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Articles

Principles of International Criminal Law

The Impact of Human Rights on International and National Developments

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Editorial

Dear Readers,

Once again, the Editorial Board of the Goettingen Journal of International Law is looking back at a highly successful year ending with this last issue of the fourth volume. The highlight of the past year was the symposium "German Precursors to International Constitutionalism" held in Göttingen in March 2012, which was organized in cooperation with the Institute of International and European Law of the University of Göttingen and the Minerva Institute for Human Rights, Hebrew University, Jerusalem. The research papers discussed at the conference were published in the previous issue of the GoJIL.

The Editorial Board of the GoJIL also welcomed several new editors during the last year and integrated them into a now younger Editorial Board. Despite these personnel changes, the Editorial is looking forward to a promising year 2013.

The first article of this issue is written by *Jochen von Bernstorff*. In his article "Georg Jellinek and the Origins of Liberal Constitutionalism in International Law" he analyzes Georg Jellinek's ideas on State sovereignty as well as his concept of 'auto-limitations' in the 20th century and the impact of Jellinek's idea of international law as a 'proto-constitution' on modern legal thinking.

Then, *Lando Kirchmair* in his article "The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law" analyzes the jurisdiction of the European Court of Justice regarding the question of the relationship between the legal orders of the European Union and the UN and its incoherent use of the doctrines of monism and dualism. He concludes that the application of both doctrines on the EU is justified although it is necessary to draw a distinct line between the application of the dualistic and the monistic doctrine.

The following paper shifts the focus from the legal thinking of the 20th century and its modern impacts – as presented in the first two articles – to a more current issue. In her article "The Supplement of Deficiencies in the Complaint Within the WTO Dispute Settlement Mechanism" *Ana Constanza Conover* analyzes the WTO dispute settlement mechanism and addresses the issues developing countries face in the current system. She proposes an amendment to Article 7 of the Dispute Settlement Understanding in order to give developing countries a less underprivileged status as complainants.

The next article, "The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?" by *Britta Lisa Krings*, examines the relation between universal jurisdiction and the principle of complementarity. After outlining her understanding of both principles, *Krings* discusses whether the term "has jurisdiction" in Article 17 of the Rome Statute refers solely to ordinary national jurisdiction or also to universal jurisdiction. If the latter were the case, a State exercising universal jurisdiction could claim precedence over the jurisdiction of the ICC. After a profound discussion, she concludes that this is the correct interpretation of Article 17 Rome Statute. Thereupon, *Krings* assesses whether States which have not signed the Rome Statute hold the same right and obligation to prosecute serious international crimes as States which have signed it and finishes by denying this.

In the following article "The Law of the International Criminal Court and Customary International Law", *Hiromi Satō* analyzes the absorption of customary international criminal law into national legislation. She concludes that most States retain their national provisions on the general principles of criminal law although the description of the relevant crimes from customary international law might be adopted. Based on different examples, *Satō* outlines the distinctions between the 'old' customary international criminal law and the 'new' international law of the Rome Statute. She concludes that the relationship between customary international criminal law, the law of the Rome Statute and national criminal law is quite intricate.

The article "Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case" written by *Patricia Tarre Moser,* discusses whether the non-recognition of State Immunity can be regarded as a countermeasure to *jus cogens* violations. *Tarre Moser* concludes – contrary to the ICJ-decision in the *Ferrini* Case in which the ICJ declared

that the exercise of jurisdiction of Italian Courts with regards to claims against Germany for war crimes in World War II was in violation of international law[1] – that the non-recognition of State Immunity is a countermeasure against *jus coges* violations and points out the conditions under which a violation of State Immunity could be a countermeasure.

The second to last article of this issue is written by the winner of the annual Student Essay Competition, *Roee Ariav*. In his article "National Investigations of Human Rights Between National and International Law" *Ariav* examines how the duty to investigate certain human rights violations is a good example for the interplay between international and national law. In 1995, the European Court of Human Rights recognized the duty to investigate as the procedural aspect to the right to life and thereby influenced the jurisprudence of the national courts and the national law enforcement mechanisms.[2] From the author's point of view, this development is just one example for the great impact of international law on those domestic systems once considered an area beyond international influence.

The last article of this issue titled "The Need to Alleviate Human Rights Implication of Lage-scale Land Acquisitions in Sub-Saharan Africa", written by *Semahagn Gashu Abebe*, deals with the issue of so called 'land grabbing' in Sub-Saharan Africa. While *Gashu Abebe* also presents possibilities for betterment, the main emphasis is on the numerous grave problems the indigenous are faced with as well as on the responsibilities that must not be forgotten. The article concludes with measures that have been or are planned to be taken both on the international and on the national level to tackle the resulting negative aspects.

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

The Editors

1 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012.

2 *McCann and Others v. the United Kingdom*, ECtHR, Judgment, Appl. No. 18984/91, 27 September 1995.

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Georg Jellinek and the Origins of Liberal Constitutionalism in International Law

Jochen von Bernstorff*

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* Prof. Jochen von Bernstorff, Chair for Constitutional Law, International Law and Human Rights, University of Tuebingen; member of the German delegation to the UN-Commission on Human Rights 2003-2005 and the UN-Human Rights Council in 2006.

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Abstract

At the end of the 19th century, Georg Jellinek developed a new theoretical foundation of international law, which he termed a "positivist" approach to international law. It became by far the most influential theory of international law developed in the 19th century in Europe. The structural ingredients of his attempt to construct a "scientific" foundation of international law as a binding and objective law of an "international community" continue to encapsulate the cornerstones, paradoxes and limits of liberal constitutionalist thinking in international law. In the 20th century reception of his international law works, Jellinek's concept of "auto-limitation" was often portrayed as a staunch apotheosis of German (hegelian) notions of absolute State sovereignty (by Kelsen and Lauterpacht). Although this somewhat distorted reception during the interwar period seems to have buried a more nuanced understanding of Jellinek's sophisticated theory of a "proto-constitution" of international law, it has after all had an arguably lasting impact on our modern concept of international law.

A. Introduction

At the end of the 19th century, Georg Jellinek developed a new theoretical foundation for what was at the time known as European international law, which he termed a "positivistic" approach to international law. It became by far the most influential theory of international law developed in the 19th century in Europe. Georg Jellinek's works synthesized the various 19th century German international legal "positivisms" and arguably shaped our contemporary understanding of international law more than any other author of the 19th and early 20th century.[1] Generally, German universities at this time were renowned for avant-garde scholarship and had an unrivaled and highly influential position in various academic disciplines in and beyond Europe. Georg Jellinek, who after his *Habilitation* had left Vienna because of anti-Semitic tendencies at the university and later became the first Jewish dean of the Heidelberg law faculty, became the most influential figure in late 19th century German

[1] On Jellinek's life and international law works, see R. Y. Paz, *A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (2012).

public law scholarship.[2] The structural ingredients of his attempt to construct a "scientific" foundation of international law as a binding and objective public law of an "international community" continues to encapsulate the cornerstones, paradoxes and limits of liberal constitutionalist thinking in international law.

What are these basic characteristics of modern liberal constitutionalism in international law? Given that the constitutionalist literature has recently grown into a quantity that defies any attempt to comprehensively reconstruct the debate, I will confine myself to highlight some fairly abstract features of modern constitutionalist thought in international law. This is not to say that all constitutionalist approaches to international law necessarily endorse these features, but most of the theories will support all or at least some of the following characteristics:[3] First, international legal constitutionalism, through imitating its domestic counterpart, arguably involves a notion of hierarchy. It is therefore being used to describe a legal-political process, in which a certain set of legal norms acquires a higher status than the rest of the norms of the international legal order. Second, most constitutional approaches work with the notion of

[2] The following reconstruction of Jellinek's theory of international law and its reception in European international law builds on the more detailed analysis of 19th century German international law in J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), 15-55.

[3] Debating the transfer of domestic constitutionalist to international law P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010); with discussions of various features of constitutionalism from different angles O. Diggelmann & T. Altwicker, 'Is There Something Like a Constitution of International Law?: A Critical Analysis of the Debate on World Constitutionalism', 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008) 3, 623; I. Ley, 'Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich', 69 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2009) 2, 317; M. Weller, 'The Struggle for an International Constitutional Order', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), 179; I. de la Rasilla del Moral, 'The Unsolved Riddle of International Constitutionalism', 12 *International Community Law Review* (2010) 1, 81; C. E. J. Schwöbel, 'Situating the Debate on Global Constitutionalism', 8 *International Journal of Constitutional Law* (2010) 3, 611; *id.*, *Global Constitutionalism in International Legal Perspective* (2011); on value oriented approaches J. d'Aspremont, 'The Foundations of the International Legal Order', 18 *The Finnish Yearbook of International Law* (2007), 219, 221-228; strongly defending constitutionalist approaches T. Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law', 81 *Nordic Journal of International Law* (2012) 2, 79.

an "international legal community"[4] and the related idea, that international law at least in part constitutes a public law of a legally integrated community of sovereign States and or individuals, which to a certain extent has emancipated itself from the will of individual sovereigns. And third, the attempt to empirically verify the existence of the assumed constitutional norms through reference to specific acts or communications of State organs.

Through this lens, Georg Jellinek is the single most important precursor of constitutionalist thinking in international law in the nineteenth century. He explicitly conceptualizes international law as the public law of an international legal community and constructs a hierarchically subordinated layer of norms within the international legal system on explicit positivist premises. This proto-constitution has emancipated itself from State-consent. While acknowledging the importance of the sovereign will of the State as the formal basis of all law, the binding nature of these fundamental rules in Jellinek is ultimately based on the notion of shared fundamental interests in a historically created international community of States. State sovereignty is understood as being defined and thus limited by the proto-constitution of this assumed international community, notably for him in the 1880s consisting of "European civilized nations" (*Europäische Kulturvölker*).

Jellinek's international law theory was an answer to a specific 19th century debate among German constitutional law scholars over a "scientific" foundation of the modern law of nations. It is also an answer to the explosive growth of international treaty law and the resulting significance of international law in the so called first globalization in the mid-nineteenth century. It is a product of the 19th century intellectual currents in German-Austrian public law, which oscillated between optimistic liberal universalism and ethnic nationalism, the latter component becoming ever more visible towards the end of the century.

B. "Legal Positivism" and the Heritage of German Idealism

Those German-speaking writers who thought of themselves as "positivists" used different methodological conceptions in their search for

[4] Cf. on the development of this notion A. L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht* (2001).

an "objective" principle of international law. This principle was to contribute to a theoretical harmonization of the presumed binding nature of international law, on the one hand, with the assumption that the empirically verifiable sovereign will of the State formed the basis of international law, on the other. Such a construct posed considerable problems for those who wrote about international law, because in contrast to State law, there was no central authority that stood above the States, which was charged with enacting norms and enforcing the law. Those who created the law and those to whom it was addressed were one and the same. Starting from various definitions of law, the selected nineteenth century authors sought to provide what they considered a methodologically superior answer to the challenge of Kant's and Hegel's question of whether law was possible at all between sovereign entities, and if so, how. This question assumed central importance in the second half of the nineteenth century also because a simple identification of international legal norms with rules of morality and reason seemed increasingly untenable under the rule of various sequential strands of "positivism" in general German jurisprudence.

Both in his first monograph on international law, *Die rechtliche Natur der Staatenverträge* (The Legal Nature of State Treaties), and in his *Lehre von den Staatenverbindungen* (Theory of International Federations), Jellinek claimed to be introducing a new, "more secure method"[5] for the study of the basic concepts of international law. What Jellinek was after was a theoretical construct of an objective and binding international law that was to be erected without recourse to the principles of natural law.[6] Jellinek sought to arrive at an objective international law by proceeding in a positivistic manner and thus positing a sovereign will of the State as the basis from which the law of nations drew its validity. Jellinek explicitly invoked Hegel, who had demonstrated that as long as there was no power that was superimposed upon the States, the rights and duties of the States

5 G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), 10 [Jellinek, Staatenverbindungen] (translation by the author).

6 On this, Jellinek unambiguously remarked, in line with the positivistic tradition of Kaltenborn and Bergbohm: "While all other areas of the law have long since recognized the untenability of a doctrine that creates both legal subjects and rights and duties on the basis of a legal order that precedes positive law and commands it, the old natural law is still celebrating its well-known orgies in the systems of international law, which are only now and then rudely interrupted by a 'denier of international law' and then soon begin again." G. Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed. [1905] (1919), 311 [Jellinek, Rechte].

could find their origins only in their particular will.[7] Consequently, only norms that could be traced back to the will of the State could be regarded as law. The legal scholar could not and should not – in his view – recognize any formal ground of the law other than the free will of the community of nations and States.[8] The German debate about the nature and binding force of international law in the 19th century revolved around the idea of the free will of the State and the repercussions this central assumption had for the validity of international law. German idealism through Kant, Fichte, Schelling and Hegel had profoundly shaped the philosophical ground for this debate.

For Kant, "a state, as a moral person, is considered as living in relation to another state in the condition of natural freedom and therefore in a condition of constant war."[9] This tenet, which goes back to Hobbes and which Kant took from Pufendorf,[10] applied the state of nature between humans to relations between States. For Kant, however, the goal of international law in the sense of an a priori postulate of reason was the gradual overcoming of the subjective will of the States by creating universal peace as a legal state of affairs (*Rechtszustand*). Although "perpetual peace" remained for Kant an "unachievable idea", the constant approximation to this condition through a permanent league or congress of States was a task for humans and States.[11]

Hegel, by contrast, described international law as "external state law" (*äußeres Staatsrecht*). The foundation of this law was the "autonomy" of nations, which originally, and here he agreed with Kant, were in a state of

7 *Id.*; G. W. F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrechts und Staatswissenschaft im Grundrisse* [1832-1845], 12th ed. (2011), § 333 [Hegel, Grundlinien].

8 G. Jellinek, *Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Construction des Völkerrechts* (1980), 3 (note 3) [Jellinek, Staatenverträge].

9 I. Kant, *The Metaphysics of Morals* [1797] (1996), § 53, 114 [Kant, Metaphysics].

10 T. Hobbes, *Leviathan* [1651] (1968), chapter 13; on the history of the reception of Hobbes see H. Steiger, 'Völkerrecht', in O. Brunner, W. Conze & R. Koselleck (eds), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Vol. 7 (1992), 97, 112-123.

11 Kant, *Metaphysics*, *supra* note 9, § 61, 119; this was not a world republic or world State, which Kant regarded as impossible because of the fear of despotism by a supreme ruler; see H. Steiger, 'Völkerrecht und Naturrecht zwischen Chr. Wolff und A. Lasson', in D. Klippel (ed.), *Naturrecht im 19. Jahrhundert* (1997), 45.

nature in their relationships to one another.[12] The law between States rested merely on its recognition, interpretation, and application by the individual States.[13] Because of the principle of autonomy, the rights of States toward each other had their reality only in a special, and not in a constitutionalized, general will.[14] Given that treaties of international law in the Hegelian system had no reality within the "general will," their observance should, in the final analysis, also be left to the discretion of the States: "A mere ought-to-hold (*Haltensollen*) of the tractates takes effect. This ought is a coincidence."[15] Hegel herewith for the first time develops a central theme of the realist critique of international law, refined by Hans Morgenthau a hundred years later. International law has no autonomous validity outside the particular recognition by an individual State in a given historical situation. Its *Sollens (ought)* structure is entirely dependent on the coincidental and passing overlap of interests among States. Hence, strong interests of States could never be regulated by this medium.

Moreover in Hegel, in contrast to Kant, a continuous approximation to a "perpetual peace" through the gradual overcoming of the subjective principle in the sense of an a priori postulate of reason is not possible. Rather, in Hegel the place of the Kantian league of peace is taken by the historical-philosophical assumption of "world history as world judgment", in which competing "national spirits" struggle for hegemony.[16] War between States was thus inevitable and ultimately a positive element of international relations, without which the life of a nation would end up in lazy stagnation and rottenness.[17]

According to the Hegelian approach of "external state law", later adopted by Karl Theodor Pütter,[18] international law thus has its reality only in the sovereign will of individual States. For Pütter, the "peculiar nature of

12 G. W. F. Hegel, *Die Philosophie des Rechts: Die Mitschriften Wannenmann (Heidelberg 1817/18) und Homeyer (Berlin 1818/19)*, edited and annotated by Karl-Heinz Ilting (1983), § 159 [Hegel, Philosophie].

13 *Id.*, § 161, and Ilting's commentary on page 348.

14 *Id.*, § 162.

15 *Id.* (translation by the author).

16 Hegel, *Grundlinien*, *supra* note 7, §§ 341-343 (translation by the author).

17 *Id.*, §§ 324, 334.

18 K. T. Pütter, 'Die Staatslehre oder -Souveränetät als Princip des practischen Europäischen Völkerrechts', 6 *Zeitschrift für die gesamte Staatswissenschaft* (1850) 2/3, 299, 304-305; on page 307, Pütter himself points to Hegel's philosophy of law as the theoretical foundation of his own scientific elaborations.

international law lies in the fact that the will of the state, in its conduct toward other nations, is self-determined with absolute freedom."[19]

At the same time, Hegel had philosophically introduced the notion of an organic State as the particular form of a nation (Volk als Staat) in a given historical situation. The "will of the state" (*Staatswille*) as a legal person, not of the prince or the government, becomes the central source of all law, be it internal or "external" State law. This theoretical innovation of the State as a unified individualistic person capable of "will" became a mantra of 19th century German public law scholarship.[20] Interestingly, in the late 1830s for Hegel it was highly questionable whether peoples on a "lower civilizational level" such as nomadic people could ever be recognized as "states" in this sense.[21]

The criticism that other German scholars, such as Bluntschli and v. Mohl had directed against Pütter's incorporation of the Hegelian concept of will into international law[22] was rejected by Jellinek, who argued that this criticism negated the applicability of the general concept of law to the law of nations and in so doing prevented that area of the law from becoming more deeply pervaded by public law scholarship.[23] But Jellinek at the same time wanted to go beyond Hegel's sceptical approach to international law by constructing a truly binding law of nations on the shared voluntaristic premise. With this endeavor, Jellinek was turning against the theory of the "external state law," which had denied that international law possessed its own binding quality as an objective law.

19 Quoted in C. Kaltenborn von Stachau, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft* (1847), 163 (translation by the author).

20 Usually the public law scholar Albrecht is seen as the author who introduced the specific and related notion of the State as a "juridical person" (Juristische Person), W. E. Albrecht, 'Romeo Maurenbrecher, Grundsätze des heutigen deutschen Staatsrechts' (Review), *Göttingische Gelehrte Anzeigen* (1837) 3, 1489, 1492.

21 Hegel, *Grundlinien*, *supra* note 7, § 331 (translation by the author).

22 R. v. Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, Vol. 1 (1855), 382; J. C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, 3rd ed. (1878), 60.

23 Jellinek, *Staatenverträge*, *supra* note 8, 3 (note 3). Bluntschli, in his review of this work, criticized precisely this starting point of the destructive Hegelian "juristic construct" and pointed instead to the "originary natural law" as the foundation of every legal statute; see J. C. Bluntschli, 'Kurze Anzeigen: Dr. Georg Jellinek, Die rechtliche Natur der Staatenverträge', 3 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1880), 579, 581.

C. A Verifiable and Formalized Ground of all Law

Jellinek's intent was to show that "the same notion of law that underlies the unquestioned parts of the law also forms the essence of the provisions that are valid for international relations."[24] With this, Jellinek was turning away from the assumption of a special substantive source for the law of nations, as for example the legal consciousness of the nations (Savigny, Hälschner)[25], or the idea of a reasonable order of the international community (v. Mohl).[26] Instead, Jellinek, following the positivist scholar Bergbohm, insisted that the same formal foundation had to be demonstrated for international law as for the other sub-fields of law.[27]

It was this quest for a monistic conception of law that led Jellinek to the nation (*Volk*) as an organized entity and to the State as a basis of his conception. From a strictly positivist perspective, one could recognize the legal character only of those propositions that could be traced back to a scientifically verifiable act of establishment. However, only the State – which established law as the "sovereign will of all"[28] – was a candidate as a law-creating organ. Here Jellinek also explicitly invoked Hegel, who had demonstrated that as long as there was no power that was superimposed upon the States, the rights and duties of the States could find their origins only in their particular will.[29] Consequently, only propositions that were demonstrable as the will of the State could be regarded as law. In this way,

[24] Jellinek, *Staatenverträge*, *supra* note 8, 1 (translation by the author).

