stay on the execution of ICSID awards. By virtue of Article 103 of the UN Charter, this decision would take precedence over the obligation of States arising under the ICSID Convention. In case of debtor holdouts, the Security Council could oblige a defaulting State to negotiate a debt workout with its creditors and impose a procedural framework for such negotiations as well as minimum substantive requirements such as respect for essential socio-economic rights. Ordering emergency payments might be difficult to achieve since the Security Council itself does not dispose of the necessary financial resources. In addition, ordering other States or the IMF to bail out a defaulting State would put a premium on creditor holdouts or delay necessary adjustments.[58] Obliging a State to implement a specific adjustment program without negotiations or other means of participation might only be justified in cases of extreme urgency, as it conflicts with the idea of ownership which guides IMF conditionalities in order to ensure their acceptance by the defaulting State and its population.[59] In addition, short of such intrusive measures, the mere threat of Security Council action might induce debtor States and their creditors to agree on timely and sustainable solutions. But such highly intrusive measures might not be necessary. International financial markets would probably stop lending to a State as soon as the Security Council orders it to negotiate a workout and thereby effectively force it into such negotiations. This might render claims arising

57 Cf. Art. 25 Charter of the United Nations.

58 Cf., however, J. Kämmerer 'Der Staatsbankrott aus völkerrechtlicher Sicht', 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005), 651, 660-662.

59 Cf. IMF, Guideline on Conditionalitiy (2002), para. 3.

from new credit agreements concluded after this point unenforceable before domestic or international tribunals.

While the UN Security Council has the legal powers to take the necessary action against creditor and debtor holdouts, it certainly cannot compete with the IMF regarding the institutional knowledge and experience in matters of sovereign debt crises. It would not be advisable for the UN to double the work of the IMF. Therefore, the UN Security Council might follow a policy of cooperation with the IMF and only act upon the request of the latter. In domestic legal orders as well as in international relations, such a relationship is known as legal assistance. Such assistance usually requires both organizations to have the competence *ratione materiae* to deal with the respective situation.[60] Thus, it needs to be established under what conditions debt crises might constitute a threat to the peace as required by Article 39 of the UN Charter.

II. The Concept of Peace in Article 39 UN Charter

According to Article 39 of the UN Charter, any use of the Security Council's Chapter VII powers requires at least the existence of a threat to the peace. Although the Security Council enjoys broad discretion in the interpretation of these notions, it needs to respect the limits imposed by this and other Charter provisions, not only as a matter of the rule of law, but also because its resolutions might be challenged before the International Court of Justice[61] or the European Court of Justice, as the Kadi case has shown.[62] This raises the question whether and when a sovereign debt crisis might amount to a threat to the peace. Does this threshold necessarily require a high likelihood of serious civil unrest or widespread violence? Or is an impending disruption of essential welfare services or massive depreciation of the level of fulfillment of socio-economic rights sufficient to establish the existence a threat to the peace as armed violence?

60 H. Damian, 'Mutual Legal Assistance in Administrative Matters', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), margin note 3.

61 Implicitly, the ICJ assigned itself such powers of review in its Order on Provisional Measures in the *Lockerbie Case* (*Libyan Arab Jamahiriya v. United Kingdom)*, ICJ Reports 1992, 3, para. 40.

62 In Kadi, the ECJ only examined the European Regulation implementing a Security Council Resolution, see Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council*, [ECJ 3 September 2008].

Obviously, the answer hinges on the understanding of the concept of peace in Article 39 of the UN Charter. According to a narrow, negative reading, peace is tantamount to the absence of armed force. In a broader, more positive understanding, however, peace means the availability of a minimum level of what John Rawls called "primary goods", i.e. basic civil rights and socio-economic conditions which enable a life in self-determination.[63] Historically, being immediately under the impression of the Second World War, the drafters of the UN Charter had a negative concept of peace in mind, although some delegates pleaded for a more positive one.[64] The positive concept of peace gained popularity only in peace research during the 1960s based on the idea that armed force represents only one particular State on a scale ranging from complete worldwide solidarity to the complete absence thereof.[65] The text of Article 39 does not contain any particular clues. At least, it does not militate against a broad concept of peace.A systematic interpretation in the context of other provisions reveals support for both the narrow and the broad concept of peace. Article 1(2) of the Charter can be understood as stipulating a broad concept of peace. It speaks of "universal peace", which is not reduced to the absence of war, but seen to comprise "friendly relations" among equal States and the principle of self-determination. Both these elements somewhat exceed the negative concept of peace. The practice of the UN General Assembly confirms the broader meaning of Article 1(2).[66] By contrast, Article 2(4) of the Charter, the duty to refrain from the "threat or use of force", is generally understood as implying a negative concept of peace only. This reading is corroborated by the preamble and Article 44, the other Charter provisions which all contain the term "force" supplemented by the predicate "armed".[67] Since the content of these two provisions is closely connected with the issues addressed in Article 2(4), inferring an *argumentum e contrario* from the omission of the predicate "armed" in Article 2(4) seems inappropriate.

63 J. Rawls, *A Theory of Justice* (1971), Section 15.

64 See C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours* (1994) 199, 335-336.

65 J. Galtung, 'Editorial', 1 *Journal of Peace Research* (1964) 1, 1-4; J. Galtung, 'Violence, Peace, and Peace Research', 6 *Journal of Peace Research* (1969) 3, 167-191.

66 R. Wolfrum, 'Article 1', in B. Simma (ed.), *The Charter of the United Nations. Commentary*, vol. 1, 2nd ed. (2002), margin note 9.

67 A. Randelzhofer, 'Article 2(4)', in B. Simma (ed.), *The Charter of the United Nations. Commentary*, vol. 1, 2nd. ed. (2002), margin notes 16-18.

Subsequent practice such as the Friendly Relations Declaration confirms the narrow concept of peace in Article 2(4).[68]

A purposive interpretation might corroborate a broader reading of Article 39, corresponding to Article 1(2) rather than to Article 2(4) of the Charter. The correlation between armed conflict and socio-economic factors makes long-term, sustainable prevention of armed conflict dependent upon the progressive attainment of socio-economic goals. This idea has found support in the practice of the United Nations. Initiated by a policy statement in 1992,[69] the Security Council recognized non-military issues such as socio-economic conditions as potential threats to the peace. In 2005, Secretary-General Kofi Annan's programmatic report "In larger freedom" stressed the importance of reducing poverty in order to achieve peace, thereby opting for a broad approach to the concept of peace under the UN Charter.[70] Also, the 2005 World Summit Outcome and the Geneva Declaration on Armed Violence and Development recognize the linkage between development and peace and security.[71] What is more, the Council let deeds follow these words. Since the early 1990s, the Council has recognized new types of situations as constituting a threat to the peace, such as human rights violations, irrespective of their impact on other States, or the ousting of democratic governments.[72] In light of this practice, it would not amount to a tremendous step for the Security Council to include in this list imminent debt crises which might cause a deep depreciation of the level of fulfillment of socio-economic rights or even armed conflicts.

Some point out that those far-reaching powers of the Security Council might lead to conflicts of competence with the other organs of the United

68 GA Res. 2625 (XXV), 24 October 1970, first principle.

69 Note by the President of the Security Council, UN Doc. S/23500/3, 31 January 1992.

70 'In larger freedom: towards development, security and human rights for all', Report of the Secretary-General, UN Doc. A/59/2005/ paras 12-17, 25-27, 106, 140-142, 21 March 2005.

71 GA Res. 60/1, 24 October 2005, para. 72; Geneva Declaration of 7 June 2006, http://www.genevadeclaration.org/fileadmin/docs/Geneva-Declaration-Armed-Violence-Development-091020-EN.pdf.

72 E.g. SC Res. 794, 3 December1992; SC Res. 841, 16 June 1993; see Tomuschat *supra* note 64, 339 et seq.; Y. Dinstein, *War, Aggession, and Self-Defense*, 4th ed. (2005), 304; I. Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (1998),85; J.A. Frowein & N. Krisch, 'Article 39', in B. Simma (ed.), *The Charter of the United Nations. Commentary*, vol. 1, 2nd ed. (2002), margin note 7.

Nations.[73] However, it does not appear that the Charter suggests a delimitation of powers between the Security Council and other organs along the lines of subject matters, but according to the urgency of the situation. Firstly, the Charter provides already for a considerable overlap of the powers of the Security Council and the General Assembly. Article 11 of the Charter gives the General Assembly the competence to deal with matters relating to peace and security. Second, Article 12(1) suggests that the relationship between the powers of the Security Council and the General Assembly is a temporal one, not one of different subject areas ("*While* the Security Council is exercising […] the functions assigned to it […], the General Assembly shall not make any recommendation[…]" – emphasis added). This provision might simply acknowledge the fact that the Security Council is better equipped to deal with emergencies, given the small number of members and the binding character of its resolutions. Conversely, the Security Council should indeed not touch upon general questions of economic and social policy (apparently the main concern of the advocates of a narrow concept of peace for Article 39) and adopt resolutions with legislative character. The UN Economic and Social Council or the General Assembly with its broader membership and committee structure might be better positioned for such tasks. Third, even in case of emergencies, the Security Council does not have the exclusive, but only the primary responsibility for peace and security (cf. Article 24 of the UN Charter). In fact, it often acts in parallel with other organs and agencies. For example, its resolutions often relate to issues which touch upon the powers of Specialized Agencies incorporated by the UN Economic and Social Council and the General Assembly pursuant to Article 63 of the Charter, such as questions of refugee and human rights protection. And the ICJ has accepted that the General Assembly remains seized with a matter and may even file a request for an Advisory Opinion while the Security Council is addressing it.[74] Finally, following the idea of the *effet utile*, one could argue that the empirical correlations between economic difficulties and armed conflict make it even more difficult to separate powers according to subject areas. Where and when should measures preventing threats to the peace begin if they are meant to be effective? Should the Security Council only intervene when a debt crisis has destablized a State to the extent that a civil war is

[73] Cf. Frowein & Krisch, *supra* note 72, margin note 6.

[74] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 24.

about to break out? This would be imprudent given that earlier interventions may produce more sustainable solutions.

III. The Decision to Intervene and the Moral Hazard Dilemma

Having thus established that a sovereign debt crisis threatening the fulfillment of essential socio-economic rights might constitute a threat to the peace in and of itself, the Security Council needs to carefully consider the correct point of intervention. After all, not every creditor holdout triggers a sovereign debt crisis with serious consequences for the enjoyment of socio-economic rights or peace and security. If the Security Council were to make abundant use of its power to resolve sovereign debt crises, it might produce moral hazard. States might become careless about their debt level and rely on the Security Council to impose a stay on the actions of their creditors or rid them of some of their debt.

In order to keep the moral hazard problem under control, the Security Council should take into account the following three considerations. First, it might strive to make the determination of a sovereign debt crisis more objective. Thus far, there is no generally accepted standard. The Security Council could use macroeconomic indicators for such a determination, such as the ratio between the long-term growth of debt and the expected long-term per capita GDP growth based on historical data sets. Also, credit ratings and sovereign bond spreads for sovereign bonds are viable indicators for impending debt crises,[75] even though each of them has its own set of problems and should not be relied on exclusively. Economists have thought about indicators for predicting sovereign debt crises.[76] Since developed States with a history of stability might live with much higher debt/GDP ratios than developing States with a history of serial default,[77] one should

[75] On credit ratings: C. Reinhart, 'Default, Currency Crises, and Sovereign Credit Ratings', 16 *World Bank Economic Review* (2002) 151-170; on sovereign bond spreads: A. Pescatori & A. Sy, 'Are Debt Crises Adequately Defined?', 54 *IMF Staff Papers* (2007) 2, 306-337.

[76] E. Remolona *et al.*, 'A Ratings Based Approach to Measuring Sovereign Risk' (January 2007) available at http://ssrn.com/abstract=963041 (last visited 2 May 2012), combine credit ratings and historic default rates; while P. Manasse *et al.*, 'Predicting Sovereign Debt Crises', *IMF Working Paper* (2003) No. 221, develop an early warning mechanism using past data about macroeconomic, fiscal and political indicators.

[77] K. Reinhart & K. Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (2009), 21-33.

not apply these indicators too schematically, but with a view to the stage of development of the affected State. Ultimately, the determination of sovereign default will, and should, always be a value judgment. But standards and indicators might protect to some extent against decision-making which market participants will find arbitrary.

Second, without narrowing down the concept of peace at this stage, the Security Council should intervene only if there are additional structural conditions which increase the likelihood of a serious socio-economic crisis affecting large parts of the population, or of the emergence of civil unrest. For example, pre-existing situations of economic duress that would become unbearable in case of a holdout or belated default; ethnic, racial, religious or similar tensions might be indicative of a necessity to intervene.

Third, before taking any measures, the Security Council, relying on the expertise of the IMF, should be aware of their potential effects on the market and on market discipline. Any stay on judicial proceedings imposed by the Council might cut off the State concerned from international capital markets until a restructuring is completed. The Council should therefore ensure that international institutions like the IMF would be able to provide necessary funds for indispensable expenditures as long as the State concerned has no access to capital markets. Otherwise, the situation might turn from bad to worse. In the absence of market discipline, the Council should seek to corroborate IMF conditionalities in order to ensure that the State concerned spends the money prudently and is committed to structural reforms. For example, the Security Council could make stays of enforcement dependent upon certain additional requirements (e.g. full cooperation in negotiations about a workout, full transparency about the country's financial situation, external auditors, or other measures).

On the positive side, Security Council intervention in debt crises would reduce creditor moral hazard. If holdouts are not that easily available any more, creditors will think twice before they lend money to States with huge piles of sovereign debt and ailing economies. Some States could only accumulate large amounts of sovereign debt because private creditors were usually bailed out in the past. While the Brady plan led to some write-offs in the 1980s, the sovereign debt crises of the 1990s had no negative consequences for private creditors. The brunt was borne by the taxpayer.[78]

[78] Scott *supra* note 31, 113-115.

Ultimately, the Security Council needs to balance all these risks and challenges. As a matter of prudence, it should always proceed in close coordination with the IMF, given its experience in sovereign debt matters as well as its funds. Also, it might enter into consultations with other international institutions such as the G20 or the Basel Committee in order to determine the consequences of a restructuring for financial markets.

IV. Limits: Constitutional and Human Rights of Creditors

Each Member State of the United Nations would have to find ways of complying with Security Council resolutions in these matters in accordance with its domestic law. Regarding stays on the execution of judgments, some legal orders already require the consent of the government before the authorities may enforce judgments against foreign sovereigns.[79] Other States would have to implement similar measures.

It is not unlikely that creditors affected by such Security Council resolutions would seek legal remedies before domestic and international courts. They might consider the decision of the Security Council, or the consent given by their government if it is a member of the Security Council, or the implementing measures, as acts amounting to an expropriation. Generally, insolvencies are not acts of expropriation: the creditor receives the actual value of its investment. It decreased in value not because of government intervention, but because the defaulting company (or private individual) did not do as well as expected. A similar logic could be applied to sovereign defaults. Certainly, creditor holdouts are an effective means of protection against unjustified, discretionary defaults.[80] However, if the Security Council determines that a workout is necessary, after an objective and hopefully transparent examination of the presence of a debt crisis, and after weighting all chances and risks, one can hardly say that creditors still need to be able to defect in order to protect themselves against arbitrary default. Their situation is not worse than it would be in case of a normal, everyday default of a private counterparty.

What is different from private counterparty defaults is, however, the fact that a State has no balance sheet. This makes it difficult to assess the remaining value of debt instrument in case of default or a debt crisis. It will

79 A case in point is the Distomo judgment of the Greek Areopag against Germany; cf. the subsequent decision of the European Court of Human Rights, *Kalogeropoulou et al v. Greece and Germany*, ECHR (2002), Appl. No. 59021/00.

80 Cf. Fisch & Gentili, *supra* note 35.

have to be determined procedurally in the course of workout negotiations. In order to ensure that domestic courts approve of Security Council measures, the Council should take the utmost care to ensure that the negotiations are conducted in a fair and equitable manner.[81]

E. Conclusion: The Security Council as the Second Best Solution

Admittedly, this paper suggests a rather intrusive approach to a problem which is in the first place "only" about money, and which not everyone might intuitively qualify as a security issue. Nevertheless, the potentially fatal effects of sovereign debt crises require a reservoir of adequate countermeasures. Governments and international institutions need to think of strategies for the prevention of civil unrest or severe depreciations of socio-economic rights. They should not wait until a multilateral resolution mechanism sees the light of day, which is unlikely to happen anytime soon. The existing legal infrastructure of the Security Council could be used in cases of emergency caused by holdouts, even though this would certainly not alleviate concerns regarding the legitimacy of the Security Council.[82] Also, such measures will only work successfully if good care is taken of the moral hazard and constitutional implications which might result from them. Besides that, it should not be forgotten that any involvement of the Security Council is only apposite in emergencies. Naturally, it is better to avoid such emergencies in the first place and to keep government debt at a sustainable level.

81 Cf. UNCTAD Principles, *supra* note 25, Principle 15.

82 E.g. E. de Wet, 'The Legitimacy of United Nations Security Council Decisions in the Fight against Terrorism and the Proliferation of weapons of Mass Destruction: Some Critical Remarks', in R. Wolfrum & V. Röben (eds), *Legitimacy in International Law* (2008), 131-154.

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Have Measures Adopted by States to Cope With the Global Financial Crisis Been in Accordance With Their Obligations Under International Investment Law?

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Abstract

International investment law guarantees broad protection. The following article examines how measures against the Global Financial Crisis, e.g. the acquisition of shares or the refusal to help particular financial institutions, affected those standards. However, the article argues that due to public policy reasons the measures have been in accordance with all protection standards.

A. Introduction

Foreign investors enjoy special protection under Bilateral Investment Treaties ("BITs") or Free Trade Agreements ("FTAs"). For this reason, numerous investors were able to sue Argentina for the measures adopted by it during its economic crisis in 2001 – 2002.[1] Although no investor has started arbitral proceedings against the Host State for measures adopted against the global financial crisis of 2007 – 2010 yet, this is not unlikely to happen.[2] Due to the transnational connections in today's commercial world, many internationally acting businesses have been seriously affected by the impact of the global financial crisis, which caused an estimated loss of $ 32 trillion for global equity markets.[3] Foreign investors could potentially sue their Host States for their losses due to the bankruptcy of Lehman Brothers Inc., or because their shares have been acquired by a government.

The following work has the ambition of assessing, whether the protection standards for foreign investors under BITs and FTAs have been violated by States when they adopted measures to cope with the global financial crisis and what potential claims might therefore result. For this purpose, the common standards of investment protection shall be described briefly (B.). Eventually, the compliance of exemplary measures, taken by the world's major economies during the global financial crisis, with the standards of investment protection shall be discussed. In respect of the

1 See for a brief description: C. Brown, 'Investment Arbitration as the New Frontier', 28 *The Arbitrator & Mediator* (2009) 1, 59, 60-61.

2 A. van Aaken & J. Kuntz, 'The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Disputes?', *Columbia FDI Perspectives*, No. 3 (23 March 2009), available at http://www.vcc.columbia.edu/documents/Perspective3-vanAakenandKurtz-FINAL.pdf (last visited 26 April 2012).

3 K. Rudd, 'The Global Financial Crisis', *The Monthly*, February (2009), 20, 21.

scope of this work, the focus will be on the measures taken by selected major economies such as China, Germany, Switzerland, the UK and the USA. The measures are categorized in respect of their target and their character. Therefore, the measures will be separated into measures adopted to stabilize financial institutions (C.), omissions to stabilize financial institutions (D.), acquisition of properties in order to regulate financial institutions (E.) and direct stimulations of domestic economies (G.).

B. Standards of Investment Protection

Notwithstanding other international law sources, the protection of foreign investors depends on the specific formulation of a BIT or a FTA. In these treaties, States agree to confer certain protective rights on investors of the treaty partner's nationality. The effect is that foreign investors no longer have to seek legal protection through diplomatic and juridical actions of their home State, but can directly initiate proceedings against their Host State, usually before an arbitral tribunal.[4] Treaty parties frequently agree on the International Centre for the Settlement of Investment Disputes ("ICSID"), as the forum for investment arbitration.[5] Established as a separate institution of the World Bank Group by the ICSID Convention in 1965, ICSID provides facilities for investment arbitration, administers the proceedings and has fixed procedural rules.[6]The award itself, however, is issued by an independently constituted tribunal and ICSID's function is solely administrative.[7]

In 2009, over 2,800 BITs and FTAs have been recognized.[8] Although scope and protection standards can differ from one treaty to another, the treaties are surprisingly similar in structure and content.[9] They usually confer five major protection rights on an investor against a Host State. The traditionally most important standard is the prohibition of expropriation of foreign investments, or measures with an equivalent effect, without

4 C. Brown, *supra* note 1, 61.

5 Art 25 para. 1, ICSID Convention.

6 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 15 October 1966) (ICSID Convention).

7 A. Reinisch & L. .Malintoppi, 'Methods of Dispute Resolution', in P. Muchlinski, F. Ortino & C. Schreuer (eds), *The Oxford Handbook on International Investment Law* (2008), 691, 698.

8 A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties* (2009), 57.

9 *Id.*, 1.

compensation.[10] In addition, Host States do not merely have to accept foreign investments once they were made, but also have to treat foreign investors in a fair and equitable way.[11] This obligation may cover more specific obligations, such as consistent conduct, respect of the investor's reasonable expectations, lack of arbitrariness, due judicial process and transparency.[12] In order to ensure fair competition within their territories, Host States especially have to treat foreign investors in a non-discriminative way.[13] This comprises two separate protection standards: First, the Host State must not discriminate *against* foreign investors, but treat them as nationals are treated.[14] Second, there must not be any discrimination *between* foreign investors. Every investor therefore has the right to the so-called Most-Favored-Nation Treatment.[15] Finally, not only Host States' authorities itself can be a threat for investors, but also the population of Host States and economic circumstances within the Host States. Therefore, Host States have to ensure foreign investors' full protection and security against third parties.[16]

It appears that during the financial crisis, four standards of investment protection might have been breached by States: The prohibition of expropriation without appropriate compensation, the fair and equitable treatment standard, the standard of national treatment and the standard of full protection and security. When assessing, whether investors have claims for breaches of these standards, a three-step test should be taken. First, is the person concerned an investor of its home State and his business an investment under the relevant investment agreement and the ICSID convention? Second, has the Host State acted in accordance with the standard of investment protection in question? Third, if not, is a potential

10 C. Schreuer, 'Introduction: Interrelationship of Standards' in A. Reinisch (ed.), *Standards of Investment Protection* (2008), 1.

11 I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008), 132.

12 K. Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in August Reinisch (ed.), *Standards of Investment Protection* (2008), 111, 118.

13 P. Acconci, 'Most-Favoured-Nation Treatment' in P. Muchlinski, F. Ortino & C. Schreuer (eds), *The Oxford Handbook on International Investment Law* (2008), 363, 364.

14 R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008), 178.

15 A. R. Ziegler, 'Most-Favoured-Nation (MFN) Treatment' in A. Reinisch, *Standards of Investment Protection* (2008), 59, 60.

16 C. McLachlan, L. Shore & M. Weininger, *International Investment Arbitration: Substantive Principles* (2007), 247.

breach of an investment protection standard justified by a defense? This test procedure shall be the course of the following observation.

C. Stabilization of the Financial System

The global financial crisis reached its peak in fall 2008. With a credit squeeze ballooning into the biggest financial crisis since the Great Depression after 1929, States suddenly faced the threat of the breakdown of the whole global financial system.[17] It is said to have been one of the most threatening moments for the global economy in modern times.[18] As a consequence, States adopted measures in order to stabilize struggling financial institutions. As it will be shown, these measures have been merely adopted for domestic banks. Therefore it shall be examined, whether foreign banks could claim compensation for this disadvantage

I. Measures Adopted

From the handling of the global financial crisis in the world, three different types of measures appear to have been adopted in order to ensure the vitality of banks. Banks received direct liquidity, guarantees and the opportunity to trade highly risky assets to States.

The first country to directly help one of its major banks was the UK in September 2007. Following an announcement about financial support from the Bank of England on 13 September 2007, customers of the UK retail bank Northern Rock plc started a run on their bank's offices. As a consequence, the UK government fully guaranteed all of the bank's retail deposits.[19] Half a year later, the Bank of England decided to allow UK banks to swap their high quality mortgage-backed and other securities for UK Treasury Bills.[20]

17 'Economic Crisis and Market Upheavals', *The New York Times Online*, available at http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html?8qa&scp=1-spot&sq=&st=nyt (last visited 23 April 2012), para. 10.

18 S. Wilske, 'The Impact of the Financial Crisis on International Arbitration' 65 *Dispute Resolution Journal* (2010) 1, 82, 83.

19 J. Goddard, P. Molyneux & J. O.S. Wilson, 'The financial crisis in Europe: evolution, policy responses and lessons for the future', 17 *Journal of Financial Regulation and Compliance* (2009) 4, 362, 363.

20 Bank of England, *Special Liquidity Scheme: Information*, notice of 21 April 2008, available at http://www.bankofengland.co.uk/markets/sls/sls-information.pdf (last visited 26 April 2012).

Whereas the Federal Reserve Bank of America and the Reserve Bank of New York managed to arrange takeovers of the major American banks Bear Stearns Inc. and Merrill Lynch & Co. Inc., Lehman Brothers Inc. filed for bankruptcy relief on 15 September 2010. On 16 September, the Federal Reserve Bank of America accepted a bailout of $ 85 billion for AIG Inc.[21] As a consequence, US Congress passed the Emergency Economic Stabilization Act of 2008[22] on 3 October 2008. Under section 101 of this act, the Troubled Asset Relief Program was established, so that assets and equity for up to $ 700 billion from financial institutions that were regulated under US law and had significant operations in the USA could be purchased. Eventually the US Department of the Treasury directly transferred almost $ 200 billion to US financial institutions in return for preferred shares.[23]

The German government first guaranteed all retail deposits in Germany on 5 October 2005.[24] Eventually the Financial Market Stabilization Act[25] was passed, which established a fund that provided € 80 billion of liquidity as well as € 400 billion of guarantees for German banks.[26] Germany is fully liable for this fund. It was not until 23 July 2009, however, that German financial institutions were allowed to trade their highly risky assets.[27]

In the meantime, UK government decided to guarantee up to £ 250 billion of UK incorporated banks' obligations and approved that the struggling HBOS plc was taken over by Lloyds TSB plc, although Lloyds TSB plc consequently acquired a market share of one third in UK savings

21 A. Shah, 'Emergency Economic Stabilization Act of 2008' 46 *Harvard Journal on Legislation* (2008) 2, 569, 573.

22 Emergency Economic Stabilization Act of 2008, Division A Public Law 110-343, 122 Stat. 3765, enacted 3 October 2010.

23 T. C. Baxter Jr. & D. Gross, 'The Federal Reserve's response to the Crisis: Doing whatever it takes within its legal authority' in M. Giovanoli & D. Devos (eds), *International Monetary and Financial Law* (2010), 293, 296.

24 'Merkel und Steinbrück im Wortlaut: Die Spareinlagen sind sicher', *Spiegel Online*, 5 October 2010, available at http://www.spiegel.de/wirtschaft/0,1518,582305,00.html (last visited 26 April 2012).

25 'Act on the implementation of a package of measures to stabilize the financial market (Gesetz zur Umsetzung eines Maßnahmenpakets zur Stabilisierung des Finanzmarktes), 17 October 2008, BGBlI 1982.

26 *Id*., Article 1 § 2 (1). In the end only € 128 billion of guarantees have been issued.

27 B. Krauskopf, 'Legislative measures to support financial market stability: The German example and its European context' in M. Giovanoli & D. Devos (eds), *International Monetary and Financial Law* (2010), 329, 352.

and mortgage markets. It even supported the takeover through a capital injection of £ 17 billion, almost the same amount of money the Royal Bank of Scotland plc received.[28]

The Swiss government did not even announce a general program, but merely offered direct help to UBS AG and Credit Suisse AG. Whereas Credit Suisse AG successfully managed to approach private investors,[29] UBS AG finally had to receive CHF 5.4 billion from the Swiss Confederation.[30]

II. Affected Foreign Investments

The disadvantaged of the measures described could be *foreign* financial institutions, which did not receive any bailout from States. As a first requirement of their investment claims, it has to be established that a foreign investment has been affected by the situations above. In the globalized world, no market merely contains domestic investors. Especially, contemporary financial institutions engage in businesses throughout the world. They trade physical assets, shares and derivatives in foreign venues and direct their business at foreign customers. For investment claims, these businesses have to be classified as investments under the relevant BIT or FTA and under the ICSID Convention. Whereas the former determine the scope of their material protection standards and usually cover any kind of *asset*,[31] Art. 25 (1) ICSID Convention requires an undefined investment for the admissibility of an arbitral claim before ICSID.

Although there is no rule of precedence in investment arbitration,[32] the course of arbitral awards under the ICSID convention established the following trademarks of an investment: A significant duration, an element of risk, a commitment of the investor and a significant contribution to the Host State's economy.[33] Whereas some tribunals regarded these criteria as

28 Goddard *et al.*, *supra* note 19, 364.

29 L. Thévenoz, 'The Rescue of UBS' in M. Giovanoli & D. Devos (eds), *International Monetary and Financial Law* (2010), 378, 383.

30 *Id*., 388.

31 McLachlan *et al.*, *supra* note 16, 171.

32 C. Schreuer & M. Weiniger, 'A Doctrine of Precedence?' in P. Muchlinski, F. Ortino & C. Schreuer (eds), *The Oxford Handbook on International Investment Law* (2008), 1188, 1189.

33 *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, (2002) 5 ICSID Reports 186, 199;

fixed requirements,[34] others adopted a more intuitive method applied the criteria as merely indicating characteristics.[35]

A participation of a foreign investor in a State's financial markets certainly involves a risk to lose assets and can therefore be regarded as a commitment. An appropriate duration can at least be approved for a business of two years.[36] The issue, however, is, whether a foreign investor's participation in financial markets constitutes a significant or positive[37] contribution to a Host State's development. For this purpose it appears useful to separate financial activities into services for customers and independent transactions between financial institutions. The provision of loans and investment opportunities for consumers and entrepreneurs ensures the supply of liquidity for an economy's participants.

In contrast, consumers and entrepreneurs do not seem to obtain any benefits from highly risky interinstitutional transactions. However, these transactions are an important factor of a financial institution's profitability. This profitability ensures the ability to provide services for customers. Providing liquidity for customers thus requires interinstitutional transactions. Since the provision of liquidity is therefore a contribution to a Host State's economy, financial institutions must meet all the significant criteria of an investment under Art. 25 (1) ICSID Convention. They are consequently allowed to commence arbitral proceedings before ICSID.

III. Compliance with National Treatment Standard

The measures adopted to bailout financial institutions could have breached the national treatment standard. The national treatment standard

SaliniConstruttoriSpAetItalstradeSpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, (2003) 42 ILM 609, para. 53.

34 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 232, cited by E. Gaillard, 'Identify or define? Reflections on the evolution of the concept of investment in ICSID practice' in Christina Binder *et. al.* (eds), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (2009), 403, 411. The tribunal, however, disclaimed the fourth requirement.

35 *CSOB v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, (1999) 14 ICSID Review – Foreign Investment Law Journal 251, para. 90; *M.C.I Power Group, L.C. and NEW Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, available at http://ita.law.uvic.ca/documents/MCIEcuador.pdf (last visited 26 April 2012), para. 165.

36 *Salini v. Morocco*, *supra* note 33, para. 54.

37 Gaillard, *supra* note 34, 415.

ensures that foreign investors shall be treated no less favorable than national investors.[38] In practice, this standard is restricted to situations where foreign and national investors are in like circumstances.[39] States required companies to be incorporated under their domestic law or have their seat in their territory in order to be eligible for State help, if they did not even drafted their measures for specific domestic banks. Foreign banks explicitly received no direct help from their Host States, but were treated less favorable than national banks. This leads to the question of like circumstances. On the one hand, foreign financial institutions undertake exactly the same business as national investors and could therefore come under even the toughest formal test.[40] They were in the same *de facto* situation, as *van Aaken* and *Kuntz* phrase it.[41]

On the other hand, however, as stated by the Tribunal in *S.D. Myers Inc. v. Canada*, the assessment of like circumstances should take reasonable policy grounds into consideration.[42] Although most investment agreements do not explicitly provide it, differentiations between foreign and national investors can be justified on rational grounds.[43] There appear to be two policy grounds to justify the focus on domestic banks while handling the global financial crisis. First, national banks are more important for the provision of liquidity within the domestic economy. Although foreign bank equivalently provide customer services, domestic institutions dominate the markets of financial services. Since the goal of the measures adopted against the global financial crisis was to keep the economy alive by ensuring the

38 See for example: 'Treaty between the Government of the Italian Republic on the Kingdom of Saudi-Arabia concerning the protection and the recivprocal protection of investments' (*Tra Il Governo della Repubblica Italiana e dil Regno dell' Arabia Saudita sulla Reciproca Promozione e Protezione Degli Investimenti*), opened for signature 10 September 1996, available at http://www.unctad.org/sections/dite/iia/docs/bits/italy_saudiarabia_it.pdf (last visited 26 April 2012) Art. 3 (2), '(…) [C]iascuna Parte Contraente accorderà agli investimenti (…) degli investitori dell' altra Parte Contraente un trattamento non meno favorevole di quello accordato agli investimenti degli (…) dei suoi investitori.'

39 Dolzer & Schreuer, *supra* note 14, 179.

40 See for this test *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, 18 ICSID Review – Foreign Investment Law Journal (2003) 2, 488, para. 171.

41 A. van Aaken & J. Kuntz, *supra* note 2, para. 9.

42 *S.D. Myers Inc. v. Canada*, Partial Award, 13 November 2000, (2001) 40 ILM 1408, para. 250.

43 Dolzer & Schreuer, *supra* note 14, 181. Indeed, the tests of breach of a standard and its justification seems merged for this standard.

provision of liquidity, it were the domestic banks that had to be rescued. In regard of the extraordinarily high costs of the bailouts, it can be regarded as a legitimate policy ground, that the costs shall be absolutely necessary for the domestic economy.

Second, it seems highly practical that States all over the world concentrate on their own financial institutions. Since every government was aware of the global financial crisis and considered possible measures to solve it, each financial institution was focused on by its home government. The alternative – each government focuses on the domestic market participants instead of the national institutions – involves the difficulty to assess each participant's market share in the domestic market and stabilize it according to this share. In an emergency situation like in fall 2008, this seems highly ineffective. The efficiency of the handling of the global financial crisis, however, was intrinsic for the vitality of the world's economy. The tribunal in *GAMI v. Mexico*, even held that the solvency of an local sugar industry was a legitimate goal of policy.[44] The effectiveness of the handling of the global financial crisis should be a legitimate goal of policy *a fortiori*. In conclusion, the distinction between foreign and national banks was justified by the enormous costs and the effectiveness of bailouts. Therefore, foreign and national banks were not in like circumstances and States did not breach the national treatment standard.

D. Rejection of Help for Financial Institutions

The incident that turned the so-called subprime mortgage crisis into the global financial crisis was the breakdown of the US investment bank Lehman Brothers Inc. Having taken over the two government sponsored loan providers Fannie Mae and Freddie Mac on 6 September 2010, the US government refused a bailout for Lehman Brothers Inc. for fiscal reasons. The bank went bankrupt and was sold to Barclays plc for $ 20 billion less than its assets were worth.[45] The issue, to what extent eventual rescue packages could have been avoided without the insolvency of Lehman Brothers Inc. shall not be the topic of this observation. It shall be

44 *GAMI Investments Inc. v. United Mexican States*, Award, 15, November 2004, available at http://www.state.gov/documents/organization/38789.pdf (last visited 26 April 2012), para. 114.

45 S. Lubben & C. Bowles, 'The sale of the century and its impact on asset securitization: Lehman Brothers', 27 *American Bankruptcy Institute Journal* (2009) 10, 1.

concentrated on the direct effects for share- and stakeholders of this refusal. Could foreign owners and creditors of Lehman Brothers Inc. seek damages from the USA, for breach of investment protection standards? The refusal of a bailout for Lehman Brothers Inc. will be examined in regard of the fair and equitable treatment standard and the full protection and security standard.

I. Affected Foreign Investments

Directly affected by the bankruptcy of Lehman Brothers Inc. have been creditors on the one hand and shareholders of Lehman Brothers Inc. on the other. The former are barely covered by the investment definitions in BITs and FTAs. Usually physical property, intellectual property, equity participation or special public law rights are required.[46] Mere contractual claims against entities incorporated under the law of another State, however, do not seem to be covered. This appears to be in accordance with the criteria for an investment under Art. 25 (1) ICSID Convention. In contrast to an equity participation, a contractual claim does not involve participation of the creditor in another's business or a commitment for further action. Although creditors certainly bear a risk when entering into a contract, they conceptually have no need for active conduct in order to satisfy their claims. Equity participation, in contrast, involves the necessity to actively develop the equity in order to obtain profit.

The holding of shares in companies, notwithstanding their amount, is usually mentioned as an investment in BITs and FTAs.[47] Art. 25 (2) (b) ICSID Convention only addresses the case of control by a foreign investor. Whether a minority shareholding in a local company constitutes an investment, however, is left unaddressed by the ICSID Convention. The usual authority for the approval of minority shareholders' claims is the case *CMS v. Argentina*, where the tribunal allowed a US minority shareholder of an Argentine company to claim under the US-Argentine BIT.[48] It relied on

[46] See for example: *Treaty between the United States of America and the Government of the Republic of Croatia concerning the encouragement and reciprocal protection of Investment*, opened for signature 13 July 1996, available at http://www.unctad.org/sections/dite/iia/docs/bits/croatia_us.pdf (last visited 26 April 2012), Art. 1 (d).

[47] Dolzer & Schreuer, *supra* note 14, 57.

[48] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003), para. 51.

the fact that ownership of shares was submitted as a specific example of an investment during the negotiation of the ICSID Convention.[49] Since shareholders are virtually owners of a company and therefore undertake their business through that company, this can be approved. If a local company would constitute an investment, what an essential bank like Lehman Brothers Inc. certainly does, than its shareholders should be seen as acting through this local investment and therefore constituting the investment. Even if not every small minority shareholding should constitute an investment, it could be argued that the bigger the business of the local company is, the smaller the minority shareholding needs to be. In respect of a major bank, such as Lehman Brothers Inc., this would allow any shareholder to be classified as an investor.

II. Compliance with Fair and Equitable Treatment Standard

When assessing, whether the rejection of a bailout for Lehman Brothers Inc. was a breach of the fair and equitable treatment of the foreign shareholders of Lehman Brothers Inc., the analysis shall not be merely concentrated on the reasonableness of the rejection. This argument is subject to a very deep economic investigation. The legal argument is, whether the US government's rejection was arbitrary and discriminatory. The obligation to avoid arbitrary and discriminatory conduct is usually expressly mentioned together with the fair and equitable treatment standard and therefore regarded as one of its aspects.[50] Although the prohibitions of arbitrariness and discrimination are sometimes assumed to be identical, their separate listing suggests that each must be accorded its own significance and scope.[51]

1. Discrimination

Why is discrimination at this stage assessed under the fair and equitable treatment standard? The reason lies within the nature of the treatment of Lehman Brothers Inc.: Neither was Lehman Brothers Inc. sent into bankruptcy because of the shareholding of foreign investors, nor were foreign investors, or investors from a certain country particularly affected by the bankruptcy. French investors in Lehman Brothers Inc., for example, suffered just as badly as investors form the US or investors from the UK.

49 *Id*., para. 50.
50 Tudor, *supra* note 11, 177.
51 Dolzer & Schreuer, *supr*a note 14, 173.