[25] P. E. Hälschner, 'Zur wissenschaftlichen Begründung des Völkerrechts', 1 *Zeitschrift für volkstümliches Recht und nationale Gesetzgebung* (1844), 26 adopted Savigny's conception.

[26] R. v. Mohl, 'Die Pflege der internationalen Gemeinschaft als Aufgabe des Völkerrechts', in *id.*, *Staatsrecht, Völkerrecht und Politik*, Vol. 1: Staatsrecht und Völkerrecht [1860] (1962), 579, 584; for another, later example see F. v. Martens, *Das internationale Recht der civilisierten Nationen*, Vol. 1 (1883), 200.

[27] Jellinek, *Staatenverträge*, *supra* note 8, 2; the critical review of this work by Bulmerincq opposed this approach: "Every legal discipline is sovereign as a science and will not tolerate mediatization by other legal disciplines […]. The law of nations, however, remains a legal discipline also with a different legal principle and a different legal systematics." (A. v. Bulmerincq 'Georg Jellinek: Die rechtliche Natur der Staatenverträge' 4 *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirthschaft im Deutschen Reich* (1880) 3/4, 254, 257 (translation by the author)). For Bulmerincq, the international belief in the law was the source of the law of nations (*id.*, 256).

[28] Jellinek, *Staatenverträge*, *supra* note 8, 2 (translation by the author).

[29] *Id.*; Hegel, *Grundlinien*, *supra* note 7, § 333.

the legal quality of international law was directly linked to the empirically verifiable process of creation.

The attempt at a theoretical separation of the question of legal character (*Rechtsqualität*) from the norm-creating entity (States) by invoking the notion of the "idea of law" (*Rechtsidee*) was dismissed, in classic positivist fashion, as "speculation" from the realm of formal jurisprudence. Although Jellinek did not go so far as to describe the free will of the State as the final philosophical basis of the law, which he, too, believed could be found only in an "objective-metajuridical" principle, the jurist could not and should not recognize any formal ground of the law other than the free will of nations belonging to an international community of States.[30] Otherwise he would relinquish the boundaries he had so laboriously drawn around his subject, and that could very likely cast the legal scholar "into the confusion and lack of clarity that is to him the real chaos".[31]

Therefore, the legal character of international law – and for Jellinek there was no getting around this if one took a strict positivist approach – had to be grounded in the sovereign will of the State:

> "The sharp formal development that the concept of law has undergone through the systematic work of the last decades, causes all demands that flow solely from the idea of law, for all the other value they may possess, to appear no longer as a law that can assert its existence alongside, above, or even against positive law […] With this, the only possible path for a legal grounding of international law is indicated. It must be shown to be grounded in the free will of states or nations."[32]

But Jellinek at the same time wanted to go beyond Bergbohm and construct a truly binding law of nations on the shared voluntaristic premise.[33] With this endeavor, Jellinek was turning against the theory of the "external state law", which had denied that international law possessed its own quality as objective law. How, then, did Jellinek attempt to escape the

30 Jellinek, *Staatenverträge*, *supra* note 8, 3 (note 3).

31 *Id.* (translation by the author).

32 *Id.*, 2 (translation by the author).

33 Cf. on Jellinek's strategy to reconcile the free will of the State with a binding international law compared to John Austin's theory: M. Koskenniemi, *From Apology to Utopia* (1989), 128-130.

dilemma of the voluntaristic foundation of international law? Jellinek's answer was two-tiered. First, by way of an abstract, preliminary examination, Jellinek discussed the question of how the free will of the State can be thought of as law in the first place. Here he introduced the figure of the self-obligating will. It was only in the second step that Jellinek raised the question whether the law created by the free will of the State could be objectified.

D. The Concept of "Self-Obligation" (*Selbstverpflichtung*) and the Emergence of an "Objective" International Law

It is the idea of law's binding nature that Jellinek linked with the free will of the State when he wrote: "It does not exhaust the nature of law that it is the will of the State, for it is not the will of the State as such that is law, but the binding will of the State."[34] The verifiable act of will was merely the formal legal basis of the obligation. The final, psychological basis of every legal obligation, however, lay in the fact that the will regarded itself as bound by its expression.[35]

Jellinek thus ascribed the idea of the binding nature of the law not to a normative-theoretical manifestation, but to the psychological manifestation of "the feeling to have obliged oneself" (*das Sichverpflichtetfühlen*). For Jellinek, the law was a psychological phenomenon inherent in human beings:[36] The validity of the law ultimately rested on the belief in its validity among those to whom a legal norm was addressed.[37] Jellinek carried out the subsequent, inductive demonstration of the concept of self-obligation by way of State- or constitutional law (*Staatsrecht*):

> "It must be shown that a reflexive element exists within national constitutional law – that there are legal norms that emanate from the State and bind the State. Should this demonstration succeed, the legal basis of international law will have been found."[38]

34 *Id.*, 5-6 (translation by the author).
35 *Id.*, 17.
36 G. Jellinek, *Allgemeine Staatslehre*, 2nd ed. (1905), 324 [Jellinek, Staatslehre].
37 *Id.*
38 Jellinek, *Staatenverträge*, *supra* note 8, 6-7 (translation by the author).

In the realm of constitutional law, he concluded, we are dealing with norms by which the State limited itself. Public law, including international law, was, in the final analysis, a self-limitation of the will of the State.[39] Still, Jellinek, too, proceeded from the assumption that this psychological validity of the law had to be "guaranteed".

Such a guarantee existed if "socio-psychological forces" reinforced the motivating power of the prescriptions, thereby endowing them with a general ability to assert themselves against countervailing, individual motivations of the addressees of the norms.[40]

Jellinek thus gave preference to the broader notion of "guarantee" over that of "coercion". As *guarantees* of State law Jellinek pointed to the organization of the State, and for international law to the conditions of international relations and other shared interests of the community of States.[41] On the basis of this psychological approach, international law was placed on an equal footing to national law, and via the "theory of the guaranteed norm" it acquired, for Jellinek, the quality of binding law in spite of the absence of a supra-ordinated coercive power. He thus conceptualized the sovereign will of the State as the final *formal ground* of the law and the "feeling of self-obligation" as the final *psychological ground* of the law. But what rules had the quality of objective international law that could not be modified by individual preferences of the State? Jellinek's interest was directed above all at those legal rules that dealt with the creation, duration, and termination of treaties in international law:

> "Treaties between states can have the character of law only when there exist norms that stand above the treaties, and from which the treaties receive their legal validity."[42]

These norms created a standard against which individual treaties between States had to measure themselves, and they were – to that extent – "objective in nature".[43] With this, Jellinek had arrived at the central question, namely, how such general norms that are the equivalent of constitutional law can be conceived between sovereign actors on the level of

39 *Id.*, 27.
40 *Id.*
41 Jellinek, *Staatslehre*, *supra* note 36, 328.
42 Jellinek, *Staatenverträge*, *supra* note 8, 5 (translation by the author).
43 *Id.*, 4 (translation by the author).

international law. To answer that question, Jellinek searched for a principle of objectification that could hold up to the arguments that the idea of self-obligation always implied simultaneously the possibility that the State could also free itself later again from any possible content of will. The possibility, inherent in free will, of self-liberation through a change of will had to be limited in Jellinek's construct through an objective principle. Jellinek at this point revealed to his curious readers the – long withheld – final *philosophical* ground of law, which could be found only in an "objective principle":

> "This principle, which we must now name, is the nature of the conditions of life that require legal normativization. This nature is as untouchable by the will of the State as nature is by the will as such […]. Here, then, we have an objective barrier to the will that is beyond any question."[44]

According to Jellinek, the objective nature of the relations between States thus entailed a logically inherent limitation on the individual will of the State. It was among the elementary purposes of a State to engage in relations with other States in an ever more interdependent international community, and to that extent it was also a demand of the nature of the State to create norms by which the relations to other States were regulated.[45] By doing so – by legally cooperating – the objective nature of some fundamental norms of cooperation between States was automatically acknowledged by the State. In other words: if States use the language of international law, they automatically recognize some fundamental rules of co-existence and co-operation. This is the very essence of constitutional thinking in public law – the assumption that a politically powerful entity

[44] *Id.*, 43 (translation by the author); on the "nature of the thing" as an instrument for objectifying legal argumentation and for an overview of the relevant legal-theoretical literature see T. Mayer-Maly, 'Die Natur der Sache und die österreichische Rechtspraxis', in W. Krawietz, T. Mayer-Maly & O. Weinberger (eds), *Objektivierung des Rechtsdenkens: Gedächtnisschrift für Ilmar Tammelo* (1984), 273.

[45] Jellinek, *Staatenverträge*, *supra* note 8, 45; here the connection to Jellinek's doctrine of the purposes of the State becomes apparent, though it is striking that Jellinek rejected the existence of objective State purposes in the general theory of the State. For Jellinek this must therefore be a subjective purpose of State, though one that is inherent in all States because of its objective nature. On the doctrine of the purpose of the State see Jellinek, *Staatslehre*, *supra* note 36, 223-258; on Jellinek's strategy to reconcile the free will of the State with a binding international law through references to the purpose of the State Koskenniemi, *supra* note 33, 129-130.

limits its freedom of action by abiding to a set of meta-rules, be they of a procedural or substantive nature, that cannot be modified unilaterally in an *ad hoc* fashion. Odysseus is tying himself to the mast, in order to limit his freedom of action and to prevent the order from being destroyed.

Behind the objective nature of international relations as a barrier to the sovereign will of the State stood Jellinek's own conception of an international "community of states". For him, however, this community of States was not an idea of natural law, but the sociological product of the growing international intertwining of (European) State interests, of the kind that had become especially apparent in the nineteenth century.[46] From Jellinek's perspective, the State could no longer be described abstractly as an entity that was autarkic and without obligations, since the assumptions derived from such a premise utterly failed to reflect the real conditions of international life.[47] Instead, the State was contingent on the totality of the States in all aspects of its existence and actions. The "community of states" was a fact, and ignoring it made any deeper comprehension of the problems related to international law impossible.[48] This was especially true in the realm of the "civilized" European nations, which was, in Jellinek's words, wrapped in a "web of international legal norms".[49] Through membership[50] in the "community of states", the State was bound by "objective international law".

It is also in this context that one should place Jellinek's critique of the construction of so-called "basic rights" of States. These were nothing other than a description of the "*status libertatis*" under international law. However, claims were being arbitrarily deduced from the notion of basic rights derived from natural law. Instead of describing what was permitted to the State, the point was for Jellinek to examine the limitations on the State's freedom through the objective law of nations.[51] It is noteworthy that for Jellinek this objective international law, which arises from the nature of the relations between States, constituted only about one tenth of the tenets of international law.[52] In that sense, the objectification of international law

46 Jellinek, *Rechte*, *supra* note 6, 320.
47 Jellinek, *Staatenverbindungen*, *supra* note 5, 92.
48 *Id.*, 92-93.
49 *Id.*, 96 (translation by the author).
50 A State acquired membership in turn through the instrument of recognition under international law: Jellinek, *Rechte*, *supra* note 6, 320.
51 *Id.*, 316-320.
52 *Id.*, 321.

comprised for Jellinek only the sphere of an elementary constitution, which was in the final analysis deduced from an "objective nature" of the community of States that was an objective phenomenon produced by European history.

The content of this constitution remained vague. It comprised those fundamental norms, such as *pacta sunt servanda*, that European sovereigns at the time had recognized explicitly or implicitly as the very basis of the legal relations amongst one another. As such it had an exclusive character and gave rights and duties only to European nations. Given that this theory was developed at the high point of European colonial expansion in Africa and the Far East, it shows how restricted and naturally Eurocentric Jellinek's liberal universalism was.

E. Conclusion

Georg Jellinek attempted to explain and defend the validity of international law as an autonomous legal order, which can theoretically be distinguished from morality, power and particular State interests. He distanced himself both from Hegel's concept of international law as mere temporary coincidence of corresponding individual wills of sovereign States and the alleged old fashioned "natural law" concept of a world State. Under the conscious and subconscious influence of German idealism, the crux of the German 19th century international law debate was the conversion of the subjective and verifiable sovereign will of one or more States as formalized legal persons into a binding legal order without centralized legislative, executive and judicial institutions. It was Georg Jellinek who solved the irresolvable task by developing the first constitutionalist theory of international law under what he called "positivist" premises.

Since then, with every new constitutionalist theory of international law, new norms have been elevated to constitutional rank through the respective scholars. For instance, when neo-scholastic natural law notions became more popular again among international lawyers in the 1920s and 1930s, specific value oriented norms were being given constitutional status by authors such as Alfred Verdross.[53] From then on, a thicker substantive

[53] Regardless of the value oriented content of these constitutional norms, Verdross insisted on portraying these norms as legal rules, which also formed part of "positive" international law based on state-consent, A. Verdross, 'Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle', in *id.* (ed.), *Gesellschaft, Staat, und Recht:*

understanding of constitutionalism has developed in Europe in the second half of the 20th century, building on the notion of *ius cogens* or other "fundamental" norms of an international community. Under these post-war pink lenses, Jellinek's procedural proto-constitution turned into a hierarchical universal order based on an alleged harmony of interests, universally shared moral values or an accomplished international community.

The problem with those constitutional approaches that proceed from an international legal system grounded in morality is that they are in danger of endowing, out of well-intentioned motives, certain morally charged norms of international law with greater scholarly weight than they have in legal and political practice. In the attempt to advance the development of the law in a "progressive" direction, they can unwittingly abet the rhetorical misuse of these norms within international politics. Certain legal norms, elevated into constitutional rank, can thus turn into a façade without lasting effects on legal practice, a façade behind which international power politics and unrestrained exploitative economic and legal structures continue to operate as usual.[54]

Or to put it differently: at what point do moral idealizations of international law become so far removed from the concrete human effects of law and politics that they themselves, for all their good intentions, take on affirmative characteristics? Charles de Visscher in 1971 held that the international community "est un ordre en puissance dans l'esprit de l'homme; dans les réalités de la vie internationale, elle en est encore à se chercher, elle ne correspond pas à un ordre effectivement établi"[55]. Despite

Untersuchungen zur Reinen Rechtslehre (1931), 354, 358; strikingly similar in his recourse to neo-scholastic notions of humanity is C. Tomuschat 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours de l' Académie de Droit International* (1999), 9.

54 I have tried elsewhere to describe in greater detail the basic dilemma of the turn to rights in international law: J. v. Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law', 19 *European Journal of International Law* (2008) 5, 903; more generally on moral foundationalism in international law J. v. Bernstorff & I. Venzke, 'Ethos, Ethics, and Morality in International Relations', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International* Law, Vol. III (2012), 709; cf. on international humanitarianism D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2005).

55 C. De Visscher, 'Positivisme et "Jus Cogens"', 75 *Revue Générale du Droit International Public* (1971), 5, 8.

the subsequent move from "bilateralism to community interests"[56] in many areas of positive international law, deep seated conflicts over what the common interests and shared values actually are continue to persist.

[56] See the comprehensive and early study of B. Simma, 'From Bilateralism to Community Interests in International Law', 250 *Recueil des Cours de l' Académie de Droit International* (1994), 217.

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The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law

Lando Kirchmair*

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* Lando Kirchmair, Dr. iur. (University of Salzburg, Austria) 2012; Mag. iur. and Mag. iur. rer. oec. (University of Innsbruck, Austria) 2008 & 2009. I was a research and teaching fellow at the Department of Public Law/International Public Law at the University of Salzburg while writing this essay. Currently I am working at the Congress of Local and Regional Authorities of the Council of Europe, Strasbourg, France. However, any expressed opinions and any committed errors remain mine alone. Contact: lando.kirchmair@auslandsdienst.at.

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Abstract

For many years, the ECJ has postulated the autonomy of the EU legal order. At the same time, it has also stressed the importance of noting that the UN and the EU are distinct legal orders. In light of this situation, we have one and the same international organization applying two diametrically opposed theoretical doctrines. Regarding the inner relationship with its Member States, the ECJ proclaims a unified legal order based on the monistic doctrine. Dualistic arguments, in contrast, serve to separate the EU legal order from international law. This paper intends to clarify whether this obvious contradiction is due to a simple misinterpretation by the ECJ or is grounded in flaws within the almost 100 year old theories of monism and dualism which can no longer serve to explain the relationship between legal orders satisfactorily. The paper concludes that the situation cannot be characterized as black and white. However, in order to establish fundamental foundations, a clear theoretical line is essential.

A. Introduction

Two lawyers have the task of discussing a problem and presenting a solution. After hours of painful negotiations they come up with three different solutions. Is this just an ironic representation of the way lawyers see themselves? Bearing the latest judgments of the Court of Justice of the European Union (ECJ)[1] in mind, however, this simple joke has much more than a grain of truth to it.

On the one hand the ECJ has postulated the "autonomy of the Community legal order"[2] for many years in order to unify European Union (EU) and Member State law. To the contrary, it has also found it "important

1 In this article, ECJ is used as the well-known abbreviation even though its new name, after the Treaty of Lisbon, is simply the Court of Justice.

2 See *Costa v. ENEL*, ECJ, Judgment, Case No. 6/64, 15 July 1964, para. 3 ("the EEC treaty has created its own legal system"; the German version states "*Rechtsordnung*"); the French version uses "*ordre juridique*" [ENEL]; cf. *EEA I*, ECJ, Opinion 1/91, 14 December 1991, para. 2 postulated the "autonomy of the Community legal order", compare the German version "*Autonomie des Rechtssystems der Gemeinschaft*"; see furthermore on this W. Schroeder, *Das Gemeinschaftsrechtssystem: Eine Untersuchung zu den rechtsdogmatischen, rechtstheoretischen und verfassungsrechtlichen Grundlagen des Systemdenkens im Europäischen Gemeinschaftsrecht* (2002), 104-105 (with further references in Fn 6 and 7).

to note at the outset that Security Council resolutions and Council common positions and regulations originate from distinct legal orders".[3] In light of this situation, we have one and the same international organization introducing two different opinions. Depending on its perspective – and not on a different standpoint of the observer – the ECJ applies a monistic doctrine relating to its Member States and a dualistic doctrine relating to international law, two completely diverging doctrines. The relationship between international and national law has been, and probably always will be, a long-running debate in public international law. Even though this discussion has been trivialized as "unreal, artificial and strictly beside the point",[4] the so-called "globalization of law"[5] framed in the famous "Constitutionalization of International Law"[6] is testimony to the topicality, as well as to the ongoing and even growing importance of this debate. As this introductory example demonstrates, international organizations such as the EU are obvious examples of entities based on international law acting within the legal orders of its Member States as much as on the international stage. International organizations with decision-making capacities do have an enormous influence on and within the legal orders of Member States and even Non-Member States. The theoretical foundation of this relationship

3 See *Bank Melli Iran*, ECJ, Judgment, Case No. 548/09 P, 16 November 2011, para. 100 [Bank Melli]; Cf. *Kadi & Al Barakaat International Foundation*, ECJ, Judgment, Case No. 402/05P and 415/05 P, 3 September 2008, paras 285 *et seq.* 326-327 [Kadi]; see also B. Fassbender, 'Triepel in Luxemburg: Die dualistische Sicht des Verhältnisses zwischen Europa- und Völkerrecht in der "Kadi-Rechtssprechung" des EuGH als Problem des Selbstverständnisses der Europäischen Union', 63 *Die öffentliche Verwaltung* (2010) 8, 333, 336 *et seq.*

4 G. Fitzmaurice, 'The General Principles of International Law: Considered from the Standpoint of the Rule of Law', 92 *Recueil des Cours de l'Académie de Droit International* (1957), 1, 71; furthermore Fitzmaurice argued that "in the same way it would be idle to start a controversy about whether the English legal system was superior to or supreme over the French or *vice-versa*, because these systems do not pretend to have the same field of application". *Id.*, 71-72.

5 Compare for this nomination J.-B. Auby, 'Globalisation et droit public', 14 *European Review of Public Law* (2002) 3, 1219, 1219 ("De tous les phénomènes qui ont affecté l'évolution de nos systèmes juridiques à la fin du siècle dernier, et qui détermineront le cours de leur évolution pendant celui-ci, la globalisation est l'un des plus importants: c'est probablement même le plus important."). Cf. A. Peters, 'The Globalization of State Constitutions', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 251.

6 Compare A. Verdross's groundbreaking *Die Verfassung der Völkerrechtsgemeinschaft* (1926); similarly J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009).

always was and still is dominated by the heavily disputed monistic [II. 1)] and dualistic [II. 2)] doctrines. However, this leads us to the crucial question to be addressed in this paper: Is the ECJ to be criticized for mixing two different approaches [III. 1)]? Or does this example uncover flaws in these doctrines, which fail to explain current developments satisfactorily [III. 2)]? One might say: in for a penny, in for a pound. Once the decision has been taken in favor of one doctrine, a stringent application of that one doctrine should be maintained consistently. However, in order to address these complex problems, it is important to broaden the scope of the discussion.

B. The 'Autonomy' of the EU Legal Order

I. A Monistic Approach Unifies the EU Legal Order Relating to its Member States

A long time ago, the ECJ postulated the "autonomy of the Community legal order".[7] This general statement was accompanied by the direct effect of EU law on the national laws of the Member States,[8] just like the primary application of EU law.[9] This was truly necessary in order to establish and guarantee the success of the EU by establishing a strong and effective autonomous legal system. Considering the far-reaching effects on the national legal orders of EU Member States it is important to base these decisions on a theoretical foundation. Bearing in mind the famous debate about the relationship between international and national law, scholarly debate began as soon as these ECJ rulings were established to analyze, in theoretical terms, the practical steps taken by the ECJ. Consequently, some authors tried and still try to fit the relationship between the EU and its Member States into a monistic scheme.[10]

7 See *supra* note 2.

8 See *Van Gend & Loos*, ECJ, Judgment, Case No. 26/62, 5 February 1963.

9 Again *ENEL*, *supra* note 2; and *Internationale Handelsgesellschaft*, ECJ, Judgment, Case No. 11/70, 17 December 1970, paras 3-4; *Simmenthal II*, ECJ, Judgment, Case No. 106/77, 9 March 1978.

10 See, for instance, the former president of the ECJ G. C. Rodríguez Iglesias, 'Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts', 24 *Europäische Grundrechtezeitschrift* (1997) 14-16, 289, 295; N. Michel, 'L'imprégnation du droit étatique par l'ordre juridique international', in D. Thürer, J.-F. Aubert & J. P. Müller (eds), *Verfassungsrecht der Schweiz* (2001), 63, 67; S. Griller, 'Völkerrecht und Landesrecht – unter Berücksichtigung des

However, the main characteristic of monism, a theory developed most prominently by Georges Scelle, Hans Kelsen and Alfred Verdross at the beginning of the 20th century,[11] is the assumption of a single unified legal system. Promoted at the EU level, the monistic doctrine would unify the EU legal order with the national legal orders of its Member States. However, should norm conflicts arise between international, EU, or national law, the monistic doctrine needs to deal with the question as to which jurisdiction shall prevail. While a monistic doctrine, with the so-called primacy of national law must be traced back to a very nationalistic view of international law, which no longer can be considered suitable,[12] monism with the primacy

Europarechts', in R. Walter, C. Jabloner & K. Zeleny (eds), *Hans Kelsen und das Völkerrecht: Ergebnisse eines internationalen Symposiums in Wien* (2004), 83, 109 [Griller, Völkerrecht und Landesrecht]; S. Griller, 'Der Stufenbau der österreichischen Rechtsordnung nach dem EU-Beitritt', 8 *Journal für Rechtspolitik* (2000) 4, 273, 284; M. Potacs, 'Das Verhältnis zwischen der EU und ihren Mitgliedstaaten im Lichte traditioneller Modelle', 65 *Zeitschrift für Öffentliches Recht* (2010) 1, 117, 120; T. Öhlinger, 'Die Einheit des Rechts: Völkerrecht, Europarecht und staatliches Recht als einheitliches Rechtssystem?', in S. L. Paulson & M. Stolleis (eds), *Hans Kelsen: Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (2005), 160, 169, concerning the very abstract interpretation of Kelsen's monism which Öhlinger favors, this kind of interpretation is possible. However, one has to bear in mind that this abstract monism cannot provide a theoretical concept explaining, for instance, the primacy of EU law (*id.*, 172); see also Schroeder, *supra* note 2, 113, 122; P. Pescatore, *L'ordre juridique des Communautés Européennes: Étude des sources du droit communautaire*, 2nd ed. (1975), 151.

11 As advocates of the monistic doctrine take H. Krabbe, *Die moderne Staatsidee*, 2nd ed. (1919) [1969]; L. Duguit, *Souveraineté et liberté* (1922); G. Scelle, *Précis de droit des gens: Principes et systématique*, Vol. I (1932); H. Kelsen, 'Les rapports de système entre le droit interne et le droit international public', 14 *Recueil des Cours de l'Académie de Droit International* (1926), 227, 299; A. Verdross, 'Le fondement du droit international', 16 *Recueil des Cours de l'Académie de Droit International* (1927), 247, 287; cf. C. Amrhein-Hofmann, *Monismus und Dualismus in den Völkerrechtslehren* (2003), 152 *et seq.*

12 Walz classified this perception of monism as "pseudomonistic", G. A. Walz, *Völkerrecht und staatliches Recht: Untersuchung über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht* (1933), 40 (translation by the author); see also J. G. Starke, 'Monism and Dualism in the Theory of International Law', 17 *British Yearbook of International Law* (1936), 66, 77, where he stated, "[r]educed to its lowest terms, the doctrine of State primacy is a denial of international law as law, and an affirmation of international anarchy." For this reason the monistic conception with the primacy of municipal law is left aside here. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre*, 2nd ed. (1928), 317, himself equated the monistic doctrine with the primacy of national law as the "*negation of all law*". However, later on he left the decision up to

of international law, on the contrary, has attracted a lot more attention. In order to justify this primacy, the monistic doctrine stipulated the premise of a hypothetical unity,[13] being kept together by the "chain of validity"[14] ('*Stufenbau nach der rechtlichen Bedingtheit*'). The ultimate ground for validity is the famous basic norm ('*Grundnorm*') of Hans Kelsen[15] on which the perception is based that States and their law-making capacities are dependent on, or directly derive from, international law.[16] Even though this

political science, see H. Kelsen, *Reine Rechtslehre*, 2nd ed. (1960), 339 *et seq.* (translated by Max Knight as *The Pure Theory of Law* (1978), 339 *et seq.*

13 Compare Kelsen, *supra* note 12, 196 *et seq.*, 221-222 (*id.*, *The Pure Theory of Law*, 193 *et seq.*, 215 ("A norm of general international law authorizes an individual or a group of individuals, on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm, thus, legitimizes this coercive order for the territory of its actual effectiveness as a valid legal order, and the community constituted by this coercive order as a 'state' in the sense of international law.").

14 The term "chain of validity" stems from J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed. (1980), 105; cf. Starke, *supra* note 12, 75; C. Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law', 16 *Law and Philosophy* (1997) 4, 377, 388.

15 Compare Kelsen, *supra* note 12, 196 *et seq.* (*id.*, *The Pure Theory of Law*, *supra* note 12, 193 *et seq.*); R. Walter, 'Entstehung und Entwicklung des Gedankens der Grundnorm', in *id.* (ed.), *Schwerpunkte der Reinen Rechtslehre* (1992), 47; *id.*, 'Die Grundnorm im System der Reinen Rechtslehre', in A. Aarnio *et al*. (eds), *Rechtsnorm und Rechtswirklichkeit: Festschrift für Werner Krawietz* (1993), 85; H. Mayer, 'Rechtstheorie und Rechtspraxis', in C. Jabloner & F. Stadler (eds), *Logischer Empirismus und Reine Rechtslehre: Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen Schule* (2002), 319; R. Dreier, 'Bemerkungen zur Theorie der Grundnorm', in Hans Kelsen-Institut (ed.), *Die Reine Rechtslehre in wissenschaftlicher Diskussion* (1982), 38, 39, note the "function of the basic norm stipulating unity" ("*Funktion der Grundnorm als Einheitskonstituante*"); for criticism see generally N. Hoerster, *Was ist Recht?: Grundfragen der Rechtsphilosophie* (2006), 134, as much as 138 *et seq.*; P. Koller, 'Meilensteine des Rechtspositivismus im 20. Jahrhundert: Hans Kelsens Reine Rechtslehre und H. L. A. Harts "Concept of Law"', in O. Weinberger & W. Krawietz (eds), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (1988), 129, 157 *et seq.* with further evidence; Griller, *Völkerrecht und Landesrecht*, *supra* note 10, 87-89; as much as Schroeder, *supra* note 2, 75 *et seq.*

16 See *supra* note 13; compare also A. Verdross, *supra* note 6, who argues from the viewpoint of a(n) (international) basic norm from which also municipal law derives. "The freedom of states is nothing else than a margin of discretion depending on international law" (translation by the author). According to Verdross (*id.*, 48 *et seq.*) the lawmakers of public international law are not States, but the international

premise of authorization ('*Delegationszusammenhang*') is surely highly debatable concerning the relationship of the EU legal order to its Member States,[17] it still holds true that many monistic arguments fit the interplay of EU and Member State law. The direct interaction between international or EU law and individuals, for example, an integral element of monism, has become more and more relevant in light of current developments.

II. A Dualistic Approach Safeguards the Stability of the EU Legal Order Relating to International Law

Although the position of the ECJ regarding the internal relations of the EU to its Member States is clearly driven by monistic arguments, the court does not seem to be totally convinced by these theoretical conceptions. Faced with United Nations (UN) Security Council Resolutions on the violation of human rights, the Court clarified that UN law and EU law "originate from distinct legal orders".[18] By stressing the concept of different legal orders, the ECJ evoked the opposite of a monistic doctrine. As introduced by Heinrich Triepel's famous phrase, stating that the international and national legal order are "two circles, which possibly touch, but never cross each other",[19] dualism divides international or EU law and

community, acting through an international organ with supranational power; cf. Krabbe, *supra* note 11, 305 *et seq.* & 309.

17 For a general critique, see J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2011), 192-193; *id.*, 'Kelsen – Which Kelsen?: A Reapplication of the Pure Theory to International Law', 22 *Leiden Journal of International Law* (2009) 2, 225, 240 *et seq.*with further references.

18 Compare *Kadi*, *supra* note 3, paras 285 *et seq.*, 326-327; and *Bank Melli*, *supra* note 3, para. 100 ("It is important to note at the outset that Security Council resolutions and Council common positions and regulations originate from *distinct legal orders*" (emphasis added by the author.)). See also Fassbender, *supra* note 3, 336 *et seq.* Cf G. de Burca, 'The European Court of Justice and the International Legal Order After Kadi', 51 *Harvard International Law Journal* (2010) 1, 1, 2 "adopting a sharply dualist tone". For references to a more open, if not to say monistic, case law regarding to international law in earlier terms see K. Schmalenbach, 'Normentheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht', 61 *Juristenzeitung* (2006) 7, 349, 352.

19 H. Triepel, *Völkerrecht und Landesrecht* (1899), 111 ("Völkerrecht und Landesrecht sind nicht nur verschiedene Rechtstheile, sondern auch verschiedene Rechtsordnungen. Sie sind zwei Kreise, die sich höchstens berühren, niemals schneiden" (emphasis omitted) (translation in the text by the author).).

national law into two different legal systems. This subdivision of legal systems was primarily based on the view that the law of international or EU and national legal systems emanates from different sources, leading to the supposition that international or EU law and national law have arisen from different legal orders relying on different grounds for validity.[20] Although it still holds true that international and national law emanate from different sources, dualism also assumes that the addressees and content of international and national law cannot be identical.[21] This argument, however, has a flaw. While the impossibility of identical addressees of international and EU law would lead to the exclusion of any kind of norm conflict between these two legal orders,[22] this obviously is not the case. Taking the *Kadi case*[23] as an example, it becomes quite clear that international and EU law alike might well concern the same addressee as much as the same content. *Kadi* would not have been able to challenge the measures of the Security Council Resolution before the EU courts if he had not been the same person. Applying for protection under EU law against UN measures clearly shows that international and EU law alike deal with the same content. Furthermore, dualism turns a blind eye towards the direct interaction between international law and individuals by stating that international law is purely inter-State law and can only stipulate obligations for States,[24] which does not share the same addressees with EU or national law.[25]

20 Compare D. Anzilotti, *Lehrbuch des Völkerrechts* (1929), 38-39.

21 See Triepel, supra note 19, 9, 11, 228-229; cf. Anzilotti, *supra* note 20, 41-42.

22 See Triepel, *supra* note 19, 254 *et seq.*; Anzilotti, *supra* note 20, 42.

23 Compare *supra* note 3.

24 See Triepel, *supra* note 19, 228-229, 119-120, 271; see also Anzilotti, *supra* note 20, 41 *et seq.*; cf. Walz, *supra* note 2, 238-239, who was considered to be a moderate dualist, yet he did not postulate the impossibility of international law addressing individuals, but stated in 1933 that the character of international law at the time was mediatized through municipal law. Moreover, he did propose a differentiation between international law addressing States and international law created in order to address individuals (he called the former material and the latter formal international law), but this, however, would still have to be mediatized through States (see *id.*, 242-244).

25 This criticism was already expressed by A. Verdross, 'Die normative Verknüpfung von Völkerrecht und staatlichem Recht', in M. Imboden *et al.* (eds), *Festschrift für Adolf Julius Merkl zum 80. Geburtstag* (1970), 425, 432 *et seq.*; cf. R. P. Mazzeschi, 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility', 14 *The Italian Yearbook of International Law* (2004), 39, 42-43 with further references in footnote 12, "This means that international law now regulates *some* relationships

The division of the legal systems implies that international law may not derogate from national law, and national law may not derogate from international law.[26] In order to give international law an effect within a national legal system, dualism demands a special procedure to transform or incorporate the international norm into a national norm.[27] As a result of this, the ground for validity ('*Geltungsgrund*') of international law within EU or national law rests solely within the latter. The main weakness of this argument becomes immediately clear when trying to establish a unitary legal subjectivity of international organizations (be it the UN or the EU) from a dualistic point of view. International norms are based on a national ground for validity within the dualistic doctrine. As a consequence, international organizations would be based on international validity and furthermore on as many national grounds of validity as they have Member States.[28] This insecure starting point complicates the effect of the legal measures of these international organizations within EU or national law when applying the dualistic doctrine. In that light, the approach of the ECJ confronting the outside world with an explicit reference to different legal orders is open to criticism.

C. Is the 'Janus Face' of the ECJ Justifiable?

On the one hand, the ECJ borrowed monistic arguments in order to establish the "autonomy" of the EU legal order, unifying the legal order of its Member States with the legal system of the EU. On the other hand, the ECJ reprimanded the General Court,[29] when it applied this monistic approach to the relationship between EU law and international law as well.[30] Facing foreign law, which is possibly dangerous for the EU legal order, the

between States and individuals *in a formal manner* (and not only in a substantive one)"; cf. *LaGrand (Germany v. USA)*, Judgment, ICJ Reports 2001, 466, 494, para. 77.

26 See Triepel, *supra* note 19, 257-258; Anzilotti, *supra* note 20, 38.

27 *Id.*, 41, 45-46.

28 For this illustrative criticism, see Griller, *Völkerrecht und Landesrecht*, *supra* note 10, 97; see also the general criticism by Starke, *supra* note 12.

29 Formerly known as the the European Court of First Instance.

30 Compare *Yassin Abdullah Kadi*, ECJ, Judgment, Case No. T-315/01, 21 September 2005, para. 214; as much as *Ahmed Ali Yusuf and Al Barakaat International Foundation*, ECJ, Judgment, Case No. T-306/01, 21 September 2005, para. 265 applying the monistic doctrine also relating to international law.

ECJ prefers a dualistic argument separating its own from external legal systems. This provokes the question as to whether this 'Janus Face' can be justified.

I. Theoretical (In-)Appropriateness of the Position of the ECJ

Is it possible to uphold a monistic argument concerning the inner relations of EU law while defending, at the same time, its autonomy by confronting the outside world with a dualistic view? In light of this situation, one and the same international organization – depending on its perspective and not on the different standpoint of the observer – would have to be categorized according to two completely diverging doctrines. Bearing in mind the controversy between monists and dualists, it is far from easy to imagine that this question provoked by the ECJ would have met with positive support by either dualistic or by monistic scholars. Monists are convinced by the unitarian legal (world)[31] order, which is structured as a hierarchical complex of norms.[32] Having this proclaimed unity in mind – inherently based on one fundamental basic norm from which all lower norms are delegated ('*Delegationszusammenhang*') – an inevitable consequence arises: national law (also constitutional law) would have to be seen as delegated from EU law, and EU law in turn from international law. Dualists, in contrast, talk about the theoretical impossibility of the same addressee, content, and sources of international or EU and national law. As a consequence, they were convinced that the separation of legal orders is not a choice to make but a theoretical necessity. These theoretical discrepancies between dualists and monists are far from being unified in one consistent position. Nevertheless, *Maduro* opined that the EU legal order is "a municipal legal order [postulating a dualistic separation in confrontation to international law] of trans-national dimensions, of which it forms the 'basic constitutional charter' [postulating a monistic unity of the EU and its Member States]".[33] If one is not willing to accept the view of the EU as a federal State, which would make a monistic view relating to its Member

31 Compare A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923); cf. Kelsen, *supra* note 12, 329 (*id.*, *The Pure Theory of Law*, *supra* note 12, 328-329).

32 See above C. II.

33 *Kadi & Al Barakaat International Foundation*, ECJ, Opinion of Adovate General Maduro, Case No. 402/05 P & 415/05 P, 16 January 2008, para. 21.

States no longer necessary, the theoretical inconsistency of this position is faced with the above-mentioned criticism. To save itself from these discrepancies, it could at least be argued that neither the monistic nor the dualistic doctrine should be adopted concerning the internal as well as external relations of the EU. However, although this is clearly conceivable from a practical point of view, it is unsatisfactory from a theoretical perspective.

II. The (In-)Appropriateness of Monism and Dualism

Given the theoretical flaws of the ECJ's position regarding the relationship of EU law with its Member States on the one hand and international law on the other, the question arises as to whether the underlying doctrines can still provide satisfactory explanations of current developments. By applying two diametrically opposed doctrines as one entity, the ECJ was criticized on theoretical grounds.[34] However, monism and dualism were developed before the rise of supranational organization(s). Furthermore, these doctrines have to be seen against the background of the political conditions of the times in which they were formulated. In this respect, another crucial point of criticism is the political dimension of this intrinsically legal[35] question.[36] Already Hans Kelsen's uncertainty regarding monism with the primacy of international law and municipal law was triggered by the fact that this question was a matter of politics from his point

34 See above C. I.

35 For this paper, the difference between political and legal decision making is simply the legal bindingness of the latter. Legal decisions are consensus-based decisions which only might be modified by consensus (e.g. by a majority agreed in advance). Political decisions in contrast might be taken solely on the basis of the selfish interests of a single State.