The discrimination could, however, lie in the fact that investors of rescued Wall Street banks did not suffer as much. This variety of potential discrimination is independent from nationality and therefore distinct from national or Most-Favored-Nation treatment. The discrimination could thus be, that the Troubled Asset Relief Program of the US Treasury Secretary helped struggling banks, while there was no bailout for Lehman Brothers Inc.[52]When assessing, whether financial assistance was discriminatory, it has to be focused on the leading case of *Saluka Investments v. The Czech Republic*. In this case, Saluka acquired the majority of shares in IPB, one out of four major Czech State banks. As a consequence of the State management during the Cold War, all of the four major banks struggled. IPB, the only bank now owned by a foreign investor, was the only bank not to receive any financial assistance from the Czech Republic. Saluka successfully claimed damages for violation of the fair and equitable treatment standard.[53]

However, there are major differences between the situations of Saluka Investments and Lehman Brothers Inc.: First, Saluka Investments inherited the debt problems from the Czech Republic. Lehman Brothers Inc. has always been privately managed in contrast. Second, when help for IPB was rejected by the Czech Republic, the other major Czech banks received financial assistance *at the same time*. The impression of discrimination of Lehman Brothers Inc. however arises out of eventual bailouts. The handling of the US government was rather a gradual decision-making process where the reasoning continuously developed.

Finally, it is an intrinsic feature of an investment, that the investor bears the insolvency risk. There is no general bailout right, merely because some institutions were regarded as essential for the economy and bolstered. The circumstances of insolvency do not impose any obligation on States. The prohibition of discrimination, however, is rather designed for situations of natural State involvement. For this reason the classification of financial assistance as discriminatory should be applied only in a limited manner.

52 Shah, *supra* note 21, 573-574.

53 *Saluka Investmens v.The Czech Republic*, Partial Award, 17 March 2006, available at http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf (last visited 26 April 2012), para. 498.

2. Arbitrary Conduct

The literal meaning of 'arbitrary conduct' is interpreted by tribunals as 'action founded on prejudice or preference rather than on reason of fact'.[54] Arbitrary measures therefore lack a rational decision-making process.[55] There cannot be found any sufficient evidence, that the Treasury Secretary and other US authorities did not sufficiently consider the relevant arguments during their conduct in September 2008. Arbitrary conduct is therefore unlikely to be argued.

III. Compliance with Full Protection and Security Standard

A violation of the full protection and security standard can be rejected as well. Most investment agreements contain clauses promising full protection and security.[56] Besides the protection from physical harm to an investment, this standard of investment protection also covers the availability of the judicial and administrative system.[57] The tribunal in *Siemens v. Argentina* even extended this to the stability of the legal system as a whole.[58] But it was not the legal system that caused the breakdown of Lehman Brothers Inc. If any, there were economic circumstances. Following the argument concerning a potential discrimination, there can be no reason, why a non-profitable business should have a claim against its State to be protected. Bankruptcy perspectives belong to a business as exorbitant profits do. In addition, it is not the purpose of the full protection and security standard to protect an investment from threats to which it contributed. Therefore, the rejection of a bailout was no breach of the full protection and security standard against shareholders of Lehman Brothers Inc.

54 *Lauder v. Czech Republic*, Award, 3 September 2001, (2005) 9 ICSID Reports 66, para. 221.

55 *CMS v. Argentina*, *supra* note 48, para.158.

56 Dolzer & Schreuer, *supra* note 14, 149.

57 G. Cordero Moss, 'Full Protection and Security' in A. Reinisch (ed.), *Standards of Investment Protection* (2008), 131, 144.

58 *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 303, cited by Moss, *supra* note 57, 145.

E. Acquisition of Properties

The German bank Hypo Real Estate AG has been extraordinarily threatened in 2008. Eventually it became an example of an expropriated company. Due the important position of this bank in the European financial system, it received guarantees for more than € 100 billion from the German government. As the situation of the Hypo Real Estate Holding AG barely improved by March 2009, it was decided to totally acquire the bank's shares. The idea was that the bank might be supervised more effectively as a State enterprise.[59] As a consequence, a statute was drafted that allowed an expropriation of shareholders.[60] Having acquired over 90 per cent of the shares of Hypo Real Estate AG after a public takeover proposal and the issue of new shares,[61] the German government initiated a squeeze-out for the remaining shareholders. The American investor J. Christopher Flowers unsuccessfully campaigned against this expropriation and finally sought legal protection before German courts.[62]

I. Affected Foreign Investment

The shareholding in the major German bank of J.C. Flowers & Co. LLC can be regarded as foreign investment.[63] Therefore the issue arises, whether the American entity, J.C. Flowers & Co. LLC, are particularly protected by foreign investment standards.

59 S. Kaiser & Antje Sirleschtov, 'Warum die HRE nicht Pleite gehen darf', *ZEIT Online*, 4 May 2009, available at http://www.zeit.de/online/2009/08/hypo-real-estate-staatshilfe/komplettansicht (last visited 26 April 2012).

60 'Act on the Rescue of Enterprises to Stabilise the Financial Market' (Gesetz zur Rettung von Unternehmen zur Stabilisierung des Finanzmarktes), 7 April 2009, [2009] BGBl. I 725, 728, Section 1.

61 'Bund kann HRE verstaatlichen', *Handelsblatt Online*, 3 June 2009, available at http://www.handelsblatt.com/unternehmen/banken-versicherungen/bund-kann-hre-verstaatlichen;2320797 (last visited 26 April 2012).

62 'Flowers macht bei HRE mit Klage Ernst', *Handelsblatt Online*, 11 October 2009, available at http://www.handelsblatt.com/unternehmen/banken-versicherungen/flowers-macht-bei-hre-mit-klage-ernst;2467652 (last visited 26 April 2012).

63 *CMS v. Argentina*, *supra* note 48, para. 51.

II. Compliance with Expropriation Standard

Investment protection between the USA and Germany is not ensured by a sole investment agreement, but by the extensive US-German Treaty concerning Friendship, Trade and Shipping of 1954.[64] Although this treaty provides court proceedings instead of arbitration, the protection of investors' properties is similar to BITs. Expropriations of foreign investors may only take place for a public purpose,[65] in a non-discriminatory way[66] and with prompt, adequate and effective compensation.[67]

1. Non-Discriminative Expropriation for a Public Purpose

The acquisition of shares in Hypo Real Estate Holding AG constituted a direct expropriation of the shares of J.C. Flowers & Co. LLC. The protection standard in question is consequently concerned. The expropriation took place in order to prevent the necessity of further aid from the German government for the private bank. Given that the public purpose of an expropriation is barely questioned,[68] the purpose to prevent further expenses is admissible. Although J. Christopher Flowers argues that there was discrimination, because Commerzbank AG, Germany's second biggest private bank, received capital from the German State without the obligation to be controlled, there is broad consensus that Hypo Real Estate Holding AG was in much worse, rather than in like circumstances.

2. Adequate Compensation

The final requirement of a lawful expropriation of J.C. Flowers & Co. LLC is therefore an adequate compensation. The compensation of shareholders was with € 1,30 per share in accordance with the market price. However, the investors purchased the shares for ten times the price. Mr. Flowers was satisfied that the share price would rise soon

64 'Treaty concerning Friendship, Trade and Shipping between the Federal Republic of Germany and the United States of America' (*Freundschafts-, Handels- und Schiffahrtsvertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika*), opened for signature 29 October 1954, [1956] Bundesgesetzblatt II 487 (entered into force 14 July 1956).

65 *Id*., Section 5 (4), sentence 1.

66 *Id*., Section 5 (3).

67 *Id*., Section 5 (4), sentence 2.

68 Dolzer & Schreuer, *supra* note 14.

after there was sufficient help for Hype Real Estate Holding AG. This submission leads to the issue, how expropriated shares should be valuated, especially concerning prospects.

As pointed out by Sergey Ripinsky and Kevin Williams in a study concerning damages in international investment law, the term 'value' refers to the price brought by property in a fair and competitive market.[69] An active market, such as a stock exchange, is an adequate forum for such a valuation.[70] Since an existing market is the venue, where necessities, expectations and information come together, this seems reasonable. If the market already takes all the relevant aspects of a property's price into account, why should an arbitral tribunal consider the prospect of the market price? It is the expropriated property itself that is decisive for the relevant compensation. Therefore only its prospect can be important. Since prospects of a share are already considered by the market price, there is no further need to derive from this price. Therefore, J.C. Flowers & Co. LLC was also adequately compensated and has no claim against the Federal Republic of Germany for breach of a standard of investment protection.

F. Stimulus Packages

From fall 2008 onwards, the global financial crisis soon developed into an economic crisis. Facing recessions, numerous States announced stimulus packages for their economies. Since these are especially targeted at domestic economies, they are likely to discriminate against foreign investors and thus enable them to claim damages for breach of the national treatment standard.

I. Measures Adopted

Soon after the breakdown of Lehman Brothers Inc. and the prospect of a decrease in economic growth, European states adopted economic stimulus packages in order to bolster their economies. Germany was one of the first countries to spent approximately € 100 billion on benefits for households, infrastructure, company support and environmental measures. The first enormous stimulus package was announced in November 2008 by China, which intended to spend more than $ 580 billion on a wide area of national

69 S. Ripinsky & K. Williams, *Damages in International Investment Law* (2008), 182.
70 *Id*., 189.

infrastructure and social welfare programs.[71] This amount was even outnumbered by Barack Obama's plan from early 2009 to spend $ 787 billion on programs for infrastructure, renewable energy projects, education and tax reductions.[72]

II. Affected Foreign Investments

Aiming at their domestic economies in general, the economic stimulus packages also concern foreign investments.

III. Compliance with National Treatment Standard

1. Breach of the Standard

Depending on the public procurement practice in each particular State, foreign and local investors may be treated differently. This depends on each case as a matter of fact. However, even if foreign and national investors are not treated alike, they have to be in like circumstances for a breach of the national treatment standard to occur.

As with the bailout of financial institutions, public policy reasons could distinguish apparently similar investors. In regard of the enormous costs of the stimulus packages, governments have a high interest in the benefit of their domestic enterprises and population. Nevertheless, the situation appears to be a different than the situation of the bailout of financial institutions: Whereas the aim of the rescue packages for banks was to immediately stabilize them, economic stimulus packages are not designed for primary beneficiaries, but to initiate a constant process of economic activity. If the primary beneficiary of a construction project, for example, is a foreign investor, this initiation can be just as useful. Since the nationality of an investor has no influence on its employees and suppliers, the benefit of a project cannot be directed by the nationality of the primary beneficiary.

In addition, since the targets of economic stimulus packages are not the primary beneficiaries, there is no practical need, as in the bailout of

71 B. Barboza, 'China plans $ 586 billion economic stimulus', *The New York Times Online*, 9 November 2008, available at http://www.nytimes.com/2008/11/09/business/worldbusiness/09iht-yuan.4.17664544.html?_r=1 (last visited 26 April 2012).

72 'Economic Stimulus', *The New York Times Online*, available at http://topics.nytimes.com/top/reference/timestopics/subjects/u/united_states_economy/economic_stimulus/index.html (last visited 26 April 2012), para. 16.

banks, for every State to concentrate on its domestic enterprises. In the contrary, the protective measures for the national economy may even have a negative influence on the overall economic growth as the national focus during the world economic crisis after 1929 revealed.[73]For these reasons, there are no public policy grounds for not declaring foreign and national investors to be in like circumstances concerning stimulus packages. Only in circumstances of a domestic investor's exceptional importance for the domestic industry, could there be a justification. Therefore, the national treatment standard will be breached, if foreign investors are treated differently when applying for stimulus projects.

2. Justification of a Potential Breach

This breach could however be justified. As Hermann Ferré and Kabir Duggal recently proposed, treaty obligations under BITs and FTAs might have been temporarily suspended during the Global Financial Crisis. The argument derives from Art. 62 S. 1 Vienna Convention on the Law of Treaties.[74] The article mentioned provides a withdrawal from a treaty if essential circumstances have changed and transformed the extent of obligations.[75] However, even if such an argument might be basically followed, the extent of the obligation at issue has not been affected. As shown above, in the particular situation of economic stimulus packages there was no essential necessity to privilege primarily domestic investors. Hence, a potential breach will not be justified. As it is an accepted principle that treaty breaches give rise to damages,[76] foreign investors could therefore claim damages.

73 See further A. J. Schwartz, 'Understanding 1929-1933' in K. Brunner (ed.), *The Great Depression Revisited* (1981), 1, 21-24.

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

75 H: Ferré & K. Duggal, 'The world economic crisis as changed circumstance', *Columbia FDI Perspectives*, No. 43 1 August 2011, available athttp://www.vcc.columbia.edu/files/vale/print/Ferre_and_Duggal_-_1_Aug_2011_FINAL.pdf (last visited 26 April 2012), para. 5.

76 *Case Concerning the Factory at Charzów (Merits) (Germany v. Poland)*, [1928] Publications of the Permanent Court of International Justice A17, 47; *CMS v. Argentina*, *supra* note 48, para. 410.

G. Conclusion

As the observation of exemplary measures that have been adopted to cope with the financial crisis shows, it will be difficult for disadvantaged foreign investors to sue their Host States. Most measures have appeared to be in accordance with standards of investment protection. Although the bailouts of financial institutions were nationally focused, this seems to be justified by public policy reasons. So was the refusal of help for Lehman Brothers Inc. by the US government. J. Christopher Flower's investment fund has been adequately compensated, when the German government lawfully expropriated its shares. The only remaining prospect of claims of foreign investors concern the States' handling of economic stimulus packages. If these packages prove to be solely for the benefit of domestic businesses, foreign investors will have possibilities to claim damages for breach of the national treatment standard.

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Human Rights and International Investment Law: Investment Protection as Human Right?

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Abstract

Legal research conceptualized the relationship between International Investment Law (IIL) and International Human Rights Law (IHRL) until recently rather as opposing fields of law with colliding policy interests as well as contradictory rules and regulations. However, lately a new approach is gaining increasing support in the academic community: Investment protection could be understood as being part of human rights law. Such a conclusion may be perceived as highly controversial, however, from a conceptual perspective IIL and IHRL share more common ground than differences. This article will argue, first, that certain material standards of IIL can be conceptualized to be human rights-like guarantees of a minimum standard of protection and second, that such an understanding does not lead to a neoliberal proliferation of economic rights but, to the contrary, may serve as an important conceptual tool to prevent overly extensive interpretations of investment treaties and to balance economic rights with other human rights in case of norm conflict. After all, IIL could prove to be not more, but also not less, than "One Out of a Crowd" of all other fundamental human rights.

A. Introduction

Legal research conceptualized the relationship between International Investment Law (IIL) and International Human Rights Law (IHRL) until recently rather as opposing fields of law with colliding policy interests as well as contradictory rules and regulations. In a fragmented international legal order international legal obligations to protect foreign investment can potentially hinder States from fulfilling their obligations under human rights treaties. Although practical examples of norm collisions between the two fields of law have been the exception,[1] at least the regulatory chill that IIL may trigger for national legislation, particularly with respect to human rights law,[2] seems widely accepted.[3] However, lately a new approach is gaining

1 J. D. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity', 18 *Duke Journal of Comparative & International Law*. (2007-2008) 1, 77, 148 and 149.

2 B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', 6 *International and Comparative Law Quarterly*' (2011) 3, 580.

increasing support in the academic community: Investment protection could be understood as being part of human rights law.[4] This understanding may seem farfetched at first, most prominently because investment protection is generally only awarded to foreign investors and as such at least *de lege lata* does not constitute a human right. From a conceptual perspective, however, IIL and IHRL share more common ground than differences.[5] Thus, it is not surprising that both fields share common roots within the customary rules of international law protecting the rights of aliens and that prior to the establishment of the relevant treaties, - International Convenant on Civil and Political Rights (ICCPR), International Convenant on Economic, Social and Cultural Rights (ICESCR) on the one hand, International Centre for the Settlement of Investment Disputes (ICSID) and numerous Bilateral Investment Treaties (BITS) on the other hand - the protection of property was widely considered to be part of human rights protection.[6] As such it seems rather surprising that IIL and IHRL at some point in their respective developments took divergent paths.

In the following contribution, I will introduce two key arguments: First, that certain material standards of IIL can be conceptualized to be human rights-like guarantees of a minimum standard of protection and second, that such an understanding does not lead to a neoliberal proliferation of economic rights but, to the contrary, may serve as an important conceptual tool to prevent overly extensive interpretations of investment treaties and to balance economic rights with other fundamental human rights in case of norm conflict. After all, IIL could prove to be not

3 J. Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 2010, paras 20 - 25; L. E. Peterson & K. R. Gray, 'International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration' (April 2003) available at: http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf, 23, 24 (last visited 3 May 2012); for a different view with regard to State regulation to mitigate climate change see: S. W. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change', 24 *Journal of International Arbitration* 5 (2007) 5, 469 477.

4 F. Schorkopf, 'Das Verhältnis von Umwelt- und Menschenrechtsschutz zum Investitionsschutz', in D. Ehlers *et al.* (eds), *Rechtsfragen internationaler Investitionen* (2009), 137, 142.

5 See T. G. Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence', 12 *Journal of World Investment & Trade* (2011) 1, 27.

6 See Art. 17 Universal Declaration of Human Rights, UNGA Res. 217 A (III) of 10 December 1948; UNYB (1948-49) 535.

more, but also not less, than "One Out of a Crowd" of all other fundamental human rights.[7]

B. International Investment Law

The significance of foreign direct investment (FDI) in the global economy has grown considerably in modern times. FDI flows quadrupled between 1990 and 2000 on a worldwide scale[8] and despite the recent economic crisis FDI flows are predicted to reach pre-crisis levels in 2011.[9] This increase of FDI flows was complemented by a corresponding growth of international investment law, which over time developed its own distinct features within the broader realm of international economic law.[10] The term *international investment law* in this context can be understood as the set of legal principals governing the relationship between a foreign investor and the host State to the investment.

Generally, three different layers of protection can be distinguished: First, the customary rules of international law protecting the rights of aliens. These century old principles of the minimum standards of protection of aliens[11] still can be of relevance in current disputes concerning the protection of investment abroad. The *Diallo* Case, a case argued before the ICJ between the Republic of Guinea and the Democratic Republic of Congo in 2010, shows that international customary rules can still be ground for claims of diplomatic protection against host States to an international investment.[12]

Second, claims of investors against States can be grounded on individual Investor – State contracts or concessions. These contracts may provide advantages to a private investor *vis á vis* the host State. To do so, however, they require considerable bargaining power on account of the private party. As a consequence, small investors often lack the means to acquire protection through individual Investor- Sate contracts.

7 See ICSID Report 2010 painting, EL Anatsui, 'One Out of a Crowd', 17.

8 See UNCTAD, *World Investment Report* (2011), 3.

9 *Id*., xii.

10 R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008), 2.

11 See M. S. Mc Dougal *et al.*, 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights', 70 *American Journal of International Law* (1976) 3, 432; R. B. Lillich, *The human rights of aliens in contemporary international law* (1984), 1.

12 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Judgement of 30 November 2010.

Third, international investment can be protected through international investment agreements (IIAs) in the form of traditional international treaties between States. Since the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan in 1959, there has been a rapid growth in numbers of concluded BITs on a global scale. Today more than 6000 IIAs have been concluded between States creating a "web" of different standards of protection almost everywhere around the world.[13] Additionally, Free Trade Agreements (FTAs) may also contain investment protection standards.[14] Yet, until today all steps taken towards concluding a comprehensive multilateral investment agreement were unsuccessful.[15]

Perhaps the most striking innovation of the rapid development of IIL was, however, the inclusion of Investor – State dispute resolution procedures in IIAs. Through arbitration clauses in IIAs private parties are provided with the opportunity to bring claims against States through independent arbitral proceedings. The resulting arbitral awards gain a high level of enforceability, as through the 1958 New York Convention[16] these awards are enforceable within national jurisdictions throughout the world. A good example of the high level of enforceability is the recent seizure of the Boeing 737 of the Thai Crown Prince at Munich Airport in July 2011, following an arbitral award issued for an insolvent German construction corporation against the Kingdom of Thailand.[17]

Recent developments show that in practice IIAs are the most relevant legal basis for investment claims brought before arbitral tribunals.[18] In light of these developments, it is not surprising that the overall number of claims brought against States before arbitral tribunals has almost steadily been

13 *Supra* note 8, xvi.

14 Of practical relevance is foremost the North American Free Trade Agreement (NAFTA) which under its Chapter 11 includes a comprehensive investment protection regime.

15 R. Dolzer & C. Schreuer, *supra* note 10, 26 and 27.

16 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf, (last visited 3 May 2012); at present 146 Signatory Parties.

17 See Frankfurter Allgemeine Zeitung Online, Thailändischer Prinz will Boing selbst auslösen (1 Aug 2011) available at http://www.faz.net/artikel/C31325/gepfaendetes-flugzeug-thailaendischer-prinz-will-boeing-selbst-ausloesen-30477281.html, (last visited 3 May 2012).

18 See International Centre for Settlement of Investment Disputes 'The ICSID Caseload-Statistics (Issue 2011 - 2)' (2011), 10, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics (last visited 3 May 2012).

increasing.[19] As a consequence, some States seem to be more and more reluctant to subject themselves to the jurisdiction of arbitral tribunals and in academia arbitral awards have at times been criticized for their one-sidedness in favor of the investor.[20]

C. Approaches towards the Relationship between IIL and IHRL

Given the increasing numbers of publications on the relationship between IIL and IHRL,[21] I will attempt to categorize the ongoing discussions in this field of academic literature into three different approaches.[22] Although any categorization bears the threat of oversimplification, a grouping of approaches may bring along a better understanding of the ongoing debate and the differing lines of argumentation. While certainly not all publications can be classified as

19 See International Centre for Settlement of Investment Disputes 'The ICSID Caseload-Statistics (Issue 2011 - 2)' (2011), 10, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics, 10 (last visited 3 May 2012).

20 See prominently the joint statement of several law professors, G. van Harten *et al*. 'Public Statement on the International Investment Regime' (31 August 2010) available at http://www.osgoode.yorku.ca/public_statement,(last visited 3 May 2012); with further reference: C. N. Browner & S. W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?', 9 *Chi J. Int'l L.* 2 (2008-2009) 2, 474, 475.

21 On the relationship of IIL with IHRL see: B. Simma, *supra* note 2, 580; J. D. Fry, *supra* note 1, 77; T. G. Nelson, supra note 5, 27; J. D. Taillant & J. Bonnitcha, 'International Investment Law and Human Rights', in: M.-C. Cordonier Segger *et al.* (eds.), *Sustainable Development in World Investment Law* (2011) 53, 79; P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009); B. Simma & T. Kill, 'Harmonizing Investment Protection and Human Rights: First Steps towards a Methodology', in: C. Binder *et al.* (eds.) *Essays in Honour of Christoph Schreuer: International Investment Law for the 21st Century* (2009) 678; M. Jacob, 'International Investment Agreements and Human Rights', *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development* (2010); B. Letnes, 'Foreign Direct Investment and Human Rights: An Ambiguous Relationship', 29 *Forum for Development Studies* (2002) 1, 33, 52; J. Tobin & S. Rose-Ackerman, 'Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties',(2 May 2005) available at http://ssrn.com/abstract=557121 (last visited 3 May 2012); L. E. Peterson & K. R. Gray, *supra* note 3, 23 and 24.

22 See also F. Schorkopf, *supra* note 4, 137.

falling within the realm of one of these approaches in a strict sense, most, if not all, publications follow lines of argumentation which can be linked in one way or the other to one of the following categories.

I. "Human Rights *against* IIL"

Traditionally, IHRL and IIL are seen as completely separated fields of international law which give rise to considerable potential for norm conflict. It is often stated that IIL may prevent States from tackling legitimate human rights issues because of the threat of being confronted with claims brought by private investors before arbitral tribunals.[23] This view is often expressed by authors who generally are skeptical of globalization and fear that neoliberal trade and investment regimes may unduly limit State sovereignty.[24] This line of argumentation is frequently connected with a challenge of the legitimacy of IIL in general and particularly its key procedural element: Investment arbitration. This approach could perhaps best be described as "IHRL *against* IIL". Although varying degrees of criticism towards IIL exist, the overall understanding that IIL may itself be detrimental to State sovereignty and human rights protection is shared by many academics.[25]

II. "Human Rights *through* IIL"

Other more "investment friendly" commentators, often practitioners in the field of IIL, try to highlight the positive side- and spillover effects of IIL. On the grounds of the positive effects of FDI on the overall economic development of societies, they seek to establish that IIL may indirectly serve the implementation of human rights.[26] Despite the difficulty to obtain empirical evidence, this is a key argument to justify substantial rights of

23 J. Ruggie, *supra* note 3, 20-25.; J. Waincymer, 'Balancing Property Rights and Human Rights in Expropriation', in: P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 275, 309; L. E. Peterson & K. R. Gray, *supra* note 2, 15 and 16.

24 B. Mahnkopf, 'Investition als Intervention: Wie interregionale und bilaterale Investitionsabkommen die Souveränität von Entwicklungsländern beschneiden', 12 *Internationale Politik und Gesellschaft* (2005) 121, 138.

25 G. van Harten *et al*., *supra* note 20.

26 C. Schreuer & U. Kriebaum, 'From Individual to Community Interest in International Investment Law', in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, 1079, 1088.

foreigners, which may, at times, provide more rights to foreign investors than to the nationals of the concerned host State. It is the author's submission, however, that it is difficult to use indirect policy arguments to legitimize special legal rights of foreign investors. In any event, the positive development of the overall human rights situation in a certain State depends on many more factors than economic growth or the mere existence of investment protection for foreign investors. This is not to say that positive spillover effects do not exist - rather to the contrary. But indirect spillover effects should in any case not serve as sole legitimization for a different treatment of nationals *vis-à-vis* foreigners. Thus, the approach that could best be described as "Human Rights *through* IIL" is not necessarily mistaken when positive effects of IIL on human rights are highlighted. However, the feeling remains that positive side effects are often times overstretched in order to defend the legitimacy of IIL and investment arbitration.

III. "IIL *as* Human Right"

Lastly, a fairly new approach can be distinguished in academic writing. IIL could be understood as part of human rights protection.[27] Although surprising at first, this view is consistent with the experience of national legal systems in which the protection of property and related economic rights are usually linked to the protection of other human rights.[28] IIL and IHRL certainly have many distinct characteristics, yet, only a comparative study focusing on the historic roots of both fields of the law can establish to what extent IIL and IHRL are different, similar or even to a certain degree identical. It is the author's submission that after careful comparative considerations one may conclude that IIL in its essence is very much alike IHRL. Although both fields of the law on a procedural level developed almost reversed characteristics, certain material standards of IIL may already constitute human rights, while others may be considered to represent human rights in the making. As a legal consequence, international investment law in the future may not be interpreted isolated from human rights law but, to the contrary, arbitrators must pay due consideration to other human rights which may be relevant to solve the investment dispute before them. In the following, similarities and differences of IIL and IHRL

[27] F. Schorkopf, *supra* note 4, 137; in this direction also T. G. Nelson, *supra* note 6, 27; J. D. Fry, *supra* note 1, 148 and149.

[28] From a German perspective see Art. 12 and Art. 14 German Basic Law.

will be scrutinized. To begin with, the contribution will first take into account procedural aspects (I.), later it will focus on material similarities in protection standards (II.), before considering the legal consequences that the described concept of "IIL *as* Human Right" could potentially trigger for the practical application of international investment law in arbitral proceedings (E.).

D. Similarities and Differences between IIL and IHRL

I. Procedural Elements

When comparing the two fields of law, it becomes obvious that while there are certain differences, the two areas share some of their most important elements. BITs contain material rights of the investor against the host State, including the right to be compensated for expropriation, to be treated equitably and fairly, to be afforded physical security and in many cases not to be discriminated against on grounds of nationality.[29] Human rights, on the other hand, are similarly rights of individuals that protect individuals against infringements by States.

Although there may be some disagreement as to what extent BITs actually contain rights of individuals or whether States on a purely procedural level give the Investor the right to exercise State rights contained in the treaty,[30] this differentiation from a conceptual perspective seems purely formalistic. In any case, BITs contain individual procedural rights to the extent that private entities have the opportunity to bring claims against States before independent arbitral tribunals. As such, one can conclude that both fields protect individuals or corporate investors against infringements by public authority by providing them with direct standing before international fora.[31]

29 T. G. Nelson, *supra* note 5, 27.

30 *Archer Daniels Midland Co. v. Mexico*, No. ARB/AF/04/05, Award, ICSID Add. Facility Nov. 21 (2007) 169; see also Z. Douglas, 'The Hybrid Foundation of Investment Treaty Arbitration' *74 British Yearbook of International Law* (2003) 162, 163; K. Parlett, 'Diplomatic Protection and Investment Arbitration', in R. Hofmann & C. J. Tams (eds.), *International Investment Law and General International Law* (2011), 217.

31 Direct standing in this context does not apply to all human rights protection mechanisms; U. Kriebaum & C. Schreuer, *supra* note 26, 1088.

Yet, at the same time there also exist differences. The most obvious one is the difference in the group of people enjoying the respective rights. While IHRL grants rights to all human beings IIL only awards rights to foreign investors, thus making nationality a key criterion in the establishment of jurisdiction of any arbitral tribunal.[32] On a procedural level, another important difference is the in IHRL prevailing rule of the exhaustion of local remedies. IIL generally does not require the exhaustion of local remedies, thus placing the investor on an equal footing with the State.[33] Moreover, the implementation and enforcement of awards and rulings differs dramatically. While arbitral awards, as described above, reach a high level of enforceability, mechanisms to protect human rights are often times not binding upon States and are thus rendered futile. Taking this into account, one can conclude that in a procedural context investment law awards more rights to private parties than even the most progressive human rights protection mechanisms.[34]

According to many academics and practitioners, however, these are not the only differences. It is often times stated that while IHRL is fundamental to protect human dignity, IIL is instrumental to stimulating foreign investment and thereby economic growth.[35] This contention has widely been uncontested. It is the author's submission, however, that the differing motivation of concluding human rights and investment treaties is in its structure a different question, and thus of no relevance to the material rights contained in the respective documents. While it is generally the case that investment treaties are concluded with express language supporting the overall intention of the treaty to promote foreign investment,[36] the material rights contained aim at protecting investors from undue State action. With the exception of the differing groups of right bearers, the same holds true for IHRL. Although human rights treaties do not contain express provisions supporting the overall aim of the treaties to promote economic prosperity, it is beyond doubt that economic considerations and sustainable development

32 U. Kriebaum, 'Judicial 'Balancing' of Economic Law and Human Rights', in P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 219, 220.

33 C. Reiner & C. 'Schreuer, Human Rights and International Investment Arbitration', in P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 82, 83.

34 *Id*., 94.

35 B. Simma & T. Kill, *supra* note 22, 707.

36 M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (2010), 16.

play a key role in the ratification of both IIL and IHRL instruments.[37] The similarities of the two fields become even more striking when scrutinizing the common roots of the two areas in the customary rules of international law protecting the rights of aliens.[38] In the following, the differing material protection standards will thus be assessed with particular focus on their historic development.[39]

II. Material Elements

1. Expropriation

The right of aliens not to be unlawfully expropriated without prompt, adequate and effective compensation is one of the most firmly established customary rules of international law protecting the rights of aliens.[40] Its roots go back to ancient times when travelling abroad was dangerous and there was a constant threat of being deprived of all possessions when crossing the next bridge on the territory of a foreign landlord.[41] The emergence of this rule is closely connected to an inherent problem of human nature that foreigners have historically been struggling with: Foreigners are and have always been particularly vulnerable to discrimination.[42] Not only are foreigners not capable of participating in the making of community decisions,[43] but it is usually easier to target foreigners with unjust measures than nationals, where a backlash of public opinion is much more likely to occur.

The protection of property of foreign investors from unlawful expropriation pursuant to the Hull formula is also a core element of most

37 Highlighting the common objective of sustainable development: J. Krommendijk & J. Morijn, ''Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration', in P.-M. Dupuy *et al.* (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 422, 430.

38 M. S. Mc Dougal *et al* .supra note 11, 432; R. B. Lillich, *supra* note 11, 1.

39 See similarly just recently published: T. G. Nelson, *supra* note 5, 27

40 I. Brownlie, *Principles of Public International Law* (2003) 509.

41 J. Jr. Goebel, 'The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, insurrection and Civil Wars', *8 American Journal of International Law* (1914) 4, 802, 803.

42 Myers S. Mc Dougal *et al.*, *supra* note 11, 433.

43 *Id*.

IIAs.[44] Surprisingly, however, the protection of property as such is not contained in the most prominent universal human rights treaties. While the nonbinding UDHR contains a provision for the protection of property,[45] neither of the UN Covenants on Human Rights include such provisions. Thus, many commentators conclude that a universal human right to the protection of property does not exist.

While ICCPR and ICESCR do not provide for the protection of property, regional human rights instruments include such provisions. The first optional protocol of the ECHR[46] provides for the protection of property just as well as the American Convention on Human Rights[47] and the Banjul Charter[48]. Yet, the protection of property in human rights treaties is not only limited to regional human rights treaties. Similar property rights are included in the Convention on the Elimination of all forms of Racial Discrimination (CERD),[49] the Convention on the Elimination of Discrimination against Women (CEDAW),[50] the Convention relating to the Status of Refugees[51] and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[52]. This short overview over the relevant human rights treaties already implies that the protection of property is included in all modern comprehensive human rights treaties. While it is certainly still correct to state that no international treaty expressly provides for a universal human right to the protection of property, modern developments of international law point towards a reconsideration of the possibility of a human right to property as either customary rule or as general principle of international law.[53]

44 R. Dolzer & C. Schreuer, *supra* note 10, 89

45 Art. 17 of the Universal Declaration on Human Rights, UNGA Res. 217 A (III) of 10 December 1948; UNYB (1948-49) 535.

46 Art.1 of the First Protocol to the European Convention on Human Rights, CETS No. 9.

47 Art. 21 of the American Convention on Human Rights, OAS Treaty Series No. 36.

48 Art. 14 of the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) 1520 UNTS 217.

49 Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

50 Art. 15 of the Convention on the Elimination of all Forms of Discrimination against Women, 2149 UNTS 13.

51 Art. 8 of the Convention relating to the Status of Refugees, 189 UNTS 150.

52 Art. 15 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3.

53 Art. 38 (c) Statute of the International Court of Justice; on the possibility of human rights as general principles of international law see: B. Simma & P. Alston, 'The

While the inclusion of a right to property in the UN Covenants was highly controversial during the cold war era, the end of the cold war and the subsequent developments in the national legal orders of former communist States seems to hint into the direction that the right to property, as a minimum standard of treatment, exists in almost all countries.[54] Of course it can be argued that a right to property in the Covenants was left out intentionally on ideological grounds. In light of the developments since the 1990s, however, such argument sounds somewhat outdated. It rather seems as if the right to property was left out. Later, however, the need for a minimum standard for the protection of property became necessary and eventually the right to a minimum standard of protection of property, already included in the treaty law of IIL, became part of modern human rights law as general principle of law.

From this observation, one could derive a certain tendency in the development of international law: Rights that primarily are only meant and designed for foreigners may eventually become accepted as rights for all.

Such a conclusion may be perceived as highly controversial, particularly because the standard of protection of property under human rights regimes often times differs from the approach taken by arbitral tribunals in IIL.[55] However, it is nevertheless argued that a minimum standard of the protection of property became a universal human right as general principal of international law. This level of protection is certainly not identical to the findings of arbitral tribunals in investment cases relying on particular BITs. These cases can, however, be of guidance when determining a minimum standard that is already part of international human rights law. While it cannot be said that existing IIL standards will be transferred into future human rights standards one-to-one, one should be mindful that, as a tendency under international law, rights of foreigners, as long as they constitute minimum standards, may eventually, ideally through democratic process, become accepted as rights for all.

When it comes to the protection from unlawful expropriation IIL and IHRL are thus not mutually exclusive, but can rather be understood as complementing each other. Although differences in the level of protection

Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *12 Australian Yearbook of International Law* (1988) 82, 108.

54 J. Waincymer, *supra* note 23, 277.

55 U. Kriebaum & C Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, available at http://www.univie.ac.at/intlaw/concept_property.pdf, (last visited 3 May 2012), 1.

exist from a conceptual perspective both fields aim *inter alia* in the same direction: Protecting private parties from State interferences with regard to a minimum guarantee of property rights.

2. Fair and Equitable Treatment

The protection standard of Fair and Equitable Treatment (FET) is next to the protection from unlawful expropriation one of the most common protection standards of IIL.[56] The content of the FET standard is somewhat vague and thus open to different interpretations.[57] It has been particularly disputed whether FET merely reflects the international customary rules of a minimum standard of treatment, or whether it offers an autonomous standard in addition to general international law.[58] This dispute by itself already displays how closely the FET standard is connected to the international customary rules of treatment of aliens. As stated by the US – Mexico Claims Commission in its famous *Neer* case of 1926:

"[..].the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[59]

Subsequent tribunals have distanced themselves from the high threshold formulated in the *Neer* case.[60] Yet, particularly in NAFTA cases by virtue of an affirmative interpretation by the NAFTA Free Trade Commission, it is well accepted that Article 1105(1) NAFTA reflects the customary rule of minimum standard and does not require treatment in addition to or beyond that which is required by customary international law.[61]

It becomes obvious, that the historical roots of the FET standard do not only lie, as often times stated, in treaty law, perhaps most prominently

56 R. Dolzer & C. Schreuer, *supra* note 10, 119.
57 M. Sornarajah, *supra* note 36, 235 and 236.
58 R. Dolzer & C. Schreuer, *supra* note 10, 124.
59 *Neer v. Mexico*, Opininon, US - Mexico General Claims Comission, 15 October 1926, 21 *American Journal of International Law* (1927), 556.
60 *Pope & Talbot v. Canada*, Award, 11 April 2001, 42 ILM, 2002, 352; *Mondev v. USA*, Award, 11 October 2002, 42 ILM, 2003, 85; *GAMI v. Mexico*, Award, 15 November 2004, 44 ILM, 2005, 545; see also with further reference R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008) 129, 130.
61 Free Trade Commission Note of Interpretation of 31 July 2001.

displayed by the practice of the US to conclude Treaties of Friendship Commerce and Navigation (FCNs).[62] But indeed also the roots of the FET standard lie in the customary rules of the protection of aliens. When tracking the exact roots of the FET standard one is faced with the problem that out of necessity customary rules protecting the rights of aliens as minimum standards are left highly general in its empirical evidence.[63] Attempts of arbitral tribunals to offer a definition of the FET standard, however, further exemplify that the FET standard is rooted in customary international law and is also not unfamiliar to modern human rights treaties. In *MTD v. Chile* the tribunal concurred with a legal opinion of Judge Schwebel that fair and equitable treatment includes such fundamental standards as good faith, due process, non-discrimination, and proportionality.[64]

These principles are common to the customary rules of international law protecting the rights of aliens, IHRL and IIL. Particularly the applicability of the principle of proportionality, mostly understood as human rights concept, in the field of IIL has lately been at the center of academic attention.[65] The understanding of "IIL *as* Human Right" could give a satisfactory explanation as to why the principal of proportionality should also be applied in investment cases. Moreover, the understanding of IIL as a human rights-like guarantee of minimum standards of protection would strongly support the view taken by the NAFTA Free Trade Commission that in principal the FET standard is to be interpreted as not going beyond the level of protection of customary international law.

3. Full Protection and Security

Most investment treaties also include the protection standard of 'full protection and security'.[66] Just like the FET standard the full protection and security standard is general in nature and open to different interpretations. Traditionally, full protection and security includes the right of the investor to be protected against various types of physical violence, including the

62 See for instance Article I (1) of the 1954 FCN treaty between Germany and the US, Treaty of Friendship Commerce and Navigation, 20 October 1954, US-FRG, 273 UNTS 4.