36 See also J. Nijman & A. Nollkaemper, 'Introduction', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007) 1, 9; see also A. Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', 65 *Zeitschrift für Öffentliches Recht* (2010) 1, 3, 25-26. Cf. the criticism of G. M. Danilenko, 'Application of Customary International Law to Municipal Law', in G. I. Tunkin & R. Wolfrum (eds), *International and Municipal Law* (1988), 13, 23 ("Experience indicates that positive results depend not only on the legal techniques used, but also on a number of political factors related to the attitude of a given State towards existing international law and relevant international obligations.").

of view.[37] However, in general it is possible to draw an analogy between the genesis of the aforementioned theories and the historical circumstances at that time. The origin of the monistic view governed by national law can be found in the eighteenth century and lasted until the late nineteenth century.[38] This period (and thus the theory) can be classified as extremely nationalistic, since a few authoritarian States ruled over the whole world and public international law was seen as "external State law".[39] Historical progress is represented by its successor: the dualistic doctrine. The following period of political moderation also influenced the theory governing the relationship between international and national law. The devolution of history in world politics and the parallel development of the two theories culminated in the monistic doctrine with the primacy of international law. So the monistic doctrine with primacy of international law, which was more or less developed after the First and the Second World War, can be seen as the output of a pacifist world-view.[40] At least nowadays the identification of the aforementioned theories with the political developments of their times leads to the conclusion that these theories, or at least fundamental elements of them, have to be qualified either way as inappropriate. On the one hand extremely nationalist, and on the other hand utopian world-views, left their traces in the diverging theories. This may disqualify them from providing an adequate theoretical explanation for the current relationship between international and EU law as much as EU law and national law. In light of these connections, the diverging positions of the ECJ become far more understandable, at least in pragmatic terms. It is quite

37 See H. Kelsen, *Reine Rechtslehre* (1934), 142; and similar *id.*, '*Die Einheit von Völkerrecht und staatlichem Recht*', 19 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1958), 234, 246 *et seq.*; but cf. J. v. Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), 104 *et seq.* Cf. J. Nijman & A. Nollkaemper, *supra* note 36, 9, identifying the monists Scelle and Kelsen as value driven defenders of democracy and the individual against State power.

38 Compare major advocates of monism with the primacy of national law G. W. F. Hegel, *Grundlinien der Philosophie des Rechts* (1821), § 330 *et seq.*; A. Décencière-Ferrandière, 'Considerations sur le droit international dans ses rapports avec le droit de l'État', 40 *Revue Générale de Droit International Public* (1933) 1, 45, 64 *et seq.*; and also G. Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), 7, 40; however, on page 45 doubts were already expressed concerning this doctrine.

39 For this term (in German "*äußeres Staatsrecht*") see Hegel, *supra* note 38, § 330 *et seq.*, § 547.

40 See for a more detailed elaboration A. Cassese, *International Law*, 2nd ed. (2005), 213 *et seq.*

striking to see that the reason for adopting a dualistic point of view is driven by protectionism. The smaller entity prefers a reticent approach in order to safeguard itself against the suspicious bigger entity. Neither the high courts of Member States like a too dominant role of EU law[41] nor does the ECJ itself want EU law to be defenseless against international law.[42]

41 Compare, for example, *Lisbon*, German Federal Constitutional Court, Judgment, 2 BvE 2/08, 30 June 2009, para. 339 ("The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, a concept conferred under an international treaty, i.e. *a derived concept* which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This derivative connection is not altered by the fact that the concept of primacy of application is not explicitly provided for in the treaties but was developed in the early phase of European integration in the case law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that in any case in the clear absence of a constitutive order to apply the law, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court." (emphasis added by the author) (available in English at http://www.bundesverfassungsgericht.de/entscheidungen/es200906302bve000208en.html (last visited 28 January 2013)); for further references, see Schroeder, *supra* note 2, 168 *et seq.*; for an overview, see *id.*, 248-249 with further references in note 270; cf. M. Thaler, 'Rechtsphilosophie und das Verhältnis zwischen Gemeinschaftsrecht und nationalem Recht', 8 *Journal für Rechtspolitik* (2000) 1, 75, 77 with further references in note 5.

42 Compare *Kadi*, *supra* note 3, paras 285 *et seq.*, 326-327; and *Bank Melli*, *supra* note 3, para. 100 ("It is important to note at the outset that Security Council resolutions and Council common positions and regulations originate from *distinct legal orders*." (emphasis added by the author)). See also Fassbender, *supra* note 3, 336 *et seq.* Cf. the defensive attitude of the ECJ concerning WTO Dispute Settlement Body decisions within the EU legal order. Concerning the WTO Agreements in general see *Portugal v. Council*, ECJ, Judgment, Case No. 149/96, 23 November 1999; concerning DSB decisions and their direct effect on EU law see *Léon Van Parys*, ECJ, Judgment, Case No. 377/02, 1 March 2005; cf. *IKEA*, ECJ, Judgment, Case No. 351/04, 27 September 2007, paras 29 *et seq.*; *FIAMM et al.*, ECJ, Judgment, Case No. 120/06 P & 121/06 P, 9 September 2008, paras 117 *et seq.*; cf. K. Schmalenbach, 'Struggle for Exclusiveness: The ECJ and Competing International Tribunals', in I. Buffard *et al.* (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008), 1045, 1056 *et seq.* See also G. de Burca, *supra* note 18, 5 ("In fact, the broad language, carefully-chosen reasoning, and uncompromising approach of this eagerly-awaited judgment [*Kadi* case] by the plenary Court suggests that the ECJ seized this high-profile moment to send out a strong and clear message about the relationship of EC law to international law, and most fundamentally, about the autonomy of the European legal order.").

Why is this to be criticized? Are political decisions not the daily bread of international and national law as well? This is true concerning the genesis of law. However, the bindingness and, later on, the enforcement of law are strictly to be qualified according to legal and not political reasons. This is important in order to retain the politically achieved compromise or consensus as agreed between the decisive persons or organs. If there is leeway concerning the bindingness or the enforcement of a compromise agreed between political entities, then there is no point making this compromise, because either way it could be abandoned unilaterally afterwards. The decisive distinction and, coincidentally, the crucial point of criticism lie in the difference between political and legal reasons. The former are relevant to reach the agreement (strictly speaking the norm), and the latter are in charge of enforcing the decision once it has been taken. By mixing this, the whole concept of agreements and in more general terms the concept of law loses effect.

D. Conclusion

It can be concluded that the ECJ follows two diametrically diverging doctrines regarding the relationship of legal orders to one another. However, from a theoretical perspective, this is inconceivable. One and the same organization cannot follow two different approaches, one based on a dualistic and one on a monistic view. However, from a pragmatic perspective, this Janus Face of the ECJ is quite understandable. Bearing in mind the historical background of the origins of both doctrines, political influences regarding both doctrines show their benefits. Monism, on the one hand, is an expression of legal unity, which is absolutely necessary for the EU to safeguard its integration process. On the other hand, dualism helps to secure the stability of this integration process by separating the EU legal order from far reaching international influences. As Janus is known as the god representing the beginning and the end, the monistic face regarding the relationship of the EU to its Member States may represent the end of an integration process. The dualistic face might indicate the beginning of broader integration regarding international law. However, while this cannot be a conclusion in absolute terms, it is necessary to emphasize that none of these integration processes is absolute. Neither has the EU been turning into a federal State representing a “municipal legal order”, nor is it possible to separate the EU legal order – itself representing an international organization – that strictly from international law. Respecting this, it would

be wise not to build up absolute structures regarding other legal systems while being in a phase of transformation. However, at the same time, this is the reason why almost 100 year old theories might not offer the theoretical framework capable of accompanying a reasonable balance between the legal spheres involved. Knowing the presumed indecisiveness of lawyers, finding a possible solution for the dilemma discussed might be a calling, prevalent in other cases, for the “Lords of the Treaties”.

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The Supplement of Deficiencies in the Complaint Within the WTO Dispute Settlement Mechanism

Ana Constanza Conover Blancas*

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* BLaw, Universidad Nacional Autónoma de México (UNAM), email address: ana.conover@outlook.com. This paper was originally prepared during an academic exchange program funded by the Santander Group at the Universidad Autónoma de Madrid, Spain, in 2010. The author would like to thank Prof. Dr. Carlos Espósito for insightful comments and review, and Daniela Gómez Altamirano, whose generous suggestions on the topic made this article possible.

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Abstract

This paper analyzes the underprivileged status of developing countries as complainants in the WTO dispute settlement mechanism. After addressing the existing special and differential treatment provisions under the DSU, the competences of WTO panels, the role of complaints and the experience of developing countries as complainants within the WTO DSM, the author proposes an amendment to Article 7 of the DSU that would allow panels to supplement deficiencies in the complaints of developing-country and least-developed country Members, to compensate for a general lack of financial and human resources in these countries. Such amendment, as a means to correct defective or incomplete motions filed by the complainant party to a dispute, would enable panels to correct mistakes in the citation of legal authority and to remedy any deficiency found in the requests for the establishment of WTO panels, as well as the complainants' first written submissions.

A. Introduction

Developing-country Members' participation in the WTO Dispute Settlement Mechanism (DSM) has increased during the last decade. However, this increased participation is remarkably uneven; very few Members constitute the majority of developing countries participating in the system. In this sense, surveys have shown that most of developing-countries' representatives consider the lack of legal capacity one of the main reasons their governments eventually decided not to file a case to the DSM.

Indeed, there are significant financial, human, and institutional restrains that may impede WTO Members' exercise of their rights under the Dispute Settlement Understanding (DSU),[1] e.g., a lack of domestic WTO legal expertise or fewer financial resources to retain expert legal counsel. These sort of restraints create an asymmetry between developed-country Members' legal capacity and that of developing-country Members and Least Developed Countries (LDCs). Such asymmetry impacts the ability of developing-country Members and LDCs to obtain favorable outcomes with

[1] Available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited 28 January 2013).

regard to their complaints and to fully benefit and make use of the WTO dispute settlement system.

This article addresses the experiences of developing-country Members and LDCs in the WTO DSM, and proposes an amendment to the DSU to modify the panels' terms of reference in a way that would allow developing countries and LDCs an opportunity to remedy deficiencies in their complaints. Such an amendment would enable panels to correct the mistakes in the citation of legal authorities and, in particular, supplement and remedy any deficiency found in the initial request for the establishment of a panel and in the complainant's initial written submissions, as a means to correct defective or incomplete motions filed by complainants.

Such amendment could encourage developing-country Members and LDCs to have a wider participation in the WTO DSM, as they would receive direct assistance in enforcing their legal rights from the panels. Besides, it would allow the Appellate Body to analyze legal issues supplemented by panels which would otherwise not be subject to legal review.

This article is divided in four sections. The first section provides a general background concerning: ***(i)*** the Special and Differential Treatment (S&DT) provisions established in favor of developing-country Members and LDCs under WTO law and the DSU; ***(ii)*** the role and competences of panels within the WTO DSM; ***(iii)*** the relevance of panels' terms of reference; and ***(iv)*** the role of complaints in the DSM.

The second section analyses developing-country and LDC Members' experiences as complainants in the WTO DSM through August 2012. Unless specified otherwise, all statistical data is based on the Worldtradelaw.net database, which labels countries as low income, lower middle income, upper middle income, and high income. Low income countries include countries such as Nicaragua, India and Pakistan; lower middle income countries include Peru, Philippines and Colombia. Upper middle income countries include Mexico, Brazil and South Africa. High income countries include the United States, the European Union (formerly "the European Communities") and Japan.[2] For purposes of this article, the data corresponding to high income countries has been used as relating to developed-country Members, whereas the data concerning low income,

[2] The Worldtradelaw.net database is frequently used among WTO practitioners and it is partnered with the Georgetown University Institute of International Economic law, a leading academic center on WTO law.

lower middle income and upper middle income countries has been used in reference to developing-country Members.

The third section concerns the principle of supplementing deficiencies found in complaints, its definition, origins and scope of application, and puts forward the applicability of such principle in the WTO DSM.

The fourth section of the paper discusses a proposed amendment to Article 7 of the DSU, and addresses the feasibility of coherently incorporating the ability to supplement deficiencies in complaints with WTO case law. The most difficult part of such an endeavor lies in previous cases concerning the interpretation of Article 6.2 of the DSU, particularly issues such as the panels' inability to cure the failings of a deficient panel request, a potential lack of jurisdiction over imprecise claims or claims not included in panel requests, and due process allegations. Finally, the article addresses the main criticisms that could be raised regarding the applicability of such principle in the WTO DSM.

B. Background

I. S&DT Provisions and the WTO Dispute Settlement System: A Brief Review

Since the advent of the WTO, it is clear that the system was intended to encourage developing countries' participation, as demonstrated by the S&DT provisions laid out across the WTO agreements.[3] These provisions grant preferential treatment only to developing-country and LDC Members while the same preferential treatment is not given to developed countries. In other words, S&DT provisions were intended to level the playing field and

[3] In general, the WTO special and differential treatment provisions comprise: technical assistance, longer time periods for implementing agreements and commitments, a more favourable treatment in the multilateral negotiation of non-tariff measures, preferential tariff rates for developing countries, preferences from regional or general agreements concluded between developing countries in the framework of reciprocal trade, and/or any special treatment for less developed countries in favor of developing countries and LDC Members. See, e.g., K. Bohl, 'Problems of Developing-Country Access to WTO Dispute Settlement', 9 *Chicago-Kent Journal of International & Comparative Law* (2009), 130, 133-134 [Bohl, Problems of Developing-country Access]; A. Keck & P. Low, 'Special and Differential Treatment in the WTO: Why, When and How?' (May 2004), available at http://ssrn.com/abstract =901629 (last visited 28 January 2013).

take into account the existing asymmetries between large and small economies within WTO membership.[4]

In the early days of GATT 1947, special provisions for developing countries were limited to Article XVIII of the Agreement, which were to assist the progressive development of the economies of Contracting Parties that were in premature stages of development.[5]

In 1963, during the preparatory phase of the Kennedy Round, the principle of "non-reciprocity", under which developing countries are not obligated to grant the same preferential treatment given to them by developed countries, was recognized. As a result, in 1964, the GATT Contracting Parties agreed to the addition of Part IV (on Trade and Development) to GATT, which came into force in 1965.[6] Part IV set forth certain provisions concerning principles, commitments, and joint actions in favor of developing countries.[7] That same year, the Contracting Parties

4 See International Institute for Sustainable Development, 'Special and Differential Treatment', 2 *IISD Trade and Development Brief* (2003), available at http://www.iisd.org/pdf/2003/investment_sdc_may_2003_2.pdf (last visited 28 January 2013), 2; and M. Tortora, 'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet', UNCTAD WEB/CDP/BKGD/16 (2003), 1, 14.

5 Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77, 25 October 2000. Art. XVIII of *GATT*, 30 October 1947, 55 U.N.T.S. 187, 252-258. Art. XVIII referred to the Governmental Assistance to Economic Development, divided into four sections. Section A allowed the Contracting Parties to modify or withdraw tariff concessions in order to promote the establishment of a particular industry. Section B provided for additional flexibility for the use of quantitative restrictions. Section C allowed developing countries to use any measure not consistent with other GATT stipulations (except Arts I, II and XIII) in case of the promotion of a particular industry. Finally, Section D enabled developing countries to be released from their obligations under relevant provisions of other articles of the GATT to the extent necessary to the establishment of a particular industry.

6 WTO (ed.), *GATT Analytical Index, Part IV: Trade and Development*, (2012), 1039-1051 [GATT Analytical Index (2012)].

7 These provisions are Arts XXXVI, XXXVII and XXXVIII of the GATT. Art. XXXVI enables less-developed Contracting Parties to use special measures to promote their trade and development and codifies the non-reciprocity principle in its paragraph 8. Art. XXXVII requires developed countries to, *inter alia*, prioritize the reduction and removal of barriers which affect less-developed countries and to make every effort to maintain trade margins at equitable levels. Art. XXXVIII states, *inter alia*, that GATT Contracting Parties shall act jointly to guarantee greater participation by less developed parties in international trade and shall provide them with greater access to primary product markets.

established the Committee on Trade and Development to continuously review the application of Part IV of the GATT.[8]

In 1979, the Contracting Parties adopted the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", commonly known as the "Enabling Clause", as it allowed developed Members to give differential and preferential treatment to developing countries.[9] Following the Tokyo Round in 1980, the Sub-Committee on Trade of Least-Development Countries was established by the Committee on Trade and Development to give special attention to the particular situation and trade problems of the least-developed among the developing countries.[10]

Hence, by the time of the Uruguay Round, the special and different treatment clauses had become embedded into the GATT system.

With the establishment of the World Trade Organization, Members agreed to incorporate S&DT provisions into the DSU, an integral part of the WTO Agreement that is binding on all Members.[11] The text of the DSU contains at least eleven S&DT provisions.[12] These provisions include, for example, the obligation of Members to give "special consideration" to interests of developing-country Members during consultations.[13]

With respect to the panels' composition, developing-country Members can demand that at least one panelist in cases in which they are a party be a national of a developing country.[14] In consultations involving a measure

8 *GATT Analytical Index (2012)*, *supra* note 6, 1045-1046.

9 Para. 1 of this decision provided as follows: "1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD 26S/203, 28 November 1979.

10 *GATT Analytical Index (2012)*, *supra* note 6, 1050.

11 *Agreement Establishing the World Trade Organization*, Art. 2.2, available at http://ww w.wto.org/english/docs_e/legal_e/legal_e.htm (last visited 28 January 2013).

12 DSU, Arts 3.12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24.1, 24.2, and 27.2. See World Trade Organization, Development Division, 'Background Document, Annex II: Summary of Provisions Contained in the Uruguay Round Agreements for the Differential and More Favourable Treatment of Developing and Least Developed Countries' (17 March 1999), available at www.wto.org/english/tratop_e/devel_e/bkgd ev_e.doc (last visited 28 January 2013).

13 DSU, Art. 4.10.

14 *Id.*, Art. 8.10.

taken by a developing-country Member, a time extension may be granted to such Member to prepare and present its arguments.[15]

In case one or more of the parties to a dispute is a developing-country Member, the panel's report shall indicate the form in which account has been taken of the relevant S&DT provisions that form part of the covered agreements raised by the developing-country Member in the course of the dispute settlement procedures.[16] On surveillance of the implementation of recommendations or rulings, matters affecting the interests of developing-country Members related to issues subject to dispute settlement should receive particular attention.[17]

Moreover, "particular consideration" shall be given to the special situation of LDC Members at all stages in the determination of causes of dispute and during dispute settlement.[18] Furthermore, Members shall "exercise due restraint" in raising matters under these procedures involving an LDC Member.[19]

Although these provisions are intended to "support to help developing countries build the infrastructure for WTO work [and] handle disputes",[20] and indeed represent the culmination of decades of negotiations concerning developing countries' interests and the WTO DSM, the vagueness in the wording of some of the S&DT provisions, along with the lack of sanctions for non-compliance, diminish the value of their applicability in practice. This has led to comments such as the following:

> "The DSU contains provisions providing positive measures designed to assist developing countries by addressing their particular problems and interests. However, these measures are not effective and adequate [...]. Most of the provisions on special and differential treatment of developing countries are so hortatory and imprecise that it is either difficult for developing countries to invoke these provisions to their benefit or the invocation of such provisions does not help at all [...]. Therefore,

15 *Id.*, Art. 12.10.
16 *Id.*, Art. 12.11.
17 *Id.*, Art. 21.2.
18 *Id.*, Art. 21.8.
19 *Id.*, Art. 24.1.
20 WTO, *10 Things the WTO Can Do: No. 6 Help Countries Develop*, available at https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi06_e.htm (last visited 28 January 2013).

> there is a pressing need to reform the WTO dispute settlement system to make it work for developing countries and remain relevant. Otherwise the system risks accusations of being deficient and biased to developed countries."[21]

Expressions such as to give "special consideration", to allow "sufficient time" or to pay "particular attention" to developing-country Members, and to give "particular consideration" and "exercise due restraint" in raising matters under dispute settlement procedures involving LDC Members are simply too broad and do not seem to point at any specific obligation of panels or developed-country Members. What does it mean to give "special consideration"? What are the limits of giving such "particular attention" to developing-countries? How much time is "sufficient time"? It is not clear. These provisions could be more accurately described as general statements, difficult to enforce in practice, for the settlement of disputes involving developing-country Members and LDCs.

Therefore, the need to reform the current legal framework for developing-country and LDC Members under the DSU becomes relevant. However, any amendment would require concrete actions so that any newly imposed obligation on panels would be clear and Members could understand its scope of application. Part four tackles this reality in its discussion of a proposed amendment to Article 7 of the DSU concerning the rights of developing-country and LDC Members.

II. Role and Competences of WTO Panels

Understanding the nature of the WTO DSM and its relationship with S&DT provisions requires a discussion of the role and competences given to the body in charge of hearing the parties' arguments and issuing a report to adjudicate disputes: the panel.

As it is well-known, there are three main stages of the DSM: consultations between the interested parties, adjudication by panels (and the Appellate Body, if appealed), and the implementation of the ruling.

[21] G. R. Lekgowe, 'The WTO Dispute Settlement System: Does it Work for Developing Countries?' (24 April 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045470 (last visited 28 January 2013), 23 [Lekgowe, The WTO Dispute Settlement System].

If consultations between the parties fail to settle the dispute within 60 days of the receipt of the request for consultations, the complaining party may request that the DSB establish a panel to adjudicate the dispute.[22]

Panels are generally composed by three members but may, in certain cases, have five members. The panelists are nominated by the WTO Secretariat from a list, and must possess the required expertise to the subject of the case, but may not be citizens of parties or third parties to a dispute.[23]

The panels' function is "to assist the DSB in discharging its responsibilities under [the DSU] and the covered agreements." In particular, a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Panels should also consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[24]

Panelists have the power to seek information and technical advice from any appropriate individual or body.[25] Moreover, panels shall preserve the rights and obligations of Members under the covered agreements and have the duty of clarifying the existing provisions of these agreements. However, WTO panels are precluded from increasing or impairing the rights and obligations provided in the covered agreements.[26]

A panel submits its findings in the form of a written report to the DSB, which is then circulated to all WTO Members and published, after the following process has been followed:

> "Panel procedures normally begin with the receipt of (often lengthy) written submissions by the plaintiff and respondent, which are then exchanged. Any third parties may then make their own submissions [...]. This is followed by a closed oral hearing involving all of the parties after which the parties exchange written rebuttals to each other's legal arguments. A

22 DSU, Art. 4.7. In many cases, however, the complaining party will not, immediately upon the expiration of the 60 day period, request the establishment of a panel, but will allow for considerably more time to settle the dispute through consultations. UNCTAD (ed.), *Course on Dispute Settlement in International Trade, Section 3.2: Panels* (2003), 5.

23 DSU, Art. 8.

24 *Id.*, Art. 11.

25 *Id.*, Art. 13.

26 *Id.*, Arts 3.2 and 19.2.

> second closed oral hearing is then held, during which the parties' arguments and rebuttals are presented. Where expert evidence, usually of a scientific nature is required, additional sets of oral hearings may be held. A panel then drafts the 'descriptive' section of its report outlining the arguments of each party and summarizes all of the factual and legal arguments which is circulated to the parties for comments and corrections. This is followed by the circulation of the Interim Review, which contains the description of the case along with a panel's findings and conclusions regarding the legal validity of the complaint. Again, the parties are permitted to make comments, request corrections and ask a panel to review specific points. These amendments and elaborations are then incorporated to produce a Final Panel Report which is circulated to all WTO Members and published."[27]

As further analyzed below, a crucial aspect of panels' competences throughout dispute settlement procedures are their terms of reference, insofar as a panel may consider only the claims identified under its terms of reference.

III. The Need for Consistency Between Panels' Requests and Panels' Terms of Reference

Unless the parties agree otherwise, a panel is given the following standard terms of reference:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement."[28]

[27] R. Read, 'Dispute Settlement, Compensation and Retaliation Under the WTO', in W. A. Kerr & J. D. Gaisford (eds), *Handbook on International Trade Policy* (2007), 497, 501 [Read, Dispute Settlement Under the WTO].

[28] DSU, Art. 7.

The "document" in these standard terms of reference is usually the request for the establishment of a panel, provided for in Article 6.2 of the DSU.[29] This article serves a pivotal function in WTO dispute settlement, and sets out two key requirements that a complainant must satisfy in its panel request: the "identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (or the claims)". Together, these two elements constitute the "matter referred to the DSB", so that, if either element is not properly identified, the matter is not within the panel's terms of reference. Both elements are therefore crucial to defining the dispute's scope that the panel is to address.[30]

The Appellate Body has repeatedly stated that panel requests must be sufficiently precise for two main reasons: ***(i)*** they form the basis for the

[29] Reports of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, 86, para. 219 ("a panel request forms the basis for the terms of reference of panels.") [China-Exportation of Raw Materials]. See also Report of the Appellate Body, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, 20 October 1998, 65, para. 220 ("[t]he matter at issue is set forth in the Panel's terms of reference, which are usually defined by the request for establishment of a panel.").

[30] *China-Exportation of Raw Materials*, *supra* note 29, 86, para. 219; Report of the Appellate Body, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, 223-224, para. 562 ("[t]he panel request "assists in determining the scope of the dispute" in respect of each measure and consequently, establishes and delimits the jurisdiction of the panel.") [EC-Fasteners]; Report of the Appellate Body, *Australia – Measures Affecting the Importation of Apples from New Zeleand*, WT/DS367/AB/R, 29 November 2010, 144-145, para. 416 [Australia-Apples]; Report of the Appellate Body, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, 4 February 2009, 68, para. 168 ("[t]he identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction.") [US-Continued Zeroing]; Reports of the Appellate Body, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, 61-62, para. 155 [EC-Chicken Classification]; Report of the Appellate Body, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, 25 April 2005, 47-48, para. 120 [Dominican Republic-Cigarettes]; Report of the Appellate Body, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, 28 November 2002, 42, para. 125 [US-German Steel CVDs]; Report of the Panel, *United States – Tax Treatment for "Foreign Sales Corporations", Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2, 30 September 2005, 25, para. 7.71.

terms of reference of panels, pursuant to Article 7.1 of the DSU; and ***(ii)*** they ensure due process by informing the respondent and third parties of the matter brought before a panel.[31]

Since a panel is bound by its terms of reference, it is very important that a request for the establishment of a panel be sufficiently precise. But what happens if a panel request is deficient and claims are poorly or imprecisely defined? As it will be further discussed in part four of this document, WTO case law has determined, in several occasions, that panels are not permitted to cure the failings of a deficient panel request, and that imprecise claims may lead to determine the lack of jurisdiction over such claims. This approach may, however, do more harm than good in balancing developing-country and LDC Members' legal capacity in the WTO DSM. On the contrary, panels should be given the authority to supplement deficiencies in the request for the establishment of a panel, and to assist developing-country and LDC Members so that panels' terms of reference can be sufficiently precise.

[31] *Australia-Apples*, *supra* note 30, 144-145, para. 416; Report of the Appellate Body, *United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, 18 August 2009, 46, para. 108 [US-Zeroing (Japan), Article 21.5]; *US-Continued Zeroing*, *supra* note 30, 65-66, para. 161; *EC-Chicken Classification*, *supra* note 30, 61-62, para. 155; Reports of the Appellate Body, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, 28 April 2005, 51, para. 143 [EC-Sugar Subsidies]; *US-German Steel CVDs*, *supra* note 30, 42-43, para. 126; Report of the Appellate Body, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, 12 March 2001, 25, para. 84-85 [Thailand-Steel]; Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, 38-39, paras 122-124 [Korea-Dairy Safeguards]; Report of the Appellate Body, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, 26, para. 69; Report of the Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, 19 December 1997, 30-31, para. 87 [India-Patents]; Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, 63-64, para. 142 [EC-Bananas].

IV. The Importance of Complaints Under the DSM

Along with panels' terms of reference, complaints constitute the initial step to proceed with the dispute settlement mechanism after the establishment of a panel.

It has been noted that complaints may encourage Members with consistently targeted policies to adjust such policies in view of the interpretation of WTO norms made by panels and the Appellate Body. Sevilla points to the fact that "the virtual guarantee of access to a panel and adoption of the report makes formal complaints a useful tool for achieving some kind of policy modification in the target state."[32]

In other words, "complaints have important distributional implications regarding the burden of compliance with international trade agreements *ex post*, since they determine which of the signatories are required to adjust their policies in light of specific interpretations of written rules."[33]

Complaints may eventually modify the interpretation of WTO norms and their application over time due to the influence that active participants have in panel proceedings and the manner in which their arguments can impact or integrate part of the arguments used in support of panels' findings within panel reports, and the subsequent interpretation of rules. Therefore, participation in the WTO dispute settlement system is essential for shaping the interpretation of WTO law over time.[34]

Complaints therefore serve to enforce WTO law by allowing the consistency of norms that have not been otherwise voluntarily adhered to. Moreover, they provide a valuable *know-how* on dispute settlement mechanisms by improving the experience of WTO Members on this regard.[35]

32 C. R. Sevilla, 'A Political Economy Model of GATT/WTO Trade Complaints', available at http://centers.law.nyu.edu/jeanmonnet/archive/papers/97/97-05.html (last visited 28 January 2013) [Sevilla, GATT/WTO Trade Complaints].

33 C. R. Sevilla, *Explaining Patterns of GATT/WTO Trade Complaints* (1998), 2.

34 See, e.g., G. Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies', in V. Mosoti (ed.), *ICTSD Resource Paper 5: Towards A Development-Supportive Dispute Settlement System in the WTO* (2003), 10.

35 For further analysis on the importance of complaints see C. P. Bown, 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes', 27 *The World Economy* (2004) 1, 59 [Bown, Developing Countries in GATT/WTO Trade Disputes].

C. Developing Countries as Complainants Within the WTO DSM

I. General Overview

Several empirical studies analyzing the participation of developing-country Members in the WTO DSM have been conducted since 1999:

> "In 1999 Horn, Mavroidis, and Nordstrom wrote the first significant empirical paper on developing country participation in the dispute settlement process. They [...] examined the effect of power and capacity constraints on the decision to bring a complaint and found that the capacity constraint has some effect but power has almost none [...]."[36]
> "Busch and Reinhardt (2003) stressed on the issue of legal capacity and argued, "developing countries require more assistance in the lead up to a case [...] wealthier countries have realized more favorable outcomes since 1995." Their observation was further reinforced by Besson and Mehdi (2004) who found that developing countries were unlikely to obtain a favorable outcome because of asymmetric legal capacity. Besson and Mehdi also suggested that when a developing country was reliant on a developed country for bilateral assistance, it was unlikely for that developing country to win a dispute against that developed country."[37]

From 1948 to 1996, the large States accounted for over 85% of all complaints under the GATT system.[38] Since the entry into force of the WTO

[36] G. Antell & J. W. Coleman, 'An Empirical Analysis of Wealth Disparities in WTO Procedures: Do Poorer Countries Suffer From Strategic Delay During Dispute Litigation?', 29 *Boston University International Law Journal* (2011) 2, 267, 271 (internal citations omitted).

[37] S. Odano & Z. Abedin, 'Insufficiency in the Dispute Settlement Mechanism of the WTO: Consequences and Implications for the Multilateral Trading System', *GSIR Working Papers* (2008), 2 [Odano & Abedin, Insufficiency in the WTO DSM].

[38] The EC and its member States held the first place as defendants with 43% (127 of 295 complaints), followed by the United States with 28% (83 complaints), and Japan and Canada at 7% (22 cases) and 6% (18 cases), respectively. Sevilla, *GATT/WTO Trade Complaints*, *supra* note 32. Busch and Reinhardt calculated 654 bilateral disputes

until 2002, 82 panel rulings were issued, of which 90% represented a success for the complainant.[39] Therefore, earlier studies on developing-country participation in the WTO DSM found that a high rate of large-economy countries as plaintiffs was correlated with a high rate of victories and litigation payoffs, and a scarce participation of developing economies with a correlative small rate of litigation payoffs.[40]

But has this changed during the last decade? And, if so, how? As of August 2012, 442 complaints have been filed under the DSU, of which 269

from 1948- 2000 of which 52% involved the United States while 36% the European Communities. M. L. Busch & E. Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement', in D. Kennedy & J. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (2002), 457, 462.

39 A case can be deemed as "won" by the complainant if the panel urged the defendant party to bring its measures, or some of the measures contested by the complainant party, into conformity with the recommendations and rulings of the DSB forasmuch as some of the policies carried out by the defendant are considered as inconsistent with its WTO obligations. Based on a dataset of 380 concluded GATT/WTO disputes from 1980-2000, 154 occurred under the WTO of which 109 favored the complainant, 26 were mixed, and 17 found for the defendant. M. L. Busch & E. Reinhardt, 'Developing Countries and GATT/WTO Dispute Settlement', 37 *Journal of World Trade* (2003) 4, 719, 723-724. Holmes, Rollo and Alasdair situate the win rate for complainants on 88% of the cases. P. Holmes, J. Rollo, & R. Alasdair, 'Emerging Trends in WTO Dispute Settlement: Back to the GATT?', *World Bank Policy Research, Working Paper No. 3133* (2003), 17.

40 See H. Horn, P. Mavroidis & H. Nordstrom, 'Is the Use of the WTO Dispute Settlement System Biased?', *CEPR Discussion Paper No. 2340* (1999); C. Michalopoulos, *Developing Countries in the WTO* (2001); Busch & Reinhardt, *Developing Countries and GATT/WTO Dispute Settlement*, *supra* note 39; A. Guzman, 'The Political Economy of Litigation and Settlement at the WTO' (12 October 2002), available at http://ssrn.com/abstract=335924 (last visited 28 January 2013); G. Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries*, *supra* note 34, 7; F. Besson & R. Mehdi, 'Is WTO Dispute Settlement System Biased Against Developing Countries?: An Empirical Analysis', available at http://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf (last visited 28 January 2013); Bown, *Developing Countries in GATT/WTO Trade Disputes*, *supra* note 35, 5; G. Shaffer, 'Can WTO Technical Assistance and Capacity Building Serve Developing Countries?', 23 *Wisconsin International Law Journal* (2005) 4, 643; C. P. Bown & B. M. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', 8 *Journal of International Economic Law* (2005) 4, 861; G. Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation', 5 *World Trade Review* (2006) 2, 177.

have been lodged by developed-country Members, and 189 by developing-country Members.[41] Hence, complaints by developed countries account for over 60% of the total number of complaints under the DSU, versus 40% of complaints filed by developing-country Members.

Although developed countries submitted a greater number of complaints under the DSU until the year 2000 (as compared to the number of complaints filed by developing-country Members during the same period), since 2001 this is no longer the case.[42] In fact, during 2001 to 2012, developed countries filed 109 complaints, compared to the 115 filed by developing-country Members.[43]

Technically, these figures suggest that there is no longer an unequal participation by developing economies in the WTO DSM. This has led commentators such as Peter van den Bossche to assert that "developing-country Members have made much use of the WTO dispute settlement."[44] Yet, recent analyses have also concluded that the countries with a large share in world trade "not only tend to use the dispute settlement mechanism more but also win more disputes than the countries with low financial strength and small trade share."[45]

41 As noted by the WorldTradeLaw.net database, a number of complaints have been filed by multiple Members acting jointly and, in some of these complaints, the Members filing the complaint fall into different income categories. In such cases, the complaint has been counted in each income category in which at least one complainant falls. Therefore, the number of the complaints adds up to more than the total number of complaints under the DSU. Section "WTO Complaints Grouped by Income Classification", available at http://www.worldtradelaw.net/dsc/database/classificationcount.asp (last visited 28 January 2013).

42 During the first five years of the WTO (1995-2000), developed countries filed 160 cases, against 74 complaints filed by developing-country Members (figures based on the author's assessment of the Worldtradelaw.net "WTO Dispute Settlement Tables and Statistics", available at http://www.worldtradelaw.net/dsc/stats.htm (last visited 28 January 2013)).

43 During the period 2006-June 2012, 53 complaints were lodged by both developed countries and developing-country Members; and during 2000 to 2005, developing-country Members filed 82 complaints, against 73 complaints filed by developed countries (figures based on the author's assessment of the Worldtradelaw.net "WTO Dispute Settlement Tables and Statistics", available at http://www.worldtradelaw.net/dsc/stats.htm (last visited 28 January 2013)).

44 P. v. d. Bossche, *The Law and Policy of the World Trade Organization*, 2nd ed. (2008), 231 [v. d. Bossche, The Law and Policy of the WTO].

45 Odano & Abedin, *Insufficiency in the WTO DSM*, *supra* note 37, 13. See also J. C. Hartigan (ed.), *Trade Disputes and the Dispute Settlement Understanding of the WTO:*

In a way, both findings do not contradict each other. Developing-country Members have indeed become active participants in the WTO DSM and yet – despite the figures shown above – developed-country Members have continued to benefit more from the WTO DSM. The main reason behind this is that participation in the WTO DSM has not been evenly dispersed among developing countries; a very small number of Members constitutes the majority of developing countries participating in the system.

II. A Selected Group of Developing-Country Complainants

At present, the six most active developing countries (Brazil, Mexico, India, China, Thailand and Argentina) account for 60% of the cases involving developing countries; and the 14 most active developing country users account for 90% of cases.[46]

It follows that although figures may suggest that complaints during the last decade have been filed in almost the same proportion by developed and developing-country Members, in fact, the majority of developing countries has not been involved in WTO dispute settlement proceedings.[47] As accurately described by one commentator:

> "[T]hese aggregate figures are misleading in several respects. First, the developing countries that used dispute settlement provisions under the GATT are still the main users under the WTO. Brazil alone totals 103 instances of participation in a dispute [...] and India totals 106 instances. Mexico participated in 90 cases. Argentina and Thailand come next, as they did under the GATT, with over 60 instances each. China is the

An Interdisciplinary Assessment (2009), 236 ("the empirical findings of this paper raise implications for a potential bias of the dispute settlements system's usage.").

46 N. Meagher, 'The WTO Dispute Settlement Process and Developing Countries: Issues and Challenges' (8 June 2012), available at www.tradelaw.nccu.edu.tw/%E5%B0%88%E9%A1%8C%E6%BC%94%E8%AC%9B/ppt/2012%E5%B0%88%E9%A1%8C%E6%BC%94%E8%AC%9B%28Niall_Meagher_8_June_2012%29.pdf (last visited 28 January 2013), 7 [Meagher, The WTO Dispute Settlement Process].

47 See H. Nottage, 'Developing Countries in the WTO Dispute Settlement System', 47 *GEG Working Paper* (2009), 2 ("the vast majority of developing countries have not participated actively in the WTO dispute settlement system. This raises concerns that they are not benefitting fully from the WTO legal regime.") [Nottage, Developing Countries in the WTO].

> major newcomer, with 108 instances of participation [...]. However, as in the GATT, the bulk of developing countries, particularly African ones, have virtually no record of participating in disputes.
> [...]
> Second, the likelihood that a developing country will face a complaint has grown exponentially, despite their proportionally lower participation in disputes overall. Between 2005 and 2011, disputes between developed and developing countries amounted to more than half of the total number of disputes [...].
> Third, the number of disputes between developing countries has also grown [...]. Between January 2005 and October 2011, 25 of 102 new disputes were between developing countries.
> Fourth, and perhaps even more importantly, the number of instances where developing countries made development arguments has not grown proportionally with their overall participation, compared to the record of the GATT years. This is all the more surprising given that the proliferation of SDT clauses in the WTO agreements now provides many more opportunities for making development-oriented arguments that under the GATT."[48]

Besides, the near absence of LDCs in the WTO dispute settlement mechanism is noteworthy. The first LDC to ever file a complaint was Bangladesh in 2004 when it requested consultations with India over anti-dumping measures on battery imports from Bangladesh.[49]

This lack of participation by most of developing-country Members in the WTO DSM raises concerns and has led several commentators to question whether the DSM is biased against developing-country Members.[50]

48 S. E. Rolland, *Development at the WTO* (2012), 142-143 [Rolland, Development at the WTO].

49 See Request for Consultations by Bangladesh, *India – Anti-Dumping Measure on Batteries from Bangladesh*, G/ADP/D52/1, G/L/669, WT/DS306/1, 2 February 2004.

50 For authors arguing that there is evidence supporting that the WTO DSM is biased against developing-country Members see *supra* note 40. See also W. A. Kerr & J. D. Gaisford (eds), *Handbook on International Trade Policy* (2008), 78 ("different criticisms have been leveled against the DSU. The first is that the procedure is biased against small countries, who can less easily afford the legal costs."); A. Santos, 'Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil & Mexico', 52 *Virginia Journal of*

In any case, "if the dispute settlement system has credibility in principle and could deliver if developing countries were able to utilize it to its full potential,"[51] then why are most of these Members not making use of it?