63 M. S. Mc Dougal *et al.*, *supra* note 11, 450.

64 *MTD v Chile*, Award, 25 May 2004, 12 ICSID Reports 6; see also R. Dolzer & C Schreuer, *supra* note 10, 131.

65 J. Krommendijk & J. Morijn, *supra* note 37, 430.

66 R. Dolzer & C. Schreuer, *supra* note 10, 149.

unlawful invasion of the premises of the investment. However, the contemporary understanding of full protection and security extends its original meaning to also provide guarantees against infringements of the investor's rights by laws and regulations of the host State.[67] The protection from physical or legal infringements, however, is far from absolute and host States are generally only responsible to exercise 'due diligence' and to take measures that are appropriate under the case specific circumstances.[68]

Just like it is the case with the FET standard, in some treaties, most prominently NAFTA, full protection and security again does not extend beyond the standards embodied in customary international law. In the ELSI case the ICJ suggested that the standard may extend further than general international law.[69] However, tribunals such as in the case of *Noble Ventures v. Romania* were doubtful of such conclusion.[70] Again, one can conclude that IIL includes protection standards similar to those included in IHRL. Protections from physical infringements in fact represent the cornerstones of international human rights protection. Although the case of *Biloune v. Ghana*[71] exemplifies that investment tribunals are often times hesitant to exercise their jurisdiction in cases where human rights violations are at the center of dispute, this does, however, not mean that human rights violations exclude the jurisdiction of investment tribunals. In cases in which an infringement of the right of an investor to full protection and security occurs, it is often times paralleled by a corresponding violation of a human right of the investor. Also in this regard IHRL and IIL can rather be understood as complementing each other, rather than being cause for norm conflict.

67 *Id.*

68 R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (1995) 61; with further reference: R. Dolzer & C. Schreuer, *supra* note 10, 149.

69 *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, ICJ Rep (1989) 15, para. 111.

70 *Noble Ventures v Romania*, Award, 12 October 2005, para. 14.

71 *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

E. Conception of IIL as Human Right: Constitutional Balancing between Economic Rights and other Human Rights?

IHRL and IIL claims are not mutually exclusive, they may exist in parallel. Although BITs may provide a foreign investor with more rights than everyone is entitled to under human rights law, both regimes in this context are not the source of norm conflict but they can rather be understood as mutually supportive and complementing each other. Problems only arise twofold: First, when material investment protection standards exceed guarantees which can be compared to minimum human rights standards and, second, when human rights other than the economic rights of the investor are of relevance in arbitral investment proceedings. Similar problems exist in IHRL when the ECtHR misinterprets ECHR provisions not as minimum standards and third parties interests in *multipolaren Grundrechtsverhältnissen* ("multipolar basic rights relationships") are left out of the balancing process.

The conception of IIL as human right may bring important advantages. Understanding investment protection as one right among others that first needs to be understood as minimum standard and second, needs to be balanced with other human rights may serve investment tribunals in the future as conceptual tool to effectively balance investment protection with other human rights. If this understanding was taken seriously, the system of IIL could hardly be viewed as illegitimate and IIL would not represent a threat to international human rights protection but rather a useful supplement to IHRL, designed to promote economic growth, the protection of property and related economic rights. While it cannot be said that existing IIL standards will be transferred into future human rights standards one-to-one, one should be mindful that as a tendency under international law rights of foreigners, as long as they constitute minimum standards, may eventually become accepted as rights for all. In any event, there exists considerable potential for cross-fertilization between the two fields of law which are separated by a merely perceived legal boundary.

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European Asylum Law and the ECHR: An Uneasy Coexistence

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Abstract

During the last two decades the European Union has become a major actor in the field of asylum law. Meanwhile, human rights law, in particular the European Convention on Human Rights (ECHR), has become of paramount importance in this field. This paper highlights certain areas of concern in the European Asylum System from the viewpoint of the ECHR. It particularly focuses on the Dublin II Regulation, the reception conditions and the detention of asylum seekers.

A. Introduction

During the 1990's and the 2000's the European Union (EU) has developed an extensive set of instruments in the field of asylum law. The emerging European Asylum Law should however not be considered in a legal vacuum: ever since the 1951 Geneva Convention relating to the Status of Refugees and the subsequent 1967 Protocol, international law has been of paramount importance in this field. In the last decades the protection of refugees and asylum seekers has been particularly shaped by evolutions in international human rights law.

At the level of the Council of Europe, the European Court of Human Rights (ECtHR), the supranational court supervising the European Convention on Human Rights (ECHR), has contributed significantly to the protection of asylum seekers in Europe.

Firstly, under Art. 3 ECHR, the prohibition of torture and of inhuman or degrading treatment or punishment, the Court has developed extensive case-law concerning asylum seekers. According to the ECtHR, "expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned."[1] In this context, it is of crucial importance that asylum

[1] E.g. *Vilvarajah and Others v. The United Kingdom,* ECHR (1991) Appl. No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Series A, No. 215, 34, para. 103. Art. 3 ECHR also prohibits "refoulement" of a person to a country where he or she

seekers have the possibility of demanding a binding interim measure from the ECtHR under Rule 39 of the Rules of Court[2] to prevent such an expulsion. Secondly, the ECtHR has developed procedural guarantees in asylum cases under Art. 13 ECHR, the right to an effective remedy against breaches of the ECHR or its protocols,[3] and Art. 4 Protocol No. 4, the prohibition of collective expulsions.[4] Finally, Art. 5 ECHR, the right to liberty and security, is particularly important in the context of detention of asylum seekers,[5] while Art. 8 ECHR, the right to respect for private and family life, provides some protection against the expulsion of asylum seekers with a family in the host country.[6]

This paper will focus on the impact of human rights law, in particular the ECHR, on European Asylum Law. As an exhaustive analysis would be beyond the scope of a short paper, this paper will highlight a few important recent developments which have redefined this relationship. The entry into force of the Lisbon Treaty has made some changes to the EU constitutional framework in the field of asylum law and significant changes to the EU system of human rights protection. Meanwhile discussions are on-going about the introduction of new pieces of legislation, recasting the current EU asylum instruments. A recast Qualification Directive was adopted at the end of 2011, while it is expected that the other recast instruments will be

runs a real risk of being subjected to the death penalty (*Al-Saadoon and Mufdhi v. the United Kingdom*, ECHR (2010) Appl. No. 61498/08, para. 120).

2 Art. 34 ECHR, the prohibition of hindering the effective exercise of the individual applicant's right of application, is the legal basis for the binding character of interim measures (*Mamatkulov and Askarov v. Turkey*, ECHR (2005), Appl. Nos. 46827/99 and 46951/99, para. 128).

3 In particular the requirement that a remedy against a removal measure must have suspensive effect, e.g. *Čonka v. Belgium,* ECHR (2002), Appl. No. 51564/99, para. 79; *Gebremedhin v. France,* ECHR, (2007), Appl. No. 25389/05, para. 58.

4 In particular the requirement that aliens cannot be compelled, as a group, to leave a country, except when 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, e.g. *Čonka v. Belgium*, ECHR (2002), Appl. No. 51564/99, para. 59.

5 See *infra* no. F.

6 Such an expulsion constitutes an interference with the right to respect for the family life, which can only be justified in so far as it is "in accordance with the law" and when it is "necessary in a democratic society" in the interests of a legitimate aim. E.g. *Amrollahi v. Denmark*, ECHR (2002), Appl. No. 56811/00, para. 28. The right to private life provides some protection against the expulsion of "settled migrants" without a family life in the host country (e.g. *Üner v. The Netherlands,* ECHR (2006), Appl. No. 46410/99, para. 59).

adopted in the course of 2012. The ECtHR on its turn has had the opportunity to touch upon the application of EU asylum instruments, in particular in the case of *M.S.S. v. Belgium and Greece*.

First this paper will give an introduction to the EU system of human rights protection (B.), as well as to the competences of the EU in the field of asylum law and the main instruments of European Asylum Law (C.). Subsequently the paper will focus on some important human rights challenges presented to European Asylum Law, in particular the "Dublin II" system of responsibility for examining asylum applications (D.), the reception (E.) and the detention of asylum seekers (F.).

B. Fundamental Rights and the European Union

Since the entry into force of the Lisbon Treaty, Art. 6 of the Treaty on European Union (TEU) provides a threefold system of human rights protection in the EU legal system: the Charter of Fundamental Rights, the accession to the European Convention on Human Rights (ECHR) and the general principles of the Union's law.[7]

I. Charter of Fundamental Rights

1. General Provisions

The Charter of Fundamental Rights of the European Union, in the adapted version of 12 December 2007,[8] has acquired "the same legal value as the Treaties" at the entry into force of the Lisbon Treaty.[9] The Charter can thus be considered as a third treaty, besides the TEU and the Treaty on the Functioning of the European Union (TFEU).[10]

The Charter is addressed "to the institutions, bodies, offices and agencies of the Union [...] and to the Member States only when they are

7 S. Peers, 'Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law', in S. Peers & N. Rogers (eds), *EU Immigration and Asylum Law – Text and Commentary* (2006), 115, 132.

8 Charter of Fundamental Rights of the European Union, 14.12.2007, *OJ 2007 C* 303/ 1 [Charter].

9 Art. 6 para. 1 Treaty on European Union (TEU). See Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, *OJ 2007 C 306/156* for some restrictions in the applicability of the Charter with regard to these countries.

10 R. Barents, *Het Verdrag van Lissabon* (2008), 537.

implementing Union law."[11] The provisions of the Charter are thus binding on Member States, but only "when they act in the scope of Union law".[12] As the EU has developed a comprehensive set of asylum instruments, most decisions in asylum matters taken by Member States will come within the scope of EU law.[13] The Charter further explicitly provides that it does not extend the field of application of Union law beyond the powers of the Union or "establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."[14]

The Charter distinguishes between "rights" and "principles". Rights must be "respected" while principles must only be "observed".[15] Principles "may be implemented by legislative and executive acts [...]. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality" and can thus not be considered as subjective rights.[16]

With regard to Charter rights which correspond to rights guaranteed by the ECHR, the Charter states that "the meaning and scope of those rights shall be the same as those laid down by the said Convention", without however preventing Union law to provide "more extensive protection".[17] A list of these corresponding rights is incorporated in the Explanations relating to the Charter.[18] Thereby the ECHR is partially incorporated in the Charter and thus in EU primary law.[19] Charter provisions recognizing "fundamental rights as they result from the constitutional traditions common to the Member States [...] shall be interpreted in harmony with those traditions."[20]

The Charter contains a general limitations clause. Limitations on the exercise of the rights and freedoms guaranteed by the Charter are only acceptable when they are "provided for by law" and "respect the essence of

11 Art. 51 para. 1, first sentence Charter of Fundamental Rights of the European Union [Charter].

12 Explanations relating to the Charter of Fundamental Rights [Explanations relating to the Charter], *OJ 2007.C303/32*.The Explanations provide guidance to the interpretation of the Charter and "shall be given due regard by the courts of the Union and of the Member States." (Art. 52 para. 7 Charter).

13 Peers, *supra* note 7, 137.

14 Art. 51 para. 2 Charter.

15 Art. 51 para. 1, second sentence Charter.

16 Art. 52 para. 5 Charter.

17 Art. 52 para. 3 second sentence Charter.

18 Explanations relating to the Charter, *OJ 2007 C 303/*33-34.

19 W. Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon', 7 *European Constitutional Law Review* (2011) 1, 64, 70.

20 Art. 52 para. 4 Charter.

those rights and freedoms."[21] Limitations are also subject to the proportionality principle, which requires that they are "necessary" and that they "genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[22]

Nothing in the Charter, including the general limitations clause, "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all Member States are party, including the [ECHR], and by the Member States' constitutions."[23] This provision is intended to maintain the current level of fundamental rights protection.[24]

2. Specific Provisions

Some of the substantive Charter provisions are particularly important from the viewpoint of EU asylum law. Art. 18 of the Charter stipulates that "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union."According to Battjes, the right to asylum is the right to a durable solution, which includes the right to an appropriate status[25]. The Charter is the first document since the Universal Declaration of Human Rights (UDHR) to contain a right to asylum.[26] The Geneva Convention only recognizes the principle of non-refoulement[27] and implicitly the right to seek, but not the right to enjoy asylum.[28] Nor does the ECHR or its Protocols guarantee such a right.[29]

21 Art. 52 para. 1, first sentence Charter.
22 Art. 52 para. 1, second sentence Charter.
23 Art. 53 Charter.
24 Explanations relating to the Charter , *OJ 2007 C 303/*35.
25 H. Battjes, *European Asylum Law and International Law* (2006), 112-114.
26 Art. 14 UDHR recognizes both the right to seek and the right to enjoy asylum from persecution (D. McGoldrick, 'The Charter and United Nations Human Rights Treaties' in S. Peers & A. Ward (eds), *The EU Charter of Fundamental Rights* (2004) 83, 113-114).
27 Art. 33 para. 1 Convention Relating the Status of Refugees (Geneva Convention 1967).
28 S. Da Lomba, *The right to seek refugee status in the European Union* (2004), 8-10.
29 E.g. *Chahal v. The United Kingdom*, ECHR (1996) Appl. No. 22414/93, para. 73.

Art. 19 para. 2 of the Charter on its turn provides that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." This incorporates the case-law of the ECtHR regarding Art. 3 ECHR, the prohibition of torture and of inhuman or degrading treatment or punishment.[30]

Art. 47 para. 2 of the Charter is relevant in the context of asylum and expulsion procedures. This provision states that "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented." This corresponds to Art. 6 para. 1 ECHR, the right to a fair trial, but unlike the latter provision, Art. 47para. 2 Charter is not confined to the determination of civil rights and obligations or of a criminal charge.[31] The ECtHR has ruled that Art. 6 para. 1 ECHR is not applicable in the context of decisions concerning the entry, stay and deportation of aliens.[32] Art. 47 para. 2 ECHR on the other hand does cover migration and asylum procedures.[33]

Finally Art. 6 of the Charter states that "[e]veryone has the right to liberty and security of person." This provision corresponds to Art. 5 ECHR, the right to liberty and security[34]. This provision may be particularly relevant in the context of the detention of asylum seekers.

II. Accession to the ECHR

The Lisbon Treaty provides that the European Union shall accede to the European Convention on Human Rights.[35] Thereby the Member States

30 Explanations relating to the Charter, *OJ 2007 C 303/*24.

31 Explanations relating to the Charter, *OJ 2007 C 303/* 30.

32 *Maaouia v. France,* ECHR (2000) Appl. No. 39652/98, para. 40.The Court has however accepted extensive procedural obligations in asylum and migration cases under Art. 13 ECHR, the right to an effective remedy (e.g. *Čonka v. Belgium*, ECHR (2002) Appl. No. 51564/99; *Gebremedhin v. France,* ECHR (2007), Appl. No. 25389/05).

33 See European Court of Justice Case 69/10, *Brahim Samba Diouf vs. Minister for Labour, Employment and Immigration (Luxembourg)* [ECJ 28 July 2011] (court decision not yet reported).

34 Explanations relating to the Charter, *OJ 2007 C 303/*19.

35 Art. 6 para. 2 TEU. As early as 1979 the European Commission called for the accession to the ECHR (European Commission, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and

have met the objections of the Court of Justice, which had ruled that the accession to the ECHR "would be of constitutional significance" and therefore required a treaty basis[36]. Since the entry into force of Protocol No. 14 to the ECHR on 1 June 2010, the new Art. 59 para. 2 ECHR stipulates that "[t]he European Union may accede to the Convention".

On 7 July 2010 official talks started between the European Commission and the Council of Europe on the EU's accession to the ECHR. At the end of the negotiations an accession agreement will be concluded between the 47 contracting parties of the ECHR and the European Union, acting by unanimous decision of the Council and with consent of the European Parliament.[37] The accession agreement needs ratification by all EU and Council of Europe Member States. The ratification process will probably take some years.[38]

A protocol to the Lisbon Treaty requires that the accession agreement "shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to […] the specific arrangements for the Union's possible participation in the control bodies of

Fundamental Freedoms, 2 May 1979, Com (1979) 210 final, Bulletin of the European Communities, Supplement 2/79, 8).

36 Opinion of the Court on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/94, ECR *1996, I-01759*.

37 Press release European Commission no. IP/10/906, http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/10/906&format=DOC&aged=1&language=EN&guiLanguage=en (last visited 22 April 2012). The Council of Europe Steering Committee for Human Rights has published a Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, 14 October 2011, CDDH(2011)009 and a Final version of the draft legal instruments on the Accession of the European Union to the European Convention on Human Rights, 19 July 2011, CDDH-UE(2011)16, available at http://www.coe.int/t/dlapil/cahdi/source/Docs 2011/CDDH-UE_2011_16_final_en.pdf (last visited 2 May 2012). On this draft agreement, see X. Groussot, T. Lock & L. Pech, *Adhésion de l'Union européenne à la Convention européenne des droits de l'homme: analyse juridique du projet d'accord d'adhésion du 14 octobre 2011* (7 November 2011) available at http://www.robert-schuman.eu/question_europe.php?num=qe-218 (last visited 2 May 2012).

38 H. Mahony, 'EU bid to join human rights convention poses tricky questions' (2010) available at http://euobserver.com/18/29711 (last visited 2 May 2012). It took almost six years before Protocol No. 14 was ratified by all Council of Europe member states, due to obstruction by Russia.

the European Convention […]"[39] Other technical issues that need to be solved relate inter alia to the relationship between the Court of Justice and the ECtHR, e.g. the possibility of the introduction of a preliminary reference procedure by which the Court of Justice could request an interpretation of the ECHR from the ECtHR[40] and the question of whether the EU will also accede to the Protocols to the ECHR.[41]

While the European institutions are already bound by the ECHR as a matter of European law,[42] as a result of the accession, the European Union's international responsibility under the ECHR for human rights violations may be engaged. By acceding, the EU will equally subject itself to external scrutiny in the field of human rights, i.e. the jurisdiction of the European Court of Human Rights. Currently the ECtHR declares applications directed against the European Union inadmissible *ratione personae.*[43]

The ECtHR however, does examine nationally implemented EU measures. In the famous *Bosphorus*-case,[44] the European Court of Human Rights stated that there's a presumption that actions taken by Member States in the execution of EU legal obligations[45] are in compliance with the ECHR, because the protection of fundamental rights by the European Union is considered to be "equivalent" to that of the Convention system.[46] This presumption can however be rebutted "if, in the circumstances of a particular case, it is considered that the protection of Convention rights was

39 Protocol relating to Art. 6 para. 2 of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, *OJ C* 17 (2007), 306/ 155.

40 For more details: Steering Committee for Human Rights, Technical and legal issues of possible EC/EU accession to the European Convention on Human Rights, 53th meeting, 25-28 June 2002, CDDH(2002)020 Addendum 2, available at www.coe.int/t/dghl/standardsetting/cddh/Meeting reports committee/53rd_en.pdf (last visited 2 May 2012).

41 Weiß, *supra* note 19, 91.

42 By application of the general principles of EU law (see B.III) or indirectly through the Charter (see B.I, 1).

43 E.g. *Connolly v. 15 EU Member States,* ECHR (2008) Appl. No. 73274/01.

44 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* ECHR (2005), Appl. No. 45036/98.

45 The Court restricted the *Bosphorus*-presumption to Community law in the strict sense, at that time the first pillar of the European Union (para. 72). In the light of the abolition of the pillar structure by the Lisbon Treaty, the presumption arguably applies to all areas in which the Court of Justice has full jurisdiction.

46 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland,* ECHR (2005) Appl. No. 45036/98, para. 165.

manifestly deficient."[47] The presumption does not apply to acts falling outside a Member State's strict EU legal obligations, in particular when they exercise State discretion.[48] It is possible that the ECtHR will change its deferential attitude towards the EU in the event of EU accession to the ECHR,[49] as this attitude is justified by the fact that the EU is currently not a party to the ECHR[50].

III. General Principles

The TEU states that fundamental rights, in particular as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law.[51] This is the explicit recognition of the case-law of the Court of Justice, which has accepted that

> "fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law."[52]

The Court of Justice however only examines the compatibility of national legislation with fundamental rights in so far as it falls within the scope of application of European law.[53]

47 *Id*., para. 156.
48 *M.S.S. v. Belgium and Greece*, ECHR (2011), Appl. No. 30696/09, para. 338.
49 F. van den Berghe, 'The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?', 16 *European Law Journal* (2010) 2, 112, 149.
50 Weiß, *supra* note 19, 95
51 Art. 6 para. 3 TEU.
52 Case 4/73, *Nold v. Commission, [1974]*, ECR 491 para. 13.
53 E.g. Case 12/86, *Demirel v. Stadt Schwaebish Gmuend*, [1987] ECR 3719, para. 28; Peers, *supra* note 7, 117.

The importance of general principles as source of fundamental rights in the European Union will undoubtedly decrease as the Charter has acquired legal binding effect and the Union will accede to the ECHR. The general principles nonetheless allow the Court of Justice to provide for a higher standard of protection than the Charter and the ECHR or for additional rights.[54] The general principles may also be relevant in so far as their scope might be broader than the scope of the Charter: a restrictive interpretation of the latter may not include situations in which Member States take actions which derogate from EU law, as in such circumstances Member States are not "implementing Union Law".[55] According to the Court of Justice, such actions do come within the scope of application of European law and therefore the general principles are applicable.[56]

IV. Conclusion

The three systems of human rights protection overlap to a high degree. In case of divergence, the standards which provide the highest level of protection should be applied.[57] The ECHR has been assigned a preeminent position in this construction, which is structurally reflected in the references to the ECHR as a minimum standard with regard to corresponding Charter rights and as a primary source of the general principles of EU law.

C. Common European Asylum System

At the entry into force in 1993 of the Maastricht Treaty, the European Union gained competences in the field of asylum and immigration policy as a part of the now abolished third pillar concerning "Justice and Home Affairs".[58] The Amsterdam Treaty, which entered into force in 1999, incorporated asylum and immigration policy in the Treaty establishing the

54 Weiß, *supra* note 19, 92.

55 Art. 51 para. 1, first sentence Charter. See C. Franklin, 'The Legal Status of the EU Charter of Fundamental Rights after the Treaty of Lisbon', 15 *Tilburg Law Review* (2010-2011) 2, 137, 153-155.

56 E.g. Case 260/89, *ERT v. DEP*, [1991] ECR I-2925. The explanations suggest that the scope of the Charter should be interpreted in line with the case-law of the Court of Justice on the scope of the general principles (Explanations relating to the Charter , *OJ 2007.C 303*/32), excluding such a restrictive interpretation of Art. 51, para. 1, first sentence, Charter.

57 Weiß, *supra* note 19, 74-75.

58 Art. K.1. Treaty of Maastricht (TEU); Battjes, *supra* note 25, 28.

European Community (since 2009: TFEU), thus transferring this area from the third (intergovernmental) to the first (supranational) pillar.[59] The growing EU competences in this field are reflected in the so-called Tampere Conclusions in which the European Council agreed to work towards the establishment of a Common European Asylum System.[60]

I. Competences

Asylum and immigration policy are part of Title V TFEU, the so-called "Area of Freedom, Security and Justice".[61] Measures in the field of asylum and immigration law must be adopted jointly by the European Parliament and the Council, deciding by qualified majority,[62] in accordance with the ordinary legislative procedure.[63] The Lisbon Treaty extends the competences of the Court of Justice: the Court now principally has full jurisdiction in the Area of Freedom, Security and Justice under the same conditions as other fields of EU law.[64] This will undoubtedly lead to a

59 Battjes, *supra* note 25, 29.

60 Tampere European Council 15 and 16 October 1999 – Presidency Conclusions, SN 200/99, www.europarl.europa.eu/summits/tam_en.htm, para. 14 (last visited 3 April 2012); Battjes, *supra* note 25, 30.

61 P. Craig, 'The Treaty of Lisbon, process, architecture and substance', 33 *European Law Review* 2, 2008, 137, 142.

62 Art. 16 (3) Treaty on European Union (TEU) provides that "(t)he Council shall act by a qualified majority, except where the Treaties provide otherwise." See Craig, *supra* note 61, 154.

63 Art. 78 (asylum) and Art. 79 (immigration) TFEU. The ordinary legislative procedure is outlined in Art. 294 TFEU. Before the entry into force of the Lisbon Treaty, co-decision was already required in the field of asylum law and the Council already acted by qualified majority, while in the field of immigration law unanimity in the Council was required and the European Parliament was merely consulted (S. Peers, 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon', 10 *European Journal of Migration and Law*, 2008, 219, 240).

64 See S. Carruthers, 'The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs', *European Human Rights Law Review* (2009) 6, 784-804. The main restriction to the Court's jurisdiction is Art. 276 TFEU, which states that "[i]n exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." As a transitional measure, the

significant increase of the Court's activities in the field of asylum and immigration law.[65]

The European Parliament and the Council have the competence to adopt measures for a Common European Asylum System, comprising a uniform status of asylum (a) and subsidiary protection (b), a common system of temporary protection for displaced persons in the event of massive inflow (c), common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status (d), criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection (e), standards concerning the conditions for the reception of applicants for asylum or subsidiary protection (f) and partnership and cooperation with third countries in the context of asylum or temporary protection (g).[66]

At first sight, the Lisbon Treaty has not significantly changed the competences in the field of asylum law[67]. Interestingly however, while the old Art. 63 of the Treaty establishing the European Community (ECT) generally only allowed for the adoption of "minimum standards" in the field of asylum law,[68] Art. 78 TFEU no longer contains this limitation.[69] This is highly relevant from the viewpoint of human rights protection. Before the Lisbon Treaty, it may well have been argued that the Member States still exclusively bore the final responsibility for the development of a legal framework which effectively protects the fundamental rights of asylum seekers – as they were free to provide more protection than EU "minimum standards". As the EU has gained harmonisation competences, the positive obligation to provide such a legal framework[70] has arguably (at least

Court's jurisdiction will remain unchanged with respect to old "third pillar" acts which have been adopted before the entry into force of the Lisbon Treaty, until these acts are amended or until five years have elapsed since the entry into force (Art. 10 Protocol on transitional provisions, *OJ C.* 17 December 2007, No. 306, 159). These restrictions are however irrelevant in the field of asylum law.

65 Peers, *supra* note 63, 219.On the restrictions of the old Art. 68 of the Treaty Establishing the European Community, see S. Peers, 'Finally 'Fit for Purpose'? The Treaty of Lisbon and the End of the Third Pillar Legal Order', 27 *Yearbook of European Law* (2008) 1, 47, 48-51.

66 Art. 78 para. 2 TFEU. For an elaborate discussion, see Peers, *supra* note 63, 219-247.

67 For a comparison of the TFEU before and after the Treaty of Lisbon, see *Id., 232-238.*

68 With the exception of Art. 63 para. 1, a), ECT which constituted the legal basis for the Dublin system.

69 Peers, *supra* note 63, 232-238, 233.

70 Starner considers the *"duty to put in place a legal framework which provides effective protection for Convention rights"* as the first and foremost type of positive obligation

partially)[71] shifted in its direction. After the accession to the ECHR,[72] the international responsibility of the EU may thus be engaged if it fails to comply with that positive obligation. To avoid this situation, it is necessary that the Court of Justice applies its increased jurisdiction to raise standards of human rights protection in the field of EU asylum law. This is particularly important in the light of the upcoming recasts of major pieces of EU asylum legislation.

II. Instruments

1. Qualification Directive

In order to understand the scope of European Asylum Law – and thus of this paper – it is necessary to first discuss the Qualification Directive[73]. This Directive lays down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.[74] The Directive does not prevent Member States from introducing

under the ECHR (S. Karner, 'Positive Obligations Under the Convention' in J. Lowell & J. Cooper (eds) *Understanding Human Rights Principles* (2001), 147). Similarly A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), 5.

71 The case *Ilaşcu and Others v. Moldova and Russia*, ECHR (2004) Appl. No. 48787/99, is a perfect example of how the same situation can attract the international responsibility of two distinct parties to the Convention, each within their own competences.

72 See above chapter B, subtitle II.

73 On 13 December 2011 a recast version of the Qualification Directive was adopted: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (Recast Qualification Directive). Directive 2004/83/EC will be repealed with effect from 21 December 2013 (Art. 40 Recast Qualification Directive), the transposition deadline of the recast directive (Art. 39, para. 1 Recast Qualification Directive). Unless stated otherwise, this paper will discuss Directive OJ L 304, 2004/83/EC; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive).

74 Art. 1 Qualification Directive. Besides these two statuses, European Asylum Law also provides for a temporary protection status in case of a mass influx of displaced

or retaining more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, insofar as those standards are compatible with the Directive.[75]

The Directive defines a refugee as:

> "a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply."[76]

This definition encompasses all elements necessary for the determination of refugee status as set out in the Geneva Convention.[77] A

persons, which must be established by the Council, see: Council Directive 2001/55/EC of 20 July 2001on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons end bearing the consequences thereof (Temporary Protection Directive). This procedure has not been applied so far. On this Directive, see S. Peers & N. Rogers, *EU Immigration and Asylum Law* (2006), 453-485.

75 Art. 3 Qualification Directive. Similarly, Art. 3 Recast Qualification Directive.

76 Art. 2 (c) Qualification Directive. Similarly Art. 2 (d) Recast Qualification Directive. The reasons for persecution are set further explained in Art. 10 Qualification Directive. Art. 10 Recast Qualification Directive takes gender related aspects more seriously in defining whether a group constitutes "a particular social group" and explicitly stresses the need to give due consideration to gender identity.

77 Under the Geneva Convention, a "refugee" is "any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence […], is unable or, owing to such fear, is unwilling to return to it" (Art. 1, A, (2) Convention relating to the Status of Refugees, Geneva, 28 July 1951, as amended by the Protocol relating to the Status of Refugees, New York, 31 January 1967 (Geneva Convention 1967)). Art. 12 Qualification

notable difference however is that the Directive is only applicable to third-country nationals – persons who do not have the nationality of an EU Member State – while the Geneva Convention does not contain a geographical limitation. This is in line with a Protocol which was annexed to the Treaty establishing the European Community (the current TFEU) at the adoption of the Treaty of Amsterdam, which principally states that an asylum application made by a national of a EU Member State may not be taken into consideration or declared admissible.[78] The Protocol's application will be incompatible with respectively Art. 33 para. 1 Geneva Convention and/or Art. 3 ECHR as well as Art. 19 para. 2 of the Charter, if it results in the removal of an EU citizen to a Member State where there is a well-founded fear of persecution and/or a real risk of ill-treatment.[79]

The Qualification Directive provides a second type of international protection: subsidiary protection is "complementary and additional to the refugee protection enshrined in the Geneva Convention".[80]

A person eligible for subsidiary protection is:

"a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds

Directive incorporates the exclusion grounds of Art. 1, D, E and F Geneva Convention 1967; Battjes, *supra* note 25, 222.

78 Protocol on asylum for nationals of Member States of the European Union, OJ *.C.* 10 November 1997, No. 340, 103. The Qualification Directive explicitly states that it is "without prejudice to" this Protocol (consideration 13). The Protocol contains a very restrictive list of exceptions: (a) when the Member States derogate from the ECHR in application of Art. 15 ECHR; (b) if a procedure under Art. 7, para. 1 TEU has been initiated; (c) if the Council, in application of Art. 7, para. 1 TEU, has established the existence of a "serious and persistent breach" of the values referred to in Art. 2 TEU; or (d) if a Member State unilaterally decides to do so, but only if it immediately informs the Council and if the application is dealt with on the basis of a presumption that it is manifestly ill-founded. Belgium has made a declaration to the protocol, in which it stated that "it shall, in accordance with the provision set out in point (d) [...], carry out an individual examination of any asylum request made by a national of another Member State" (*OJ .C.* 10 November 1997, No. 340, 144). Strikingly, Spain had lodged the proposal for the Protocol, exactly because Belgium had refused to extradite a Basque couple which was suspected of aiding ETA terrorists.

79 The case of *M.S.S. v. Belgium and Greece* ECHR (2011), Appl. No. 30696/09 illustrates that a removal to an EU Member State may well violate Art. 3 ECHR, see D.3.

80 Preamble, (24) Qualification Directive.

> have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."[81]

Art. 15 defines serious harm as (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment in the country of origin or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[82]

Refugee and subsidiary protection apply regardless whether the actor of persecution or serious harm is "(a) the State, (b) parties or organisations controlling the State or a substantial part of the territory of the State or (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm [...]."[83]

The Qualification Directive further determines the content of the international protection, including the principle of non-refoulement, the issuance of a residence permit and access to employment, education, health care and social assistance.[84] Generally speaking, the rights attached to the

81 Art. 2 (e) Qualification Directive. Similarly Art. 2 (f) Recast Qualification Directive. Art. 17 Qualification Directive is comparable to Art. 12 but slightly broader; Battjes, *supra* note 25, 264.

82 Similarly Art. 15 Recast Qualification Directive. The Court of Justice has ruled that "the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place […] reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive." (Case 465/07, Elgafaji v. Staatssecretaris van Justitie (Netherlands), *[2009] ECR, I-921*, para. 35. This is conform with the case-law of the ECHR, which has accepted that in the most extreme cases of general violence, there may be a real risk of ill-treatment (in the sense of Art. 3 ECHR) simply by virtue of exposing an individual to such violence. See *NA v. The United Kingdom,* ECHR (2008), Appl. No. 25904/07, para. 115.

83 Art. 6 Qualification Directive. Similarly Art. 6 Recast Qualification Directive.

84 Art. 20-34 Qualification Directive.

refugee status are more elaborate than those attached to the subsidiary protection status.[85]

2. Other Instruments

Other important EU asylum instruments are the Asylum Procedures Directive,[86] the Reception Conditions Directive[87] and the Dublin II Regulation.[88] While the latter will be discussed extensively in the next chapter, the first two need some further elaboration here.

The Asylum Procedures Directive lays down minimum standards for the granting and withdrawing of refugee status.[89] It applies to all asylum applications made in the territory, including at the border or in the transit zones of a Member State, as well as to the withdrawal of refugee status.[90] The Directive generally guarantees a right of access to an asylum procedure and the right to remain in the Member State until a first instance decision

85 The Recast Qualification Directive approximates the rights of refugees and of beneficiaries of subsidiary protection, but continues differentiation between these statuses with respect to residence permits (Art. 24 Recast Qualification Directive) and access to social welfare (Art. 29 Recast Qualification Directive) and integration facilities (Art. 34 Recast Qualification Directive).

86 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive).

87 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive).

88 Council Regulation 2003/343/EC of 18 February 2003, (OJ 2003 L 050) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation).

89 On this Directive, see elaborately Peers & Rogers, *supra* note 74, 367-452.

90 Art. 3 para. 1 Asylum Procedures Directive. Art. 35 however contains the possibility of derogating from a high number of guarantees with respect to procedures at the border or in transit zones. The Directive does not concern subsidiary protection procedures, unless when Member States apply a single procedure for refugee claims and claims for subsidiary protection (Art. 3 para. 3 and Peers & Rogers, *supra* note 74, 367. The Commission Proposal for a recast of the Directive however does cover all procedures for granting and withdrawing of international protection status (see: Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), COM(2011) 319 final).

has been made.[91] It contains a number of procedural guarantees[92] and minimum requirements for the decision-making process.[93] Applicants must enjoy the right to an effective remedy before a court or a tribunal against decisions on their asylum application.[94] The Directive further contains common standards and practices related to the rejection of asylum applications: it enumerates the grounds on which applications can be declared inadmissible[95] or (manifestly) ill-founded[96] and makes provision for the use of accelerated procedures in these cases.[97] Applications can *inter alia* be declared inadmissible when a Member State is not responsible in accordance with the Dublin II Regulation[98] or when a country which is not a Member State is considered as a "first country of asylum"[99] or as a "safe third country".[100]

The Reception Conditions Directive in turn lays down minimum standards for the reception of asylum seekers in the Member States.[101] The Directive applies to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State, but only as long as they are allowed to remain on the territory as asylum seekers.[102] The Directive grants asylum seekers the right to obtain

91 Art. 6 and 7 Asylum Procedures Directive. The Directive allows an exception on the right to remain in the case of a subsequent application which will not be examined or in cases of extradition (Art. 7 para. 2).

92 Such as a right to information about procedures (Art. 10) , the opportunity of a personal interview (Art. 12); the right to legal assistance and representation (Art. 15).and specific guarantees for unaccompanied minors (Art. 17).

93 E.g. decisions are taken individually, objectively and impartially (Art. 8 para. 2, a)), are given in writing (Art. 9 para. 1) and, in case of rejection, state the reasons in fact and in law as well as written information on how to challenge a negative decision (Art. 9 para. 2).

94 Art. 39 Asylum Procedures Directive. The fact that the Directive allows for non-suspensive appeals is incompatible with Art. 13 ECHR (Peers & Rogers, *supra* note 74, 408.).

95 Art. 25 Asylum Procedures Directive.

96 Art. 28 Asylum Procedures Directive.

97 Art. 23 para. 4 Asylum Procedures Directive.

98 Art. 25 para. 1 Asylum Procedures Directive.

99 Art. 25 para. 2, b) and Art. 26 Asylum Procedures Directive.

100 Art. 25 para. 2, c) and Art. 27 Asylum Procedures Directive. Unnecessary to say that these last two concepts entail the risk of indirect refoulement (see below).

101 On this Directive, see Peers & Rogers, *supra* note 74, 297-322.

102 Art. 3 para. 1 Reception Conditions Directive. The Directive does not apply to applicants for subsidiary protection, but Art. 3 para. 4 however allows states to decide to apply the Directive in connection with procedures for deciding on applications for

documentation and to principally move freely within the territory of the host Member State.[103] It generally requires Member States to make provisions on material reception conditions – such as housing, food, clothing or financial allowances[104] – to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.[105] The Member States must ensure that applicants receive the necessary health care[106] and that asylum seeking minors and minor children of asylum seekers have access to the education system under similar conditions as nationals of the host Member State.[107] The Directive allows for access, under restrictive conditions, to the labour market and to vocational training.[108] It also contains specific provisions concerning persons with special needs, such as minors, unaccompanied minors and victims of torture and violence.[109]

While the Reception Conditions Directive essentially is a humanitarian instrument, its underlying aim is to discourage asylum seekers from moving from one Member State to another: the harmonization of reception conditions should help to limit the secondary movements of asylum seekers within the EU influenced by the variety in the level of reception conditions in the diverse Member States.[110] In Da Lomba's words, "the need to ensure respect for human dignity was balanced against the

kinds of protection other than that emanating from the Geneva Convention. The Commission proposal for a recast of the Reception Conditions Directive however does cover all applicants for international protection (see Art. 3 Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), COM(2011) 320 final.

103 Art. 6 and 7 Reception Conditions Directive. The freedom of movement is however far from absolute, see below chapter F.

104 Art. 2 (j) defines "material reception conditions" as "the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance."

105 Art. 13 para. 2. Art. 14 deals with the modalities for material reception conditions.

106 Art. 15 para. 1 Reception Conditions Directive. This must at least include emergency care and essential treatment of illness.