III. Reasons Behind a Less Active Participation in the WTO DSM

There are several reasons why developing-country Members and LDCs do not participate more frequently in WTO dispute settlement proceedings, some of which are not directly related to their legal capacity. For instance, the overall dispute settlement activity has declined in recent years.[52] Besides, several developed countries participate infrequently in the DSM.[53]

However, there are several other reasons which indicate a lack of legal *know-how* and other human capital.[54] Generally, these restraints include the high costs of access to the system, the lack of sufficient domestic WTO legal expertise, foreign language difficulties, and the technicalities concerning WTO law.[55]

International Law (2012) 3, 551, 631 ("the asymmetry of power and resources between countries does affect their experience in the system and thus influences the outcomes to a greater extent than liberal trade scholars usually acknowledge.").

51 Rolland, *Development at the WTO*, *supra* note 48, 137.

52 Whereas during the period 1995-2000 developed-country complaints accounted for 160, during 2000-2005 only 73 complaints were filed and during 2006-2012, the number of complaints filed by developed countries dropped to 53. Similarly, during the period 1995-2000 complaints filed by developing countries accounted for 74, during 2000-2005 this number increased to 82, and during 2006-2012, the number of complaints filed by developing countries dropped to 53 (figures based on the author's assessment of the Worldtradelaw.net "WTO Dispute Settlement Tables and Statistics", available at http://www.worldtradelaw.net/dsc/stats.htm (last visited 28 January 2013)).

53 For example, Australia has participated as a complainant only seven times. Worldtradelaw.net, Section "WTO Complaints Filed By Selected WTO Members", available at http://www.worldtradelaw.net/dsc/database/complaintscomplainant.asp (last visited 28 January 2013).

54 Meagher, *The WTO Dispute Settlement Process*, *supra* note 46, 10.

55 See A. T. Guzman & B. A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes', 34 *Journal of Legal Studies* (2005) 2, 557.

The complexity of the measures at issue in panel proceedings results in the need for expensive, specialized legal expertise or 'attorney-time'.[56] These cost problems are accentuated by developing countries' small trade shares and government budgets, and a lack of proper domestic WTO legal expertise.[57]

Also, there is a much shorter supply of scholars and graduates specialized in WTO affairs in developing countries and LDCs than there is in developed countries.[58] This situation has two main consequences: first, the number of domestic law firms specializing in WTO law decrease; and

[56] Fees may usually vary between US$600 and more than US$1000 per hour when private law firms are hired to advise and represent States in international proceedings. See, e.g., V. O'Connell, 'Big Law's $1,000-Plus an Hour Club' (23 February 2011), *The Wall Street Journal*, available at http://online.wsj.com/article/SB10001424052748704071304576160362028728234.html ("[l]eading attorneys [...] are asking as much as $1,250 an hour, significantly more than in previous years.").

[57] See D. Bethlehem *et al.* (eds) *The Oxford Handbook of International Trade Law* (2009), 492 ("[t]he cost problems faced by developing countries in the WTO are accentuated by their small trade shares and government budgets [...]. These factors have resulted in developing countries being at an undeniable resource and cost disadvantage in WTO dispute settlement proceedings.") [Bethlehem *et al.*, The Oxford Handbook of International Trade Law]; Nottage, *Developing Countries in the WTO*, *supra* note 47, 4 ("[a] number of WTO Members and commentators argue that WTO dispute settlement system is 'overly complicated and expensive' resulting in insurmountable 'human resource as well as financial implications' for developing countries. Ambassador Bhatia of India observed that, even for a large developing country, the high costs of WTO litigation are a 'major deterrent' for using the system. Developing-country concerns with the high costs of WTO litigation stem from many governments lacking sufficient internal WTO legal expertise to conduct disputes themselves."); Bohl, *Problems of Developing-country Access*, *supra* note 3, 131-132 ("[m]ember states with smaller economies or in differing stages of development either tend to shy away from participating in disputes or are unable to access the system. The reasons for this may include a lack of resources, a lack of institutional capacity, or a lack of political will."); and Read, *Dispute Settlement Under the WTO*, *supra* note 27, 507 ("[a]lthough the DSU Articles pay special attention to the needs of developing countries, their participation continues to be constrained by a lack of financial and intellectual resources necessary to fight dispute cases.").

[58] See, e.g., H. Hohmann, *Agreeing and Implementing the Doha Round of the WTO* (2008), 312-313 ("[developed] WTO Members have highly qualified and experienced lawyers. They also have more sophisticated private industries that also contribute resources to assist the government in defending the country's interests in the dispute settlement system. This, combined with the complexity of the WTO dispute settlement proceedings, has resulted in *developing countries being at a distinct disadvantage in WTO dispute settlement.*") (emphasis in the original).

second, the costs associated with "importing" WTO legal expertise from abroad increase.[59]

Moreover, language is another aspect in which developing-country Members and LDCs seem to find an additional barrier, as most of them must participate in WTO panel proceedings that are not in their respective native languages.[60]

The abovementioned considerations are closely interrelated. A more infrequent use of the DSM by developing countries and LDCs may correspond to their comparatively smaller volume of trade, which might explain a fewer mobilization of legal resources, including resources to develop domestic WTO law expertise. A lack of domestic lawyers specialized on international trade law ultimately forces most of developing-country Members and LDCs to retain high-cost legal consultancy and litigation services from abroad.

An interesting study on this matter was conducted by Busch, Reinhardt and Shaffer through a series of surveys made to WTO Members to investigate the main reasons why developing-country Members and LDCs considered themselves constrained to actively participate in the WTO DSM. The results of the survey highlighted the importance of strengthening the legal capacity of these Members.[61]

The study indicated that most of developing-country representatives considered the lack of legal capacity as one of the main reasons why their governments had considered not filing a case to the DSM. In particular, 56% of the respondents pointed at the "high cost of litigation" or a "lack of private sector support", while 9% decided to intervene as third party instead of as party to a dispute so that the experience would be "training for future

59 See, e.g., R. R. Babu, *Remedies Under the WTO Legal System* (2012), 369 ("[t]he lack of expertise in WTO and huge cost of litigation, apart from the incidental cost of having a base and litigating in Geneva have made the DSU process unaffordable for most developing countries [...]. Consequently, for the victim, especially the developing country victim, the costs of dispute settlement and retaliation are generally too high and unaffordable.").

60 In these cases, costs associated with official translations of every document submitted to the panel should be taken into consideration.

61 The survey included the delegations of 150 Member States, of which 52 delegations responded in full, in 2007. The respondents included a broad range of membership in terms of income and geographical diversity. M. L. Busch, E. Reinhardt & G. Shaffer, 'Does Legal Capacity Matter?: Explaining Patterns of Protectionism in the Shadow of WTO Litigation' (1 February 2008), available at http://ssrn.com/abstract=1091435 (last visited 28 January 2013).

disputes." Besides, 88% of the respondents expressed that the advantages of developed Members within the DSM came primarily from their legal capacity instead of other factors, such as market power.

The DSU contains certain provisions designed to address these resource constraints. Article 27.2 provides that the WTO Secretariat shall make available experts to provide "additional legal advice and assistance" to developing countries. This provision's efficacy is, however, debatable. As noted by several commentators, experts may not provide legal advice prior to the initiation of a dispute, and may only assist the developing-country "in a manner ensuring the continued impartiality of the Secretariat", which poses concerns as to the practical implications and limits of such "continued impartiality" in assisting a party with its defense in a dispute.[62]

There have been other advances in the protection of developing-country Members' legal interests at the WTO. One of the most prominent examples was the creation of the Advisory Centre on WTO Law (ACWL) in 2001. The main activity of the ACWL is to provide legal advice in response to requests from its developing-country Members and the LDCs that qualify for its services. As of 2011, the ACWL issued 218 legal opinions and provided support in three WTO disputes.[63] Notably, the ACWL is staffed with only nine lawyers, including the Executive Director.[64] The ACWL charges fees for support in dispute settlement proceedings, based on hourly rates and a time budget for each stage of the proceeding. Moreover, developing-country Members must have contributed to the ACWL's

[62] See, e.g., v. d. Bossche, *The Law and Policy of the WTO*, *supra* note 44, 234 ("[concerning] Article 27.2 of the DSU [t]he extent to which the Secretariat can assist developing-country Members is, however, limited by the requirement that the Secretariat's experts give assistance in a manner 'ensuring the continued impartiality' of the Secretariat."); Nottage, *Developing Countries in the WTO*, *supra* note 47, 5 ("the utility of this provision is debatable. The experts may only assist 'in respect of dispute settlement' and cannot provide legal advice before a dispute is initiated [...] making it impossible to act as an advocate in a legal proceeding."); Bethlehem *et al.*, *The Oxford Handbook of International Trade Law*, *supra* note 57, 492.

[63] Advisory Centre on WTO Law, 'Report on Operations 2011' (2011), available at http://www.acwl.ch/e/documents/reports/Oper_2011.pdf (last visited 28 January 2013), 1, Appendix 4 "Members of the ACWL" (*id.*, 37) and Appendix 5 "LDCs Entitled to the Services of the ACWL" (*id.*, 38).

[64] The ACWL also provides support through external legal counsel. When parties pursuing incompatible objectives request the support of the ACWL on the same matter, the ACWL's lawyers normally assist the party that first requested advice and provides support to the other party through external counsel. In these cases, fees are increased by 20 per cent. *Id.*, 13.

Endowment Fund to be entitled to its services.[65] Although this assistance should be regarded with the greatest consideration, it has been also noted that the legal assistance offered by the ACWL may be a "partial solution to the problem" which may not "necessarily be in alignment with the welfare interests of the developing countries involved."[66]

Overall, there is a need to enhance developing-country Members and LDCs' legal capacity in the WTO DSM. Insofar as developing-country Members and LCDs consider themselves to be unable to adequately defend their rights and interests before a WTO panel, their participation in the dispute settlement mechanism will continue to be scarce.

Although *external* legal advice and assistance to developing-country Members and LDCs, such as that provided under Article 27.2 of the DSU and the ACWL, should not be discarded, the *internal* assistance that panels may provide to developing countries and LDCs as complainants can and should be further developed. Could WTO panels assist developing countries in presenting their case and claims more clearly? The answer should be yes.

To this purpose, the following sections address an amendment proposal to modify WTO panels' terms of reference with the objective to allow developing countries and LDCs to benefit from the supplement of deficiencies in their complaints. Under this proposal, panels would be enabled to correct the mistakes in the citation of legal authorities and, in particular, to supplement and remedy any deficiency found in the panel request and the initial complaint of developing-country Members and LDCs. Section three below elaborates on the definition, origins and scope of application of this figure. Finally, section four addresses a specific amendment proposal to Article 7 of the DSU and the feasibility of incorporating this figure coherently with WTO case law.

65 Advisory Center on WTO Law, *The Services of the ACWL*, available at http://www.acwl.ch/e/documents/The%20Services%20of%20the%20ACWL%20inside%20pages%2012%20September%202011%20for%20website.pdf (last visited 28 January 2013), 5.

66 Lekgowe, *The WTO Dispute Settlement System*, *supra* note 21, 18 ("it has been argued that the ACWL only offers a partial solution to the problem, depending on the form of the legal assistance and the source of funding or needs of the sponsor, the resulting bias in the distribution of the cases brought forward for litigants might not necessarily be in alignment with the welfare interests of the developing countries involved. This criticism has merit.").

D. The Supplement of Deficiencies in the Complaint

The ability to remedy any deficiency in the complaint is given to constitutional judges in certain jurisdictions to adjust domestic claims filed by complainants considered to be "the weakest party to a dispute."

In Mexico, for example, the principle of supplementing deficiencies in the complaint is applicable to, and derives from, the *amparo* procedure, which is an extraordinary judicial remedy specifically created to protect against constitutional harms or threats committed by authorities or individuals.[67]

These adjustments or corrections are made *ex officio* by constitutional judges with respect to errors, irregularities, omissions or imperfections found in the complainant's submission to an *amparo* procedure. In particular, this principle applies to the allegations of violation of substantive provisions and to the description of grievances identified by the complaining party. In *amparo* procedures, the allegations of violation identify the constitutional provisions allegedly violated by certain acts of an authority or an individual – e.g., that the right to be heard, established in Article 14 of the national constitution, was violated at a certain hearing because the competent authority failed to notify the complainant party –, and in the description of grievances the complainant sets forth the legal reasoning to assert the illegality of such act. In other words, the grievances explain to the *amparo* judge the reasons why certain act of an authority violated certain constitutional rights.[68]

The origin of this principle is found in the Mexican Amparo Act of 1862 that introduced the possibility for constitutional judges to remedy the

[67] In Latin American civil law countries the constitution and special legislation explicitly regulate the judicial remedies available for rights protection, such as the *amparo* proceeding. These constitutional and statutory regulations are generally very detailed, including, for instance, the general rules of procedure and standing to file *amparos*, the definition of the competent courts to hear this type of cases, the specific constitutional rights that can be protected, and the legal effects of judicial decisions in *amparo* suits. See A. R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (2008), 87-91.

[68] Some of the countries that include this figure into their domestic legislation are Mexico and Peru. Mexico incorporates this figure in Art. 107 (II) of its national constitution and Art. 76 bis of the *Amparo Act*, Regulatory of Articles 103 and 107 of the Political Constitution of the United Mexican States. Likewise, Peru developed the supplement of deficiencies in the complainant in Art. 7 of the Peruvian Act No. 23506.

'ignorance' or errors of the complainant, allowing the *amparo* procedure to proceed even when the alleged violations were not accurately specified in the complaining party's *amparo* suit.

This figure was later incorporated into the Mexican Constitution of 1917, mainly for political reasons and as a reaction to the prosecutions against the previous government's opponents who were frequently accused of crimes to keep them away from their public activities, and who used to resort to unprepared defendants that filed deficient lawsuits which the defendant often lost.[69]

Along with the Mexican Constitution of 1917, the Amparo Act of 1936 reiterated this principle's applicability to *amparo* proceedings under the following circumstances: ***(i)*** in any case when the contested act, i.e. the act perpetrated by an authority or an individual that caused or threatened to cause a harm to a constitutional right of the complainant, is grounded on regulations previously declared as unconstitutional by the national Supreme Court; ***(ii)*** in criminal matters, even if the complainant fails to identify any grievances or any allegation of violation of constitutional provisions; ***(iii)*** in agricultural matters, only when the complainant party belongs to the peasantry; ***(iv)*** in labor matters, where this principle applies only in favor of the working class; ***(v)*** in favor of minors and others incapable of their own representation; and ***(vi)*** in other cases, if there has been a manifest violation of the law that deprived the complainant from having any legal defense.[70]

The supplement of deficiencies in the complaint, therefore, stands as a protective, anti-formalist principle that corrects omissions in the complainant party's submissions, always to the complainant's benefit and in accordance with the limitations established by law.[71] It addresses the need to subsume the errors or omissions that the 'weak party' to a constitutional procedure may have in a considerable number of situations due to the complainant's inability to obtain adequate legal counseling.[72]

Under this principle, adjudicators are allowed to set aside from a rigorous and strict technical review of the provisions the claimant considers to be breached by the other party, and the explanation of the manner in

69 J. Castro**,** *Justicia, Legalidad y la Suplencia de la Queja* (2003), 3-4 [Castro, Suplencia de la Queja]**.**

70 See *Amparo Act*, Regulatory of Articles 103 and 107 of the Political Constitution of the United Mexican States, Article 76 bis, available at http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf (last visited 28 January 2013).

71 Castro, *Suplencia de la Queja*, *supra* note 69, 11-12.

72 See H. Fix-Zamudio, *Ensayos Sobre el Derecho de Amparo* (1993).

which said acts violated certain provisions. This way, adjudicators are enabled to add, complete or integrate the omissions or deficiencies of the complaint, acknowledging the existing procedural inequality of the parties and the need to procure a balance in the capacity of obtaining legal counseling by both parties to a dispute.

However, the applicability of this principle is, in no case, to be confused with a divergence from the principle of impartiality that adjudicators must uphold; adjudicators are not allowed to act as counsel to claimant.[73] Under the principle of supplementing or amending deficiencies in the complaint, it is understood that a lack of proper legal counseling impedes the parties to a dispute to accurately expose their arguments and, therefore, to duly present their claims before an adjudicator. However, the understanding of law that adjudicators possess to analyze the legal claims presented by the parties to a dispute shall lead them to issue a decision based on an objective assessment of the facts and law referred by the parties, and should not disregard certain claims for a want of clarity capable of supplementation by the adjudicator in light of the facts of the case and its understanding of the applicable law.

The principle of supplementing deficiencies in the complaint is therefore consistent with the principle *iura novit curia* (commonly translated as "the court knows the law"), under which adjudicators shall apply the law *ex officio*, namely without being bound by the legal arguments or legal reasoning put forward by the parties.[74] That is, through the *iura novit curia* principle, courts are expected to make their own ascertainment of the law and their own legal evaluation of the factual record before them.[75]

I. Differences and Similarities with other Procedural Related Figures

By means of the *iura novit curia* principle, the judge has the duty to identify the applicable law to the dispute, even when it may not be expressly

[73] See I. Burgoa, *El Juicio de Amparo* (2000) [Burgoa, El Juicio de Amparo].

[74] T. Giovannini, 'International Arbitration and Jura Novit Curia: Towards Harmonization', in M. Á. Fernández-Ballesteros & D. Arias (eds), *Liber Amicorum Bernardo Cremades* (2010), 495, 495-496. This principle is a derivative of another maxim, *da mihi facto, dabo tibi ius*, i.e., "give me the facts and I will give you the law (justice)".

[75] M. Oesch, *Standards of Review in WTO Dispute Resolution* (2003), 50.

set out in the complainant's initial submission. However, under the principle's permission to supplement deficiencies in the complaint, the role of judges is not to make an overall assessment of the applicable law to the dispute, but rather to ***(i)*** specifically identify the omissions or errors found in the complainant's submission concerning the alleged violations of substantive provisions and the description of grievances identified by the complaining party, and ***(ii)*** to correct them. The judge therefore issues its decision without intending to rely on facts other than those alleged by the parties and does not incorporate additional claims others than those presented by the complaining party.

The principle of supplement of deficiencies in the complaint also differs from a mere 'supplement of the error'[76] in which the complainant's citation errors are amended in accordance to the *iura novit curia* principle referred above and, therefore, judges have the obligation to apply the pertinent legal precept even in cases where it is not accurately invoked by the parties.

Adjudicators shall not add new claims not set forth by the parties to a dispute. Nonetheless, as abovementioned, there may be cases in which a claim is not clear or evident, or it is sustained in an incorrect manner, or the applicable legal authority has been invoked erroneously. In these cases, judges must perform a factual scrutiny of the case, analyze the core of what they have been requested to decide, and pronounce themselves on that matter.

II. Scope of Application

The traditional elements for the identification of a dispute are the *persona* (the parties), the *petitum* (the request for relief) and the *causa petendi* (the facts underpinning the *petitum*).[77] In other words, there are two main requisites to identify a dispute: ***(i)*** identity of the parties; and ***(ii)*** identity of the subject matter. The latter is in turn generally divided into:

[76] *Amparo Act*, Regulatory of Articles 103 and 107 of the Political Constitution of the United Mexican States, commented by A. del Castillo del Valle (2005), 310; J. A. Campuzano, *Naturaleza y Alcance de la Suplencia de la Deficiencia de la Queja en Amparo Laboral* (2003), 32-33.

[77] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), 340; S. Rosenne, *Essays on International Law and Practice* (2007), 137.