107 Art. 10, para. 1 Reception Conditions Directive.

108 Art. 11 and Art. 12 Reception Conditions Directive.

109 Respectively Art. 18, Art. 19 and Art. 20 Reception Conditions Directive.

110 Consideration 8 Reception Conditions Directive. According to Peers & Rogers, there is however "little or no evidence that secondary movements are made on this basis" (Peers & Rogers, *supra* note 74, 306.) similar consideration was made at the drafting of the Asylum Procedures Directive, see Consideration 6 Asylum Procedures Directive.

overall restrictive objectives of the EU asylum policy as well as financial considerations."[111]

As both the Asylum Procedures Directive and the Reception Conditions Directive lay down minimum standards, Member States are explicitly allowed to maintain or introduce more favourable conditions, insofar as these are compatible with the respective directive.[112]

D. Dublin II Regulation

I. Content Regulation

The so-called Dublin II Regulation, named after the preceding Dublin Convention,[113] contains a hierarchical list of criteria to determine which EU Member State is responsible for the examination of an asylum application lodged in one of the Member States by a third-country national.[114] The objective of the Regulation is to avoid "asylum shopping", i.e. the lodging of asylum applications in several Member States or the travelling to a preferred Member State to apply for asylum after transiting other States.[115] The criteria must be applied in the order in which they are set out in the Regulation.[116]

111 Da Lomba, *supra* note 28, 220.

112 Art. 5 Asylum Procedures Directive and Art. 4 Reception Conditions Directive.

113 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, Dublin, 15 June 1990. On this Regulation, see Peers & Rogers, *supra* note 74, 221-257.

114 Applicants for subsidiary protection are not included in the Dublin II Regulation, which predates the Qualification Directive. The Commission Proposal for a recast of the Dublin II Regulation however encompasses every application for international protection (Art. 1 Commission Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast) (Commission Proposal Dublin II), Com(2008) 820 final/2). The Regulation applies to the 27 EU Member States as well as to Norway, Iceland, Switzerland and Liechtenstein.

115 Battjes, *supra* note 25, 27.

116 Art. 5 para. 1 Dublin II Regulation.

A first set of criteria is related to reasons of family reunification.[117] A second set of criteria relates to the issuance of residence permits or visas.[118] The most well-known criterion is that of the country where the asylum seeker has irregularly entered the European Union.[119] Subsequent criteria relate to a third-country national entering the territory of a Member State in which the need for him or her to have a visa is waived.[120] and to the application made at the international transit area of an airport of a Member State,[121] in both instances that Member State shall be responsible. When no Member State can be designated on the basis of these criteria, the first Member State with which the application was lodged shall be responsible.[122] With the exception of the criteria related to family reunification, the Dublin system is thus designed to allocate responsibility to that Member State which has played the most important part in the entry of the asylum seeker concerned.[123]

Regardless of these criteria, the Member State where the asylum application is lodged can decide on the basis of the so-called "sovereignty clause" to examine the application[124]. Moreover any Member State may, at the request of another Member State, accept to examine an application on humanitarian grounds based in particular on family or cultural considerations, on condition that the persons concerned consent[125].

The Regulation provides that the designated Member State is obliged to "take charge of" an asylum seeker who has lodged an application in a different Member State or to "take back" an applicant who already lodged an application in the designated Member State, which is under examination, has been withdrawn by the applicant or has been rejected.[126] The Regulation further specifies the procedure for the submission of and the response to

117 Art. 6-8 Dublin II Regulation. These criteria have been criticized for defining the concept of family too narrowly, in line with the western concept of the nuclear family (e.g. Da Lomba, *supra* note 28, 122.).
118 Art. 9 Dublin II Regulation.
119 Art. 10 para. 1 Dublin II Regulation.
120 Art. 11 Dublin II Regulation.
121 Art. 12 Dublin II Regulation.
122 Art. 13 Dublin II Regulation.
123 Da Lomba, *supra* note 28, 119.
124 Art. 3 para. 2 Dublin II Regulation.
125 Art. 15 para. 1 Dublin II Regulation.
126 Art. 16 para. 1 Dublin II Regulation.

"take charge" or "take back" requests, including strict time limits, and the "transfer" to the designated Member State.[127]

II. Criticism

The Dublin II Regulation has been widely criticised for failing to adequately protect asylum seekers' fundamental rights.[128] According to the United Nations High Commissioner for Refugees (UNHCR), "a basic assumption underlying the Dublin system is not yet fulfilled – namely, the premise that asylum-seekers are able to enjoy generally equivalent levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States."[129] This fact has led to the result that "many individuals transferred under Dublin do not have their claims properly considered or may even be denied access to a procedure altogether."[130] The huge differences in success rates of asylum applications in different Member States have been correctly labelled as an "asylum lottery".[131] There

127 Art. 17-20 Dublin II Regulation.

128 E.g. M. Kengerlinsky, 'Shifting Borders: Immigration, Refugee and Asylum Matters & Public Policy: Immigration and Asylum Policies in the European Union and the European Convention on Human Rights: Questioning the legality of restrictions', 12 *Georgetown Public Policy Review* (2006-2007), 101, 110.

129 'UNHCR Comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (Dublin II) (Com(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for a comparison of fingerprints for the effective application of [the Dublin II] Regulation] (COM(2008) 825, 3 December 2008)', 1-2 (March 2009) available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&query=COM%282008%29+825%2C+3+December+2008&x=0&y=0 (last visited 2 May 2012). According to the European Council on Refugees and Exiles (ECRE), "[t]he Dublin II Regulation is based on an erroneous presumption that an asylum seeker will receive equivalent access to protection in whichever Member State a claim is lodged" (ECRE, 'Report on the Application of the Dublin II Regulation in Europe', 169 (March 2006) available at http://www.ecre.org/component/content/article/57-policy-papers/135-report-on-the-application-of-the-dublin-ii-regulation-in-europe.html (last visited 2 May 2012) [ECRE Report].

130 *Id.*

131 ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered', 15 (March 2008) available at http://www.ecre.org/component/content/

equally exists a great divergence in the level of reception conditions in the different Member States.[132] The Regulation has also been criticized for being an incentive for States to resort to an increased use of detention in order to secure Dublin II transfers.[133]

The fact that entry controls are linked to the allocation of responsibility under the Dublin II Regulation, has been criticized for creating unequal burdens depending on a State's geographical location.[134] This is contrary to Art. 80 TFEU, which states that "[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."[135]

Moreover, while "efficiency" appears to be one of the primary objectives of the Dublin II Regulation, its operation is inefficient, expensive and time-consuming.[136] It does not achieve its goal of reducing the number of multiple applications.[137] According to the European Council on Refugees and Exiles (ECRE), "[a]t best, the Dublin Regulation adds a lengthy, cumbersome procedure to the beginning of the asylum process."[138] This lengthy process, with its numerous deadlines, unnecessarily prolongs the

article/57-policy-papers/134-sharing-responsibility-for-refugee-protection-in-europe-dublin-reconsidered.html (last visited 2 May 2012) [ECRE Responsibility].

132 Amnesty International, 'The Dublin II Trap' (March 2010) available at http://www.amnesty.org/en/library/info/EUR25/001/2010/en, 35-41 (last visited 2 May 2012).

133 ECRE Report, 169. See below, chapter F, III, 2.

134 E.g. Da Lomba, *supra* note 28, 137; ECRE Report, 169. While in practice the majority of the actual transfers are not directed towards Member States located at an external border (Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, 6 June 2007, COM(2007) 299 final), the proper operation of the Dublin system would lead to a significant increase in the number of applicants in certain border countries (European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Report on the evaluation of the Dublin system, 2 July 2008, A6-0287/2008, 12).

135 The old Art. 63, para. 2, (b) Treaty establishing the European Community strove to "a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons."

136 ECRE Responsibility, 10.In reality few transfers are actually agreed on and more than half of the agreed transfers never happen. See similarly the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Report on the evaluation of the Dublin system, 2 July 2008, A6-0287/2008.

137 ECRE Responsibility, 11.

138 *Id.*

State of uncertainty in which asylum seekers find themselves and unnecessarily delays refugees' integration in the host country.[139]

Unsurprisingly, some have therefore argued that it might be better to do away with the Dublin system altogether.[140] In the opponents' view, it would be better to allow asylum seekers the freedom to choose in which Member State they lodge an asylum application[141] – Member States receiving disproportionately high numbers of asylum seekers would then be compensated by a financial burden sharing instrument.[142] This would be more in line with the freedom of movement, a fundamental principle of EU law,[143] as it does not compel asylum seekers to apply in a Member State not of their choosing.[144] Others have argued in favour of a system in which an asylum application is first examined by an EU body, instead of an individual Member State.[145] In the case of a positive decision, a refugee would then be distributed over the Member States on a quota basis.

III. European Court of Human Rights

On 21 January 2011, the European Court of Human Rights issued the long-anticipated Grand Chamber judgment in the case of *M.S.S. v. Belgium and Greece*. The case concerned an Afghan asylum seeker who was transferred by Belgium to Greece in application of the Dublin II Regulation. At his arrival in Greece, he was placed in detention for three days. After his release he had to live on the streets, without accommodation or means of

139 *Id*., 26.

140 ECRE Report, 170.

141 ECRE Responsibility, 29-30.As an alternative, ECRE proposes the use of criteria which indicate a significant connection of an asylum seeker with a particular Member State.

142 ECRE Report, 170.

143 Art. 45 Charter and Art. 3 para. 2 TEU.

144 ECRE Responsibility, 7.

145 C. Clarke, 'The EU and migration: A call for action' (1 December 2011) available at http://www.cer.org.uk/publications/archive/essay/2011/eu-and-migration-call-action, 18 (last visited 2 May 2012); 'UNHCR Working Paper A Revised "EU Prong" Proposal' (22 December 2003) available at http://www.unhcr.org/refworld/docid/400e 85b84.html (last visited 2 May 2012). Such a system, or even worse, a system of processing in centers outside the EU (see M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', 18 *International Journal of Refugee Law* (2006) 3-4, 601-629, is however contrary to the need for integration of refugees from day one (ECRE Responsibility, 27).

survival. Later he was detained for seven more days, after a failed attempt to leave Greece, after which he was again abandoned to live on the streets.

One of the applicant's complaints concerned his "indirect refoulement" by Belgium. As explained above, Art. 3 ECHR prohibits the expulsion of a person to a country where he or she runs a real risk of being subjected to torture or to an inhuman or degrading treatment or punishment. In the case of *T.I. v. The United Kingdom*, the Court had already ruled that "the indirect removal […] to an intermediary country […] does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention."[146] Therefore, when they apply the Dublin Regulation, "the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention."[147] As States can refrain from transferring asylum seekers to the designated Member State on the basis of the "sovereignty clause", such a transfer does not strictly fall within their international legal obligations and therefore the *Bosphorus*-presumption does not apply.[148]

In the earlier case of *K.R.S. v. The United Kingdom*, concerning the Dublin II transfer of an Iranian asylum seekers from the United Kingdom to Greece, the Court had stated that "in the absence of any proof to the contrary, it must be presumed that Greece will comply with [Art. 3 ECHR] in respect of returnees including the applicant."[149] In light of the numerous reports issued in recent years regarding the deficiencies of the asylum procedure in Greece, the Court adopted the different view in *M.S.S. v. Belgium and Greece* that:

> "it was in fact up to the Belgian authorities, faced with the situation described above, 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

146 *T.I. v. The United Kingdom,* ECHR (2000), Appl. No. 43844/98.
147 *M.S.S. v. Belgium and Greece,* ECHR(2011), Appl. No. 30696/09, para. 342.
148 *Id*., para. 339-340.
149 *K.R.S. v. The United Kingdom,* ECHR (2008), Appl. No. 32733/08.

> faced were real and individual enough to fall within the scope of Article 3."[150]

Therefore the Court ruled that Belgium had violated Art. 3 ECHR by transferring the applicant to Greece.[151] The Court found a further violation of Art. 3 ECHR by Belgium, because the transfer had knowingly exposed the applicant to detention and living conditions that amounted to degrading treatment.[152]

This ruling more or less implies the end of mutual trust in European Asylum Law: transferring States should not just presume that other Member States comply with their international obligations. When an issue arises under Art. 3 ECHR, they are obliged to apply the "sovereignty clause".

IV. Recast Regulation

The concern about the capacity of countries like Greece to comply with European minimum standards on asylum procedures and reception conditions is reflected in the 2008 Commission proposal to recast the Dublin II Regulation. The proposal contains a procedure which will allow the Commission – on its own initiative or on the initiative of another Member State – to suspend the Dublin II transfers to a Member State when "circumstances prevailing in [the Member State concerned] may lead to a level of protection for applicants for international protection which is not in conformity with Community legislation, in particular with [the Reception Conditions Directive] and [the Asylum Procedures Directive]."[153] The proposal further provides that a Member State may request the Commission to temporarily suspend incoming Dublin II transfers when faced with "a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants for international protection in accordance with this Regulation to that Member State could add to that burden."[154] The

150 *M.S.S. v. Belgium and Greece,* ECHR (2011), Appl. No. 30696/09, para. 359.

151 *Id.*, para. 360.

152 *Id*., para. 367-368. The transfer of M.S.S. equally violated Art. 4 (the prohibition of torture and of inhuman or degrading treatment or punishment) and Art. 19 para. 2 of the Charter of Fundamental Rights, both with respect to the risk of indirect refoulement as with respect to the exposure to inhuman and degrading detention and living circumstances.

153 Art. 31 para. 2-3, Commission Proposal Dublin II.

154 Art. 31 para. 1 Commission Proposal Dublin II.

Commission proposal has been slightly amended by the European Parliament[155] and is currently being discussed by the Council.

In the Council, however, there is fierce opposition to the idea of a suspension mechanism,[156] which makes it highly likely that the proposal will eventually be dropped. The Polish presidency has even made a counterproposal to instead introduce an "early warning system", which will allow the Commission to make recommendations to a Member State, inviting it to draw up a "preventive action plan" in case it identifies problems in the application of that Member States' asylum system.[157] If that "preventive action plan" does not lead to an improvement, the Commission, in cooperation with the Member State concerned, may elaborate a "crisis management action plan". The Member State concerned will have to submit regular reports on the implementation of these plans.

While it is unclear at this moment whether Poland's proposal will be endorsed by the Council, it is likely that the final version of the recast Dublin II Regulation will not contain a strong mechanism in order to avoid asylum seekers being transferred to Member States where they risk indirect refoulement or inhuman or degrading detention and living circumstances. As the *M.S.S.* judgment makes clear that such a transfer is prohibited, a strong mechanism is highly feasible because it would allow the EU institutions to monitor whether the basic assumption of the Dublin II system – that the receiving Member State offers asylum seekers a sufficient level of human rights protection – is fulfilled in practice. It is in any event clear that the current powers of the Commission to initiate infringement proceedings before the Court of Justice against a Member State which fails to comply with European law[158] are insufficient.[159]

155 Position of the European Parliament adopted at first reading on 7 May 2009 with a view to the adoption of Regulation (EC) No …/2009 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ *C* 5 August 2010, No. 212, E/371.

156 See e.g. Council Discussion Paper No. 15561/10, 29 October 2010.

157 Council Discussion Paper No. 16782/11, 14 November 2011.

158 As provided for by Art. 258 TFEU.

159 The Commission has initiated proceedings against Member States for failure to respect the transposition deadline of the Reception Conditions Directive and the Asylum Procedures Directive, but never for a failure to respect the minimum standards themselves.

The lack of a strong mechanism is particularly problematic in the light of the upcoming accession of the EU to the ECHR: the case-law of the ECtHR shows that the international responsibility of a State under the ECHR is engaged when domestic law makes lawful a treatment which breaches a Convention right.[160] In the future, it can therefore equally be argued that the EU is internationally responsible for a Dublin transfer by one Member State to another, in violation of the ECHR, because EU law makes such transfers lawful without however providing sufficient safeguards to prevent a violation of the human rights of asylum seekers.

E. Reception Conditions

A second interesting aspect of the *M.S.S.* judgment from the viewpoint of European Asylum Law is the applicant's complaint about his living circumstances in Greece. It should first be noted that the Court, as a body supervising a civil and political rights instrument, is generally quite reluctant to enter the sphere of social and economic rights.[161] The Court has however held 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."[162] Sometimes socio-economic interests can be protected from the angle of "negative" obligations – i.e. obligations of the State authorities not to interfere arbitrarily with Convention rights – for example the protection against eviction of a family from a Romani caravan site.[163] The main potential for the Court to enhance the protection of human rights in the socio-economic sphere, however lies in the doctrine of "positive"

160 E.g. *Young, James and Webster v. the United Kingdom,* ECHR (1981), Appl. Nos 7601/76 and 7806/77, para. 49; *VgT Verein gegen Tierfabriken v. Switzerland,* ECHR (2001), Appl. No. 24699/94,, para. 47; *Khurshid Mustafa and Tarzibachi v. Sweden*, ECHR (2008), Appl. No. 23883/06, para. 34.

161 E.g. E. Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', 2 *Erasmus Law Review* (2009) 4, 397-425.

162 *Airey v. Ireland,* ECHR (1979), Appl. No. 6289/73, para. 26. See also *Sidabras and Džiautas v. Lithuania***,** ECHR, (2004), Appl. Nos 55480/00 and 59330/00, para. 47.

163 *Connors v. The United Kingdom,* ECHR (2004), Appl. No. 66746/01.

obligations.[164] These types of obligations necessitate that States actively protect and fulfil[165] Convention rights.

So far, the Court has refused to read extensive positive obligations in the socio-economic sphere into the Convention. The Court has for example stated that:

> "Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being [has] a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."[166]

The Court nonetheless does not exclude that a refusal to solve the housing problem of an individual suffering from a severe disease might in certain circumstances raise an issue under Art. 8 ECHR, because of the impact of such refusal on the private life of the individual.[167] In the case of *Müslim v. Turkey*, the Court has also held that Art. 8 ECHR and Art. 3 ECHR do not oblige Member States to give refugees financial assistance to enable them to maintain a certain standard of living.[168]

The Grand Chamber, however, distinguishes the case of M.S.S. v. Belgium and Greece from the Court's earlier case law. Because "the obligation to provide accommodation and decent material conditions has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely [the Reception Conditions Directive]"[169] and because asylum seekers are a

164 This doctrine was first applied in *Marckx v. Belgium,* ECHR (1979), Appl. No. 6833/74, in which the Court stated that Art. 8 ECHR, the right to respect for family life, "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life" (para. 31).

165 The distinction between obligations to respect, to protect and to fulfill stems from the work of Asbjørn Eide; *The Right to Adequate Food as a Human Right*, Report prepared by Mr. A. Eide, UN Doc E/CN.4/Sub.2/1987/23.

166 *Chapman v. The United Kingdom,* ECHR (2001), Appl. No. 27238/95, para. 99.

167 *Marzari v. Italy,* ECHR (1999), Appl. No. 36448/97.

168 *Müslim v. Turkey,* ECHR (2005), Appl. No. 53566/99, para. 85.

169 *Id*., para. 250.

particularly underprivileged and vulnerable population group in need of special protection,[170] the Court ruled that "the Greek authorities must be held responsible, because of their inaction, for the situation in which [the applicant] has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs"[171] and that Greece thereby violated Art. 3 ECHR.[172]

The subsequent case of *Rahimi v. Greece* concerned the lack of care for a 15 year old Afghan unaccompanied minor. At arrival in Greece, he was placed in detention for two days, after which he was abandoned to live on the streets. The Court recalled the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* in which it stated that unaccompanied minors can be considered to belong to a "class of highly vulnerable members of society to whom the […] State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention."[173] The Court particularly emphasized the fact that the Greek authorities had neglected to appoint a legal guardian, although this was required by Greek law, in transposition of the Reception Conditions Directive.[174] The Court further attached importance to the lack of shelter and support, recalling the findings of the *M.S.S.* judgment.[175] Therefore the Court concluded that there had been a violation of Art. 3 ECHR.[176]

In both cases, the Court has attributed decisive power to the obligations under the Reception Conditions Directive in finding a violation of Art. 3 ECHR. This is confirmed by Judge Rozakis in his concurring opinion to the M.S.S. judgment, in which he states that "[t]he existence of those international obligations of Greece – and notably, vis-à-vis the European Union – to treat asylum seekers in conformity with these requirements weighed heavily in the Court's decision to find a violation of Article 3."

In the case of *M.S.S. v. Belgium and Greece*, the applicant was found to be in a situation which was incompatible with Art. 13 Reception

170 *Id.*, para. 251.
171 *Id*., para. 263.
172 *Id*., para. 264.
173 *Rahimi v. Greece,* ECHR (2011), Appl. No. 8687/08, para. 87; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* ECHR (2006), Appl. No. 13178/03, para. 55.
174 *Rahimi v. Greece,* ECHR (2011), Appl. No. 8687/08, para. 88.
175 *Id*., para. 90-93.
176 *Id*., para. 94.

Conditions Directive, which generally requires that "Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence."[177] The applicant's situation in Rahimi v. Greece was in turn incompatible with Art. 19 Reception Conditions Directive, which requires that "Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation."[178]

By attributing decisive power to the obligations under the Reception Conditions Directive, the ECtHR strengthens the impact of this instrument. Invoking Art. 3 ECHR may be a good substitute for directly invoking the provisions of (the domestic legislation implementing) the Reception Conditions Directive. Firstly the Court does not appear to require that the authorities' inaction breaches the Reception Conditions Directive in the strictest sense. It is sufficient that the situation of an asylum seeker reaches the minimum level of severity required by Art. 3 ECHR and that this results from an inaction on the part of the authorities which can be linked to one of the obligations under the Reception Conditions Directive. Secondly, Art. 3 ECHR constitutes a subjective right, while this might not be the case for the provisions of (the domestic legislation implementing) the Reception Conditions Directive. In this respect it is necessary to mention the case-law of the Court of Justice concerning the direct effect of directives: an individual can only invoke the provisions of a directive which has not been transposed at the expiry of the transposition deadline or which have not been transposed correctly, in so far as these provisions are unconditional and sufficiently precise.[179]

A more fundamental issue is whether one can really maintain that the scope of Art. 3 ECHR is defined by obligations under the Reception Conditions Directive. The question of whether a State has violated a preventive positive obligation under Art. 3 ECHR generally depends on

177 Art. 13 para. 2 Reception Conditions Directive.

178 Art. 19 para. 1 Reception Conditions Directive.

179 E.g. Court of Justice, 28 April 2011, no. C-61/11 PPU, El Dridi, para. 46. In Peers' and Rogers' view, the guarantees for asylum seekers in the Reception Conditions Directive meet the conditions for direct effect (Peers & Rogers, *supra* note 74, 303). In the absence of an explicit ruling of the Court of Justice in this sense, invoking Art. 3 ECHR will however avoid the potential direct effect pitfall.

whether or not the authorities concerned took "reasonable steps" to prevent ill-treatment of which they "had or had to have had knowledge".[180] The State thus only has to provide justification for an alleged lack of such "reasonable steps", insofar as a situation comes within the scope of Art. 3 ECHR or not. This solely depends on whether the required "minimum level of severity" was attained or not.[181] The legality of a situation is irrelevant for determining whether or not that situation comes within the scope of Art. 3 ECHR – to hold otherwise would allow States themselves to determine the minimum level of human rights protection, which is contrary to the counter-majoritarian function of human rights.

The correct starting point of the Court's analysis should thus have been to establish that the situations of *M.S.S.* and *Rahimi* attained the "minimum level of severity". The subsequent step would have been to rule that by failing to comply with its obligations under the Reception Conditions Directive,[182] the Greek authorities had not taken "reasonable steps" to remedy the situations of *M.S.S.* and *Rahimi* of which they had been well aware. This implies that the situation of extreme destitution in which asylum seekers sometimes find themselves – regardless of whether this situation is lawful under European law or not – can reach the threshold of Art. 3 ECHR. Similarly, such a situation may be in violation of Art. 4 of the Charter, which equally prohibits torture and inhuman or degrading treatment or punishment and has the same meaning and scope of Art. 3 ECHR.[183] It can thus be examined whether the Reception Conditions Directive is compatible with Art. 3 ECHR and Art. 4 of the Charter – this would always be the case if the scope of these provisions would depend on the content of the Reception Conditions Directive, which makes no sense whatsoever.

When the recast version of the Reception Conditions Directive is adopted, the Court of Justice may be called upon to examine *in abstracto*

180 E.g. *Z. and Others v. the United Kingdom,* ECHR (2001), Appl. No. 29392/95, para. 73.

181 E.g. *Gäfgen v. Germany,* ECHR (2010), Appl. No. 22978/05, para. 88.

182 Such an approach would be comparable with the one the Court takes in environmental cases under Art. 8 ECHR. In these cases the Court generally finds a violation of the State's positive obligations under Art. 8 ECHR when the domestic authorities fail to comply with or to enforce domestic environmental legislation (e.g. *Fadeyeva v. Russia,* ECHR (2005), Appl. No. 55723/00, para. 97). The failure to comply with domestic law is essentially problematic from the viewpoint of the rule of law, an important underlying principle of the ECHR (e.g. Broniowski v. Poland, ECHR (2004), Appl. No. 31443/96, para. 184).

183 Explanations relating to the Charter, 18.

whether it provides sufficient protection against potential inhuman or degrading living circumstances. For example, Peers and Rogers have argued that the exclusion from the scope of the Reception Conditions Directive of persons whose asylum application has been rejected but who have not been expelled may be incompatible with Art. 3 ECHR if these persons are thereby left in a situation of destitution.[184] Similarly, the Court may examine whether the restrictive conditions to which certain guarantees of the Reception Conditions Directive are subjected are compatible with Art. 3 ECHR.

F. Detention of Asylum Seekers

I. Arbitrary Detention

Art. 9 para. 1 ICCPR explicitly and Art. 5 para. 1 ECHR implicitly prohibit arbitrary detention. The latter is acknowledged in the case law of the ECtHR: "any measure depriving the individual of his liberty must be compatible with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness."[185] The notion of "arbitrariness" *inter alia* prohibits the granting of absolute discretion to a single authority or the discriminatory use of detention, and is linked to ethical standards such as justice and reasonableness.[186] The aim of this notion is the maximization of personal liberty,[187] which is clearly illustrated by the structure of both Art. 9 para. 1 ICCPR and Art. 5 para. 1 ECHR, which both primarily and principally guarantee a right to personal liberty and only secondarily and restrictively allow for deprivation of liberty. In Marcoux's words, therefore,"[t]he more a law operates to deprive individuals of the right to personal liberty, the more such a law becomes arbitrary. At the same time, the state has a correspondingly greater duty to justify its actions."[188] This justification requires reference to certain universally recognized goal values and the use of necessity and proportionality arguments.[189] Necessity which

184 Peers & Rogers, *supra* note 74, 304-305.
185 E.g. *Bozano v. France,* ECHR (1986), Appl. No. 9990/82, para. 54.
186 L. Marcoux, 'Protection from Arbitrary Arrest and Detention Under International Law', 5 *Boston College International & Comparative Law Review* (1982) 2, 345, 370-371.
187 *Id*., 369.
188 *Id*, 374.
189 *Id*.

is thus directly connected to the prohibition of arbitrariness generally requires the use of the least intrusive means to achieve a certain legitimate aim.[190] Detention without considering the least intrusive means is thus unnecessary and arbitrary.[191] With respect to the detention of asylum seekers, this is clearly established in the case-law of the Human Rights Committee (HRC) and slowly emerging in the case-law of the ECtHR.

II. Asylum Detention

Art. 5 para. 1, f) ECHR allows "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country." The meaning of this provision was clarified by the Grand Chamber of the ECtHR in the case of *Saadi v. The United Kingdom*. The case concerned an Iraqi Kurd who had lodged an asylum application upon arrival at London-Heathrow airport, but who was subsequently detained for seven days in a special facility for asylum seekers. According to the Court any entry is "unauthorised" until a State has authorised it and the Court "does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5 para. 1 (f)."[192] The Court thereby permits the detention of asylum seekers "in certain

190 R. Alexy, *A Theory of Constitutional Rights* (2002), 66.

191 In a comment to the *Saadi* judgment, O'Nions argues that "necessity" cannot be separated from "arbitrariness" and "proportionality" and that it is impossible to conceive of these concepts in isolation, H. O'Nions, 'No Right to Liberty: the Detention of Asylum Seekers for Administrative Convenience', 10 *European Journal of Migration and Law* (2008) 2, 149, 181 and 184. Similarly, G. Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?', 6 *European Journal of Migration and Law* (2004) 2, 93, 108-109.

192 *Saadi v. The United Kingdom,* ECHR (2008), Appl. No. 13229/03, para. 65. This was criticized by Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in their dissenting opinion. In their view, "asylum seekers who have presented a claim for international protection are ipso facto lawfully within the territory of a State." Therefore the first limb of Art. 5, para. 1, f) cannot be applied to asylum seekers, as the aim of this provision is "to prevent illegal immigration, that is, entry into or residence in a country based on circumvention of the immigration control procedures." In the dissenters' view, the majority thus unjustifiably assimilated the situation of asylum seekers to that of ordinary immigrants.

circumstances, for example while identity checks are taking place or when elements on which the asylum claim is based have to be determined."[193]

The ECtHR does not require such detention to be "reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing",[194] it must however be "carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued."[195]

Recent case law however suggests that some Sections of the Court are slowly moving away from the Grand Chamber's rejection in Saadi of a necessity test under Art. 5 para. 1, f).[196] Such a test is accepted under most sub-paragraphs of Art. 5 para. 1 ECHR.[197] In the case of Hilda Hafsteinsdóttir v. Iceland, concerning the repeated detention of an alcohol-intoxicated woman on the basis of Art. 5 para. 1, e),[198] the Court for instance held that "[t]he detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be

193 *Id*. In the dissenters' view, however, detention under Art. 5, para. 1,) cannot be justified if it pursues "a purely bureaucratic and administrative goal, unrelated to any need to prevent [an] unauthorised entry into the country."

194 *Id*., paras 72-73. According to the dissenters, however, "the requirements of necessity and proportionality oblige the State to furnish relevant and sufficient grounds for the measure taken and to consider other less coercive measures, and also to give reasons why those measures are deemed insufficient to safeguard the private or public interests underlying the deprivation of liberty." In their view, "the question of alternatives to detention should have been considered by the majority."

195 *Id*., para. 74.

196 See L. Lavrysen, 'Less stringent measures and migration detention: overruling Saadi v. UK?' (25 January 2012) available at http://strasbourgobservers.com/2012/01/25/less-stringent-measures-and-migration-detention-overruling-saadi-v-uk/ (last visited 2 May 2012).

197 See references *Saadi v. The United Kingdom,* ECHR (2008), Appl. No. 13229/03, para. 70.

198 Art. 5 para. 1, e) allows "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

detained."[199] As the Court made clear in Hilda Hafsteinsdóttir, the "less stringent measures" test (or necessity test) is linked to the requirement that detention can only be lawful in the absence of arbitrariness. In the cases of Rahimi v. Greece and Popov v. France, the Court held that the detention of a minor under Art. 5 para. 1, f) ECHR can only be justified insofar as it can be considered to be "a measure of last resort which could not be replaced by any other alternative."[200] This clearly resonates the requirements of Art. 37, b) of the Convention on the Rights of the Child (CRC).[201] In the case of Yoh-Ekale Mwanje v. Belgium, the Court applied a similar "less stringent measures" test. The Court held that the detention of an HIV-positive Cameroonian woman violated Art. 5 para. 1, f) ECHR, because "the authorities had not considered a less severe measure capable of safeguarding the public interest."[202] These cases show that the Court's case law increasingly recognizes that the detention of asylum seekers and migrants is arbitrary if there are "less stringent measures" available.

A strict necessity requirement similarly but unambiguously flows from the case-law of the Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights (ICCPR).[203] Art. 9 para. 1 ICCPR prohibits arbitrary detention and arrest. The HRC has stated that "the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."[204] According

199 *Hilda Hafsteinsdóttir v. Iceland,* ECHR (2004), Appl. No. 40905/98, para. 51.

200 Originally: "une mesure de dernier ressort à laquelle aucune alternative ne pouvait se substituer", see *Popov v. France,* ECHR (2012), Appl. Nos. 39472/07 and 39474/07, para. 119, and similarly *Rahimi v. Greece,* ECHR (2011), Appl. No. 8687/08, para. 109.

201 "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." In Rahimi, the Court explicitly refers to Art. 37 CRC (para. 108).

202 Originally: "les autorités n'ont pas envisagé une mesure moins sévère […] pour sauvegarder l'intérêt public de la détention", see *Yoh-Ekale Mwanje v. Belgium,* ECHR (2011), Appl. No. 10486/10, para. 124.

203 The Court of Justice takes the ICCPR into account when applying the general principles of EU law, see e.g. Court of Justice, 17 February 1998, no. C-249/96, Grant, para. 44.

204 HRC, 3 April 1997, no. 560/1993, A. v. Australia, para. 9.2.

to the HRC it is not *per se* arbitrary to detain individuals requesting asylum,[205] but "detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal."[206] The Committee therefore requires States to demonstrate "that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends, that is to say, compliance with the state party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions […]".[207]

Art. 6 of the Charter of Fundamental Rights in combination with the general limitation clause of Art. 52 para. 1, only allows limitations of the right to freedom insofar as these are "necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." Although the Court of Justice has not yet interpreted the scope of this necessity criterion, any such interpretation should require that less stringent measures are considered and found to be insufficient to achieve a legitimate aim.

III. EU Asylum Law

1. General

In the context of asylum detention, the ECtHR has clearly held that "there must be adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention."[208] It is therefore not sufficient that every case of detention is justified *in concreto* the law itself should also provide protection against arbitrary detention *in abstracto*. As the European Union has gained important competences in the field of asylum law, the positive obligation to

205 *Id*., para. 9.3.
206 *Id*., para. 9.4.
207 HRC, 28 October 2002, no. 900/1999, C. v. Australia, para. 8.2. See also HRC, 6 August 2003, no. 1014/2001, Baban et al. v. Australia, para. 7.2; HRC, no. 1069/2002, Bakhtiyari v. Australia, para. 9.3.
208 *Amuur v. France,* ECHR (1996), Appl. No. 19776/92, para. 53.

provide a legal framework which protects asylum seekers from arbitrary detention has simultaneously shifted in its direction.

Art. 18 of the Asylum Procedures Directive requires that "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum." Although this provision expresses a generally negative stance towards the detention of asylum seekers,[209] it does not provide real safeguards to properly limit Member States in their use of detention.[210] Art. 7 Reception Conditions Directive generally protects the freedom of movement of asylum seekers, but para. 3 allows Member States "[w]hen it proves necessary, for example for legal reasons or reasons of public order, [… to] confine an applicant to a particular place in accordance with their national law." While "confinement" is not in itself defined, it is clear that it covers "detention", as the notion of "detention" itself is defined as "confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement".[211]

These provisions allow for the detention of asylum seekers for a wide variety of reasons. Although detention is only allowed insofar as it is considered "necessary", the lack of a list of limited detention grounds entails the risk of arbitrary use of detention. Many asylum seekers are simply detained on the formal basis that it is likely that they will abscond before the completion of the asylum procedure.[212] In Peers' and Rogers' view, "[t]here is a real danger […] that in the face of having to apply certain minimum standards of reception to asylum applicants, Member States will find it increasingly convenient to resort to the use of detention."[213] This risk is exacerbated by the fact that the Reception Conditions Directive does not explicitly link the necessity criterion to the need to adequately consider

209 Hailbronner argues that "if this clause is to be given any useful meaning, it must be based on a distinction between a set of legitimate reasons like prevention of unauthorised entry and residence, danger of flight etc.", see: K. Hailbronner, 'Detention of Asylum Seekers', 9 *European Journal of Migration and Law* (2007) 2, 159, 169.

210 ECRE, 'Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status', 18 (October 2006) available at http://www.unhcr.org/refworld/publisher,ECRE,,,464317ab2,0.html (last visited 2 May 2012).

211 Art. 2 k) Asylum Procedures Directive. See Peers & Rogers, *supra* note 74, 304.

212 Da Lomba, *supra* note 28, 246.

213 Peers & Rogers, *supra* note 74, 304.

alternatives to detention. The lack of provision for such alternatives to detention risks making the necessity criterion meaningless.

The Commission proposal to recast the Reception Conditions Directive is more ambitious. The proposal introduces a strict necessity test: "[w]hen it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively."[214] The proposal further enumerates an exhaustive list of grounds for the detention of asylum seekers: "an applicant may only be detained: (a) in order to determine or verify his/her identity or nationality; (b) in order to determine, within the context of a preliminary interview, the elements on which the application for international protection is based which could not be obtained in the absence of detention; (c) in the context of a procedure, to decide on the right to enter the territory; (d) when protection of national security or public order so requires."[215] Member States must "ensure that rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law."[216] Detention must be limited to "as short a period as possible" and can only be maintained for as long as the detention grounds are applicable.[217] The proposal further sets out procedural guarantees for asylum seekers placed in detention[218] and imposes minimum standards for detention conditions, including the requirement that "[d]etention shall only take place in specialised detention facilities."[219] The proposal finally contains stricter rules for the detention of vulnerable persons and persons with special reception needs.[220] At this point it is unclear whether the Commission proposal will be adopted without significant amendments. In the past, discussions in the Council on asylum instruments have systematically led to a decrease in the level of human rights protection for asylum seekers in the final document.

214 Art. 8 para. 2 Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast) (Commission Proposal Reception Conditions), COM (2011) 320 final.
215 Art. 8 para. 3 Commission Proposal Reception Conditions.
216 Art. 8 para. 4 Commission Proposal Reception Conditions.
217 Art. 9 para. 1 Commission Proposal Reception Conditions.
218 Art. 9 Commission Proposal Reception Conditions.
219 Art. 10 Commission Proposal Reception Conditions.
220 Art. 11 Commission Proposal Reception Conditions.

The proposal appears to be more in line with the (lenient) case law of the ECtHR. The addition of a strict necessity criterion would be in conformity with the necessity test under Art. 9 para. 1 ICCPR and Art. 6 of the Charter, as well as the prohibition of arbitrariness under Art. 5 para. 1 ECHR. The obligation to consider less coercive alternatives is also to be hailed. Sub-paragraphs (a) and (b) are construed in a way that can only justify detention in very restrictive circumstances. Sub-paragraph (c) can however be criticized as it allows for wide interpretation and thus may provide justification for the systematic detention of asylum seekers during the examination of their asylum application.[221] As the detention grounds in the Commission proposal are "without prejudice [...] to detention in the framework of criminal proceedings",[222] sub-paragraph (d) is worrying because it is unclear how these goals cannot be served within the said framework. It is highly feasible that, in the event that the Commission proposal is adopted without significant amendments, these grounds are interpreted restrictively by the Court of Justice.

It is a missed opportunity that the proposal does not entirely endorse the UNHCR guidelines on detention of asylum seekers, which recognize that "as a general principle asylum-seekers should not be detained."[223] In the light of the increasing amount of literature on alternatives for detention,[224] it

221 ECRE, 'Comments from the European Council of Refugees and Exiles on the European Commission Proposal to recast the Reception Conditions Directive' (April 2009) http://www.ecre.org/topics/areas-of-work/protection-in-europe/142.html, 7 (last visited 2 May 2012).

222 Art. 8 para. 3 Commission Proposal Reception Conditions.

223 UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers' Guideline 2 and 3 (26 February 1999) http://www.unhcr.org/refworld/docid/3c2b3f844.html (last visited 2 May 2012). The guidelines however allow some room for exceptions in more limited circumstances.

224 E.g. 'UNHCR Alternatives to Detention of Asylum Seekers and Refugees' (April 2006) at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84&page=search (last visited 2 May 2012); UNHCR 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (April 2011) available at http://www.unhcr.org/refworld/docid/4dc935fd2.html (last visited 2 May 2012); International Detention Coalition, 'There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention' (May 2011) available at http://www.scribd.com/fullscreen/54661929?access_key=key-ptqwr6iqwxth9v8zbne (last visited 2 May 2012); Amnesty International, 'Irregular Migrants and Asylum-Seekers: Alternatives to Immigration Detention' (April 2009) available at http://www.amnesty.org/en/library/info/POL33/001/2009 (last visited 2 May 2012); 'Summary Conclusions of Global

is clear that the detention of asylum seekers will almost never be justified *in concreto*. Moreover, as the objective of asylum detention generally is to have some amount of control over the whereabouts of asylum seekers,[225] it is important to note that evidence shows that in destination States, the likelihood of absconding is very low as asylum seekers want to be recognised as lawful residents.[226] In any event, the aims mentioned to justify detention are already served in the asylum procedure itself: if an asylum seeker fails to cooperate with the authorities (sub-paragraphs (a) to (c)) or constitutes a danger to national security or public order (sub-paragraph (d)), Member States can apply an accelerated procedure and – if their legislation allows so – even declare an application manifestly ill-founded.[227] Asylum detention can only be justified insofar as it actually serves these aims better, which will only rarely be the case. It would therefore have been preferable if the Commission proposal had construed the detention grounds more narrowly or, even better, simply prohibited detention.

2. Dublin Detention

The Commission proposal to recast Dublin II also contains safeguards to avoid excessive use of detention in the context of the procedure to transfer an asylum seeker or an applicant for subsidiary protection to the responsible Member State. As asylum seekers are frequently detained in the context of these procedures,[228] the lack of such safeguards in the current Dublin II Regulation is striking.[229] The proposal in turn only allows for detention in

Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons', 23 *International Journal of Refugee Law* (2011) 4, 876-883.

225 Da Lomba, *supra* note 28, 245

226 O'Nions, *supra* note 191, 180.

227 See Art. 23 para. 4, Art. 28 para. 2 and Art. 11 Asylum Procedures Directive. The Commission Proposal for a Recast of the Asylum Procedures Directive brings some changes (see Art. 31 para. 6, Art. 32 para. 2 and Art. 13), but still allows to serve the listed aims.

228 UNHCR, 'The Dublin II Regulation. A UNHCR Discussion Paper', 52-55 (April 2006) available at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4445fe344&page=search; ECRE, 'Report on the Application of the Dublin II Regulation in Europe', 162 (March 2006) http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html (last visited 2 May 2012).

229 The Commission tried to incorporate a provision on Dublin detention in the Asylum Procedures Directive, this provision was however not included in the final version. See Art. 18 Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status,

case of a significant risk of absconding. The detention must be proven to be necessary, on the basis of an individual assessment of each case, and is only allowed if other less coercive measures cannot be applied effectively.[230] In this respect, the proposal explicitly requires Member States to take into consideration alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, an obligation to stay at a designated place or other measures to prevent the risk of absconding.[231] The proposal only allows detention after the decision to transfer has been notified to the applicant, which is only possible after the requested Member State has agreed with the transfer.[232] It does not contain time limits, but only allows detention for the shortest period possible, which shall be no longer than the time reasonably necessary to fulfil the required administrative procedures for carrying out a transfer.[233]

The adoption of this proposal would be a significant advancement in preventing the arbitrary use of detention in the context of the Dublin II procedure. Even if the proposed provision is adopted, the Dublin system will continue to lead to a widespread use of detention. These cases of detention are primarily motivated by the need of maintaining the Dublin system itself – a system which has proven to be totally inefficient in practice and which compromises the fundamental rights of asylum seekers – rather than actually serving a real legitimate aim. One could therefore argue that the Dublin system in itself is incompatible with the positive obligation to provide a legal framework to protect asylum seekers against the unnecessary and arbitrary use of detention. If one wishes to avoid arbitrary detention, it is therefore preferable to do away with the Dublin system altogether.

G. Conclusion

Over the past two decades, the European Union has become a major actor in the field of asylum law. Ever since its emergence, the relationship between European Asylum Law and human rights law has nonetheless been

COM(2002) 326 final, which restricts the use of detention to the situation when another member state has agreed on the take charge or take back request, to prevent an asylum seeker from absconding or effecting an unauthorized stay, for a maximum period of one month.

230 Art. 27 para. 2 Commission Proposal Dublin II.

231 Art. 27 para. 3 Commission Proposal Dublin II.

232 Art. 27 para. 4 Commission Proposal Dublin II.

233 Art. 27 para. 5 Commission Proposal Dublin II.

tense. European Asylum Law mainly focuses on preventing abuses of the asylum system, restricting secondary movements of asylum seekers and efficiently disposing of asylum applications, rather than on adequately protecting the human rights of asylum seekers. This is related to the broader context of the emerging "Fortress Europe": economic migrants are unwanted because of the alleged threat they pose to the sustainability of the model of the welfare State. As asylum seekers are primarily regarded as potential economic migrants, rather than as persons who may be in need of international protection, asylum law risks becoming an instrument of a restrictive immigration policy[234].

The emphasis of the Dublin II system of establishing which Member State is responsible to examine an asylum application, lies too much on efficiency and burden sharing considerations, rather than on human rights concerns. The basic assumption of the Dublin II system – that the receiving Member State offers asylum seekers a sufficient level of human rights protection – has not been fulfilled. Dublin transfers may therefore expose asylum seekers to inhuman or degrading detention and living circumstances, as well as to the risk of indirect refoulement. The European Court of Human Rights has recently made clear in its *M.S.S.* judgment that Art. 3 ECHR prohibits such transfers. The EU urgently needs a strong mechanism to monitor the Reception Conditions Directive and the Asylum Procedures Directive. The suspension mechanism provided for in the Commission proposal for a recast of the Dublin II Regulation would be a significant improvement.

In the *M.S.S.* judgment, the Court has equally made clear that inhuman or degrading living circumstances violate Art. 3 ECHR. By referring to the obligations under the Reception Conditions Directive, the Court has strengthened the binding force of this document, thus compelling member States to take this piece of legislation seriously. This finding also requires the EU institutions to ensure that the recast of the Reception Conditions Directive sufficiently protects asylum seekers against destitution.

The Reception Conditions Directive and the Asylum Procedures Directive lack sufficient safeguards to properly limit the Member States' use of detention, which exposes asylum seekers to the risk of being arbitrarily detained. In the light of the frequent use of detention in Dublin procedures, the lack of safeguards in the Dublin II Regulation is particularly striking. In

234 See similarly O'Nions, *supra* note 191, 155;O'Nions labels this as "the climate of non-entrée".

order to avoid being branded as arbitrary, human rights law demands that a detention is necessary to achieve a legitimate aim, which requires that less stringent measures have been considered and found to be insufficient. Although Commission proposals for a recast of these instruments are a step in the right direction, it would have been preferable to even further restrict the detention grounds, or even better, to simply prohibit the detention of asylum seekers. As the operation of the Dublin system in itself leads to a widespread use of detention, it would even be preferable to do away with this system altogether.

This paper has identified certain problematic aspects of European Asylum Law. These aspects should be duly remedied by the EU institutions while recasting the existing asylum instruments. In the light of the EU's increasing commitment towards human rights law, the effective respect for human rights should always be the primary concern of European Asylum Law.

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Re-thinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation

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Abstract

Indigenous Peoples have classically been defined in terms of their situation of vulnerability and discrimination traceable back to colonialism. The first international legal instruments addressing indigenous peoples are based on such an understanding, and emphasize special protection for indigenous peoples in order to preserve their cultural identity. This article describes this approach a human rights-based one, even though, at the national level, the label "indigenous" is sometimes also interpreted as a synonym of political power. Meanwhile, international environmental law has introduced what this author calls a "functional approach" recognizing the participatory role of indigenous communities in supporting environmental conservation and use of biodiversity. From a functional perspective, it is a logical consequence to include other local communities, albeit not "indigenous" in the classical sense. Thirdly, in the sector of development cooperation, international financial institutions (IFIs) have designed policies with the aim of assuring indigenous peoples the opportunity to be consulted when IFI-funded projects could entail a negative impact on indigenous communities. At first glance, it could be said that those policies were inspired by a human rights-based approach. However, from a holistic perspective, the role of indigenous peoples becomes a more functional one. This paper contributes a critical analysis of the role of indigenous peoples from these two approaches: the human rights-based approach and the functional approach. The author argues that a definition of indigenous peoples based on a human-rights approach should be understood as encompassing also other groups living in similarly vulnerable situations. Even though a functional approach to indigenous peoples responds better to the principle of equality, this approach should be more respectful to the cultural and social values of indigenous or local communities, from whom a particular behavior is expected in order to achieve certain goals.

A. Introduction

"Indigenous peoples' issues have become more prominent on the international agenda than ever before"[1], said UN Secretary-General Ban Ki-

[1] UN Secretary-General Ban Ki-Moon, 'Message on the International Day of the World's Indigenous Peoples' (9 August 2010) http://www.un.org/sg/statements/index.asp?nid=4717 (last visited 02 May 2012).

moon on the occasion of the International Day of the World's Indigenous Peoples in 2010.

Certainly, indigenous peoples have gained considerable attention at the international level. Two international conventions and one UN-Declaration addressing the rights of indigenous peoples have been adopted over the last 60 years. The practices and traditional knowledge of indigenous peoples have been said to be pivotal for the achievement of sustainable development. Moreover, in 2004 the United Nations proclaimed, for the second time, the "International Decade of the World's Indigenous Peoples" with the aim of promoting indigenous peoples' full and effective participation in decisions that could affect their lifestyles directly or indirectly.[2] Notwithstanding this wave of international concern, there is still no agreement on a universal definition of indigenous peoples.[3] Therefore it is not clear who should be afforded special protection. A classical approach to indigenous peoples as the marginalized and uprooted society, reflected in two conventions of the International Labor Organization (ILO) and in the UN Declaration on the Rights of Indigenous Peoples, has shifted to a rather functional one in the field of international environmental law and the law of development cooperation.[4]

As will be explained throughout this paper, a classical definition of indigenous peoples is based on a human rights-based approach that situates indigenous peoples in need of special protection. The functional approach, reflected in international environmental law and – to certain degree – in the law of development cooperation, takes less account of the situation of marginalization attached to the classical definition of indigenous peoples.

2 GA Res. 59/174, 24 February 2005. The first World's Indigenous Peoples' Decade took place from 1994 to 2004, GA Res. 48/163, 18 February 1994.

3 This definitional problem was envisaged by Professor Rüdiger Wolfrum before the approval of the Declaration on the Rights of Indigenous Peoples in 2007 by the UN General Assembly: "The appropriate definition of the term indigenous peoples will remain one of the crucial problems waiting for solution." This problem remains unresolved until today. R. Wolfrum, 'The Protection of Indigenous Peoples in International Law', 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999), 369, 379.

4 Philipp Dann advocates the existence of a "Law of Development Cooperation" ("*Recht der Entwicklungszusammenarbeit"*) as an independent field of law that regulates the normative structure of the process of official development assistance (ODA) through States, supranational and international organisations. P. Dann, 'Grundfragen eines Entwicklungsverwaltungsrecht', in C. Möllers *et al.* (eds), *Internationales Verwaltungsrecht* (2007), 7.

From a functional perspective what matters is the role that indigenous peoples play in the sustainable use of biodiversity as well as in the legitimization of projects funded by international financial institutions (IFIs).

I will begin with a brief historical review of the main criteria used by international law to define indigenous peoples from colonialism through today. Second, I will explore some problems deriving from the use and abuse of the label "indigenous" – in the classical sense – by States and indigenous organizations at the national level. Third, I will focus on the role of indigenous peoples as active participants in the process of environmental protection and development cooperation. In doing so it will be argued that a human rights-based approach to indigenous peoples is being overtaken by a rather functional one.

B. Development of the Indigenous Peoples' Issues in International Law

Different criteria have been used by international law to define indigenous peoples. Even though those criteria do not reflect a universal position, we can refer to them in order to better understand both the agreed aspects and the controversial issues concerning the definition of indigenous peoples in international law.

I. From Colonialism to the League of Nations: Indigenous Peoples under the Label of "Backward Society"

The concept of indigenous peoples was originally shaped by the idea of colonization. "Indian"[5] was the term used during colonialism to differentiate European settlers from the aboriginals of the discovered

[5] In this chapter the terms aborigine, native and Indian are used as synonyms of indigenous. The word "indigenous" stems from the Latin form "*indigena*" (INDV + GENVS) which means "one born in a place, a native" or "born or produced in, or belonging to a particular place" (and not of external origin). Definition found in Oxford Latin Dictionary (1968). In modern international law the indistinct use of those terms involves the idea of priority in time. E. Daes, Working Paper by the Chairperson-Rapporteur on the concept of "indigenous people", UN Doc.E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, 5.

territories.[6] Francisco de Vitoria referred to Indians as "unfit to found or administer a lawful State".[7] Such an approach corresponded mainly to the Spanish and Portuguese mode of colonization which focused on the subjugation of the Indian to use them as a labor force.[8]

According to the classical Westphalian system of international law,[9] indigenous forms of organization did not fit into the concept of the modern nation-State. European political structure, which inspired the Westphalian notion of the nation-State was inspired, was based on exclusivity of territorial domain and the existence of hierarchical and centralized structures of power.[10] In contrast, indigenous peoples were organized by kinship-ties, decentralized political structures and shared overlapping spheres of territorial control.[11] Thus, Indians were "not recognized as members of the community of nations".[12]

Based on this understanding of aboriginal peoples as "backward society", the community of newly emerged nation-States assumed for the first time the duty to integrate African aboriginal populations into the "civilized world" at the Berlin Africa Conference (also called the *Kongokonferenz*) held in 1884-1885.[13] This international conference

6 F. de Vitoria, 'De Indis et de Ivre Belli Relectiones', in *Classics of International Law* (1917), 116.

7 *Id*., 160-161.

8 Conversely, the purpose of the British and French colonialism, especially in North America, was the proper acquisition of the land by making land cession treaties with indigenous populations. K. Engle, *The Elusive Promise of Indigenous Development - Rights, Culture, Strategy* (2010), 22. Such a pattern of colonization responded to the necessity of a legal justification for the occupation of indigenous territories different than the mere fact of discovery. The theory of discovery was hardly criticized by Grotius, who denied the possibility to regard the territories occupied by Indians as *terra nullis*. C. Oguamanam, 'Indigenous Peoples and International Law: The Making of a Regime', *30 Queen´s Law Journal* (2004-2005) 348, 354.

9 J. Anaya, *Indigenous Peoples in International Law,* 2nd ed. (2004) 16, 19-20.

10 *Id*., 22; A. Cassese, *International Law in a divided World* (1986), 38; Olufemi Elias refers to the Westphalian legacy as the "Europeanisation of international law", O. Elias, 'Regionalism in International Law-Making and the Westphalian Legacy', in C. Harding & C. L. Lim (eds), *Renegotiating Westphalia* (1999), 25, 33.

11 Anaya, *supra* note 9, 22; Elias remarks: "Those not within the European system of civilisation, and who had not been admitted into it by constitutive recognition, were non-existent as subjects of the law." Elias, *supra* note 10, 36.

12 *Island of Palmas case (Netherlands v. USA)*, 2 Reports of International Arbitral Awards 829, 858 (4 April 1928).

13 Article 6 of the General Act of the Berlin Conference (26 February 1885), reprinted in: R. J. Gavin and J. A. Betley (eds), *The Scramble for Africa: Documents on the*

introduced the so called "trusteeship doctrine" as the legitimate yardstick used in the relationship between empowered nations of that time and indigenous populations. In other words, it was a kind of guardianship exercised by the former over the latter.[14] A similar approach was followed by the League of Nations in its Covenant of 1919.[15]

At this stage, we are able to distinguish two main aspects of the conception of indigenous peoples in international law before the advent of the United Nations System: Prior occupation of the territories conquered by European colonists, and the label of a "less advanced" society[16] unable to attain the status of nation-State.

II. The Definition of Indigenous Peoples within the United Nations System

1. ILO Convention No. 107 and the "Integrationist Approach"

The ILO became the first intergovernmental organization[17] to give specific attention to indigenous peoples with the adoption of the "*Convention (No.107) concerning the Protection and Integration of Indigenous and Tribal and Semi-Tribal populations in independent countries.*"[18] This convention constitutes the first international legal instrument providing for a definition of indigenous peoples – by that time

Berlin West African Conference and Related Subjects, 1884/1885 (1973), 288. A critical analysis on the trusteeship doctrine can be found in: Anaya, *supra* note 9, 33; R. Barsh, 'Indigenous North America and Contemporary International Law'*, 62 Oregon Law Review* (1983), 73, 74.

14 In the words of Alpheus Snow indigenous peoples were regarded as: "*wards and pupils of the society of nations*". A. Snow, *The Question of Aborigines in the Law and Practice of Nations,* (1929), 191; Anaya, *supra* note 9, 31-34.

15 Article 22 of the *Covenant of the League of Nations* (28 April 1919) available at http://www.unhcr.org/refworld/docid/3dd8b9854.html (last visited 2 May 2012)

16 In 1938 the Pan-American Union put forth the necessity to "*offset the deficiency*" in the intellectual and physical development of indigenous populations. Daes, *supra* note 5, 7, para. 15.

17 The problem of poverty and inequality suffered by indigenous peoples in new independent countries was included in the agenda of the International Labor Organization even before its institutionalization as an organ of the United Nation System. See e.g. *Convention concerning the Regulation of Certain Special Systems of Recruiting Workers*, 20 June 1936, 40 U.N.T.S. 109 [C 50 Recruiting of Indigenous Workers Convention].

18 328 U.N.T.S 247, 26 June 1957 [ILO Convention No.107].

called "populations". They were defined in terms of their history of colonization along with their social, economic and cultural distinctiveness.[19]

ILO Convention No. 107 sought to repair the situation of forced and underpaid labor suffered by indigenous peoples,[20] a situation which, as stated previously, occurred mainly in former Spanish and Portuguese colonies in Latin-America. Hence, the instrument could be seen as being confined to the Latin-American context. This could perhaps explain why the instrument did not receive support from the majority of the former British and French colonies.

ILO Convention No. 107 focused on the integration of indigenous populations into the societies of their respective nation-States[21] rather than on the protection of their indigenous identity and autonomy. This is unsurprising, considering that the main goal of the ILO at that time was to enable indigenous populations to "benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population."[22]

Not surprisingly, ILO Convention No. 107 was widely rejected by indigenous peoples, who saw it as a threat to the preservation of their cultural identity.[23] Still, it was the first international document which conferred upon indigenous peoples' rights over the territories traditionally occupied by them.[24] In the end, the convention was ratified by only 17 States, among them Bangladesh, India and Pakistan which have not ratified ILO Convention No. 169.

19 *Id.*, Art. 1.

20 *Id.*, Preamble; D. Sanders, 'The Re-Emergence of Indigenous Questions in International Law', 1 *Canadian Human Rights Yearbook* (1983) 3, 19.

21 ILO Convention No. 107, *supra* note 18, Art. 2.

22 *Id.*, Art. 2 para. 2 (a). As Balakrishnan Rajagopal argues: "The modernist desire to embrace the Other initiated during the early part of the century, coupled with the cosmopolitan desire to advance the uncivilized[…]. Important signals of the change could be detected by the work of the International Labour Organization (ILO) banning slavery and forced labor in the inter-war period." B. Rajagopal, *International Law from Below* (2003), 29.

23 Barsh refers to the ILO Convention No. 107 as a "restatement of the nineteenth century doctrine of being guardianship of tribal people." Barsh, *supra* note 13, 81; from the same author see also 'Revision of ILO Convention No. 107', 81 *American Journal of International Law* (1987) 3, 756, 758.

24 ILO Convention No. 107, *supra* note 18, Arts 11, 12.

2. ILO Convention No. 169 and the Martínez Cobo-Report: In Protection of the Indigenous Cultural Distinctiveness

The struggle against the "integrationist approach"[25] of ILO Convention No. 107 strengthened the action of pan-indigenous movements during the 1970s, albeit in different directions. In North America, indigenous peoples' claims focused mainly on territorial sovereignty and even on the recognition of statehood.[26] On the other hand, indigenous movements in Latin America put more emphasis on respecting indigenous peoples' right to culture, which included the right to preserve their cultural distinctiveness and to live in accordance with their own customs and traditions.[27] Notwithstanding these different perspectives, indigenous peoples were able to gain access to international intergovernmental institutions and spark discussions concerning their claims of self-determination albeit subjected to nation-States boundaries.[28] In other words, indigenous peoples demanded what scholars define as internal self-determination.[29]

In 1971 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed José Martinez Cobo as a Special Rapporteur for a study of the problem of discrimination against indigenous populations.[30] In his study, Martinez Cobo proposed a definition of indigenous peoples based mostly on an element that he called "historical continuance"[31] manifested in three ways: A line of ancestry of the community reaching back to the time of colonization, occupation of ancestral lands and the continuance of their ancestral institutions that come

25 See http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm (last visited 3 April 2012).

26 Under the name of "Fourth World" indigenous representatives of North America blamed developing nations of the South for the denial of their right to self-determination. Engle, *supra* note 8, 49-53.

27 *Id.*, 56.

28 R. Barsh, 'Indigenous Peoples in the 1990s: From Object to Subject of International Law?', 7 Harvard Human Rights Journal (1994) 33, 40-42.

29 A. Cassese, *Self-determination of Peoples* (1995), 101.

30 A. Willemsen-Díaz, 'How Indigenous Peoples' Rights Reached the UN', in C. Charters & R. Stavenhagen (eds), Making the Declaration work – The United Nations Declaration on the Rights of Indigenous Peoples (2009), 16, 23.

31 J. R. Martínez Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, 30 September 1983, paras 379, 380.

with a cultural distinction from the rest of the society. So the definition was again closely linked to the experience of colonialism as it appeared in ILO Convention No. 107.

Against this background, a second and slightly more successful convention was adopted in 1989 by the ILO called the "*Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*"[32]. ILO Convention No. 169 largely refers to the definition[33] laid down in ILO Convention No. 107. However, it incorporates a new important but controversial aspect: The subjective criterion of self-identification as indigenous.[34] So the question of who may be labeled as "indigenous" ceases to be determined solely by States. If we look at the States that failed to ratify ILO Convention No. 169, it seems that Asian and African countries disagree with this innovation, probably because of the risk that some communities, until now treated as "tribe" or "minority", could attain recognition as "indigenous" under the criterion of self-identification.

A second difference between ILO Convention No. 107 and ILO Convention No. 169 lies in the new goals of the latter. The document reflects a new approach by explicitly supporting the cultural distinctiveness and autonomy of indigenous and tribal groups. In doing so, ILO Convention No. 169 replaces the term "population" by the term "peoples".[35] So this new ILO Convention supports the respect of the traditions, customs and way of life of indigenous peoples[36] rather than the integration of these communities into the rest of society. In this way, ILO Convention No. 169 better satisfies the expectations of indigenous groups.

A last important aspect of ILO Convention No. 169 is a stronger recognition of the right of indigenous peoples over their traditional lands, only roughly mentioned in ILO Convention No. 107, as well as over the natural resources pertaining to those lands.[37] In order to endorse the effectiveness of those rights, ratifying States assumed the obligation to

32 1650 U.N.T.S. 383, 27 June 1989 [ILO Convention No. 169].
33 ILO Convention No. 169, Art.1 para. 1(b).
34 *Id.*, Art.1 para. 2.
35 The use of the term "peoples" cannot be understood as granting indigenous and tribal populations further rights than those expressly established in ILO Convention No. 169. *Id.*, Art. 1 para. 3.
36 *Id.*, Art.2 para. 2(b).
37 *Id.*, Arts 14 and 15.

consult indigenous peoples before the implementation of administrative and legislative measures that could affect their rights directly or indirectly.[38]

In spite of these new advances with regard to the rights of indigenous peoples, ILO Convention No. 169 has failed to attract broad international acceptance, as had its predecessor. More than twenty years after its adoption, ILO Convention No. 169 has only been ratified by 22 States, the majority of them Latin-American countries. With the exception of Nepal and the Central African Republic, any other African and Asian country appears in the list of ratifying States. In Europe, the situation has not changed a lot. Denmark, the Netherlands, Norway and Spain are still the only European backers of ILO Convention No. 169.[39]

3. The long-awaited UN Declaration on the Rights of Indigenous Peoples

As early as 1982 the UN Working Group on Indigenous Populations was established as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights.[40] This organ was in charge of the elaboration of the Draft Declaration on the Rights of Indigenous Peoples. Indigenous peoples' organizations and other non-governmental organizations (NGOs) established an international advocacy network including indigenous activists from Asia, Africa and Europe which actively participated in discussions on the Draft[41], which was completed in 1994.[42] In subsequent years the participation of indigenous organizations at the United Nations continued to be endorsed by the creation of the United

38 *Id.*, Art.6 para. 1(a).

39 In Germany, members of the Social Democratic Party (*Sozialdemokratische Partei Deutschlands*) and the Green Party (*Bündnis 90/Die Grünen)* call for the ratification of ILO Convention No. 169. Furthermore, they suggest that the German international developmental policy should be inspired in the purposes laid down in ILO Convention No. 169. See 'Antrag: Rechte indigener Völker stärken – ILO-Konvention 169 ratifizieren.' (BT Drucksache 17/5915, 25 May 2011) available at http://dipbt.bundestag.de/dip21/btd/17/059/1705915.pdf (last visited 2 May 2012).

40 ECOSOC Res. 1982/34, 7 May 1982.

41 A. Erueti, 'The International Labor Organization and the Internationalisation of the Concept of Indigenous Peoples', in Stephen Allen (ed.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011), 93, 108.

42 Draft Declaration on the Rights of Indigenous Peoples as Agreed Upon by the Members of the Working Group at its Eleventh Session, E/CN.4/Sub.2/1994/2/Add.1.

Nations Voluntary Fund for Indigenous Peoples[43] and the United Nations Permanent Forum on Indigenous Issues.[44]

In particular, the ILO and NGOs prompted discussions at the working group concerning commonalities between indigenous peoples in Latin-America and tribal peoples in Southeast Asia, in spite of the insistence of Asian States that the issue of indigenous peoples be kept out of their borders.[45] During the debates on the Draft Declaration some indigenous peoples' representatives were reluctant to set forth any definition of indigenous peoples that could exclude certain groups from protection.[46]

After more than ten years of discussions, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[47] was finally approved by the General Assembly in 2007. The Declaration constitutes a very important step in the internationalization of indigenous rights. It is the first international document that set forth indigenous peoples' right to self-determination.[48] It is necessary to mention that in its preamble, the UNDRIP recognizes the existence of a variety of historical and cultural backgrounds surrounding indigenous peoples and the necessity of taking these differences into consideration.[49] This is, indeed, an important step forward towards a more flexible application of the category "indigenous". Moreover, States agreed to obtain the "free, prior and informed consent" of indigenous peoples before the implementation of any measure that could imply a possible displacement of indigenous peoples from their traditional lands.[50]

A similar approach is not found in the Declaration on Minorities' rights,[51] which essentially aims for stronger protection of minorities' freedom of cultural and religious expressions as well as their integration into

43 GA Res. 40/131, 13 December 1985.

44 ECOSOC Res. 2000/22, 28 July 2000.

45 Erueti, *supra* note 41, 104, 105

46 M. Cole, *Das Selbstbestimmungsrecht indigener Völker: eine völkerrechtliche Bestandsaufnahme am Beispiel der Native Americans in den USA* (2009), 194.

47 GA Res. 61/295, 13 September 2007.

48 UNDRIP, Art. 3.

49 See UNDRIP, Preamble para. 21. Furthermore, if we look at the paragraph 4 of the preamble of the Declaration we can understand that the use of the words "inter alia" reflects an attempt to encompass other ethnic groups, which were also victims of dispossession, but not necessarily linked with a history of colonialism.

50 UNDRIP, Art. 10.

51 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 47/135, 18 December 1992 [Declaration on the Rights of Minorities].

the States where they are living.[52] This declaration does not even offer a definition of minority as other international documents do with respect to indigenous peoples. Even though a right to participation in national decision-making is granted to minority groups, such recognition is not as strong as it is in the case of indigenous peoples. Whereas indigenous peoples can exercise this right to participation in accordance with their own procedures and own indigenous decision-making institutions,[53] minority groups are required to participate in a manner "not incompatible with the national legislation".[54] Thus, the minority regime clearly seems to favor individual rights over collective rights. If it is said that within international law collective rights do not find support,[55] the UNDRIP is undoubtedly the exception to this rule.

The UNDRIP was adopted with the approval of 143 countries and the opposition of four (Australia, Canada, New Zealand and the United States). Even though it does not generate international obligations for the States, it is undoubtedly an important example of universal recognition of indigenous peoples' rights.

C. When the Label "Indigenous" Generates Conflicts

With this background in mind, being identified as "indigenous" has become for some marginalized groups – including groups regarded as minorities by their national States – the most effective way to capture international attention and to gain recognition of certain collective rights.[56] Thus, potential conflicts have arisen not only in Asian and African countries where the existence of indigenous peoples is denied, but also in the Latin-American context where other groups, who do not entirely fit into the definition of indigenous peoples given by international law instruments, find themselves in a disadvantaged position.

52 *Id.*, Preamble and Art. 2 (1).

53 UNDRIP, Art. 18.

54 Declaration on the Rights of Minorities, Art. 2 (3).

55 Y. Jabareen, 'Towards Participatory Equality; Protecting Minority Rights Under International Law', 41 *Israel Law Review* (2008), 635, 657.

56 Barsh warned at the time of the negotiation of the Draft Declaration on the Rights of Indigenous Peoples: "Definitions will become important if being "indigenous" means having fewer rights than other peoples or having more rights than a minority." Barsh *supra* note 28, 82.

I. Contentious Aspects of the Application of the Definition of "Indigenous Peoples" beyond America and Australasia: Nobody is Indigenous or Everyone is!

After the statement of the criteria of self-identification in ILO Convention No. 169, some African and Asian communities increased their participation at the meetings of the Working Group of Indigenous Peoples.[57] Even in Europe, debates took place regarding the existence of indigenous peoples there.[58] Many of the arguments used to justify the applicability of the "indigenous peoples" concept to Africa and Asia based on the criterion of vulnerability, in other words on a "human rights approach", were also used in the European context.[59] Nevertheless, the application of a concept of "indigenous" into Europe based on the idea of "first inhabitants" could certainly lead to serious difficulties.[60]

Indigenous Peoples' organizations from Asia follow, in general terms, a fundamental human rights approach, similar to the one used by Latin American indigenous peoples' organizations during the 1970s, with an emphasis on the right to life, right to security and right to culture.[61] Nevertheless, countries like India, Indonesia, China and Bangladesh, for which the issue of self-determination is still a sensitive issue, have taken a radical position rejecting the existence of "indigenous peoples" within their boundaries. They argue that the concept of "indigenous" has been shaped in societies which experienced European colonial settlement; a situation, they

57 Erueti, *supra* note 41, 103.

58 Before the adoption of the first ILO Convention, Belgium contended that indigenous peoples could be found living in independent States from all regions of the world and not only in overseas colonies. See Daes, *supra* note 5, 8 para. 20. In 1977, the Swedish parliament recognized the status of "indigenous" of the Sami Peoples living in their territories. See Paul Hunt, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum: Mission to Sweden', A/HRC/4/28/Add.2, 28 February 2007; Oguamanam, *supra* note 8, 384.

59 An example of a Central/East European self-identified indigenous group is the case of the Nenets Peoples in Russia, who, as explained by Aukerman, attended the sessions of the Working Group of Indigenous Peoples denouncing the exploitation of oil and gas companies in territories used by their community for subsistence fishing and hunting. M.J. Aukerman, 'Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context', *22 Human Rights Quarterly* (2000), 4, 1022.

60 *Id*.

61 Erueti, *supra* note 41, 109.

said, which did not occur in most parts of Asia, and therefore such a distinction is, in their opinion, inapplicable within their societies.[62] The delegations of Indonesia and India, for instance, voted in favor of the Declaration but clearly pointed out that they understand indigenous peoples according to the definition provided in ILO Convention No. 169.[63] So, put differently, their main argument is that their whole population is "indigenous". This position taken by Asian States demonstrates the inconsistency in how those countries have been handling the question of indigenous peoples: on the one hand, refusing to ratify ILO Convention No. 169; but on the other hand explicitly referring to it in order to avoid any recognition of the existence of indigenous peoples within their territories.

In Africa, the landscape is to some extent different from that of many Asian countries.[64] Indigenous movements in Africa, like those representing the Batwa and San peoples in South Africa and Botswana (identified as hunter-gathers and nomadic pastoralist), have underscored this element of cultural distinctiveness as the basis for their recognition as indigenous both at the national and international level.[65] African countries fear however that precisely this emphasis on cultural distinction[66] could lead to new

62 B. Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy', *92 American Journal of International Law* (1998) 3, 414, 433. K. Ahmed, 'Defining "Indigenous" in Bangladesh: International Law in Domestic Context', *17 International Journal on Minority and Group Rights* (2010) 1, 47, 50. Erueti, *supra* note 41, 103.

63 See statement of the Delegation of Indonesia and India at the General Assembly in the day of the adoption of the UN Declaration on the Rights of Indigenous Peoples (13 September 2007) available at http://www.un.org/News/Press/docs/2007/ga10612.doc.htm (last visited 2 May 2012).

64 Justin Kenrick & Jerome Lewis explain the situation of indigenous peoples in Africa from an anthropological point of view: "In Africa the term "indigenous" is best understood relationally. Africans view themselves as indigenous relative to colonial and post-colonial powers. Additionally, Africans who live in the same region as African hunter-gatherers and former hunter-gatherers recognize these groups as being indigenous relative to themselves." J. Kenrick & J. Lewis, "Indigenous Peoples' Rights and the Politics of the Term "Indigenous"', 20 *Anthropology Today* (2004) 2, 6.

65 Eruerti, *supra* note 41, 112. R. Sylvain, '"Land, Water, and Truth": San Identity and Global Indigenism', *104 American Anthropologist* (2002) 4, 1074-1075.

66 Erueti, *supra* note 41, 113.

ethnically-based conflicts, from which several parts of the continent are still suffering or struggling to recover.[67]

The aforementioned problem concerning the application of a universal definition of indigenous peoples has been summarized by Benedict Kingsbury in the following words: "Any strict definition [of indigenous peoples] is likely to incorporate justifications and referents that make sense in some societies but not in others".[68]

II. The Situation of "Non-Indigenous" Groups in Latin America: What about Equality?

Most of the ratifying countries of ILO Convention No.169 have already recognized in their constitutions the existence of, and special protection for, indigenous communities in their territories.[69] In the case of the constitutions of Paraguay,[70] Mexico[71] and Bolivia,[72] by way of example, indigenous peoples are defined according to criteria similar to those established by ILO Convention No. 169. Some Latin American States have granted indigenous peoples the series of rights established in the Convention, such as property rights over traditional lands and the right to participation and consultation. It is interesting to note that in some cases the level of political representation given to indigenous peoples is not extended to other groups in similar situations, despite the fact that they are in a vulnerable situation alike to indigenous groups. This is the case of non-indigenous peasants (*campesinos*) and Afro-American communities, which

67 Andrew Erueti explains: "[t]he central role of cultural difference in (recent) African indigenist discourse threatens to limit the scope of their rights and lock out groups that fail to conform to the local image of indigenous peoples." *Id*., 115.

68 Kingsbury, *supra* note 62, 414.

69 G. Aguilar *et al*. 'Análisis comparado del reconocimiento constitucional de los pueblos indígenas en América Latina', available at http://www.ssrc.org/workspace/uploads/docs/Ana%CC%81lisis_Comparado_del_Reconocimiento_Constitucional_de_los_Pueblos_Indigenas_en_Ame%CC%81rica_Latina%20_Dec%202010_CPPF_Briefing_Paper_f.pdf (last visited 2 May 2012).

70 Art. 62 of the Constitution of Paraguay, available at http://www.wipo.int/wipolex/es/details.jsp?id=9579 (last visited 2 May 2012).

71 Art. 2 of the Constitution of the United Mexican States, available at http://www.wipo.int/wipolex/es/details.jsp?id=8010 (last visited 2 May 2012).

72 Art. 2 of the Constitution of the Plurinational State of Bolivia, available at http://www.wipo.int/wipolex/en/details.jsp?id=5430 (last visited 2 May 2012).

demonstrates that the human rights approach is not being wholly implemented at the national level in Latin- America.

Indigenous movements in Ecuador and Colombia aligned with peasant and worker's unions during the 1970s in the class struggle against capitalism. This alliance contributed to the strengthening of the cause in defense of indigenous identity, language and customs.[73] This was the case for the *Colombia's Consejo Regional Indígena del Cauca* which described itself as "an organization managed by indigenous campesinos" representing not only the interests of indigenous peasants groups, but of all exploited peasants in Colombia.[74] In Ecuador a similar organization was the *Movimiento de Campesinos del Ecuador (Ecuarunari)*, founded in the early 1970s with the strong support of the most progressive sector of the Catholic Church, and composed of indigenous and non-indigenous peasants groups seeking to recover their traditional and agriculturally productive lands.[75] Years later, indigenous peoples started to adopt an independent political position which has become more successful than the other non-indigenous political movements.[76]

Particularly in Bolivia, indigenous leaders rejected any assimilation of their people as "*campesinos*".[77] In a country where indigenous peoples have been said to constitute a majority, being identified as "indigenous" or even as "original" seems for some Bolivian farmers' political organizations to be more important than being considered "*campesino*". This is the case for the CSUTCB (*Confederación Sindical Única de Trabajadores Capesinos de Bolivia*) and for *Bartolina Sisas*, a rural women´s organization.[78] Moreover, since the adoption of Bolivia´s new Constitution (which granted greater rights to indigenous peoples) and the attempt of the current government to transform Bolivia into an indigenous State,[79] being identified as indigenous could allow for these organizations to gain access to power. However, within a context of a highly fragmented indigenous sector, only those whose

73 Engle, *supra* note 8, 60.
74 *Id*., 62.
75 M. Carlosama, 'Movimiento Indígena Ecuatoriano: historia y consciencia politica', 2 *Publicacion mensual del Instituto Científico de Culturas Indígenas* (2000), 17.
76 Engle, *supra* note 8, 62; See also history of the ECUARUNARI, available at http://www.llacta.org/organiz/ecuarunari/ (last visited 2 May 2012).
77 Engle *supra* note 8, 61.
78 A. Schilling-Vacaflor, *Recht als umkämpftes Terrain – Die neue Verfassung und indigene Völker in Bolivien* (2010), 86-88.
79 *Id*., 249, 250

interests coincide with the interests of the government are heard.[80] Thus, the human rights approach to indigenous peoples in Bolivia is vanishing.

Some African-American communities in Latin America, despite greater vulnerability, are unable to capture the attention of governments as the self-identified indigenous peoples of Asia did. For instance, some Afro-American groups located on the Pacific coast of South America depend on the use of rivers, seas and forests for subsistence purposes, and keep equivalent cultural and spiritual ties to the territory occupied by them, just as many indigenous peoples do.[81] As a consequence of their detrimental treatment, some Pacific coast black leaders have been started to associate themselves politically with indigenous groups "in an implicit effort to create an "indian-like" identity in the eyes of the State".[82]

We should think about whether under the principle of equality,[83] anthropological or historical criteria attached to the idea of colonialism can still be used as justification to confer special treatment exclusively to indigenous peoples within societies that are undergoing an ongoing process of racial and cultural mixture. As Jabareen brings into question: Does the weight of the claim increase if the minority is indigenous to the land on which the nation now exists?[84]

According to a human rights approach, special protection should be conferred to those who suffer from poverty and discrimination and are vulnerable to lose their cultural identity, regardless of the label "indigenous". This approach is not only fairer but also conforms with the principle of equality which was initially the source of inspiration to grant protection only to indigenous peoples. Otherwise, some Latin America

80 *Id*., 170 -172.