(i) identity of the relief or object (*petitum*); and ***(ii)*** identity of cause (*causa petendi*).[78]

This distinction arises from the doctrine of *res judicata*, under which parties are prevented from re-litigating issues already decided in a judgment or award. Under most civil law jurisdictions, the method to determine whether an issue has been previously decided requires a triple identity: parties, grounds, and subject matter, whereas common law jurisdictions tend to require only double identity – of parties and subject matter. International law tends to follow the civil law approach requiring triple identity. For example, Judge Jessup of the International Court of Justice, in his dissenting opinion in *The South-West Africa Case*, listed as the essentials for the application of the *res judicata* principle, identity of parties, identity of cause, and identity of object in the subsequent proceedings, namely *persona*, *petitum*, and *causa petendi*.[79]

The *causa petendi* refers to the reasons of fact and law underlying the claims upon which the plaintiff's submission is based, since the issues of fact and law that give raise to a cause of action must be established by the complainant party in order to be entitled to the relief claimed. In relation with the object of the *petitum*, the jurisdictional organ cannot concede something different to that asked by the parties. In words of Professor Lauterpacht:

> "This is particularly true in the preliminary phase of a case, for the *petitum* may be the subject of submissions which, without exceeding the overall scope of the subject of the dispute as reflected in the application, may be modified by the applicant up to the end of the oral phase on its merits. The *causa petendi*, for its part, cannot be modified without a change of case."[80]

Concerning the supplement of the deficiencies in the complaint, adjudicators must evaluate the facts and the law referred by the parties to determine the *causa petendi*, and, insofar as they neither stray from the pled

[78] E. Zuleta, 'The Relationship Between Interim and Final Awards: Res Judicata Concerns', in A. J. v. d. Berg (ed.), *Arbitration Advocacy in Changing Times* (2011) [v.d. Berg, Arbitration Advocacy], 231, 235.

[79] M. Friedman, 'Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration' in A. J. v. d. Berg (ed.), *International Arbitration 2006: Back to Basics?* (2007), 545, 562.

[80] E. Lauterpacht, *International Law Reports* (2003), 349 (emphasis added).

facts nor modify the object of the claims, they shall be entitled to supplement any deficiency, error or omission found in the complaint. As further explained below, this same principle could be incorporated into the WTO DSM.

E. Supplementing Deficiencies in the Complaint within the WTO DSM

There are three procedural stages of the WTO DSM where supplementing a complaint's deficiencies would be relevant: ***(i)*** the complaining party's request for consultations; ***(ii)*** the request for the establishment of a panel; and ***(iii)*** the complainant's initial written submissions. The correction, supplement or amendment of any omission or deficiency in the complaint should be applied to the complainant's request for a panel – as the appropriate procedural moment to determine the applicable claims to a dispute – in a manner consistent with the initial request for consultations, as well as to the first submissions made by the complainant before a WTO panel. The consistency of incorporating this principle with the relevant case law concerning each one of the referred procedural stages is addressed below.

I. The Complainant's Request for Consultations

Pursuant to Article 4.4 of the DSU, any request for consultations must provide an "identification of the measures at issue and an indication of the legal basis for the complaint". This provision is relevant insofar as panels must not only determine if a panel request indicates whether consultations were held, but also if the measures identified in the request for consultation are consistent with the measures later identified in the panel request. The Appellate Body has observed that although there is no need for a "precise and exact identity" between the measures subject to consultations and those identified in the panel request, a panel request shall not expand the scope or change the essence of the dispute set forth in the initial request for consultations.

This issue was addressed in *US-Shrimp (Thailand)*, where India requested the Appellate Body to reverse the panel's findings that certain regulations were not within the scope of the measure at issue, and were

therefore not within the Panel's terms of reference. The Panel had noted that, whilst such regulations were mentioned in India's panel request, they had not been included in India's request for consultations with the United States. India claimed that the regulations at issue should nonetheless fall within the panel's terms of reference because it was the request for the establishment of a panel that defined a panel's mandate, and because there was no need for a "precise and exact identity" between the measures subject to consultations and those identified in the panel request.[81]

The Appellate Body recognized the important role that consultations play in providing the parties an opportunity to "define and delimit" the scope of the dispute between them and acknowledged that a "precise and exact identity" of measures between the two requests was not necessary, provided that the 'essence' of the challenged measures had not changed.[82] However, due to the circumstances of the case, the Appellate Body rejected India's claims and upheld the panel's findings on the basis that a "responding Member would not be in a position to anticipate reasonably the scope of a dispute if, by reason only of the inclusion of a specific measure in a consultations request, any legal instrument providing a general authority or legal basis for the specific measure would be deemed to be part of a panel's terms of reference."[83]

Since that there is no further clarification concerning the extent to which the measures identified in the panel request must correspond to the measures identified in a request for consultations, panels should assist developing-country Members and, particularly, LDCs, in supplementing

81 Report of the Appellate Body, *United States – Measures Relating to Shrimp from Thailand, United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R, 16 July 2008, 109-114, paras 286-296 [US-Shrimp (Thailand)].

82 Similarly, in *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, Mexico argued that the inclusion in the United States' panel request of WTO legal provisions that did not form part of the request for consultations was inconsistent with Art. 6.2 of the DSU. The Appellate Body considered that instead of a rigid approach, the dispute settlement mechanism should allow for a degree of flexibility to Members in subsequently formulating complaints in panel requests and found that it was not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations. Report of the Appellate Body, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, 29 November 2005, 40-41, paras 136-138.

83 *US-Shrimp (Thailand)*, *supra* note 81, 113-114, para. 294.

deficiencies in their panel requests by examining such panel requests' consistency with these Members' initial requests for consultations. There may be cases where complainants could indeed attempt to change the essence of a dispute for their advantage. In such cases, it is clear that those claims should not be later admitted under a panel's terms of reference. But it also may be the case that complainants do not intend to expand the scope of the dispute nor to change its essence but are seen as doing so due to inexperience in the WTO DSM and the use of imprecise or confusing wording in their request for a panel.

A preliminary analysis on this matter by panels and the supplement of these sort of deficiencies, so as to present the claims of the complainant in a more clearly way, could prevent the panel from determining, in a later stage of the proceedings, a lack of jurisdiction over certain claims, or an appeal before the Appellate Body on grounds such as those expressed in *US-Shrimp (Thailand)* that certain regulations are not within the scope of the measures at issue, and are therefore not within a panel's terms of reference.

II. The Request for the Establishment of a Panel

As noted above, Article 6.2 of the DSU sets out two key requirements that a complainant must satisfy in its panel request: ***(i)*** the "identification of the specific measures at issue"; and ***(ii)*** the provision of "a brief summary of the legal basis of the complaint."

As further analyzed below, the Appellate Body has determined that panels are impeded to 'cure' the failings of a deficient panel request, and that imprecise claims may result in a lack of jurisdiction over such claims. However, if panels were allowed to supplement the deficiencies found in the request for the establishment of a panel, they could avoid complainants from attempting to 'cure' the failings associated with a deficient panel request in a later stage of the proceedings, as panel requests would be previously revised and supplemented, if necessary, by panels at an early stage of the proceedings.

The Appellate Body has acknowledged that defective panel requests "may impair a panel's ability to perform its adjudicative function within the strict timeframes contemplated in the DSU" and therefore complainants

should be "particularly vigilant in preparing its panel request."[84] For instance, in *US-OCTG Sunset Reviews*, the Appellate Body explicitly recognized that the panel request of a developing-country Member, Argentina, "could have been drafted with greater precision and clarity."[85]

In a way, WTO panels have already made preliminary rulings on the adequacy of complainants' panel requests and their consistency with the requirements of Article 6.2 of the DSU. In *China-Exportation of Raw Materials*, one day after the composition of the panel, China submitted a request for a preliminary ruling on the adequacy of the complainants' panel requests and its consistency with Article 6.2 of the DSU.[86] A supplementation of deficiencies in the complaint could therefore take the form of a preliminary ruling on the adequacy of panel requests, in which panels would not merely refer to the existence of deficiencies in panel requests submitted by developing-country Members and LDC, but would be allowed to supplement them.

84 *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220. In *Thailand-Steel*, the Appellate Body "encourage[d] complaining parties to be precise in identifying the legal basis of the complaint", in view of the importance of the request for the establishment of a panel. *Thailand-Steel*, *supra* note 31, 29, para. 97. Panels could perhaps do more than merely "encouraging" complainants to be precise, and assist developing-country Members and LDCs in supplementing errors and deficiencies found in their panel requests.

85 Report of the Appellate Body, *Unites States – Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268/AB/R, 29 November 2004, 59, para. 172 [US-OCTG Sunset Reviews].

86 The panel issued a preliminary ruling in two phases responding to China's allegation that complainants' panel requests failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Appellate Body criticized the panel's decision of reserving its decision on whether the panel requests complied with Art. 6.2 until it had examined the parties' first written submissions and was more able to "take fully into account China's ability to defend itself." The Appellate Body found that Section III of the complainants' panel requests did not satisfy the requirements of Art. 6.2 and declared moot and of no effect the panel's finding relating to the claims under such Section. See *China-Exportation of Raw Materials*, *supra* note 29, 82-85, paras 211-216 and 93-94, paras 233-235. Interestingly, in 1997, the Appellate Body found in *EC-Bananas* that issues concerning whether a claim is sufficiently specified in the request for the establishment of a panel "could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings." *EC-Bananas*, *supra* note 31, 64, para. 144.

To determine whether complaints from developing countries or LDCs are sufficiently precise to comply with Article 6.2 of the DSU, panels would follow the usual path of "scrutiniz[ing] carefully the language used in the panel request", "read as a whole, and on the basis of the language used."[87] Such obligation of panels to scrutinize the request for a panel has been previously noted by the Appellate Body in *Thailand-Steel*, where it emphasized that "in view of the automaticity of the process by which panels are established by the DSB, it is important for panels to scrutinize closely the request for the establishment of a panel."[88]

Hence, panels could look into the particular context in which measures identified by developing-country Members and LDCs operate and examine the extent to which they are capable of precise identification. For instance, whether a panel request challenging a number of measures on the basis of multiple WTO provisions sets out "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" may depend on whether it is sufficiently clear which "problem" is caused by which measure or group of measures.[89] Or, to the extent that a provision may contain multiple obligations, panels may assist developing-country Members and LDCs in specifying which of the obligations contained in the provision is being challenged.[90]

In any event, *all claims* must be included in the request for establishment of a panel in order to come within the panel's terms of reference. In *EC-Sugar subsidies*, the Appellate Body recalled its previous decision in *EC-Bananas III* that Article 6.2 of the DSU "requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the

87 *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220; *EC-Fasteners*, *supra* note 30, 223-224, para. 562. See also *US-Zeroing* (Japan), Article 21.5, *supra* note 31, 46, para. 108; *US-Continued Zeroing*, *supra* note 30, 65-66, para. 161; *EC-Sugar Subsidies*, *supra* note 31, 51, para. 143; *US-German Steel CVDs*, *supra* note 30, 42-43, para. 126.

88 *Thailand-Steel*, *supra* note 31, 25, para. 86, referring to *EC-Bananas*, *supra* note 31, 63-64, para. 142.

89 *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220.

90 Complainants may refer in general to "Respondent's trade law" as a measure at issue (*id.*, 90-91, para. 227). Yet from that language it would be impossible to discern which provisions of the WTO covered agreements at issue are alleged to have been violated by such measure.

request for the establishment of a panel."[91] In this sense, it is pertinent to distinguish between claims and arguments.[92]

Claims refer to the specific provisions of the covered agreements that contain the allegedly violated obligations.[93] In *Dominican Republic-Cigarettes*, the Appellate Body observed that there is a distinction "between the *claims* of a Member regarding the application of the various provisions of the *WTO Agreement*, and the *arguments* presented in support of those claims. Claims, which are typically allegations of violation of the substantive provisions of the *WTO Agreement*, must be set out clearly in the request for the establishment of a panel. Arguments, by contrast, are the means whereby a party progressively develops and supports its claims. These do not need to be set out in detail in a panel request; rather, they may be developed in the submissions made to the panel."[94]

Moreover, in *US-OCTG Sunset Reviews*, the Appellate Body clarified that "[b]y *'claim'* we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must [...] be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[95]

Therefore, whereas *claims* would fall under the scope of application of the supplement of deficiencies in the complaint, *arguments* would not.

The supplement of deficiencies in the complaint would preserve the due process rights of the parties, as it would not allow panels to add new

91 *EC-Sugar Subsidies*, *supra* note 31, 50-51, paras 140-144; *EC-Bananas*, *supra* note 31, 64, para. 143.

92 The Appellate Body has addressed such distinction between claims and arguments in several occasions. See, e.g., Report of the Appellate Body, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, 26 November 2003, 44, para. 127 (note 213); Report of the Appellate Body, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 September 2002, 57-58, paras 181-182; *Korea-Dairy Safeguards*, *supra* note 31, 39, para. 125; *India-Patents*, *supra* note 31, 30, para. 88; *EC-Bananas*, *supra* note 31, 63, para. 141; Report of the Panel, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, 29 November 2002, 20-21, para. 6.63.

93 Report of the Appellate Body, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, 13 November 2006, 51, para. 130.

94 *Dominican Republic-Cigarettes*, *supra* note 30, 48, para. 121.

95 *US-OCTG Sunset Reviews*, *supra* note 85, 55, para. 162, citing the Appellate Body Report in *Korea-Dairy Safeguards*, *supra* note 31, 43-44, para. 139.

claims during the course of the proceedings. In any case, both parties to a dispute would still be able to provide further supporting evidence and argumentation throughout the panel stage.

As a result, in case of a broadly phrased, imprecise or faulty request for the establishment of a panel, supplementing deficiencies in the complaint would become a job of the panels, and would require a close examination of the complainant's panel request, to determine precisely which claims (and not arguments) have been made and may fall under the terms of reference of the panel.

III. The Complainant's Initial Written Submissions

The Appellate Body has consistently established that, although submissions by a party may be referenced in order to confirm the meaning of the words used in the panel request, the content of those submissions cannot cure the failings of a deficient panel request.[96] Notably, however, the Appellate Body in *US-German Steel CVDs* also acknowledged that panels may consult with the complainant with respect to its first written submission in order to "confirm the meaning of the words used in the panel request" as follows:

> "[I]n considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced."[97]

Such exercise of confirming the meaning of the words used in a panel request by a complainant party is exactly what stands behind the possibility of allowing panels to supplement the deficiencies found in a request for the establishment of a panel, or even in the initial written submission of the

[96] See, e.g., *China-Exportation of Raw Materials*, *supra* note 29, 86-87, para. 220; *EC-Fasteners*, *supra* note 30, 223-224, para. 562; *Australia-Apples*, *supra* note 30, 145, para. 418; *US-German Steel CVDs*, *supra* note 30, 43, para. 127.

[97] *US-German Steel CVDs*, *supra* note 30, 43, para. 127 (emphasis added).

complainant: to clarify and confirm the intention of the complaining party to a dispute.

In order to incorporate the supplement of the deficiencies in the complaint within the WTO system, Article 7, paragraph 2, of the DSU should be amended. The current text of this provision reads as follows:

> "7.2 Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

The amendment would consist in adding a second sentence to this provision, in the following terms:

> "7.2 Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute, and shall supplement and correct any deficiency found in the request for the establishment of a panel, and in the initial written submissions, filed by developing-country and least developed country Members parties to the dispute."

As noted before, this amendment would allow the Appellate Body to review legal aspects that, if not supplemented by panels, would not have been otherwise subject to a legal review analysis.[98]

This amendment would also benefit respondents, as the lack of clarity may lead them to be "[unable] to provide adequate responses due to the

[98] E.g., in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, the Appellate Body concluded that, provided that Mexico's panel request referred only to three actions taken during the course of an investigation by Guatemalan authorities as the "matters in issue" but did not specifically identify the final, definitive anti-dumping duty, considered "that the merits of Mexico's claims in this case [were] not properly before[the Appellate Body]." Therefore, the Appellate Body did not consider "any of the substantive issues raised in the alternative by Guatemala in this appeal." Report of the Appellate Body, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, 2 November 1998, 31, para. 89. Similarly, in *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* the panel considered that 'inter-linked' or 'dependent' obligations upon a provision identified in the panel request must not be considered if not expressly set out by the complainant party. Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, 7 March 2003, 15-18, para. 7.14.

confusion" of complainants' claims, and could ultimately save time and expenses associated with respondents' appeals alleging that panels' findings were based on unclear claims and are therefore moot and without legal effect.[99]

As observed by the Appellate Body in *US-Gambling*, "[a] party must not merely be given an opportunity to respond, but that opportunity must be meaningful in terms of that party's ability to defend itself adequately. [Otherwise, if a] party considers it was not afforded such an opportunity, [it] will often raise a due process objection before the panel."[100] In other words, "[a] defending party is entitled to know what case it has to answer and what violations have been alleged so that it can begin preparing its defense."[101]

The core of this proposal is therefore to enhance WTO's ability to settle international trade disputes by balancing the disadvantages of developing-country Members and LDCs, and could also serve to increase the legitimacy of the DSB and to stimulate these Members to become active participants in the system.

Finally, there are several arguments that could be raised in favor and against the implementation of this proposal in the WTO DSM that are analyzed below.

IV. The Pros and Cons

Perhaps the most anticipated criticisms to this proposal are that it could contravene the WTO panelists' impartiality requirement, and that it would disregard the principle of equality of the parties and the *ne ultra petita* principle. Also, it could be argued that the correction of omissions or deficiencies by panels could 'backfire' and lead to lazy complainants and the potential abuse of the system.

Two other practical considerations are worthy of note: first, the current workload of panels could make this amendment too burdensome to be observed, and second, the lack of a precise identification of the beneficiaries of this amendment –given that the WTO does not distinguish

99 See, e.g., *EC-Fasteners*, *supra* note 30, 26, para. 67.

100 Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005, 90, para. 270 [US-Gambling]. See also *Thailand-Steel*, *supra* note 31, 26, para. 95.

101 *EC-Sugar Subsidies*, *supra* note 31, 50, para. 142; *US-OCTG Sunset Reviews*, *supra* note 85, 55, para. 161; *Thailand-Steel*, *supra* note 31, 26, para. 88.

between 'developed' and 'developing-country' Members– could also complicate the amendment's application.

In essence, the principle of supplementing deficiencies in the complaint attempts to eliminate the legal rigor in cases where there is a material inequality of the parties to a dispute. Therefore, it is said that this principle constitutes an exception to the principle of 'equality of the parties' or 'strict respect for the rule of law,' which refers to the adjudicators' obligation to analyze the allegations of violations and grievances in the submissions of the parties to a dispute without considering anything beyond what is expressly set out by the parties.[102] Under international law, this principle is similar to that of *ne ultra petita*, which prohibits judges, arbitrators or panelists from deciding something not explicitly entrusted to them by the parties.[103]

The principle of equality of the parties implies that both parties to a dispute must have the same ability to advocate for their position. There are two main reasons behind the applicability of the principle of equality of the parties: first, it provides legal certainty, as both parties must be aware of the legal grounds upon which their dispute is to be adjudicated without the subjective appreciations of judges, panelists, or arbitrators; and second, it prevents the idleness of the parties who, aware of the formalities associated with a proceeding, will provide the adjudicator with all the necessary elements to present their case.[104]

[102] Burgoa, *El Juicio de Amparo*, *supra* note 73, 297.

[103] D. de Groot, 'Chapter 16: The Ex Officio Application of European Competition Law by Arbitrators', in G. Blanke & P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (2011), 567, 577 ("[a] court decision is *ultra petitum* [...] if in its decision (*dictum*), the plaintiff was awarded more than had been requested (*petitum*)."); C. v. Wobeser, 'The Effective Use of Legal Sources: How Much Is Too Much and What Is the Role for Iura Novit Curia?', in v. d. Berg, *Arbitration Advocacy*, *supra* note 78, 207, 212 ("the limit lies in that [adjudicators] may not award the parties more than they sought in their claims."); G. v. Segesser & D. Schramm, 'Swiss Private International Law Act (Chapter 12: International Arbitration)', in L. A. Mistelis (ed.), *Concise International Arbitration* (2010), 911, 956-957 ("[t]he tribunal only decides *ultra petita* or *extra petita* if [...] it adjudicates more, or something else, than what has been requested in the prayers for relief."); P. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 1 *European Journal of International Law* (2000) 4, 763, 767 ("[i]n public international law the *non ultra petita* rule circumscribes the ambit of the powers of the adjudicating body: according to this rule, an adjudicating body cannot decide more than it has been asked to.").