81 R. Roldán, *Territorios colectivos de Indígenas y Afroamericanos en América del Sur y Central. Su incidencia en el dessarrollo,* a Study presented in the Conference 'Desarrollo de las Economías Rurales de América Latina y el Caribe: Manejo sostenible de los Recursos Naturales, Acceso a Tierras y Finanzas Rurales' Fortaleza, Brasil, with the Sponsor of the Interamerican Bank of Development and The German Government (March 2002) available at http://www.pueblosaltomayo.com/articulos/tierras-y-territorios/territorios%20colectivos_BID.pdf (last visited 2 May 2012).

82 P. Wades, 'The Cultural Politics of Blackness in Colombia', *22 American Ethnologist* (1995) 2, 341, 346.

83 Jabareen, *supra* note 55, 652, Jabareen explains that the basis of participatory equality is that "all citizens share appropriately in the resources, decisions, and progress of the State, and therefore have appropriate influence over their shared futures".

84 *Id*., 639.

countries could shift from barely criticized Euro-centrism to a not necessarily better "indigenous-centrism" without even questioning how many of those who label themselves "indigenous" are really in need of special protection.

D. A New Functional Approach to Indigenous Peoples?

Notwithstanding the debate surrounding the definition of indigenous peoples as described so far, some other international legal instruments in the field of international environmental law and the law of development cooperation allude to indigenous peoples with a stronger focus of participation. In this way they seem to leave aside the classical understanding on indigenous peoples as the only exploited or discriminated society needed of special protection, referred to above as a limited approach to human rights. Instead, they put forward a functional approach, according to which groups are granted special protection based on their environmental input. In this context, a new category of local community appears on the scene.

I. Indigenous Peoples as Stewards of the Environment

In the international environmental law context, both the Rio Declaration on Environment and Development[85] and the Convention on Biological Diversity (CBD)[86] stress the role of indigenous peoples as "fundamental" for the conservation and sustainable use of biodiversity. This recognition is, however, not exclusive to indigenous communities but is shared by other local communities.[87] Similarly, the Nagoya Protocol[88]

85 Rio Declaration on Environment and Development (3-14 June 1992) available at http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 (last visited 2 May 2012).

86 1760 U.N.T.S 79 (5 June 1992).

87 Rio Declaration on Environment and Development, *supra* note 85, Principle 22; C BD, Preamble (para. 12).

88 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits from their Utilization to the Convention on Biological Diversity (29 October 2010) available at http://www.cbd.int/abs/text/ (last visited 2 May 2012) [Nagoya Protocol]. It was adopted in Nagoya, Japan in 2010 and establishes the legal framework for the implementation of one of the three objective of the CBD: The fair and Equitable Sharing of Benefits from the utilization of genetic resources. The protocol is opened for ratification since February 2011.

acknowledges both indigenous peoples and local communities as holders of traditional knowledge.[89] Furthermore, the UN Collaborative Programs on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (better known as UN-REDD programs)[90] encompass, besides indigenous peoples, forest-dwelling and local communities as "active participants" in the design and implementation of REDD plans. In light of all these examples, we can conclude that the label "indigenous", in the classical sense, is not of special relevance.[91]

One explanation might be what I call a "functional" or "instrumental" approach to indigenous peoples, which also applies with respect to other local communities. The Rio Declaration and the CBD refer to indigenous peoples not primarily in terms of their vulnerability and cultural distinctiveness, but rather in terms of their contribution to environmental conservation. The same is true for other non-indigenous groups labeled as "local communities". At this point, one could contend that, in the environmental context, indigenous peoples are protected inasmuch as they adopt their livelihood to the "green stereotype". Escobar argues that indigenous peoples are recognized as owners of their territories "only to the extent they accept to treat it – and themselves – as reservoirs of capital."[92] On the other hand, some scholars argue that indigenous peoples use the environmental frame as a platform to obtain wider recognition of the right to self-determination.[93] Irrespective of what the purpose behind the environmental discourse may be, this functional approach has at least the advantage of boosting participation of indigenous peoples in decision-making procedures without discriminating against other non-indigenous groups, who may be also entitled to it.

At first glance, it seems that the Nagoya Protocol is based on a human rights approach to protection of indigenous peoples 'cultural and property

89 *Id.*, Preamble, para. 23.

90 REDD is a joint initiative of the FAO, UNDP and UNEP attempting to reduce emissions in tropical countries by preventing activities that cause degradation and deforestation such as poor forest management practices, forest fires, overgrazing, etc. See *e.g.* UN-REDD Programme Framework Document, available at http://www.un-redd.org (last visited 2 May 2012).

91 Kingsbury, *supra* note 62, 451.

92 A. Escobar, *Encountering Development. The Making and Unmaking of the Third World* (2012), 203.

93 R. Morgan, 'Advancing Indigenous Rights at the United Nations: Strategic Framing and its Impact on the Normative Development of International Law', 13 *Social and Legal Studies* (2004) 4, 481, 491.

rights. Based on this approach the Nagoya protocol states that access to traditional knowledge must be subject to the free, prior and informed consent of the indigenous or local community concerned.[94] However, in a scenario in which the world's eyes focus mainly on time-saving and cost-effective procedures for accessing genetic resources and traditional knowledge, indigenous peoples are rather treated as trade partners. From this point of view, a functional approach to indigenous peoples seems to be present again.

II. Indigenous Peoples in the Context of Development Cooperation

The role of indigenous peoples has also gained some importance in the law of development cooperation, both at the State level with regard to development assistance projects and programs and at the international level, i.e. within the provisions of international financial institutions (IFIs). Even though in the field of development cooperation a human rights –based approach to indigenous peoples still prevails, it seems to be slowly replaced by the functional one.

With respect to official development assistance, both Germany and Denmark, which serve as examples, run development programs exclusively targeted to indigenous peoples. In the case of Denmark, the indigenous development policy focuses mainly on the democratization of indigenous communities, the establishment of mechanism for the implementation of consultation and assistance with the conservation and sustainable use of indigenous lands and natural resources.[95] In the case of Germany, the cooperation with indigenous peoples is concentrated in Latin America. The programs are intended to strengthen indigenous political organizations and include capacity building and the conservation and transmission of indigenous knowledge.[96] With regard to the definition of indigenous

94 Nagoya Protocol, *supra* note 88, Art. 7.

95 See "Strategy for Danish support to Indigenous Peoples", Danish Ministry of Foreign Affairs, 10-14, available at http://amg.um.dk/en (last visited 2 May 2012).

96 Since 2006 the German Agency for International Cooperation has furthered a regional project: "Strengthening of Indigenous Organizations in Latin-America". The project comprises countries from the Andean Region, the Amazon basin and the Caribbean, Information at http://www.gtz.de/en/praxis/18698.htm (last visited 4 April 2012). The "Indigenous Intercultural University" is also a regional project started in 2005 which provides technical, organizational and financial support for the establishment in some Latin American Universities of postgraduate courses aimed at the teaching of

peoples, both Denmark and Germany refer to the criteria established in ILO Convention No. 169, such as historical continuity with pre-colonial societies, cultural distinctiveness, and a situation of marginalization; but in a more flexible way.[97] The way these development cooperation policies are designed can be seen as the most appropriate application of a human rights approach.

At the international level, international financial institutions such as the World Bank or regional development banks have also started to bring indigenous peoples into the development agenda. During the 1980s, the World Bank fostered the implementation of integrated rural development (IRD) programs. The purpose of this initiative was to introduce "development" in poor rural areas by stimulating the agricultural productivity of small-scale farmers, tenants and the landless, among them indigenous communities.[98] One of these projects took place in the State of Oaxaca in Mexico, a State where 56% of the population is considered to be indigenous.[99] An analysis of the implementation of IRD in Oaxaca observes that "[r]ural Development in Marginal Areas appeared to be systematically either excluding or bypassing the most consolidated indigenous producer organizations in its areas of operation."[100] As can be seen in this case, both indigenous and non-indigenous communities seem to be encompassed under the sole category of peasants and the functional approach prevails; this time, however, for the purpose of "development".

Concerning other IFI's policies the situation is even more complex. Not only the World Bank but also regional finance institutions such as the

indigenous knowledge. See http://www.gtz.de/en/praxis/14065.htm (last visited 4 April 2012).

97 See "Strategy for Danish support to Indigenous Peoples", *supra* note 95, 9-10; "Development Cooperation with Indigenous Peoples in Latin America and the Caribbean", Federal Ministry for Economic Cooperation and Development, Germany (July 2006), 5, available at http://www.bmz.de/en/publications/topics/human_rights/konzept141.pdf (last visited 2 May 2012).

98 Escobar, *supra* note 93, 161.

99 Information provided by the Office of the High Commisioner for Human Rights in its report "Advancing Indigenous Peoples' rights in Mexico" (July 2011) available at http://www.ohchr.org/EN/NewsEvents/Pages//IndigenousPeoplesRightsInMexico.aspx (last visited 2 May 2012).

100 J. Fox & J. Gersham, 'The World Bank and Social Capital: Lessons from ten Rural Development Projects in the Philippines and Mexico', 33 *Policy Science* (2000), 399, 409.

Asian Development Bank,[101] the European Bank for Reconstruction and Development[102] and the Inter-American Development Bank[103] have designed operational policies towards participation of indigenous peoples in IFIs- financed projects affecting them. We will concentrate on the policies of the World Bank.

In 1982 the World Bank adopted the Operational Manual Statement[104] 2.34 Tribal People in Bank-Financed Projects, referred to as OMS 2.34. The policy addressed for the first time the situation of tribal communities in Bank-financed development projects, which responded to the internal and external condemnation of the consequences some projects had had for indigenous communities in the Amazon region.[105] The policy required recipient States to provide safeguards for the protection of the integrity and well-being of tribal peoples who could be affected by the implementation of a World-Bank funded project.[106] NGOs and indigenous peoples' organizations criticized OMS 2.34, since it did not expressly preclude the Bank from supporting projects involving encroachment onto tribal peoples´

101 See 'Safeguard Policy Statement', Asian Development Bank (June 2009) available at http://www.adb.org/documents/safeguard-policy-statement (last visited 2 May 2012).

102 See "Environmental and Social Policy", European Bank for Reconstruction and Development (EBRD) (May 2008) available at http://www.ebrd.com/downloads/research/policies/2008policy.pdf (last visited 2 May 2012).

103 See 'Operational Policy on Indigenous Peoples and Strategy for Indigenous Development', Inter-American Development Bank (IADB) (July 2006) available at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35773490 (last visited 2 May 2012).

104 "Operational Manual Statement (OMS): These are Bank instructions to staff, the policy substance of which might have been approved by the Bank. OMSs contain a mixture of policy, procedure and guidance materials." See The World Bank, 'Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review', Glossary (10 January 2003) available at http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/472DE0AEA1BA73A085256CAD005CF102/$file/IP_evaluation.pdf [World Bank Report] (last visited 2 May 2012).

105 B. Kingsbury, 'Operational Policies of International Institutions as Part of the Lawmaking Process: The World Bank and Indigenous Peoples', in G. Goodwin-Gill & S. Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), 323, 324, available at: http://iilj.org/aboutus/documents/OperationalPoliciesofInternationalInstitutions_000.pdf (last visited 2 May 2012).

106 S. Davis, 'The World Bank and Indigenous Peoples', The World Bank (1993), 5, available at: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/11/14/000012009_20031114144132/Rendered/PDF/272050WB0and0Indigenous0Peoples01public1.pdf (last visited 2 May 2012).

territories.[107] Moreover, it was argued that this policy focused primarily on isolated tribal societies, forgetting those who had already been more integrated in the society, the so-called "indigenous peasant populations".[108]

Due to OMS 2.34's deficiencies and the growing protest against World Bank projects,[109] the Bank, in 1992, adopted a second policy in the form of Operational Directive 4.20 (OD 4.20), aimed specifically at indigenous peoples.[110] OD 4.20 responded to prior World Bank policies' failure to include isolated groups undergoing acculturation in addition to isolated groups or tribes.[111]

According to OD 4.20, borrowers should prepare an Indigenous Peoples Development Plan (IPDP), including a strategy for indigenous participation in projects affecting them.[112] The task of identification of an affected indigenous community was under the responsibility of the World Bank. For this purpose a group of "Task Managers" was in charge of examining the recipient States' law, policies and procedures, and to make anthropological and sociological studies where necessary.[113] OD 4.20 stated that social groups to be covered "can be identified in particular geographical areas by the presence in varying degrees of the following characteristics: (a) close attachment to ancestral territories and to the natural resources in these areas; (b) self-identification and identification by others as members of a distinct cultural group; (c) an indigenous language, often different from the national language; (d) presence of customary social and political institutions; and (e) primarily subsistence-oriented production."[114]

Critics of the application of the policy suggested that only indigenous groups in the strict sense were covered by the OD; however, the Bank's position was that the OD applied to all "social groups who meet the five

107 F. MacKay, 'Indigenous Peoples and International Financial Institutions', in D. Hunter (ed.) *International Financial Institutions and International Law* (2010), 287, 288.

108 Davis, *supra* note 106, 3.

109 MacKay, *supra* note 107, 289.

110 'Operational Directive (OD): A Bank Directive that contains a mixture of policies, procedures, and guidance, gradually being replaced by Operational Policy, Bank Procedure, and Good Practice.' See The World Bank Report, *supra* note 104, Glossary.

111 *Id*., *supra* note 104, 1, para. 1.4.

112 *Id*., 2, para. 1.5.

113 *Id*., 2, para. 1.5.

114 *Id*., 3, para. 1.9.

characteristics"[115] named above, although to varying degrees. In spite of the progress that OD 4.20 made in extending the application of the policy to non-isolated indigenous communities, the policy was still criticized as being incompatible with indigenous rights and ineffective as a safeguard mechanism. Here it is important to note the progressive approach of this policy by including under the label "indigenous" other project-affected groups regardless of ethnic criteria.

After two failed attempts to satisfy the demands of indigenous peoples´ advocates, in 2005 the World Bank adopted Operational Policy (OP)[116] 4.10 on Indigenous Peoples, currently in force, which was supposed to mark "the beginning of a wholesale reevaluation and revision by the IFIs of their "safeguard" policy instruments pertaining to indigenous peoples".[117] From a legal point of view, operational policies can be defined as World Bank internal norms which are binding on the Bank staff.[118] This new policy provides that "[f]or all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation."[119] Even though the wording is similar, the World Bank does not use the term "consent" – as does the UNDIPR – but the word "consultation". Even though OP 4.10 was adopted before the approval of the UNDIP in 2007, four years have passed without any attempt to adopt the wording of the Declaration into the World Bank`s Operational Policy. It seems that the Bank is unwilling to go any further and is afraid of giving the equivalent of a veto right to parties other than those specified in the countries´ legal framework.[120]

As it did in OD 4.20, the World Bank relies on a group of experts who decide on the existence of indigenous peoples in the light of the World

115 *Id*., 3, para.1.10.

116 "Operational Policy (OP): A short, focused statement that follows from the Bank's articles of agreement, the general conditions, and policies approved by the Board of Executive Directors", *Id*., Glossary.

117 MacKay, *supra* note 107, 289.

118 P. Dann, *Entwicklungsverwaltungsrecht: Theorie und Dogmatik des Rechts der Entwicklungszusammenarbeit, untersucht am Beispiel der Weltbank, der EU und der Bundesrepublik Deutschland* (2012), 180.

119 'World Bank Operational Directive 4.10 on Indigenous Peoples' (July 2005) para. 1, available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html (last visited 2 May 2012) [World Bank Directive 4.10].

120 MacKay, *supra* note 107, 316.

Bank´s own list of flexible criteria. Those criteria are practically identical to the former policy.[121] The only difference is that the OP does not include the criterion of "primarily subsistence-oriented production". In the application of the policy, it could be said that the World Bank is following a broad version of the human rights-based approach but with a more flexible definition of indigenous peoples. This suggestion can be confirmed by the last report on the implementation of the World Bank´s policy on indigenous peoples. According to that report, even poor minority communities in India have been regarded as "indigenous", despite India´s refusal to accept the existence of indigenous communities within their territory.[122] So it is vulnerability that matters.

However, this conclusion seems more doubtful from a holistic perspective. One of the reasons why the World Bank applies operational policies and imposes certain duties on recipient States is the huge backlash against many of its policies and programs. The World Bank became one of the favorite targets of the anti-globalization movements, and instead of celebrating its 50th birthday; campaigners started the "Fifty-years-is-enough" campaign.[123] A reform of the policy was probably necessary to improve its reputation and ensure that its projects and programs were accepted. The argument is that development projects or programs must be supported by the affected population in order to be effective.[124] This is also legally supported by the IDA[125] Articles of Agreement, which state that "*the proceeds of any financing are used only for the purposes for which the financing was provided, with due attention to considerations of economy, efficiency and competitive international trade and without regard to political or other non-economic influences or considerations.*" Arguing that the consultation of indigenous communities allows for more efficient development cooperation is thus in line with the Articles of Agreement.

121 World Bank Directive 4.10, *supra* note 119, para. 4.

122 Implementation of the World Bank's Indigenous Peoples Policy – A Learning Review (FY 2006-2008); prepared by the Quality Assurance and Compliance Unit of the Operations Policy and Country Services Vice Presidency (OPCS, August 2011), 23, available at http://siteresources.worldbank.org/INTSAFEPOL/Resources/Indigenous_peoples_review_august_2011.pdf (last visited 2 May 2012).

123 This also became the title of a book with a preface written by Muhammed Yunis, cf. K. Danaher (ed.), *Fifty Years is Enough. The Case Against the World Bank and the International Monetary Fund* (1994).

124 World Bank Directive 4.10, *supra* note 119, para. 1.

125 IDA is the abbreviation for International Development Association which is the section of the World Bank in charge to help world's poorest countries.

From this point of view, indigenous peoples are seen as potential backers of World Bank-funded projects. This suggests that we are dealing again with a functional approach to indigenous peoples. Even though there is extensive academic debate about the extent to which the World Bank is bound by human rights and should implement some human rights in its policy,[126] it seems that the World Bank is not yet willing to adopt an explicitly human-rights based strategy into its development programs and projects.

E. Final Analysis and Conclusions

The first conclusion to be drawn is that international law has focused more on indigenous peoples than on minorities or other vulnerable groups in society. The role of the ILO has been crucial in the internationalization of indigenous rights. Without its action, indigenous peoples might have continued to be regarded as the "underdeveloped" part of society, and States might have more easily dispossessed indigenous peoples from their territories under the name of "national development". ILO Convention No. 107 proposed a definition of indigenous peoples with limited application. ILO Convention No. 169 keeps this definition but adds the criterion of self-identification in order to extend its scope of application to those who are not recognized as indigenous by their national States. However, ILO Convention No. 169 has not attained wide support outside the Latin-American context. The UNDRIP opted for a flexible interpretation of the definition of indigenous peoples based on a human rights approach. What matters is the protection of people who have lived for a long time in a situation of marginalization, the preservation of their cultural distinctiveness as well as the spiritual ties between these people and their territory.

However, the lack of a universally accepted definition of indigenous peoples has brought about some problems at the national level. Some Latin America countries still refer to indigenous peoples as descendants of the early settlers of the country, privileging traditional indigenous groups over peasants and Afro-American communities. Unfortunately, many of the latter still suffer discrimination and might even be more vulnerable than some indigenous communities. On the other hand, many governments in Asia and Africa refer to the same argument to deny any form of special protection

[126] G. Brodnig, 'The World Bank and Human Rights: Mission Impossible?', in *Carr Center for Human Rights Policy, Working Paper T-01-05*, 8, available at http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf (last visited 2 May 2012).

under the "indigenous" label to certain communities. In this context we find a limited human rights approach to indigenous peoples.

In the field of environmental law, the Rio Declaration and the Convention on Biological Diversity refers to indigenous peoples in terms of their potential contribution to sustainable development. The same is true for the Nagoya Protocol, which points to the traditional knowledge of indigenous peoples. Important to note is the contribution of environmental instruments to solve the problem of differentiation between indigenous and non-indigenous groups by including the category of local communities. Here arises a new functional approach to indigenous peoples.

Concerning development cooperation, it seems that the World Bank in particular, due to its limited mandate, follows a functional approach to indigenous peoples. In doing so, the Bank includes non-indigenous communities in the implementation of its assistance programs and operational policies, whereas the German and Danish Development Cooperation support specific programs targeted at indigenous groups based on their vulnerability.

One aspect should be mentioned. If it is argued that no *distinction* between certain groups, say indigenous and Afro-American communities, should be made based on ethnicity, but that rather all "vulnerable" groups require protection, this does, however, not imply that any kind of cultural *consideration* should be avoided. For instance, questions such as the cultural relationship of a specific community with their territory or traditional decision-making systems are crucial in the design of national policies. This rule should apply not only with respect to indigenous communities but also with regard to every community whose culture and ways of life differ considerably from the dominant society.

In sum, to create special systems of protection for each group that is not in line with the classical definition of indigenous peoples seems an impractical and undesirable option. Rather, it is necessary to redefine indigenous peoples without overstating the colonial and anthropological arguments. We should focus more on elements such as vulnerability to dispossession, cultural and economic connections with a specific territory, and the exercise of specific practices intrinsically connected with the land and natural resources. Even though a functional approach seems to be the closest one to this suggestion, we must question ourselves to what extent indigenous peoples and local communities are willing and able to assume the role that international environmental law and the law of development cooperation have designed for them.

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They Entered without any Rumour.

Human Rights in the Belgian Legal Periodicals

Sebastiaan Vandenbogaerde*

Table of Contents

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Abstract

Legal periodicals offer an opportunity to gaze on the daily pursuits of legal practitioners. By measuring the attention on a certain topic, it is possible to retrace to what extent it was deemed to be important for Belgian jurists. In this particular paper, a closer look will be taken at human rights and their relevance for Belgian legal practice. Therefore, research will be done in one of the most influential periodicals in Flanders: the *Rechtskundig Weekblad*. The attention on human rights, and more specific the European Convention of Human Rights, can give an impression of the importance of these rights for Belgian, and more specific, Flemish legal practice. As this periodical was preoccupied with the Flemish movement, its 'ideology' also affected its reporting of human rights. Thus, legal periodicals can be found at the crossroads of all actors in the legal world.

A. Introduction

Periodicals[1] are mirrors or seismographs of cultural and social processes in a society. Legal periodicals are no exception, as they register day-to-day legal culture and reflect its evolution over a longer period.[2] The legal periodical as a genre dates back to the end of the 18th century when specific journals were founded to comment on legal cases.[3] Surprisingly enough, despite their importance for the knowledge of legal culture, they were not studied scientifically until the 1980s. Since then, legal journalism

1 In this paper periodicals, journals or reviews will be used as synonyms.

2 M. Stolleis (ed.), *Juristische Zeitschriften. Die neue Medien des 18.-20. Jahrhunderts* (1999); M. Stolleis & T. Simon (eds.), *Juristische Zeitschriften in Europa* (2006); M. Luts-Sootak & M. Ristikivi, "Dear reader", 17 *Juridica International* (2010) 1, 1.

3 Initially, they were part of periodicals dedicated to the sciences in general and mostly they were nothing more than a collection of case law. The French *Journal des Scavants*, established in 1669, is seen as the first scientific periodical and contained a small amount of case law. E. Holthöfer, *Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert* (1993), 139; G. Van den Bergh & C. Jansen, "De wording van het juridische tijdschrift. Drie Nederlandse pogingen uit de Franse tijd", 56 *Tijdschrift voor Rechtsgeschiedenis* (1988), 341; C. Jansen, "Rechtsgeleerd magazijn Themis (RM Themis)", 16 *Ars Aequi* 2009, 589.

has become a hot topic of study in most European countries.[4] However, Belgian historiography lags behind.[5] Today, the impact of rankings and peer review on research funding, but also of technological changes cannot be underestimated. Therefore it is necessary to know how these publications work.[6]

In this paper, the importance of human rights in Belgian juridical periodicals will be analyzed. The main question is to what extent human rights were deemed to be important for Belgian legal practitioners. In order to answer this question, a study about periodicals will be made. In that way, one can gain an impression of the importance of human rights in the Belgian legal world, but also of certain selection criteria handled by the board of editors of law reviews. Did the board of editors give attention to the

4 P. Grossi (ed.), *La cultura delle riviste giuridiche italiene* (1984); *Id*., *Riviste giuridiche italiene 1865-1945, Quaderni fiorentini per la storia del pensiero giuridico moderno* (1987); A.-J. Arnaud (ed.), *La culture des revues juridiques françaises* (1988); M. Stolleis (ed.), 1999, *supra* note 2; T. Simon & M. Stolleis (eds.), 2006, *supra* note 2; K. Saleski, *Theorie und Praxis des Rechts. Im Spiegel der frühen Zürcher und Schweizer juristischen Zeitschriften* (2007); M. Krupar, *Tschechische juristische Zeitschriften des 19. und 20. Jahrhunderts* (2011).

5 There are a few studies about specific titles e.g. V. Carré, *Le Journal des Tribunaux d'Edmond Picard (1881-1899). Approche d'un journal judiciaire au dix-neuvième siècle*, unpublished master's thesis ULB, 1986; B. Coppein, *Mirror of changing law. The Journal des Tribunaux in the fin de siècle*, s.l.n.d. ; A. Van Oevelen, "Vijfenzeventig jaar Rechtskundig Weekblad", *Rechtskundig Weekblad* [*RW*] 2011, 1-6; S. Vandenbogaerde, "Vive Lejeune! Het Tijdschrift van de Vrederechters (1892-2011)", in G. Martyn (ed.), *Scènes uit de geschiedenis van het vredegerecht/Scénes de l'histoire du justice de paix*,129-146; As a general study about the Belgian legal periodicals one can consult E. Holthöfer, 'Belgien' in F. Ranieri (ed.), *Gedruckte Quellen der Rechtsprechung in Europa (1800-1945)*, (1992), 3-94; *Id*., *Beiträge zur Justizgeschichte der Niederlande, Belgiens und Luxemburgs im 19. und 20. Jahrhundert* ,(1993); D. Heirbaut, "Law reviews in Belgium (1763-2004): instruments of legal practice and linguistic conflicts" in Simon & Stolleis, *supra* note 2 , 343-369.

6 Since 2003 the scientific output of universities in Flanders is an important element in the distribution of research funding. Thus the number of publications and citations has become more significant for a university. In the databases of Web of Science social and human sciences are underrepresented. The 2008 funding decree and the resolution on research funding established a committee to create a special database for these social and human sciences. This is called VABB-SHW (Vlaams Academisch Bibliografisch Bestand-Sociale en Humane Wetenschappen). For now, legal periodicals are divided in 'peer reviewed' and not 'peer reviewed'. Books are ranked per publisher, but as of now no Belgian publishers are considered to be scientific. N. Hoekx & A.-L. Verbeke, 'Verleden, heden en toekomst van juridische tijdschriften in Vlaanderen', *RW* 2011, 7-22.

evolutions in the field of European human rights? Was there a lot of doctrine and case law of the European Court or were only the leading cases published? Is there an evolution of doctrine and case law and how can it be explained?

The vastness of the subject requires a limitation in two ways. First, because it is one of the only legally enforceable human rights treaties, the impact of the European Convention and the European Court of Human Rights on the Belgian legal system will be subjected to research. This means that Belgian periodicals will be studied from 1950 onwards. The second limitation concerns the selection of the reviews. There are plenty of titles to choose from.[7] There is one Belgian periodical specifically dedicated to the field of human rights, the *Tijdschrift voor Mensenrechten*[8], but this would only present a distorted image. After all, specialized periodicals remain silent about the impact of their topic upon general legal culture. In contrast, an important general periodical better reflects the penetration of certain legal issues in the legal world. Therefore, the focus is on one of the most important general periodicals, the *Rechtskundig Weekblad*, which celebrated its 75th year of publication in 2011.[9] The obtained data will probably confirm two hypotheses Firstly, as the number of cases before the European Court has risen throughout its history, this should result in a rise of the attention for human rights in the *Rechtskundig Weekblad*. Secondly, as some rulings e.g. the *Marckxruling* (1979) have had a profound impact upon

7 Depending on the definition of 'legal periodical' or library catalogues the number of titles can be more than 500 and even then are online publications excluded. Today, even law firms publish their own periodical, which is not always publicly accessible and thus not known for the researcher. A useful instrument is the yearly published *Recueil Permanent des Revues Juridiques/Permanent Overzicht van Juridische Tijdschriften* which summarizes what was published in 130 Belgian law reviews.

8 The *Tijdschrift voor Mensenrechten* is the successor of the *Liga Nieuwsbrief*, the newsletter of the league of Human Rights in Belgium. The goal of this review is to encourage research on human rights and to spread knowledge about it. It appears four times a year since 2003. Each edition contains two or three short articles, followed by an interview or report. Every editorial gives the opinion from a member of the editorial board. The last page is reserved for new leading cases. The difference with the old newsletter is that henceforth it is published by a professional publisher and it has an independent editorial board.

9 This commemoration started with an academic session, in which the first issue of that year was presented. It contained several articles which discussed the most important changes in every field of law, but it opened with a historical contribution written by its editor in chief Aloïs Van Oevelen, followed by an article about the future of legal periodicals.

Belgian legal system, this should be visible. These assumptions must be put in a larger historical context.

B. The Rechtskundig Weekblad

The *Rechtskundig Weekblad* is seen as one of the most important legal reviews in Flanders, the northern, Dutch-speaking part of Belgium. Ever since its founding, a new issue appeared every week (with the exception of the years during the Second World War[10] and the judicial recess in August and September) and it has always reached a considerable number of lawyers. To give an indication: today it has 4300 subscribers, without the ones who have only a subscription online, which makes it the most successful weekly published legal periodical in Flanders.[11] The periodical was founded in 1931 by the Antwerp attorney René Victor[12] who was the secretary of the editorial board and became the *de facto* editor in chief.[13]

10 During the Second World War it was not published due to higher costs and the refusal of editor René Victor to work for the German occupier.

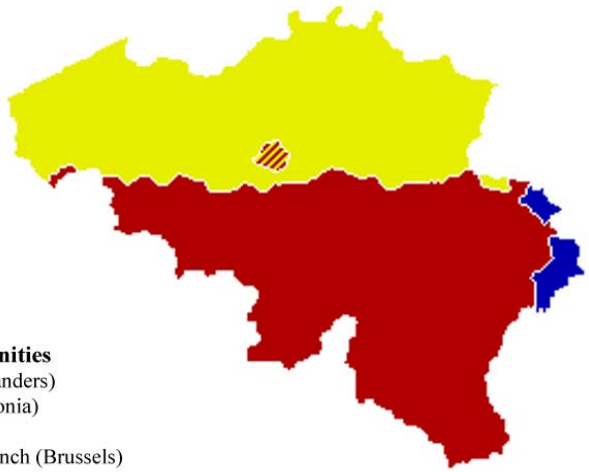
11 A. Van Oevelen, *supra* note 5, 4.

12 René Victor (1897 – 1984) born in Antwerp was a jack of all legal trades. He was an attorney at the Antwerp Bar, president and secretary of the Vlaamse Conferentie, the association of Dutch speaking attorneys there. He was one of the most passionate advocates of Dutch as the official legal language in Flanders, which can be explained by the fact that he was educated by August Borms, a Flemish nationalistic frontman and collaborator of the German occupier during both World Wars. During WWI Victor worked for *Het Vlaamsche Nieuws*, an activist newspaper. Therefore, after the armistice he was suspended as a State clerk. In 1921 he was *doctor iuris* and he joined the Antwerp Bar in 1922. He wrote a lot of articles and books and was appointed as the first Dutch-speaking professor at the *Université Libre de Bruxelles*. In 1941, he resigned due to a conflict with the Germans. In 1955 he became professor at Ghent University. Victor was president of the Flemish Jurists' Union (1964 – 1983). It is partly due to him that law in Flanders is taught, practised, discussed and examined in Dutch. Until 1982 he presented an overview of the Flemish legal literature in the *Rechtskundig Weekblad* every year. Because of his merits for the legal world, the King ennobled him. He died in 1984 and was succeeded as editor in chief by Edgar Boonen. F. Erdman, 'R. Victor en de Balie', *Rechtskundig Weekblatt* [*RW*] 1984 / 1985, 2865-2870; R. Vandeputte, 'Leven en Werk van R. Victor', *RW* 1984 / 1985, 2869-2884; M. Storme, 'R. Victor en de Vlaamse Juristenvereniging', *RW* 1984 – 1985, 2883-2886; J. Stevens, 'R. Victor en de Vlaamse Conferentie', *RW* 1984 – 1985, 2885-2888; H. Van Goethem, 'Victor, ridder René', in R. de Schryver (ed.), *Nieuwe Encyclopedie van de Vlaamse Beweging* (1998).

13 The other editors were Jules Franck, Herman De Jongh, Louis Elebaers, John Stockmans, Ignace Van den Brande, Fernand Collin, Emiel Ooms en Gaston Craen. They were all attorneys.

Through it he wanted to develop a Flemish legal culture and thus to make Flemish lawyers contribute to the greatness of the Flemish culture. Hitherto the French language had dominated the Belgian legal world, even though the majority of the Belgians were Dutch speaking.[14] This periodical cannot be comprehended without taking a closer look to the Belgian linguistic history.

Today Belgium is a federal State on the cultural boundary between Germanic and Latin Europe. It has three linguistic communities and three territorial regions. The northern part is Flanders, where Dutch/Flemish is spoken by the inhabitants, whereas in the southern part, Wallonia, they speak French/Walloon. In the Eastern part of Wallonia there is a German speaking community.[15] The second half of the 20th century was marked by the rise of non-violent conflicts between the Dutch and French speaking Belgians fuelled by cultural differences on the one hand and an asymmetrical economic evolution of Flanders and Wallonia on the other hand. These conflicts have caused far-reaching reforms of the formerly unitary Belgian State into a federal State.



Belgian Linguistic Communities
- Yellow = Dutch-speaking (Flanders)
- Red = French-speaking (Wallonia)
- Blue = German-speaking
- Shaded = Bilingual Dutch-French (Brussels)

14 R. Victor, "Aan onze lezers", *RW* 1931-1932, 1; R. Victor, 'Ons doel', *RW* 1931-1932, 17; D. Heirbaut, 'Law reviews in Belgium (1763-2004): instruments of legal practice and linguistic conflicts" in Simon en Stolleis, *supra* note 2, 358.

15 This small region was appointed to Belgium after the peace treaty of Versailles (1919) as compensation for war damages.

I. Belgian linguistic history

The French dominance was the product of history. Under the reign of the Emperor Charles V, French became the language of the nobility and the higher courts, whereas in lower courts Dutch was still used. Needless to say that Latin was the common language at universities. In this context it became fashionably for wealthy people to speak French.[16] Moreover, literature in Dutch in the Southern Netherlands (the later Belgium) was vastly inferior to the vernacular literature in the Dutch Republic, so it is not strange that Dutch in Flanders became heavily influenced by French. The 1795 French annexation ended the use of Flemish in public institutions. The French imposed not only their administrative and legal system but also their language.

The Vienna conference (1815) reunited the Southern and Northern Netherlands. King William I. of the United Kingdom of the Netherlands decided in 1819 that Dutch should be used in administration and courts in Flanders. Due to practical problems, temporary measures were foreseen until 1823. Because there was not always a good translation for French legal terminology, or the possibility to achieve a uniform terminology, Dutch was still seen as inferior to French in the Southern Netherlands. Moreover, the lack of legal literature in Dutch in the South only compounded this problem. The linguistic policy of William I. and many other political decisions led to discontent amongst the French-speaking elite in the South, which resulted in the 1830 Belgian Revolution and the independence of the South as a new State: Belgium.

In theory the Belgian revolutionaries recognized the linguistic freedom, but in practice it amounted to the complete Frenchification of the Belgian legal world.[17] Even though Flemings may have had the right to be judged in Dutch, attorneys and judges refused to cooperate, not in the least because they were trained in the French tradition. Some notorious cases showed how disastrous it could be for the Flemings to be judged in a language which was not their own. Some Flemish attorneys started a crusade for the use of Dutch in criminal trials.[18] However, most attorneys

16 The Spanish and especially the Austrian domination of the Southern Netherlands introduced French in public offices.

17 There was difference between penal and civil cases. In the latter, French was used almost everywhere in the country, whereas for the former Dutch was used in Flanders.

18 H. Van Goethem (ed.), *100 jaar Vlaams rechtsleven 1885 – 1985* (1985); H. Van Goethem, 'De Nederlandse Rechtstaal in België in de 19de eeuw', in F. Stevens & D.

continued to plead in French because they lacked the knowledge and experience to do so in Dutch. Therefore, Flemish Bar organizations, so called '*Vlaamsche Conferenties*', organised moot courts in Dutch and they also supported the publication of the first legal periodical in Dutch in 1897: the *Rechtskundig Tijdschrift voor Vlaamsch België*. Despite all these initiatives and the first linguistic statutes, the position of Dutch as a legal language remained very minor. This frustrated René Victor, a radical Flemish lawyer, who wanted to mend this situation by publishing a real Dutch periodical: *Rechtksundig Weekblad*.

His policy was to publish only case law from Flemish courts, written in Dutch and his successors remained faithful to this publication policy until the present day.[19] The birth of the new review coincided with another linguistic earthquake in Belgium. In 1930, Ghent University became the first university to teach in Dutch. This finally gave Flemish lawyers the training they had lacked for so long.[20] Nevertheless, it still took until 1935, with a statute concerning the use of languages in court, before French and Dutch had equal rights in court.[21] Thereafter, the *Rechtskundig Weekblad* could focus on the further development of a Flemish legal culture which had to be 'purified' from French influences.[22]

The scientific element of the review became more important by the publication of annotated case law and since the 1970s professors and assistants of the Flemish universities are asked to comment on judgments.

van den Auweele, "*Houd voet bij stuk*". *Xenia iuris historiae, G. Van Dievoet oblata* (1990), 587-599.

19 In the first year, the periodical had to publish a lot of Dutch cases from the Netherlands, because there were not enough in Flanders. This led to a new attention to the Netherlands instead of France, which was traditionally the guiding example in Belgium.

20 L. Vandersteene, '*De geschiedenis van de rechtsfaculteit van de universiteit Gent. Van haar ontstaan tot aan de Tweede Wereldoorlog (1817 – 1940)*', Verhandelingen der Maatschappij voor Geschiedenis en Oudheidkunde te Gent, Deel XXXIII, 2009.

21 This act determined the use of languages in court. In Flemish districts, the whole procedure is in Dutch, in the Walloon districts in French, except for the Eupen courts which can use German. The situation of the courts in the Brussels district is more complicated, because they can be unilingual or bilingual. Parties can ask to complete the procedure in another language. By doing so, the case is passed to a court in another region.

22 The periodical wanted to build a Dutch legal vocabulary by publishing a list of words that could be used instead of commonly used French terms. Every year the periodical started with an overview of legal literature published in Dutch.

Around the same time attorney Edgar Boonen[23] and judge Camiel Caenepeel[24] entered the board of editors.[25] To guarantee the professional character and to enhance the scientific element, there were some changes in the editorial board. Initially, only attorneys were on it, today are they companioned by magistrates or professors. The editorial board is in its policy assisted by an advisory board, which exists of magistrates and academics. The policy is to offer young researchers an opportunity to publish their research results, with peer review guaranteeing the quality of these contributions. Furthermore, every legal branch has its own section editors. In that way the *Rechtskundig Weekblad*'s existence as a scientific legal periodical is ensured.[26]

23 Edgar Boonen (1912 – 1993) obtained his law degree not from a university, but from a State commission. He became a member of the Antwerp Bar in 1936. Even though he was an apprentice of Joseph Aerts he soon became a collaborator of René Victor helping him with editing the *Rechtskundig Weekblad*. He was a die hard Flemish nationalist and was therefore deported to France at the start of WWII. He had joined the Flemish Catholic Student Union which during the 1930s became gradually more extremist. After the war, its members were prosecuted because of their German sympathies, Edgar Boonen included. He was disbarred, this marked him but he never lost his Flemish ideals. Nevertheless, he could after a few years return to the Bar and was even elected as president of it from 1970 - 1972. As such, he made a lot of changes in the Antwerp Bar. As a member of the editorial board, he selected the cases to be published in the *Rechtskundig Weekblad*; J. Stevens, 'Stafhouder Mr. Edgar Boonen', *RW* 1993 – 1994, 1-3.

24 Camiel Caenepeel (1921 – 1998) studied law at Leuven University. He joined the Antwerp Bar in 1946 and in 1963 he became a judge in the Commercial Court. In 1975 he was appointed as a judge in the Antwerp Court of Appeal and four years later as a judge in the Belgian Court of Cassation where he remained active until 1991. From the start of his career as a magistrate Caenepeel contributed to the *Rechtskundig Weekblad*. He wrote innumerable articles and was one of the first to write annotations of judgments. Furthermore, he had done a lot of work as an editor, so it was almost predestinated that he would succeeded Edgar Boonen after his death in 1993. Caenepeel took the review to a higher scientific level and paved the way for a more 'academic' board of editors. De Redactie, 'Camiel Caenepeel (1921 – 1998)', *RW* 1998 – 1999, 1-2.

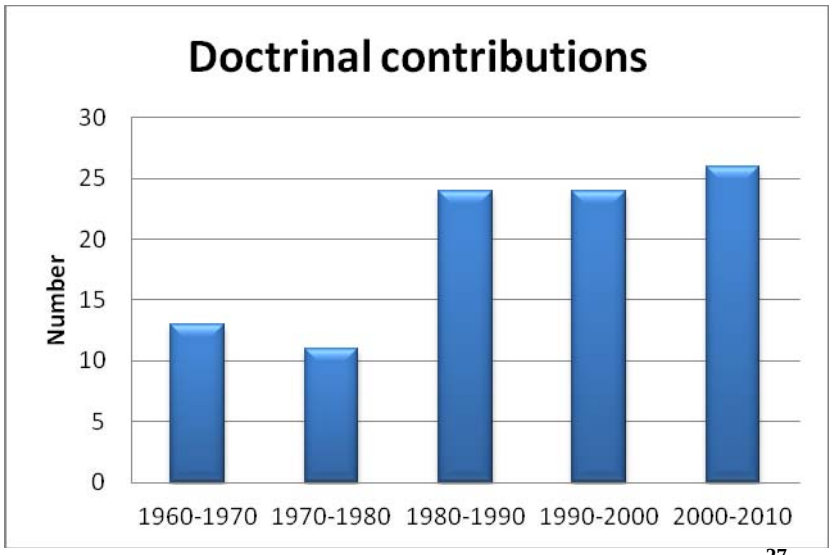
25 They were the leading personalities. Until the death of René Victor, they took terms in editing new issues.

26 A. Van Oevelen, 'Vijfenzeventig jaar Rechtskundig Weekblad', *RW* 2011, 4-5.

II. Quantitative analysis

1. Autonomous doctrinal contributions

Attention will go to autonomous doctrinal contributions published under the heading "Contributions" ("Bijdragen") about the European Convention and Court of Human Rights. This means that neither annotations of case law nor small announcements were taken into account. Because of their smaller relevance, the 1950s were also left out.



Graph 1: Doctrinal contributions in Rechtskundig Weekblad (1960-2010)[27]

In the decade 1960-1970 13 doctrinal contributions were dedicated to the European Convention and Court. They had a more general approach towards the new institutions which had been created, and most of the time they discussed the position of the individual in the framework of the Convention.

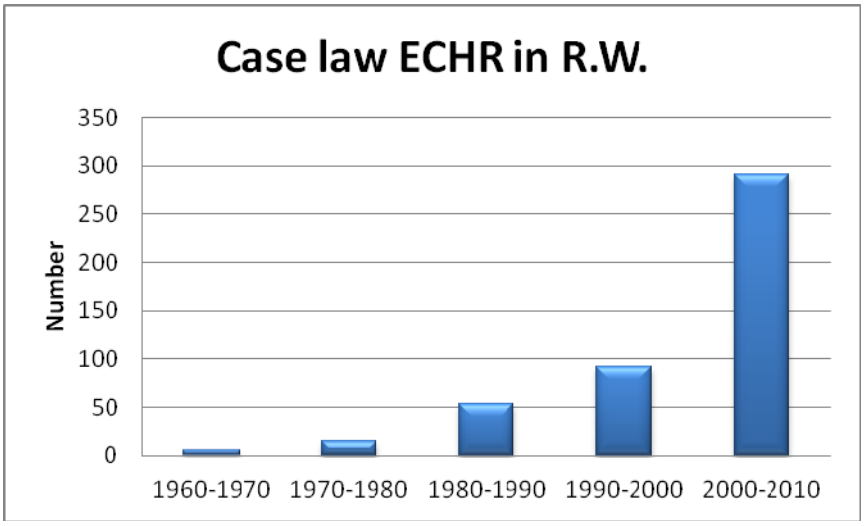
During the 1970s a slight diminishment can be seen, followed by a sudden rise in the 1980s. Although thereafter the number increased slightly, stagnation can be perceived. This can be influenced by the fact that only one doctrinal contribution per issue was published. Anyhow, the first hypothesis

[27] Number obtained by a search on and count of the lemmas 'human rights' and 'european court on human rights' under the subtitle 'Bijdragen' (Contributions/Articles) in each year's index.

we made in the introduction can be considered true. The growing attention for the European Convention and Court on Human Rights run parallel with one another, but what about the evolution of human rights in the published case law?

2. Case law

The focus for this part is on the application of the ECHR in Belgian Courts and of course the cases of the ECtHR. The strategy used focuses on the term "Human Rights" in the index which appears for the first time in the year 1962-1963. This corresponds fairly with the first judgments of the European Court. For earlier years the index did not have a separate entry on human rights, so we had to find the relevant cases ourselves.



Graph 2: number of cases based on the European Convention on Human Rights (1960-2010)[28]

Over the five decades, 455 cases related to the European Convention on Human Rights were published. Only four of them during the 1960s[29], but

[28] Number obtained by a search on and count of the lemma's 'human rights' and 'european court on human rights' under the subtitle 'Rechtspraak' (Case Law) in each year's index.

[29] Three of them were pronounced by the European Court, one by the Belgian Court of Cassation. The European Court judged between 1959 and 1973 only seventeen times. In the period 1974 to 1983 there were only 59 cases and the decade thereafter already 372.

thereafter we notice an exponential growth. Remarkable is the enormous rise of published cases of the European Court of Human Rights from 2000 on.

Between 2000 and 2010 the *Rechtskundig Weekblad* published 172 cases from the European Court[30], whereas previously it published only case law from Belgian courts referring to the ECHR[31], the Belgian Court of Cassation being the main supplier.[32]

Only to a small extent can this be explained to a rise of case law changes in the Courts procedure. From 1959 until the end of September 1998, the European Court delivered 837 judgments out of more than 45,000 applications. Since the 'new court' (*infra*) is in place, it has almost the same amount of applications each year. In 2010 the count stopped at 61,300 complaints.[33]

How can the obtained data be interpreted and explained? Clearly the periodicals have more and more attention for everything which has to do with the European Convention of Human Rights. There are some external changes to which the periodical responded, but also some internal changes can explain the rising attention for the European human rights.

C. External: Belgian cases procedural changes

I. Linguistic issues create a greater attention for Strasbourg

In the aftermath of WWII, there were many unanswered questions on international law, especially how to punish the Nazi regime for its atrocities, but also about the UN and its declaration on Human Rights. Nevertheless, it took until 1949 before the *Rechtskundig Weekblad* mentioned International Human Rights.[34]

30 Out of a total of 291 cases related to the European Human Rights in that decade.

31 In the 1970s and 1980s, no case law from the European Court was published in the *Rechtskundig Weekblad*. During the late 1990s the European Court revived to boom in the 2000s.

32 On the total of all cases 41% came straight from Strasbourg whereas 31% was pronounced by the Belgian Court of Cassation. The other courts: Belgian Constitutional Court (9%), Council of State (3%), Courts of Appeal and First Instance (8% each).

33 ECHR, ‚Analysis of Statistics 2010' (2011) available at http://www.echr.coe.int/NR/rdonlyres/0A35997B-B907-4A38/85F4/A93113A78F10/0/Analysis_of_statistics_2010.pdf (last visited 1 May 2012).

34 J. De Meyer, 'De raad van Europa', *RW* 1949 – 1950, 145-150.

The first article mentioning the European Convention on Human Rights was published in 1958.[35] An academic had written it, which can indicate that Belgian practitioners at that time were not interested in international human rights.[36] Firstly, the 1831 Belgian Constitution foresaw many civil rights and secondly the international human rights were not directly applicable in legal practice, which explains the rather low interest in it. One would suspect that the establishment of the European Court would be a cause for celebration in the European legal world, but it went rather unnoticed in the *Rechtskundig Weekblad*. Or to quote Mr. Nyssens:

"*The European Convention on Human Rights has made its entrance in our legal system without any rumor and without drawing any attention*"[37]

The first time the *Rechtskundig Weekblad* made a big issue of human rights was in 1968 with the so called Belgian Linguistic case.[38] It was not the first time that Belgium was summoned before the ECHR[39], but this case

35 J. Bacalu, 'Het verdragsrecht betreffende de Rechten van de Mens', *RW* 1957-1958, 1321.

36 There was a European Commission for Human Rights in 1954. The Court was established in 1959.

37 Free translation of "*Het Europees Verdrag der Rechten van de Mens heeft in ons wetgevend arsenaal zijn intrede gedaan zonder rumoer en zonder de aandacht te trekken*."; A. Nyssens, 'Het Europees Verdrag van de Rechten van de Mens, is dit een voldoende bescherming?', *RW* 1959-1960, 1213.

38 *Belgium v. Belgium*, ECHR (1968) Appl. No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

39 That was the case *De Becker v. Belgium*, ECHR (1962) Appl. No. 214/56, in which for the first time application of the freedom of speech was demanded. Mr. Raymond De Becker filed a request to the European Commission of Human Rights against the government of the Kingdom of Belgium. De Becker, an author and journalist was in 1946 condemned to death by the Brussels Court Martial on the count of collaboration with the German authorities in various ways, especially in his function as general editor of the newspaper *Le Soir*. In appeal the judgment was reformed to a lifelong sentence. To a result of this condemnation, De Becker lost all his civil rights as stated in article 123sexies of the Belgian Penal Code. A few years later he was released under parole but he was banned to France, could not engage in politics and remained deprived from his rights as a Belgian citizen. Therefore, he could not take up his professional writing and sought relief in the European institutions. Belgium acted swiftly by publishing a new act on June 1, 1961 by which a judgment became unnecessary. On October 5, 1961, De Becker's attorney wrote a letter to the Commission stating that Belgian law henceforth was in compliance with the European Convention and therefore he gave up his complaint. The Court had two options: striking the case from the list or to judge on the contested article 123sexies. The Court choose the former. In the *Rechtskundig Weekblad* nothing was mentioned about it at that time, for reasons which are unclear. K. Aerts, 'There's something rotten in the

had a huge symbolic value not in the least for René Victor and his companions who fought for the right to speak Dutch in Flemish courts. The judgment of the European Court was considered a victory in this struggle for the recognition of Flemish as a language of law.

In complicated linguistic issues, the Belgian Parliament has enacted several statutes concerning the use of languages in administrative, judicial and educational matters. Nevertheless, the linguistic issue in Belgium loomed up again when the Belgian Parliament voted for a new act 'relating to the use of languages in education'.[40] Even though a large majority in Parliament stood behind it, six applicants filed a complaint against Belgium, on their own behalf and the behalf of their children. They claimed that the legislation relating to education infringed their rights under the Convention.[41]

The act stated that the language of education should be Dutch in the Dutch-speaking region, French in the French-speaking region and German in the German-speaking region. In Kraainem and five other communities at the outskirts of Brussels[42], kindergarten and primary, but not secondary education were allowed in French if the latter was the child's maternal or usual language. All applicants were inhabitants of Alsemberg, Beersel, Antwerp, Ghent, Louvain and Vilvoorde which belonged to the Dutch-speaking region. Only one was from Kraainem, which belonged to the Brussels region.

The Court condemned Belgium only for the fact that in Kraainem certain children, solely on the basis of the residence of their parents, did not have access to French-language schools existing in the six communities

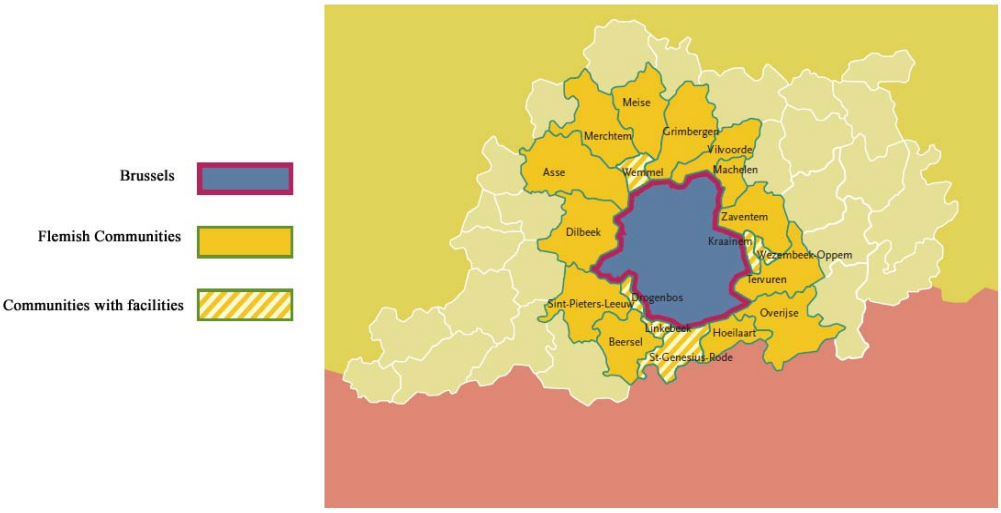
State of Belgium. De liquidatie van de repressie en het Europees Verdrag tot Bescherming van de Rechten van de Mens en de Fundamentele vrijheden: de zaak De Becker (1956-1962)', in: D. Heirbaut, X. Rousseau *et. al*. (ed.), *Histoire du droit et de la justice: une nouvelle génération de recherché/Justitie- en rechtsgeschiedenis: een nieuwe onderzoeksgeneratie* (2009), 93-108; K. Aerts,", *'Repressie zonder maat of einde?' De juridische reïntegratie van incivieken in de Belgische Staat na de Tweede Wereldoorlog*, (2011), unpublished doctoral thesis, Ghent, 422-461.

40 Act of 30th July 1963 "relating to the use of languages in education", *Belgisch Staatsblad* 22 August 1963.

41 They based their arguments on article 8 and 14 ECRM and article 2 of the First Protocol.

42 The other cities are: Drogenbos, Linkebeek, Sint-Genesius-Rode (Rhode-Saint-Génèse), Wemmel and Wezembeek-Oppem.

with facilities on the periphery of Brussels.[43] This 'victory' was the signal for the board of editors to proclaim this decision a landmark in the history of the Flemish Movement. The Dutch translation of this decision was published in two complete issues. Anything else had to wait for a later issue.[44] This case was so symbolic that it had already been a topic in a contribution the previous year.[45] Here one cannot but notice the firm hand of the editor-in-chief René Victor, who saw his ideals confirmed by a European Court.



Map of Brussels[46]

43 The communities with facilities are a typically Belgian answer to the linguistic problems. In principle these communities belong to Flanders, but their French-speaking inhabitants can ask the local authorities to communicate with them in French. This is a mitigation of the constitutional territoriality principle. Its application often leads to serious problems. According to the Flemish government, the facilities are an instrument of integration for French-speaking inhabitants. Therefore, administrative documents are in Dutch, unless a Francophone citizen asks for a French translation.

44 De Redactie, 'Het arrest van Straatsburg', *RW* 1968-1969, 1.

45 J. Grootaert, 'De vrijheid van onderwijs in België en…Straatsburg', *RW* 1967-1968, 631-640.

46 Vlaams Parlement, *De Taalwetwijzer. Welke taal wanneer?*, (http://www.taalwetwijzer.be) available at http://brussel.vlaanderen.be/documenten/53776Brussel.pdf (last vistited 1 May 2012).

On its own, this case explains the higher rate of contributions during the decade 1960-1970 and the small amount of published case law. The judgment at the end of that period was the most important factor. The 1970s were not exceptional, because there were no important Belgian cases before the European Court, but at its end a child turned the Belgian legal world upside down.

II. How a baby changed the focus in the legal periodicals

On 13 June 1979 the European Court decided the famous Marckx-case[47] by which Belgium was condemned for the third time in history.[48] Not only Belgian law had to change, but also other European States were confronted with possible problems. The story starts in 1973 when Ms. Paula Marckx gave birth to a daughter: Alexandra. In itself, this was not very special, if it was not that Mrs. Marckx was unmarried. According to Belgian law the newborn infant was "illegitimate". The 1804 Civil Code, still stated that only children born in wedlock were legitimate and, hence, had a full legal affiliation with their parents which enabled them to fully inherit. To give her child rights equal to those of 'legitimate children', mother Marckx had to adopt her own daughter, which had its effects on both the extent of the child's family relations and the patrimonial rights of both the child and her mother. The European Court of Human Rights ruled on June 13, 1979 that such discrimination was a violation of Articles 8 and 14 of the European Convention on Human Rights and Article 1 of the First Protocol.

Before the judgment there were already voices to treat all children equal, regardless of their parents' marital status, but Parliament barely heard them.[49] Throughout history, children born out of wedlock, often referred to

47 From a legal historian's point-of-view see: B. Debaenst, 'Moeder Marckx maakt geen bastaard', 14 *Pro Memorie* (2012) 1.

48 In 1968 in the Belgian Linguistic Case and also in the case of *De Wilde, Ooms & Versyp v. Belgium*, ECHR (1971), Appl. No. 2832/66; 2835/66; 2899/66, known as the Vagrancy Cases. In the latter detention ordered by decisions of magistrates at Charleroi, Namur and Brussels in compliance with the Belgian Act of 27 November 1891 for the suppression of vagrancy and begging, was found to be against human rights.

49 J. Gerlo, 'Is hercodificatie van het familierecht wenselijk?, in J. Erauw *et al* (eds)., *Liber Memorialis François Laurent 1810-1887* (1989), 517; J. Gerlo, 'Hiërarchie der afstammingen of gelijkheid der statuten', *RW* 1972-1973, 1889-1914; J. Gerlo, 'De ontwerpen Vrancks, Vanderpoorten en Van Elslande betreffende de afstamming', *RW*

as 'bastards', were discriminated because they were the result of a 'sinful' sexual relationship.[50] Even though discrimination was the rule, there were exceptions, nobility in Flanders where the principle 'mother makes no bastard' was held i.e. a child is never seen as a bastard in its relationship with its.[51] The French Revolution improved the situation for the illegitimate child. The *Déclaration des droits de l'Homme* was clear: '*Les hommes naissent et demeurent libres et égaux en droits*'.[52] Moreover '*Tous les enfants sont des enfants de la patrie*' (all the children are children of the fatherland). November, 2 1793 a law was enacted turning these lofty principles in practice.[53] However, the Napoleonic code of 1804 turned back the clock in France and its Belgian provinces. Neither the Dutch nor the 1830 revolution made any change in this. In 1879, the liberal Minister of Justice Bara invited the famous jurist François Laurent to revise the Civil Code. Six years later, he finished his draft which abolished the discrimination between legitimate and illegitimate children. Unfortunately his text was seen as too progressive and it was banished to the archives. During the 20th Century, the legislator tried to diminish the inequality between children, but the whole process had been rather slow before the Marckx case. The judgment fully opened the discussion amongst Belgian lawyers. Some felt that the Court had gone beyond its powers[54] by

1978-1979, 193-203; J.M. Pauwels, 'Het wetsontwerp Van Elslande betreffende de afstamming en adoptie', *RW* 1978-1979, 1201-1212.

50 According to the Catholic Church they were the defiance of the sacrament of marriage. Nevertheless, reality forced the Church to be pragmatic in case of 'lovechildren' whose parents could still marry and wash their sin away. Other 'illegitimate children' could not be accepted by Catholic Faith, though the King could legitimate them. J. Gilissen, *Historische inleiding tot het recht* (1981), 571; A. Teillard, 'L'enfant naturel dans l'ancien droit français', in: *Recueils de la société Jean Bodin pour l'histoire comparative des institutions, XXXVI, L'enfant, II, Europe médiévale et moderne* (1976), 266-267.

51 J. Gilissen, *supra* note 48, 571; J. Monballyu, 'De toepassing van de regel 'Moeder maakt geen bastaard' in de interpretatie van een schenkingsakte. De zaak Philips Despieres, alias van der Poorte, contra Jan de Grendele' (1580-1587), in: A.M.J.A. Berkvens & G.H.A. , Venner (eds), '*Om daarmede vrijelijk te doen naer wil ende welgevallen" Rechtshistorische opstellen aangeboden aan Prof. Mr. A. Fl. Gehlen*, Werken LGOG nr. 16, (1998), 76-84.

52 This was repeated in article 6: 'All civilians are legally equal'.

53 J.-G. Locré, *La législation civile, commerciale et criminelle de la France, ou commentaire et complément des codes français*, (1827), III, 141.

54 F. Rigaux, "La loi condamnée. A propos de l'arrêt du 13 juin 1979 de la Cour européenne des droits de l'homme", *Journal des Tribunaux* 1979, 513-524.

interpreting article 8 in "*a whole code of family law*".[55] Whatever the truth in that, Belgium had to amend its legislation. Nevertheless, in 1983 the Court of Cassation, the highest Court in Belgium, had the opportunity to follow the Marckx-ruling. However, most doctrine suggested abandoning the distinction between 'illegitimate and legitimate children' since only Belgium, France and the Netherlands still had it.[56] A minority found otherwise.[57] The abolition of any discrimination between children, whether born within or without wedlock, did not take place before March 31, 1987, when the law was finally changed. The decision and its aftermath was an important source of inspiration for books and articles, also in the *Rechtskundig Weekblad*.[58]

Consequently, the rise of published European case law can be explained by the growing workload for the Court. At that time, the Court did not hold permanent sessions which made it harder to cope with the influx of cases. To solve the problem, the Council of Europe introduced two new important procedural protocols to the 1950 European Convention.

III. The adoption of the 11th and 14th Protocol

On May 11, 1994, Protocol No. 11 to the European Convention on Human Rights was signed in Strasbourg after years of discussion and it came into force on November 1, 1998.[59] It created a single and permanent

55 Dissenting opinion of judge Sir Gerald Fitzmaurice, *Marckx v. Belgium*, June ECHR (1979.), Appl. No. 6833/74.

56 M.-T. Meulders Klein, 'Le statut juridique des enfants adultérins et incestueux', in J. Pauwels (ed.), *La réforme au droit de la filiation : perspectives européenes* (1981), 237-254.

57 See F. Rigaux, *supra* note 54.

58 A. Heyvaert & H. Willekens, *Beginselen van het gezins- en familierecht na het Marckxarrest: de theorie van het Marckxarrest en haar weerslag op het geldend recht*, (1981), 142; M. Bossuyt, 'Publiekrechtelijke aspecten van het arrest Marckx', *RW* 1979-1980, 929-970; K. Grimonprez, 'Het Hof van Cassatie en vijfentwintig jaar E.V.R.M.', *RW* 1981-1982, 2657-2674; W. Pintens, 'Het erfrecht van het natuurlijk kind en het E.V.R.M.', note to Court of First Instance Brussels 29 March 1983, *RW* 1983-1984, 454; J. Pauwels, 'De Marckx-interpretatie van het Europees Verdrag voor de Rechten van de Mens: België geen koploper', *RW* 1983-1984, 2795-2806; P. Senaeve, 'Het Marckx arrest, de directe werking en het Hof van Cassatie', *RW* 1985-1986, 1823-1838.

59 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 155, entered into force 1 November 1998. Belgium

Court and ended the filtering mechanism of the former European Commission of Human Rights. The aim was to finish cases in a shorter time and to guarantee the Court's efficiency. Nevertheless, these measures failed because of the expansion of the territory in which the ECHR is applicable and the obligatory complaint filing by citizens. In five years, complaints doubled. Barely ten years after the 1998 reform, the Court had delivered its 10,000th judgment.[60] Its output is such that more than 90% of the Court's judgments since its establishment had been delivered between 1998 and 2008.[61] This was the signal that something had to change and a 14th protocol was approved in 2004.

On February 18, 2010 the 14th Protocol of the ECHR was ratified, entering into force on June 1, 2010.[62] It tried to offer a solution for the enormous workload of the Court and to improve its capacity. The most important innovation was the introduction of the *unus iudex* who has the competence to declare a case non-admissible if it is plainly inadmissible. Committees of three judges were allowed to issue judgments, whereas previously only 7-judge Sections of the Court had been allowed to do so.[63] Even though, this protocol is only in force for one year, in reality the caseload has not diminished, on the contrary. Recent data show a 5% increase of filed applications between 2010 and 2011.[64] The rise of the caseload is indeed traceable in the *Rechtskundig Weekblad*.[65] The number of cases from the ECtHR or based on the Convention rose by more than 300% in the decade 2000-2010.[66] The doctrine focused on the procedural changes

approved the 11th Protocol by law on November 27, 1996 and ratified it on January 10, 1997.

60 *Takhayeva and Others v. Russia*, ECHR (2008), Appl. No. 23286/04.

61 X, *50 Years of Activity. The European Court of Human Rights. Some Facts and Figures*, 3; X, *The European Court of Human Rights. Some Facts and Figures (1998-2008)*, 5, available at http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf (last vistited 1 May 2012).

62 Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention

63 Y. Haeck & L. Zwaak, 'De Hervorming van het Europees Verdrag en het Europees Hof voor de Rechten van de Mens ingevolge het 14e Protocol: pompen of verzuipen?', *TBP* 2006/1, 3-17.

64 European Court of Human Rights, *Statistics* 2011 available at http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5DEDD8C160AC1/0/STATS_20102011_EN.pdf (last visited 1 May 2012).

65 See Van Oevelen, *supra* note 26.

66 See graph 2

caused by the implementation of the new protocols[67] but also on important cases such as Taxquet[68] and more recent Salduz.[69]

IV. A Change of mentality in the Belgian legal world

Another explanation for the growing interest in the case law of the European Court of Human Rights, is the growing popularity of international and human rights law in Belgian universities. Nevertheless, according to some stories, even in the early 1990s Belgian judges made fun of attorneys who used the European Convention in their pleadings, for the Belgian constitution provided all the direct applicable human rights one needed. A procedure before the European Court was until the late 1990s too complicated and there were fewer judgments too take into account.

Today, partly because of the implementation of above-mentioned protocols, no jurist will question the use of the European Convention or Court. In universities, the attention for international law and human rights has gradually taken on more importance for the students. In that way the Belgian practitioners no longer need to be convinced that the supranational level is important. Consequently, the editors of the *Rechtskundig Weekblad* wanted to give more attention to it. However, not only the readers played a significant role, but also the changes in the board of editors can explain the phenomenal rise of attention for the European Court.

D. Internal changes: the Editorial Board

Until 1984, René Victor was editor-in-chief, a title to be taken very literally: he decided whether something should be published or not. The *Rechtskundig Weekblad* was his creation, and until his death he was the determining factor. When Boonen and Caenepeel made their entry in the

67 Y. Haeck & J. Vande Lanotte, 'Het nieuwe Europese Hof te Straatsburg aan de vooravond van de 21e eeuw. Analyse van de nieuwe samenstelling, structuur en procedureregels', *RW* 1999-2000, 1417-1448; C. Van de Heyning, 'Vijftig jaar Europees Hof voor de Rechten van de Mens: van Hercules naar Sisyphus', *RW* 2009-2010, 602-614.

68 *Taxquet v. Belgium*, ECHR (2010), Appl. No. 926/05.

69 E.g. E. De Bock, 'Het arrest-Taxquet en de motivering van het verdict van het hof van assisen', RW 2008-2009, 1272-1276; M. De Swaef & A. Vandeplas, 'De Salduz-story: lof der redelijkheid?', RW 2011-2012, 89-92; J. Meese & P. Tersago, 'Het recht voor elkeen die wordt verhoord op consultatie van en bijstand door een advocaat na de Salduz-wet van 13 augustus 2011', RW 2011-2012, 934-952.

editorial board, they formed a real triumvirate deciding which texts were published. When Victor died, he was succeeded by his close colleague and friend Edgar Boonen, who respected the legacy of his predecessor. The most important change in the editorial board came only in the early 1990s. For the first time a magistrate, Camiel Caenepeel, was head of the *Rechtskundig Weekblad*. These three persons were all practitioners so one can assume that more practical topics were taken into account. Since the procedure before the European Court only changed from 1998 onwards, it became more important for legal periodicals. But there is another aspect which can be assumed as important: the scientification of the board of editors.

Since the late 1990s the board of editors has been mainly composed of academics such as professors, assistants and researchers. In 1998 the Antwerp professor, Aloïs Van Oevelen, was appointed as editor-in-chief. During his tenure, the *Rechtskundig Weekblad* has been taken to a higher scientific level and tried to broaden the spectrum of legal topics. Young researchers get the opportunity to present their research. Since international law and international human rights have become more important for national legal systems, it is not strange that there is greater attention for it in the legal periodicals.

E. Conclusion

After WWII Belgian (Flemish) jurists had little interest in 'human rights'. Despite the atrocities of the war, human rights were seen as self-evident. There was no real need for international human rights. Most of them were embedded in the Belgian constitution, one of the most progressive when it was written in 1831. This explains the slow growth of attention for the European Convention and European Court for Human Rights. External factors, such as leading Belgian cases, procedural changes of the Court and a growing interest in international law, made it compulsory for the practitioner to stay abreast of the evolutions in the field of human rights. Internal factors also explain the change of interest in Belgian legal periodicals. The *Rechtskundig Weekblad* was established in a reaction against the use of French in Flemish courts. It is no coincidence that the first case on European human rights published was the Belgian Linguistic case. New members in the editorial board broadened the scope of the review. Thus the periodical finds itself on the crossroads of the legal world (i.e. practice), the points of interest of an editorial board and the needs of the readers. As long as it keeps this - sometimes delicate - equilibrium, the ongoing success of the periodical is guaranteed.

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The EU Charter of Fundamental Rights and its Impact on Labor Law: a Plea for a Proportionality-Test "Light"

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Table of Contents

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Abstract

Traditionally, fundamental human rights have occupied an important place in labor law. The ILO constitution of 1919 focuses, for example, on the right of freedom of association. Subsequent ILO documents stress other fundamental rights such as the right to non-discrimination in the field of labor. The fundamental rights of the worker did begin to get some attention in the EU too, especially in non-binding documents such as the Community Charter of the Rights of the Worker from 1989. Since the entry into force of the Treaty of Lisbon in 2009, the Charter of Fundamental Rights introduced at the summit in Nice is legally binding to the same extent as the EU Treaty itself. The Charter includes fundamental rights in the field of labor law under the heading 'solidarity'. In this article two basic questions will be addressed. The first question will address the 'old' issue of the clash between fundamental (labor) rights and the four economic freedoms of the EU, which are seen by the ECJ as of fundamental nature as well. Since the seminal cases of *Viking* and *Laval,* a lot has been written about this theme by both European and labor lawyers. I will not revisit the literature that has been written about these cases, but the more dogmatic issue of a (potential) clash between the four economic freedoms and the fundamental rights is still in need of clarification. The second question is whether the fundamental human rights will get a more important place in the case law of the European Court of Justice now that the Charter of Fundamental Rights is of binding character, or, will there be just a continuation of the already developed relationship between fundamental freedoms and rights or between two different kind of fundamental human rights? I will focus here on case law in the field of labor law. The article will finish with a plea for a proportionality test 'light' in order to limit the interference of EU law with the essence of fundamental rights.

A. Introduction

Human rights have gradually assumed increasing importance in EU law (considered to be an autonomous legal order since the seminal decisions by the European Court of Justice (ECJ) in the cases *Van Gend & Loos* (26/62) and *Costa/ENEL* (6/64)[1] in the first half of the 1960s). First they

[1] [1963] ECR 1 and [1964] ECR 585 respectively.

were considered to be a part of the constitutional traditions of all the Member-States. Through that comparative law route, they became general principles of law and thereby an independent source of European law. The coexistence of a separate European Convention on Human Rights (ECHR) with a court in Strasbourg might cause problems in the near future. The entering into force of the EU-Treaty of Lisbon of December 2009 can either solve or exacerbate these problems. Article 6 Treaty on European Union (TEU)[2] considers the provisions in the Charter of Fundamental Rights of the EU of 2000[3] to have 'the same value' as the Treaty itself. The fundamental rights of the ECHR are treated as general principles of law of the Union in article 6, paragraph 3 TEU.

In European labor law, the ECJ has given the general principles of law an extremely prominent place. We only have to consider cases such as *Mangold*.[4] Some fundamental rights were already well-established from the very beginning. Non-discrimination on the basis of nationality and equal pay between men and women were the most important examples to be found already in the original EEC Treaty[5] of 1958. For these rights there was no need to resort to general principles of law. The same is true for the so-called four economic freedoms.

We will study the 'fundamental' nature of the four economic freedoms first. Because of their 'fundamental' nature, the economic freedoms interact with human rights, which are also of a fundamental nature. What is the meaning of the term 'fundamental' in this respect? Do there exist several layers of 'fundamental-ness'?[6] Second, the effect of the entry into force of the Lisbon Treaty with respect to fundamental rights will be studied. Is the role of the Charter of Fundamental Rights in the case law of the ECJ now different? Is there a quiet evolution in EU law or is there something going

2 *Consolidated Version of the Treaty on European Union*, 13 December 2007, O.J. C 83/13 (2010) [TEU].

3 *Charter of Fundamental Rights of the European Union*, 7 December 2000, O.J. C364/1 (2000) [ECHR].

4 Case C-144/04, *Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981.

5 *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11.

6 T. Kingreen, 'Theorie und Dogmatik der Grundrechte im europäischen Verfassungsrecht', 31 *Europäische-Grundrechte Zeitschrift* (2004) 19, 570, 572 talks about the fundamental economic freedoms as a 'second layer of fundamental rights'. This, however, raises the question of the hierarchy between the two categories of rights. Does second mean second place?

on that has to be analysed more rigorously?[7] Does the now binding Charter add something or is it only a codifying instrument? We will study this by analyzing case law in the field of European labor law since December 2009 in which the provisions of the Charter have been explicitly mentioned. I will end this contribution with a plea for a proportionality-test 'light' in order to protect fundamental human rights.

B. The 'Fundamental' Nature of the four Economic Freedoms and the Human Rights in the Charter

The four economic freedoms are of a fundamental nature. They are the pillars of the EU. Without these freedoms the internal market would become a fiction, as would the realization of an area without internal frontiers (Article 26 (2) TFEU).[8] In the case-law of the ECJ the fundamental nature of the four freedoms had gradually been established even before 1985, when the Single European Act was concluded in which 'the area without internal frontiers' was inserted in the Treaty. An example is the case *Dassonville* from 1974 and also *Casati* from 1981 is important in this respect.[9] What does the notion 'fundamental' mean in this respect? Is the notion used in the same way as in 'fundamental (human) rights'? Although both might overlap, a difference in focus will without doubt exist.[10] Fundamental human rights are those human rights that are linked to the basic dignity of human beings. Fundamental freedoms are primarily linked to the realization of the internal market. Fundamental freedoms are functional rights, they are considered to serve a certain purpose. The ECJ sometimes even refers to economic freedoms as fundamental principles of the Community itself.[11] Sauter and Schepel submit that the word 'fundamental' has only been used

7 As J. Morijn expects per definition in his article 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', 12 *European Law Journal* (2006) 1, 15.

8 *Consolidated Version of the Treaty on European Union*, 13 December 2007, O.J. C 83/13 (2010) [TEU].

9 Case 8/74, *Public Prosecutor v. Benoit and Gustave Dassonville,* [1974] ECR 837 and Case 203/80, *Criminal proceedings against Guerrino Casati,* [1981] ECR 2595 respectively.

10 C. Walter, 'Geschichte und Entwicklung der Europäischen Grundrechte', in D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 3rd ed. (2009), No. 42.

11 As for example in Case 220/83, *Commission v. France*, [1986] ECR 3663.

by the ECJ to "forcefully impose the internal market rules upon the member-states".[12]

Nevertheless, in the structure of the Treaty the four economic freedoms have an important role. The four freedoms had a prime stage at the beginning of the EC-Treaty.[13] Fundamental human rights have also had a place even earlier in that Treaty, as in Article 6 TEU. In the Lisbon-Treaty this has changed. In Article 6 (1) of the EU Treaty, the same legal value as the Treaties is given to fundamental human rights in the Charter. Only in part III of the Treaty on the functioning of the EU do we find the fundamental freedoms. The first two parts of the TFEU concern the general principles and non-discrimination including European citizenship. This position of the internal market rules in the new Treaty is not spectacular. The internal market is only qualified as one of the 'policies' of the EU. It is nowhere established in the text of the Treaty that these freedoms are 'fundamental'.

This implies that the main driver behind the fundamental-ness of the four economic freedoms was and still is the ECJ. It is submitted that the word 'fundamental' has been introduced by the ECJ to enlarge the scope of the Treaty.[14] Ehlers is of another opinion in this respect. In no situation do the fundamental freedoms operate as the creation or widening of a competence.[15] The four freedoms consist of broad principles and narrow exceptions, as if the adage *in dubio pro communitate* is still relevant. The wider the scope of the principles, the more the Member-States will be forced to justify their legislation and administrative measures. Proof of this development of the widening scope of the fundamental economic freedoms is that these freedoms are also applied to sensitive policy issues like direct taxation, labor law and the law concerning social security. Even in case the Union has no competencies in an area, the four freedoms are still applied. The Member-States have a certain discretionary freedom to make policies where they still have competencies. Nevertheless, these competencies must be fulfilled within the framework of the four economic freedoms. Ehlers is therefore not completely right in that the four freedoms cannot enlarge the

12 W. Sauter & H. Schepel, *State and Market in European Union law: the public and private spheres of the internal market before the EU Courts* (2009), 11.

13 *Treaty Establishing the European Community*, 7 February 1992, 1 Common Market Law Review (1992) 573 [ECT].

14 As Sauter and Schepel submit, *supra* note 12.

15 D. Ehlers, 'Die Grundfreiheiten der Europäischen Gemeinschaften', in D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten* 3rd ed. (2009), 230, No. 39.

scope of the Treaty. The competencies that the Member States still possess will have to be implemented and enforced taking into account the four freedoms. It is as if an additional layer of oversight is put on the activities of the Member-States and economic and other operators. In this way, the four economic freedoms have become a kind of superstructure. There is still a discretionary freedom for the Member-States, but it is subject to limits. In this respect Rigaux and Buelens use the term 'infralaw': but for free movement of persons, which is one of the four freedoms itself, European labor and social security law are infralaw. They submit that there is a hierarchical relation between the internal market and competition law on the one hand and labor and social security law on the other hand.[16] The first category is more important. In my view it is certainly possible that through this category European labor and social security law are 'reframed' by the ECJ. This is not the same as a clear hierarchy between different areas of the law.So the freedoms must be of a fundamental nature if they can reframe other areas of law. That even minor restrictions of the economic freedoms are prohibited also proves the fundamental character of the freedoms.[17] In this respect the ECJ has always refused to accept a *de minimis*-exception in the area of the four freedoms. This exception, derived from competition law, allows small effects on competition not to be taken into account. Small or only potential effects on free movement of goods or services caused by a national measure does not prevent the measure to be caught by the prima facie ban on all discriminatory or restrictive measures.[18] Any kind of infringement or inhibition is sufficient to trigger the application of the freedoms.

The *de minimis*-exception is often confused with the lack of a sufficient cross-border element. If there is no cross-border element, there is no free movement at all. In that situation, there is an insufficient link to one of the freedoms. The link is too uncertain and too indirect to be caught by the Treaty provisions on free movement.[19] The *de minimis*-exception is a

16 M. Rigaux & J. Buelens, 'Can a Stronger Anchoring of European Labour Law and Social Security Law to Community Law Guarantee a Sustainable European Social Model?', in F. Pennings *et al.* (eds), *Social Responsibility in Labour Relations. European and Comparative Perspectives. Liber Amicorum for Teun Jaspers* (2008), 26.

17 Sauter & Schepel, *supra* note 12, 11.

18 See for example case C-67/97, *Criminal proceedings against Ditlev Bluhme*, [1998] ECR I-8033.

19 See for example case C-379/92, *Criminal proceedings against Matteo Peralta,* [1994] ECR I-3453.

quantitative criterion, while the 'too uncertain, too indirect" exception is a qualitative criterion.

Even the cross-border element becomes somewhat irrelevant if we study recent case law. Especially concerning (a) free movement of persons or services (where a personal element is at stake) and (b) European citizenship, an element of human rights is involved too. An example is the case of *Angonese*, where the cross-border element was quite thin.[20] Angonese was an Italian who was required to present a specific certificate of German language proficiency. This certification could only be obtained in Italy in order to participate in a vocational training course leading to a job with a bank in Italy. But he had obtained certification much earlier in Vienna, Austria. The ECJ seems to focus here on those who are generally in the same situation as Angonese. It is only a coincidence that he is an Italian. Any other European citizen moving to another Member State could be confronted with the same kind of trouble as Angonese had in Italy. Especially in the areas of free movement of persons and European citizenship, the convergence with fundamental human rights is significant.[21]

While the four freedoms have been interpreted by the ECJ in an extremely broad and comprehensive manner from the 1970s onwards, the attention to fundamental human rights is of a later date. The fundamental nature of human rights has been finally established in the old EU-Treaty and the Lisbon-Treaty. The origin of protection of human rights within the EEC has been rather difficult, because the fundamental human rights were not mentioned in the original Treaty. Only through a method of comparative law, by looking at the national constitutional traditions of the Member-States, the ECJ was able to apply fundamental human rights in the early years of the EEC. The national constitutional traditions of the Member-States were transferred to the European level through the form of general principles of law. General principles of law have always played a major role in the development of Community law, probably due to the rudimentary stage in which the legal order of the Community was at that time. In the *Wachauf* of 1989 and *ERT* cases of 1991 the role of fundamental human rights (in the form of general principles of law) was that the Member-States were bound to adhere to these principles when they implemented

[20] Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR I-4139.

[21] See also Kingreen, *supra* note 6, 572. European citizenship implies free movement of persons without an economic context.

Community law.[22] Moreover, the principles fulfilled a role in testing whether a restrictive or discriminatory measure could still be objectively justified.

This second role of the principles is a way to solve potential clashes between an economic freedom and a fundamental human right. This implies that a solution to the clash, *de lege lata*, is only possible at the stage of the justification and in order to arrive at that stage, the existence of a *prima facie* restriction to one of the economic freedoms has to be established. *Prima facie*, at first face, is a notion often used in law. Its precise meaning is, however, disputed. According to Dammann it is a rule of argumentation.[23] A *prima facie* restriction implies a general inclination of the measure to restrict one of the economic freedoms. This implies that the measure is contrary to the Treaty, unless individual and less general arguments specific to the case at hand lead to another outcome. This view is better than the one suggesting that the *prima facie* test is only an intermediate test and that the real test is at the justification stage. The *prima facie* test only focuses on the general inclination of a rule; it only takes into account the consequences for the internal market. It is a one-dimensional test. It is at the level of the subsequent justification stage that all the facts of the case become relevant, including fundamental human rights. And during that stage the proportionality principle fulfills a crucial role.

The only exception is the situation where a restriction to a fundamental human right itself hinders an economic fundamental freedom. An example is the case of *Carpenter* where a British service-provider showed that his provision of services within the Community was dependent on his family life.[24] A refusal of the British government to let his wife of Filipino nationality stay in the UK became thereby a condition under which he could exercise a fundamental economic freedom. The right to a family life recognized in article 8 ECHR became linked to the provision of services in the Community.

The development of European citizenship is another field in which human rights and economic freedoms could become reconciled at the first

22 Cases 5/88, *Wachauf v. Germany,* [1989] ECR 2609 and C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas,* [1991] ECR I-2925 respectively.

23 J. Dammann, *Materielles Recht und Beweisrecht im System der Grundfreiheiten* (2007), 210.

24 Case C-60/00, *Carpenter v. Secretary of State for the Home Department*, [2002] ECR I-6279.

prima facie level. The *Zambrano* case[25] is an example of this. Without having utilized the economic freedoms within the EU, Belgium could not refuse the right of residence and the right to work and a work permit to a Colombian father of a child who had obtained Belgian citizenship and therefore became *ipso facto* an EU citizen. This outcome is the ultimate consequence of the point of view of the ECJ that Union citizenship is the central capacity of the subjects of the Member States. Apart from this citizenship, Article 8 ECHR must have played a role.

This situation is exceptional though. For all other situations the original framework developed by the ECJ will still be used. Fundamental human rights will have their full weight only during the second justification stage. This way of testing seems due only to the fact that the fundamental freedoms were developed earlier in Community law than the fundamental human rights as general principles of law. Now that the ECJ has such a huge experience with interpreting the four economic freedoms, the interpretation of fundamental human rights will have to be adapted in one way or another to this huge experience. This implies that necessity and proportionality are extremely important principles to interpret fundamental human rights as well. There are different ways in which to apply the proportionality test. The suitability or appropriateness test focuses on the effectiveness of the measure in attaining its objective. The necessity test focuses on the question whether the measure is really necessary and whether there is an alternative that is less severe for the economic freedoms. The most intrusive test is the proper proportionality test: this involves a balancing of conflicting interests.[26] It is submitted here that fundamental human rights should not be subjected to the most intrusive test. The ECJ should use some self-restraint in this respect.

An interesting example in the area of labor law is the *Schmidberger*-case.[27] Demonstrations in Austria blocked imports and thereby the free movement of goods. The Austrian government did not immediately intervene to end the demonstration, because it wanted to pay respect to fundamental rights such as the freedom of assembly and the freedom to expression. The ECJ had to reconcile these fundamental rights with the free movement of goods, which was characterized again as having a 'fundamental role […] in particular for the proper functioning of the internal

25 Case C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, [ECJ 8 March 2011] (Court decision not yet reported).

26 See in this respect J.H. Jans *et al.*, *Europeanisation of Public Law* (2007), 152.

27 Case C-112/00, *Schmidberger v. Austria*, [2003] ECR I-5659.

market'.[28] The two fundamental human rights at stake are not absolute and therefore it must be shown whether the restrictions to the free movement of goods are proportionate in relation to their social purpose. In this case they were: the demonstrations were approved, alternatives were considered beforehand by the Austrian authorities, traffic was deviated, etc. The rights expressed through the demonstrations could be safeguarded. In the earlier case *Commission v. France* the outcome was different.[29] The French government did not do anything to alleviate the consequences of a strike on imports to France. Governments have a positive duty to realize the freedoms. Although other parties, such as the collective partners, may implement directives or start a strike, it is the Member-State that is responsible for the actual implementation and enforcement of EU law.

These two cases have been criticized firmly in the literature. The road would be open now for the degradation of fundamental human rights such as the right of assembly. Fundamental human rights would be lowered to the level of economic efficiency arguments and fundamental rights would only become a last resort, because means that are less restrictive to the free movement of goods would prevail.[30] On the other hand, the ECJ makes an explicit distinction in *Schmidberger* between fundamental rights in the ECHR that allow a restriction, such as the freedom of assembly, and others such as torture, that do not permit a derogation.[31] Case law of the Strasbourg Court of Human Rights on certain fundamental rights will probably not change this[32]. That Court interprets fundamental human rights, whereas the ECJ tries to balance economic freedoms and fundamental rights. In the EU system both kinds of rights are comparable but not equal. Both are directly

28 *Id.*, para. 60.

29 Case C-265/95, *Commission v. France,* [1997] ECR I-6959.

30 See for example J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law', 12 *European Law Journal* (2006) 1, 15.

31 *Schmidberger v. Austria*, *supra* note 27, para. 80.

32 The case of the European Court of Human Rights in *Demir and Baykara v. Turkey* [2008] ECHR 1345, in which the right of collective bargaining is qualified as an 'essential element' of the right to freedom of association in Art. 11 ECHR, led to comments in the literature. K.D. Ewing and J. Hendy argue that this might have consequences for the ECJ case law as well. See their ‚The Dramatic Implications of *Demir and Baykara*', 39 *Industrial Law Journal* (2010) 1, 2, 40. I doubt this, because in *Demir and Baykara* there was an absolute prohibition on forming trade unions imposed on civil servants in Turkey and the right of those unions to participate in collective bargaining. In the ECJ case law there is not often an absolute prohibition on the freedom of association, the right to collective bargaining or the right to strike. These rights are 'only' balanced with the economic freedoms.

effective in the legal orders of the Member-States and citizens are able to refer to these freedoms before their national courts. To qualify the four freedoms as *lex specialis* of the fundamental human rights, as Ehlers seems to do, is in my opinion one step too far.[33] Normally the *lex specialis* has preference to the *lex generalis*. Ehlers is, however, right in arguing that the fundamental human rights receive a Europe-friendly interpretation by the ECJ. They are reframed. The fundamental economic freedoms are about creating Europe. That is their specific aim. That these freedoms should be completely separated from fundamental human rights, as Kingreen suggests vehemently,[34] is difficult to uphold. Morijn thinks that the approach of the ECJ in reconciling freedoms and human rights "will have to fundamentally change" in case these human rights get a place in the new EU Treaty.[35] I doubt whether Morijns' argument is right. I submit that the way the ECJ tests fundamental rights is not that different before and after the entering into force of the Lisbon-Treaty in December 2009. Will the Charter of Fundamental Rights really be treated as a new element, now that the ECJ has more than 60 years of experience in adjudicating cases? Now that the Lisbon Treaty is in force, let us have a look at some of the case law of the ECJ.

C. Testing of Fundamental Human Rights in European Labor Law Before the Entry into Force of the Lisbon-Treaty

I consider the main cases in the field of (European) labor law, in which fundamental human rights as general principles of law have been used as a source of inspiration, to be the cases *UK v. Council* and *BECTU*.[36] In the first case the UK government complained about the then new working time directive 93/104/EC,[37] which the other Member-States in the Council voted for with qualified majority voting, because the legal basis of working conditions was used. It considered the legal basis of employment rights to

33 As Ehlers does. See Ehlers, *supra* note 15, 217- 218, No. 18. See also chapter 14 of D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 448-449, No. 13.

34 Kingreen, *supra* note 6, 574-576.

35 Morijn, *supra* note 30, 40.

36 Cases C-84/94, *United Kingdom v. Council*, [1996] ECR I-5755 and C-173/99, *The Queen v. BECTU,* [2001] ECR I-4881 respectively.

37 Council Directive 93/194/EC, OJ 1993 L 307/18.

be a more appropriate legal base, as working times and the maximum working week concern also and mostly workers' rights. Use of that legal base would require unanimity of votes within the Council. The Commission, however, maybe for tactical reasons, preferred the legal base concerning working conditions. A qualified majority of Member-States supported the Commission in this. The ECJ was of the opinion that working conditions should not be interpreted in a narrow manner. A limitation on the number of working hours per week (and day) and sufficient hours of rest is perfectly capable of being related to working conditions. The ECJ opted for a Scandinavian view of working conditions and also mentioned an international treaty concluded by all the then Member-States within the framework of the World Health Organization (WHO). Although fundamental human rights were not mentioned explicitly in this case, the manner of legal finding of the ECJ is absolutely comparable with situations concerning a fundamental human right. The treaty of the WHO was referred to in the preamble of the directive.

In *BECTU*, where the same directive had to be interpreted, the ECJ had recourse to another document in order to buttress the right to paid annual leave. In its national law, the UK limited the scope of the entitlements by introducing a minimum threshold of employment with the same employer for thirteen weeks. BECTU, a trade union in the broadcasting sector, did not accept this piece of legislation and submitted a breach of the directive. In its reasoning, the ECJ focused first on a grammatical or textual analysis of Article 7(1)1 of directive 93/104. The provision contains a clear and precise obligation to a specific result, paid annual leave of at least four weeks. Because the directive also leaves some room for national legislation and practice, the ECJ also had to take the purpose and the system of the directive into account. For this, the legal basis and the preamble of the directive need to be studied in detail. The directive aims to lay down minimum requirements. Article 17 of the directive allows for derogations, but only with respect to those explicitly mentioned in that provision. The ECJ also refers to the Community Charter of the Fundamental Social Rights of workers of 9 December 1989[38]. On its own, the reference would be strange, because this Charter was deliberately meant to be a non-binding text by the government leaders of that time. The then British government of Margaret Thatcher refused to allow any kind of binding character with respect to that text. The Charter was, however,

[38] *The Queen v. BECTU*, *supra* note 36, para. 39.

mentioned explicitly in the preamble of directive 93/104. This fact was sufficient for the ECJ to take points 8 and 19 of that Charter into account. Those points refer to the enjoyment of sufficient health and safety conditions by employers and the entitlement to paid annual leave. Furthermore, the ECJ considers the right to paid annual leave to be "a particularly important principle of Community social law".[39] The text of directive 93/104 is sufficiently precise, derogations are allowed but within clear limits, and more favorable national provisions are allowed because of the favor-principle which is embedded in almost every European labor law directive.

The precise role of the Community Charter in this case is not clear. It seems only to be an additional text of declaratory nature. The scheme and text of the directive is sufficiently precise in order to support the outcome of the case. Probably the Charter had some role in the ECJ's framing of the right to paid annual leave as "a particularly important principle of Community social law". The possibility of abuse by employers in the UK seems to be important as well. They could simply hire employees for less than thirteen weeks to evade the duty to allow paid annual leave.[40] The part in the preamble of the directive that the improvement of workers' health and safety should not be subordinated to purely economic arguments is as important as the reference to the non-binding Charter.

Just like the Community Charter of 1989, the EU Charter of Fundamental Rights of 2000 was originally not meant to have any binding effect. Just as with the Community Charter, this did not prevent the ECJ from referring to the EU Charter in its case law. In the famous *Laval* case the right to take collective action was at stake.[41] The ECJ made reference to several legal texts: the European Social Charter of 1961, Convention no 87 of the ILO, the Community Charter of 1989, and the Charter of Fundamental Rights of the EU of 2000. Those texts seem to have the same status, but the ECJ simply refers to Article 28 of the Charter of 2000. In this provision, the right to collective negotiations and the right to take collective action is seen as a fundamental right, but nevertheless only protected "in accordance with Community law and national law and practices".[42] This implies, according to the ECJ, that these rights may be subjected to

39 *Id*., para. 43.
40 *Id*., para. 51.
41 Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others*, [2007] ECR I-11767.
42 *Id.*, para. 90-91.

restrictions. They are therefore not absolute, as such restrictions are found in many national constitutions.

The use of fundamental human rights in the *Viking*-case is not that different.[43] Although this case was related to freedom of establishment and one might expect a difference in the approach of the ECJ towards establishment in comparison with free movement of services, this difference is non-existent at least with respect to the role of the rights of collective bargaining and collective action. This implies that fundamental human rights are not completely outside the scope of the EC-Treaty, they only are seen as 'legitimate interests' which may justify a restriction on other obligations in that Treaty. The confrontation between the fundamental freedoms and fundamental human rights takes place only at the justification stage. The Charter of Fundamental Rights of the EU of 2000, which since the 1st of December 2009 has had a legally binding status, has been referred to several times in ECJ decisions. Even before December 2009 the Charter was used in the case law of the ECJ. It has increasingly become a competitor for the Community Charter of Fundamental Social Rights of Workers of 1989, although this last text is still mentioned explicitly in article 151 TFEU. This provision, concerning the legal base for the social policy of the EU, uses rather vague wording. Weiss rightly criticizes the words "having in mind", and asks himself whether this is only 'a point of orientation' for the EU legislator in making labor law directives.[44] A direct and binding application of a provision in a Charter is another matter.

An important case after the 1st of December 2009, in which the facts, however, arose far before that date, is the case of *Kücükdeveci.*[45] A German provision on the termination of the employment relationship by the employer contained a threshold: periods prior to the completion of the employee's 25th birth year are not to be taken into account for the calculation of the notice period. Is this a case of age discrimination? The referring German court particularly pointed to primary EU law and directive 2000/78[46]. But the ECJ, following its earlier case law[47], holds "that the

43 Case C-438-05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779.

44 M. Weiss, 'The politics of the EU Charter of Fundamental Rights', in B. Hepple (ed.), *Social and Labour Rights in a Global Context. International and Comparative Perspectives* (2002), 74.

45 Case C-555/07, *Kücükdeveci v. Swedex GmbH & Co. KG*, [2010] ECR I-365.

46 Council Directive 2000/78/EC, O J 2000 L 303/16.

47 See especially *Mangold* Case, *supra* note 4.

directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States"[48]. Here, the focus is not on primary or secondary EU law together with the fundamental freedoms, but rather the emphasis is placed on international instruments and constitutional traditions together with the fundamental freedoms.

What is the purpose of this consideration of the ECJ? Is the purpose that the general principle of EU law at hand did already exist, and that details concerning the implementation of a directive are only more of a technical matter? Is the general principle already there, and the directive is only its specific expression? The ECJ refers to Article 21(1) of the EU Charter.[49] Herein age discrimination is prohibited. An exception is not given in that provision as in the case of for example Article 28 of the Charter, dealing with the right of collective bargaining. This provision concerns freedom of association and the right of social action which has to be exercised in accordance with EU law and the national legislation and practices. The implication of *Kücükdeveci* is that a directive such as directive 2000/78 is important to determine whether a particular case falls within the scope of EU law. The principle of non-discrimination already existed before the directive 2000/78. The fundamental human rights in the Charter, however, cannot decide their scope by themselves. Here, other legal texts such as directives are of great importance and help for the ECJ to decide its cases.

D. The Role of the EU Charter of Fundamental Rights after the Entry into Force of the Lisbon Treaty (1 December 2009)

I. Category I: Only a Supportive Role for the Fundamental Rights

Several provisions of the EU Charter have been cited in many cases in the field of European labor law. There is an increasing tendency to invoke these provisions. In labor law, the following sub-fields are of importance in

48 *Kücükdeveci* Case, *supra* note 45, para. 20.
49 *Id.*, para. 22.

this respect. Most cases (including pending cases) concern the working time directive and the right to paid annual leave.[50] Age discrimination is a second important topic.[51] Collective bargaining is also important.[52] Other topics are equal treatment on the basis of sex[53] and effective remedies for employees in the situation of transfer of undertaking.[54]

In *Rosenbladt*[55] the EU Charter itself was not mentioned. Age discrimination and the possibility of regulating the retirement age by collective bargaining are both covered. Therefore this case is important. Is a clause in a collective labor agreement whereby the labor contract of a person that has reached the age of 65 is automatically terminated compatible with directive 2000/78? The ECJ refers to Article 16 (b) of that directive which forces the Member States to declare clauses in (collective) contracts that are contrary to the principle of equal treatment null and void or to amend them. This provision implies, according to the ECJ, that an effective review of collective agreements by the (national) courts is a necessity. The referring German court in *Rosenbladt* expressed doubts that the aim in the collective agreement was a legitimate one. In its answer, the ECJ considered the right to bargain collectively to be a fundamental right[56] and found that the wide discretion for the social partners in Germany had been used in a reasonable

50 Case C-350/06, *Schultz-Hoff v. Deutsche Rentenversicherung Bund*, [ECJ 20 January 2009] (Court decision not yet reported); Cases C-159/10 and C-160/10, *Fuchs and Köhler v. Land Hessen,* [ECJ 21 July 2011] (Court decision not yet reported); case C-155/10, *Williams and Others v. British Airways plc.,* [ECJ 14 September 2011] (Court decision not yet reported); case C-194/11, *Natividad Martínez Álvarez v. Consejería de Presidencia, Justicia e Igualdad del Principado de Asturias*, [ECJ 27 April 2011] (Court decision not yet issued); cases C-229/11 and C-230/11, *Heimann and Toltschin v. Kaiser GmbH*, [ECJ 16 May 2011] (Court decision not yet issued).

51 Case C-236/09, *Association Belge de Consommateurs Test-Achats ASBL and Others v. Conseil de ministres*, [ECJ 1 March 2011] (Court decision not yet reported); case C-45/09, *Rosenbladt v. Ollerking Gebäudereinigungsges. mbH,* [ECJ 12 October 2010] (Court decision not yet reported).

52 *Rosenbladt v. Ollerking, id.*; case C-271/08, *Commission v. Germany,* [ECJ 15 July 2010] (Court decision not yet reported); case C-132/11, *Tyrolean Airways v. Betriebsrat Bord der Tyrolean Airways,* [ECJ 18 March 2011] (Court decision not yet issued).

53 Case C-104/10, *Kelly v. National University of Ireland*, [ECJ 21 July 2011] (Court decision not yet reported.

54 Case C-108/10, *Scattolon v. Ministero dell'Università e della Ricerca*, [ECJ 6 September 2011] (Court decision not yet reported).

55 *Rosenbladt v. Ollerking*, *supra* note 51.

56 In quoting case C-271/08, *Commission v. Germany,* [ECJ 15 July 2010] (Court decision not yet reported).

way. As long as the collective agreement is not contrary to Articles 1 and 2 of directive 2000/78, the German government may even declare that agreement to be of general application nationwide. In this case, the ECJ was respectful of the right to bargain collectively. Anyhow, this freedom seems to be subject to a kind of reasonableness criterion. The discretion of the social partners is not without limits.

In the joint cases *Fuchs* and *Köhler*[57] the same directive was interpreted by the ECJ. Here, the EU Charter was mentioned explicitly.[58] Both Fuchs and Köhler were civil servants and they wanted to remain in their positions after having reached the age of 65. They requested an interim measure to achieve this purpose. Again, the ECJ focused on the reasonableness and the existence of a legitimate aim for the German legislation whereby civil servants were forced to compulsorily retire at the age of 65. Member States have a large discretion in this respect. They are, however, not allowed to frustrate the prohibition of age discrimination in directive 2000/78. The ECJ then mentioned Article 15 (1) of the EU Charter, which contains the right to engage in work. Senior workers must also be able to participate in economic, cultural and social life. But the right balance between this aspect and opposing interests, such as encouraging recruitment of young workers, is to be made at the national level. This implies that the right mentioned in Article 15 (1) of the Charter is not of an absolute nature. The decision is made on the basis of earlier case law concerning retirement at the age of 65.

In many cases the provisions in the Charter have had a non-decisive role. *Danosa*[59] was a female member of the Board of Directors of a company. Could she be removed from her post by the supervisory board because she was pregnant? The ECJ strongly upholds the protection to pregnant women in several cases, no matter whether a woman is to be qualified as worker or self-employed under national legislation. The reference of the ECJ to Article 23 of the EU Charter is only of a supportive character here. The provision does not refer to pregnancy but only mentions the principle of equality between men and women in general.

57 *Fuchs and Köhler v. Land Hessen, supra* note 50.

58 Namely Art. 15(1) of the Charter (the right to work); *Fuchs and Köhler v. Land Hessen, supra* note 50.

59 Case C-232/09, Danosa v. LKB Lîzings SIA, [ECJ 11 November 2010] (Court decision not yet reported).

In *Kelly*[60] an applicant for a course on vocational training wanted more information on why his application was not successful in order to see whether he was discriminated, directly or indirectly, on the basis of sex[61]. One of the preliminary questions of the national court was that the potential right to disclosure of information of Mr. Kelly was eventually subject to the principle of confidentiality. In this context the ECJ confirmed that several EU legal acts are about confidentiality. It mentioned several directives. Finally it referred to Article 8 of the EU Charter and considered that the protection of personal data was 'also' provided for in that part of the Charter. Here, the Charter was referred to only in on the last occasion, and only as an additional means by which to interpret the principle of confidentiality. Again, this demonstrates that the provision in the Charter only has a supportive role.

II. Category II: More than only a Supportive Role for Charter Provisions

A more important role (rather than merely a supportive one) for a Charter provision is possible in case the EU legislator itself has made an omission. For example, the text of a directive might be incomplete or too vague and thus might go against one of the fundamental rights in the Charter. As it is now, after the entry into force of the Lisbon Treaty, the Charter provisions are of the same legal value as the Treaty itself; directives may not violate these provisions. In this sub-category, there is one example in the field of labor law. In the Belgian case *ASBL,*[62] complaints were raised against a derogation in directive 2004/113[63] on the implementation of the principle of equal treatment between men and women in the access to, and supply of, goods and services.[64] The derogation is about the use of sex as a factor in the calculation of premiums and benefits in insurance-related matters. The derogation in Article 5 (2) gives the Member States the possibility to decide to keep 'proportionate' differences in the premiums and benefits, where the use of sex is a determining factor, up to a certain date in 2007 Accurate statistical figures will have to be used in this respect. The

60 *Kelly v. National University of Ireland*, *supra* note 53.
61 *Id*.
62 Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil de ministres* [ECJ 1 March 2011].
63 Council Directive 2004/113/EC, O J 2004 L 373/37.
64 *Id*.

Belgian complainants, supported by the consumer organization ASBL, deemed this provision in the directive to be against the principle of equal treatment. The ECJ is of the opinion that the derogation as such is admissible, but that a temporal limitation ought to have been set. Without such a limitation, the directive would violate the objectives in Article 21 (1) (non-discrimination) and 23 (equality of men and women) of the EU Charter. The derogation would then exist indefinitely. It is possible that the ECJ referred to the two provisions of the Charter, because in the preamble of directive 2004/113 there is an explicit reference to these two. In my opinion, the reference to the preamble is still necessary in the process of decision making of the ECJ, because the scope of the Charter is unclear. Several Member States do not even accept the legally binding character of the Charter (e.g. the UK and Poland). The provisions of a directive including its preamble are needed to show that an order of events is within the scope of the Treaty. This is not different from the situation before the entry into force of the Lisbon Treaty.

Another and more important case reminds us of the already mentioned balance of fundamental rights and the fundamental economic freedoms. In *Commission v. Germany*[65] the ECJ had to decide whether two public procurement directives implementing the freedom of establishment and the freedom to provide services could stand in the way of the content of collective agreements freely negotiated by management and labor in Germany. That Member State, together with Denmark and Sweden, argued that because of their nature and subject matter, the awarding of contracts to implement a salary conversion to bodies or undertakings would fall outside the scope of directives 92/50[66] and 2004/18.[67] They used the case of *Albany*,[68] where the ECJ decided that collective agreements do not fall under the scope of competition law, as a precedent. In an interesting opinion of the 14th of April 2010, Advocate-General Trstenjak pleaded for a strong role for the fundamental rights mentioned in the Charter. The ECJ, however, followed the reasoning of its earlier cases *Viking* and *Laval*. It carefully set out that Article 28 of the Charter had the same legal value as Treaty provisions. Nevertheless, an opening is left by Article 28: the right must be

65 *Commission v. Germany, supra* note 56.
66 Council Directive 92/50/EEC, O J 1992 L 209/1.
67 Council Directive 2004/18/EC, O J 2004 L 134/114.
68 Case C-67/96, Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie, [1999] ECR I-5751.

exercised 'in accordance with EU law'.[69] This outcome proves that the ECJ prefers to balance fundamental rights and fundamental economic freedoms. The principle of proportionality is an important tool of the ECJ in this respect. First, it makes some observations on 'the essence of the right to bargain collectively'.[70] While enhancing the level of pensions to local authority employees is part of this essence, the designation of bodies and undertakings is not. Second, the ECJ prefers a 'fair balance' between the interests involved:[71] A higher level of pensions and what I would call 'Europeanization', namely the opening up of competition to the EU-level and the participation of bodies or undertakings from outside Germany in this levelling up of the pensions, must be reconciled. Preservation of elements of solidarity is perfectly possible in a procurement procedure, according to the ECJ. Hence, the ECJ basically reframes the issue. Solidarity is to be allowed, but borders are irrelevant within the EU. It seems that the Charter, however important it is, does not make a difference. Earlier elements from the *Viking* and *Laval* case law are applied. The real problem is the wide condition in Article 28 of the Charter: 'in accordance with EU law'. This condition is so wide, that potentially anything decided at EU level can interfere with the right to collective bargaining.

This development means that the tradition of the German federal government and the German labor courts to not interfere with provisions in collective agreements will have to change. Also, in the Netherlands there exists a longstanding practice not to interfere in the content of collective agreements concluded by representative organizations of workers and employers in case the agreement will be declared to be of general applicability by the Minister of Labor. Because of the existence of the Charter, courts hesitate to intervene in the content of a collective agreement. Nevertheless, the ECJ makes this perfectly possible. Collective bargaining does not seem to be an absolute fundamental human right. Important questions relate to what the 'essence' of collective bargaining is and to the use of the proportionality criterion in balancing rights.

Let us have a look at two major examples in this respect and focus on the proportionality criterion: in the first place the joined cases *Hennigs* and

69 This conditionality is qualified by M. Weiss as a 'dramatic inconsistency', *supra* note 44, 85.

70 *Commission v. Germany*, *supra* note 56, para. 49.

71 *Id.*, para. 52; here the ECJ refers to the earlier *Schmidberger Case*, *supra* note 27.

Mai[72] and in the second place the case *Prigge and others*.[73] In the first case two employees protested against a collective agreement for public sector contractual employees concerning the determination of their pay. The Federal Labor Court wanted to know whether the content of a collective agreement could violate the prohibition to discriminate on the basis of age in Article 21 of the Charter, especially in the light of Article 28 of the same document guaranteeing the right to bargain collectively. In the collective agreement at stake, basic pay in individual salary groups was determined by age categories. This is therefore a direct discrimination on the basis of age and this implies that the discrimination can only be justified by a legitimate aim. The means of achieving this aim must be appropriate and necessary (Article 6 (1) of directive 2000/78). A kind of proportionality criterion is written in the text of this provision of secondary EU law focusing on reasonableness, appropriateness, and necessity. This provision of secondary EU law is of central importance. A simple quotation of the famous cases *Viking* and *Laval* and the text of Article 28 of the Charter whereby collective bargaining must be exercised in compliance with EU law is a sufficient motivation for the ECJ, as is the statement that directive 2000/78 is an expression of the principle of non-discrimination on the basis of age. Concerning the question of the presence of a legitimate aim in this case, the ECJ confirms that the rewarding of professional experience of all ages is a legitimate aim. Moreover, the criterion of length of service is in general an 'appropriate' criterion. Only for those contractual employees that, on their appointment, are initially classified in an age group, the age criterion is not appropriate and necessary. Some account should be taken of their experience as well.[74] For this limited group the collective agreements do not comply with EU law. It has become clear that age per se is a suspect criterion. This will have huge consequences for collective agreements practices in many Member States. The importance of a provision of merely a secondary EU law text in balancing two different human rights is striking.

In the case *Hennings and Mai*, the question was also what the discretionary freedom for social partners to move only gradually from a pay

[72] Cases C-297/10 and C-298/10, *Hennings v. Eisenbahn-Bundesamt* and *Land Berlin v. Mai*, [ECJ 8 September 2011] (Court decision not yet reported).

[73] Case C-447/09, Prigge and Others v. Deutsche Lufthansa AG, [ECJ 13 September 2011] (Court decision not yet reported).

[74] In paragraph 77 of the 'Henning and Mai case' the ECJ even appears to give an advice: "a criterion also based on length of service or professional experience but without resorting to age" would be a better criterion.

system based on age groups to one based on other criteria was. Here the ECJ accepted the important role of the social partners, which should have a broad discretion in the area of pay. The 'transitional and temporary character' of the ongoing discrimination is appropriate until a completely new system of pay is in place and does not go beyond what is necessary to achieve the aim.

The case *Prigge a.o.* concerned Lufthansa pilots, whose employment relationship was terminated at the age of 60 because of a clause in a collective labor agreement. This case is an example that might lead to more interference by governments with the content of such agreements. In this case, two fundamental rights, the right not to be discriminated on the basis of age and the right to collective negotiation, had to be reconciled. Noteworthy is that the opinion of the Advocate-General Cruz Villalón and the decision of the ECJ do not run completely parallel. The directive 2000/78, and not the provisions of the Charter, is at center stage both in the opinion and the decision. Article 16 sub (b) of the directive already states that collective agreements must respect the principle of non-discrimination of the directive. Again, *Viking* and *Laval* are mentioned by the ECJ in the same paragraph of its judgement as Article 28 of the Charter with little motivation. Both the Advocate-General and the decision of the ECJ successively pay attention to the three exceptions in the directive: the exception on public security in Article 2 (5), the exception concerning the nature of the occupation in Article 4 (1), and the exception concerning age discrimination in general in Article 6 (1). The main difference between the ECJ and its learned Advocate-General is that the ECJ does not pay a lot of attention to Article 6 because the clause in the German collective agreement is related to public security and safety, while the Advocate-General takes a strict approach with respect to the exception in Article 2 (5) and therefore needs more room for an analysis under Article 6 (1). According to the Advocate-General, public security should always be dealt with by a public authority and not by social partners. The Advocate-General applies the test of 'necessity' in Article 2 (5) of the directive not only in the sense of checking the proportionality of the measure in relation to its purpose, but much further in the sense that only public authorities are able to decide what 'security' is. This view, if it had been adopted by the ECJ, would have had huge consequences for the rights of social partners throughout the EU. A limitation of the scope of collective bargaining would then have been adopted at EU-level. The ECJ did not accept this view, but forced the collective partners to be precise and transparent in their rules concerning security.

It becomes clear that the proportionality principle is the main vehicle available for the ECJ to balance economic freedoms with fundamental rights or two different fundamental rights. If a proportionality criterion is written explicitly in a secondary EU law directive, the ECJ prefers to use that criterion. The sensitive balancing of fundamental rights itself is not explicitly addressed. The ECJ is only operating through existing directives. The Charter of Fundamental Rights did not bring many changes at all in this respect. The problem is the wording of Article 28 of the Charter and Article 16 sub (b) of the directive 2000/78. Not so much the ECJ, but rather the EU legislator is at the basis of this development by classifying some fundamental human rights, such as the right to collective bargaining, less fundamental than other rights such as non-discrimination, for example on the basis of age. This will without doubt lead to less autonomy for national labor law[75]. Some individual fundamental rights will get preference over collective labor law. I fully agree with Bernard Ryan in this respect and I cannot but quote him: "the danger is that an overemphasis on the protection of fundamental rights may obscure, or even undermine, alternative arguments for the extensive recognition of collective labor rights, deriving from inequality of income and social power".[76]

III. Category III: A Short Look at Pending Cases

Some still pending cases could shed more light on the balancing of fundamental rights and the role of the Charter. In *Tyrolean Airways*[77] the non-discrimination principle in Article 21 of the Charter is used to criticize an Austrian national collective agreement in which the classification of older workers for their remuneration was supposedly indirectly discriminatory because of age. Moreover, the Oberlandesgericht Innsbruck also wants to know whether clauses in individual employment contracts may be declared null and void, when they are indirectly discriminatory on the ground of age. The words used in this preliminary question show already that national courts change their approach to collective agreements. This

75 See also J. Kenner in his book review of P. Syrpis, *EU intervention in domestic labour law* (2007), 37 *Industrial Law Journal* (2008) 2, 189.

76 B. Ryan, 'The Charter and Collective Labour Law', in T. K. Hervey & J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: a Legal Perspective* (2003), 90.

77 *Tyrolean Airways v. Betriebsrat Bord der Tyrolean Airways, supra* note 52.

case is of great importance, because it may lead to more interference with collective agreements.

In the joined cases *Heimann* and *Toltschin*[78] the question whether a lawful order to work short-time (because of the economic crisis) may also lead to a decrease in the paid annual leave guaranteed in Article 31 (2) of the Charter. And what about a reduction of work to zero hours - does this imply that there is no paid annual leave at all? Finally, in *Antonopoulos*[79] four provisions of the Charter are mentioned.[80] Is the principle of non-discrimination in the pursuit of trade union rights at stake now that trade union officials with a contract of indefinite duration are treated differently from those officials with a fixed-term contract? This case is also about the criterion of comparability for the purpose of non-discrimination laws. Furthermore, the question whether (non-)payment of remuneration to workers during leave of absence from work on trade union business reminds us of earlier case-law concerning the same situation with members of works councils.[81]

E. Conclusion

Is the EU Charter on Fundamental Rights in its binding character after the 1st of December 2009 adding anything to the existing case law? Can it be seen as an autonomous source of law, standing on its own? Are fundamental human rights now better protected than before the Lisbon-Treaty? An overview of recent case law does not suggest a revolutionary impact of the now binding character of the EU Charter. The ECJ is not changing its weighing of fundamental human rights and fundamental economic freedoms substantially. Pending cases, however interesting they are, will very probably not change this. Although the remark by the ECJ in *BECTU* that paid annual leave should not be subordinated to purely economic considerations was a promising one, economic arguments related to free movement within the EU are of continuing importance. Labor law, quite autonomous in the national setting, has to interact with the rules of the

78 *Heimann and Toltschin v. Kaiser GmbH, supra* note 50.

79 Case C-363/11, *Commissioner oft he Court of Auditors at the Ministry of Culture and Tourism v. Antonopoulus*, [ECJ 7 July 2011] (Court decision not yet issued).

80 These are Arts 12 (freedom of assembly and association), 20 (equality before the law), 21 (non-discrimination) and 28 (collective negotiations and collective action).

81 Cases C-360/90, *Arbeiterwohlfahrt der Stadt Berlin v. Bötel*, [1992] ECR I-3589 and C-278/93, *Freers and Speckmann v. Deutsche Post,* [1996] ECR I-1165.

internal market at EU-level.[82] The fundamental human rights are subject to a proportionality test, limited to their proper purpose and to a certain extent reframed and europeanized, opened up until the EU external borders. It is important that the ECJ shows some self-restraint in the balancing of fundamental freedoms and fundamental human rights and in the balancing of two different fundamental human rights. A not too intrusive proportionality criterion that protects the 'essence' of, for example, the right to collective bargaining, is essential. A test limited to 'appropriateness' and 'necessity' is needed in this respect. Increasingly, the ECJ uses the proportionality criteria mentioned in directives such as directive 2000/78, also to balance two fundamental human rights. The right to collective bargaining seems to be less important than the right to non-discrimination on the basis of age. National governments and national courts will probably intervene more in this process when declaring collective agreements to be of general applicability. This is a consequence not so much of the decisions of the ECJ, but of the deliberate choice of words by the EU legislator in Article 28 of the Charter and article 16, sub (b) of directive 2000/78.

The entering into force of the Lisbon Treaty in December 2009 did not change much in this respect. On their own, the fundamental rights in the Charter cannot change the powers and competencies of the EU. The ECJ will continue its balancing as it did before December 2009. The Charter seems to be primarily a codifying instrument.

82 See also S. Sciarra, 'Market freedom and fundamental social rights', in B. Hepple (ed.), *Social and Labour Rights in a Global Context. International and Comparative Perspectives* (2002), 99.