[104] H. S. Camacho, *Análisis Práctico Operativo de la Suplencia de la Queja Deficiente en el Juicio de Amparo* (1994), 31.

The principle of supplementing deficiencies in the complaint is consistent with the principle of equality of the parties, insofar as panelists would neither be allowed to incorporate new claims on behalf of the complainant nor to modify the *causa petendi* of a dispute, therefore respecting the principle of legal certainty.

Concerning the principle of *ne ultra petita*, it is noteworthy that the predominant tendency "is to treat as *ultra petita* only those [rulings] which decide beyond the relief sought by the parties, and not those in which the reasoning goes beyond the parties' submissions."[105] Hence, so far as supplementing or correcting errors, omissions, or deficiencies in the complaint is not tantamount to granting non-requested remedies, panelists would not adjudicate more than what was originally claimed and this principle would remain intact.

As to the parties' advocacy and the potential abuse of this principle, it should be recalled the interest expressed by developing-country Members and LDCs in gaining experience in the WTO DSM. As noted above, most of developing country representatives considered the lack of legal capacity as one of the main reasons why their governments had considered not filing a case to the DSM. Also, the two-hundred-plus legal opinions issued by the ACWL so far demonstrate that developing-country and LDC Members are indeed eager to participate more actively in the WTO DSM, and to enhance, not hinder, their capacity to present cases before WTO panels.

On the other hand, the panels' workload is a matter that deserves further consideration. The WTO dispute settlement proceedings' complexity demands a significant amount of working hours from panels, and to add more requirements for panelists during the course of the proceedings could be perceived as excessively burdensome. However, as noted above, the Appellate Body has already recognized that panels are obligated to closely

[105] P. Landolt, 'Arbitrators' Initiatives to Obtain Factual and Legal Evidence', 28 *Arbitration International* (2012) 2, 173, 192. See also A. Dimolitsa, 'The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law', 27 *ASA Bulletin* (2009) 3, 426, 438 ("the principle of '*ne ultra petita partium*' does not enter into play as much when [adjudicators] introduce *ex officio* new issues of law. Indeed, introducing new issues of law does not equate with granting non-requested remedies."); J. Jenkins & J. Stebbings, *International Construction Arbitration Law* (2006), 177 ("there is some debate in the case law as to the extent to which the tribunal must adhere to the arguments pleaded by the parties. For example, a tribunal may award relief of a different nature from that requested by the claimant, provided this is available under the applicable law, within the limits of the claim and (therefore) within the parties' reasonable contemplation.").

scrutinize the request for a panel, and WTO panels have already made preliminary rulings on panel requests' adequacy, suggesting that a panel review to remedy deficiencies in the complaint could fall within the current DSM time frames.

Finally, a relevant aspect to remedying complaints' deficiencies is to determine the parties that would benefit from it. As stated before, this proposal is aimed at 'developing-country Members' and LDCs. The definition of a LDC is determined by the United Nations Economic and Social Council, based on objective criteria regarding their *per capita* income and related development standards, and recognized as such by the WTO.[106]

However, although the term 'developing-country' is often used in WTO Agreements, it is undefined, allowing countries to self-designate their status, subject to challenge from another Member. This self-declared basis of 'developing' countries is a valid concern, given that, if a separate measure is applied to developing countries to offset structural imbalances, the WTO will need to develop clearer legal criteria for defining 'developing country' status.

Alternative definitions of developing countries are available in the criteria set out by the Advisory Centre on WTO Law and the World Bank, under which a country's development status attends to a country's per capita GNP and its share of global trade. The World Bank classifies developing countries into "low" and "middle" income countries.[107] Similarly, the OECD's Development Assistance Committee divides countries into multiple categories that include "least developed countries," "other low income countries," "lower middle income countries," "upper middle income countries," and "high income countries."[108]

Although the definition of "developing country" is conceptually and politically complex, the abovementioned criteria could serve as a starting

[106] Basically, the criteria to classify a country as 'least developed' is based on: ***(i)*** a low-income criterion; ***(ii)*** a human resource weakness criterion; and ***(iii)*** an economic vulnerability criterion. See UNCTAD, 'What are the Least Developed Countries?', available at http://r0.unctad.org/ldcs/LDCs/index.html (last visited 28 January 2013).

[107] See World Bank, 'Beyond Economic Growth, Glossary', available at http://www.worldbank.org/depweb/english/beyond/global/glossary.html (last visited 28 January 2013).

[108] See OECD, 'DAC List of ODA Recipients: Effective for Reporting on 2009 and 2010 Flows', available at http://www.oecd.org/dataoecd/32/40/43540882.pdf (last visited 28 January 2013).

point to qualify countries and thus, to determine which Members could make use of the supplement of deficiencies in their complaints.

F. Conclusions

The remedy of deficiencies in a complaint would be congruent with the WTO's normative framework, and could be incorporated as a special and differential treatment provision aimed toward balancing the existing legal capacity asymmetry between developed country Members on the one hand, and developing-country Members and LDCs on the other hand.

Although the DSU has incorporated certain special and differential treatment provisions, these are generally not binding. Therefore, it is a shared responsibility among WTO Members to facilitate bridging these differences through the review of the existing special and differential treatment provisions, as well as to continue to analyze potential amendments to the DSU to level the legal capacity among WTO Members.

The core of the proposal to incorporate the remedy of deficiencies in complaints is to enhance WTO's ability to settle international trade disputes by addressing the disadvantages faced by developing-country Members and LDCs, and could also serve to increase the legitimacy of the DSB and to stimulate these Members to become active participants in the system.

Under this principle, it is understood that a lack of appropriate legal counsel impedes the parties to a dispute to accurately expose their arguments and, therefore, to duly present their claims before an adjudicator. Hence, this principle's application attempts to eliminate the legal rigor in cases where the parties have materially different capacities to represent themselves.

There are three procedural stages in the WTO DSM in which remedying deficiencies in the complaint would be relevant: ***(i)*** the complaining party's request for consultations; ***(ii)*** the request for the establishment of a panel; and ***(iii)*** the complainant's initial written submissions. The remedying of any omission or deficiency in the complaint should be applied to the complainant's request for a panel as it corresponds to the initial request for consultations, as well as to the first submissions made by the complainant before a WTO panel.

Of course, developing-country Members and LDCs should develop internal techniques to harness their own legal resources more effectively through, e.g., the strengthening of internal legal expertise, and the promotion of academic research and teaching on international trade law.

However, if these efforts are not matched by WTO's provisions allowing developing countries and LDCs to take advantage of the legalized international dispute settlement structure, then all the talk about the need to level their legal capacity misses the point.

Therefore, the proposed amendment to incorporate the remedy of deficiencies in the complaint should be considered as part of other efforts aimed at improving these Members' dispute settlement capacity. Ultimately, insofar as developing-country Members and LCDs consider themselves in a disadvantaged position to defend their rights and interests before a WTO panel, their participation in the dispute settlement mechanism will continue to be scarce.

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The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?

Britta Lisa Krings*

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Abstract

The concepts of complementarity and Universal Jurisdiction as such raise various concerns, just in themselves. The combination of these concepts may be a very reasonable one, however, it tends to cause confusion and renunciation within the international community. The objective of the present work is to present very briefly the two different legal concepts and provide an analysis on their compatibility. In order to come to a result, the principle of complementarity is evaluated as both, an admissibility criterion and a State obligation and right, to primarily be able to deal with a case in their national legal system, acknowledging that criminal jurisdiction is situated in the heart of State's sovereignty. Universal Jurisdiction is brought into a relation with these two ideas of complementarity. This paper addresses possible solutions.

A. Introduction

Paul Kagame, President of the Republic of Rwanda stated "lately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply such that a judgment from less powerful nations indicts those from the more powerful?"[1] This clearly critical, almost hostile approach towards Universal Jurisdiction may be representative for a contemporary suspicion in the spheres of the African Union.[2] It is, however, not a final argument against this concept. The recent establishment of a system of international criminal justice, which sooner or later will most probably mainly consist of the International Criminal Court (ICC), is built to deal with those *most responsible* for egregious crimes, mostly mass crimes. Accordingly, it leaves a huge gap between those most responsible and those innocent. The low-level perpetrators of these crimes can only be held responsible, if the national jurisdictions contribute their share. This is

1 Address at the 'Facing Tomorrow Conference', Presidents Discussing Tomorrow, Jerusalem, Israel, (13 May 2008), found in C. C. Jalloh, 'Universal Jurisdiction, Universal Prescription?: A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', 21 *Criminal Law Forum* (2010) 1, 1, 1.

2 *Id.*, 2-4.

where the principle of complementarity comes into focus. It ensures that the ICC is nothing more and nothing less than an international court of "last resort", supposedly stepping back where the States themselves can and want to deal with international crimes. Complementarity is a matter of admissibility in the Rome Statute, but also a guiding principle of the ICC's relationship to the national jurisdictions. A recent example of the practical importance of the question of scope and nature of complementarity in relation to Universal Jurisdiction arose in Germany. A Rwandan national, living in France, was suspected of the commission of crimes against humanity in the Democratic Republic of Congo in 2009. The ICC investigated in this matter as did the German General Federal Prosecutor of the German Federal Court, basing the investigations on Universal Jurisdiction. With regard to the ICC's investigations the Germany General Federal Prosecutor dismissed the investigation in accordance with § 153 f II 1 No. 4 *German Code of Criminal Procedure*.[3] Universal Jurisdiction, being a jurisdiction related concept, may be relevant on the level of determination of admissibility and in the finding of obligations of States. The core question to be raised in the present work is: How do the two principles mingle, is there a possibility of reconciling two possibly polar concepts? It was stated that with the establishment of the ICC the use of Universal Jurisdiction was only necessary in cases outside the scope of jurisdiction of the ICC.[4] This article considers three divergent positions, first, the principle of complementarity furthers/improves the use and implementation of Universal Jurisdiction, second, in the exercise of complementarity there is no room left for nationally prescribed Universal Jurisdiction,[5] or third, Universal Jurisdiction enforces the principle of complementarity effectively by increasing the number of potential National States that are able to deal with international crimes that were committed.

3 German Federal Constitutional Court, Decision of 1 March 2011, 2 BvR 1/11, 31 *Neue Zeitschrift für Strafrecht* (2011) 6, 353, 354.

4 S. García Ramírez, 'Principio de Complementariedad en el Estatuto de Roma', 4 *Anuario Mexicano de Derecho Internacional* (2004), 149, 154-156.

5 Burke-White even argued that the establishment of the ICC as such leads to a reluctance of States to engage in proceedings under Universal Jurisdiction. W. W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', 49 *Harvard International Law Journal* (2008) 1, 53, 63.

In the following, the principle of complementarity and universal jurisdiction will be very briefly defined, however, these definitions do not claim to be academic and final definitions but to be understood as working definitions for the purposes of the present work.[6] After that the possible interplay between the two concepts is discussed and a conclusion is drawn.

B. The Principles: Definitions

I. Principle of Universal Jurisdiction

The principle of Universal Jurisdiction provides for jurisdiction of a State over certain crimes without requiring any of the normally required linkages,[7] such as commission on its territory,[8] nationality of either

6 The difficult task of finding a final definition for the principles was – in relation to Universal Jurisdiction – even left open by the ICJ, as stated in a dissenting opinion to the *Arrest Warrant Case*; on the lack of a definition for Universal Jurisdiction: Jalloh, *supra* note 1, 6.

7 *Princeton Principles*, Principle 1 (1), in 'The Princeton Principles on Universal Jurisdiction', available at http://www.law.depaul.edu/centers_institutes/ihrli/downloads/Princeton%20Principles.pdf (last visited 28 January 2013), 28; Amnesty International, 'Universal Jurisdiction: The Duty of States to Enact and Implement Legislation' (2001), available at http://www.amnesty.org/en/library/asset/IOR53/002/2001/en/be2d6765-d8f0-11dd-ad8c-f3d4445c11 8e/ior530022001en.pdf (last visited 28 January 2013), 11; B. Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law', 35 *New England Law Review* (2001) 2, 399, 400; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 467; D. Carreau, *Droit International*, 10th ed. (2009), 387, para. 1039 (he refers to the nationality requirements only); R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd ed. (2010), 44; M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (2008), 25; K. Ipsen, *Völkerrecht*, 5th ed. (2004), 663, para. 7; G. de La Pradelle, 'La competence universelles', in H. Ascensio *et al.* (eds), *Droit international penal* (2000), 905, para. 1; M. E. Odello, 'La Corte Penal Internacional y las legislaciones nacionales: Relación entre Derecho Internacional y derechos nacionales', 1 *Foro: Revista de Sciencias Jurídicas y Sociales* (2005) 1, 295, 316; R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 3, 735 *et seq.*, 745; B. H. Oxman, 'Jurisdiction of States', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VI (2012), 546, 552, para. 37; J. J. Paust *et al.*, *International Criminal Law: Cases and*

perpetrator or victim,[9] or the threat towards its national security.[10] Thus, it enables a State to prosecute a person under its jurisdiction no matter where or against whom the crime, was committed, independent of the perpetrator's nationality. Some understand Universal Jurisdiction to be limited to situations in which the perpetrator is present in the State that uses Universal Jurisdiction (*iudex loci deprehensioni/forum deprehensionis*).[11]

Materials (1996), 95; X. Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?', 88 *International Review of the Red Cross* (2006) 862, 375, 377; L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003), 22 (phrasing it negatively).

8 Known as principle of territoriality, providing for jurisdiction of the State on whose territory the crime was committed, see Cryer *et al.*, *supra* note 7, 40-41; Oxman, *supra* note 7, 549, paras 13-17; O'Keefe, *supra* note 7, 735 *et seq.*, 739.

9 Principle of personality, either active (nationality of the perpetrator) or passive (nationality of the victim) nationality are relevant to establish jurisdiction, see Cryer *et al.*, *supra* note 7, 41-43; Oxman, *supra* note 7, 552, paras 34-36; O'Keefe, *supra* note 7, 735, 739.

10 The 'protective principle', enabling a State to exercise its jurisdiction over foreigners, acting in foreign territory but threatening the national security, see I. Cameron, 'International Criminal Jurisdiction, Protective Principle', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol I (2012), 712, 712, para. 1 (in *id*., 715, para. 13, the major difference between universal and protective principle is that the first protects values of the international community whereas the latter protects the National State's very own interests); Cryer *et al.*, *supra* note 7, 43; Oxman, *supra* note 7, 550-551, paras 27-28; O'Keefe, *supra* note 7, 735 *et seq.*, 739; Reydams, *supra* note 7, 22.

11 National Legislations: Netherlands (*Internationals Crimes Act*, § 1 Art. 2 (1) (a), 19 June 2003, available in V. Santori (ed.), 'Domestic Implementing Legislation and Related Documents' (CD-ROM), in C. Kreß *et al.* (eds), *The Rome Statute and Domestic Legal Orders*, Vol. II (2005)); Canada (*Crimes Against Humanity and War Crimes Act 2000*, Sec. 6 (1), available in *id.*); Case law: ICJ, *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, Separate Opinion of Judges R. Higgins, P. H. Kooijmans & T. Buergenthal, ICJ Reports 2002, 63, 76, para. 45; Scholars: Institut de Droit International (ed.), 'Universal Criminal Jurisdiction With Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes' (26 August 2005), available at http://www.idi-iil.org/idiF/resolutionsF/2005_kra_03_fr.pdf (last visited 28 January 2013), 2, para. 3 (b); C. C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', 59 *Law & Contemporary Problems* (1996) 4, 153, 165; G. Abi-Saab, 'The Proper Role of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 3, 596, 601; A. Cassese, 'Is the Bell Tolling for Universality?: A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 3, 589, 592; O'Keefe, *supra* note 7, 735 *et seq.*, 752-754.

Furthermore, it remains unclear to which crimes the concept relates. Initially it was only accepted in relation to piracy, the tendency today is, however, to extend it to more – international – crimes.[12]

The principle of Universal Jurisdiction is not undisputed.[13] There are treaties that contain or acknowledge the principle of Universal Jurisdiction,[14] it is found in various domestic legislations,[15] and claimed to

12 *Princeton Principles*, Principle 2 (1), *supra* note 7, naming piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture; M. C. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* (2001) 1, 81, 151-152, 156 (arguing that it is the status of being "*ius cogens* crimes that implies that universal jurisdiction exists"); Odello, *supra* note 7, 316; Oxman, *supra* note 7, 552-553, paras 38-39.

13 General overview of the discussion: S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2004); strongly against Universal Jurisdiction: G. P. Fletcher, 'Against Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 3, 580; addressed and opposed by: A. Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism', 39 *The University of Tulsa Law Review* (2004) 4, 955.

14 Such as *International Convention for the Suppression of Counterfeiting Currency*, Art. 9, 20 April 1929, 112 L.N.T.S. 371, 379 (under condition of request of extradition); *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*, Art. 8, 26 June 1936, 198 L.N.T.S. 299, 311 (under condition of request of extradition); *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Art. 49, 12 August 1949, 75 U.N.T.S. 31, 62; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Art. 50, 12 August 1949, 75 U.N.T.S. 85, 116; *Geneva Convention Relative to the Treatment of Prisoners of War*, Art. 129, 12 August 1949, 75 U.N.T.S. 135, 236; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Art. 146, 12 August 1949, 75 U.N.T.S. 287, 386; *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Art. 28, 14 May 1954, 249 U.N.T.S. 215, 260; *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* Art. 5 (2), 10 December 1984, 1465 U.N.T.S. 85, 114 (containing primarily the *aut dedere aut iudicare* principle, as a secondary step, implicitly calls for Universal Jurisdiction).

15 Such as: Belgium (*Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, Art. 7); Canada (*Crimes Against Humanity and War Crimes Act 2000*, Sec. 8, *supra* note 11); Germany (*Code of Crimes Against International Law*, § 1; *German Criminal Code*, § 6); New Zealand (*International Crimes and International Criminal Court Act 2000*, § 8 (1), available in Santori, *supra* note 11); Spain (*Ley Orgánica de Poder Judicial*, Art. 23 (4), available in Santori, *supra* note 11); United Kingdom (*International Criminal Court Act 2001*, § 68, available in Santori, *supra* note 11).

be accepted as customary international law.[16] Universal Jurisdiction sometimes is distinguished from the principle *aut dedere aut iudicare*, which is considered to be related, but not essentially the same.[17] The idea of this principle is basically that no State should shield alleged perpetrators of certain crimes from criminal responsibility but should either prosecute under their own (possibly also universal) jurisdiction or extradite to another place of jurisdiction.[18]

Although the rationale of Universal Jurisdiction is to close the gap of impunity for the commission of certain grave crimes,[19] its practical importance may be challenged, since diplomatic and policy reasons may pose serious obstacles to its practical use, or at least to its uniform "universal" use of and towards every State, which is sometimes challenged

16 The PCIJ found in the S.S. Lotus case that the states were free to prosecute under universal jurisdiction as long as international law does not limit this broad jurisdiction, *Case of the S.S. Lotus*, PCIJ Series A, No. 10 (1927), 19 [Lotus Case]; recently and more explicitly found by Amnesty International, *supra* note 7, 11; Institut de Droit International, *supra* note 11, 2, para. 2; P. Benvenuti, 'Complementarity of the International Criminal Court to National Criminal Jurisdictions', in F. Lattanzi & W. A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (1999), 21, 25; Broomhall, *supra* note 7, 404-405 (referring to "permissive" Universal Jurisdiction); J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1 (2005), 604 (Rule 157): "State practice establishes this rule as a norm of customary international law with respect to war crimes committed in both international and non-international armed conflicts."; Philippe, *supra* note 7, 386; C. L. Sriram, 'Exercising Universal Jurisdiction: Contemporary Disparate Practice', 6 *International Journal of Human Rights* (2002) 4, 49, 50; G. Werle, *Principles of International Criminal Law* (2005), 60, para. 174.

17 See Bassiouni, *supra*, note 12, 152-153.

18 Amnesty International, *supra* note 7, 11; A. Abass, 'The International Criminal Court and Universal Jurisdiction', 6 *International Criminal Law Review* (2006) 3, 349, 353-355; M. P. Scharf, 'Aut dedere aut iudicare', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. I (2012), 749, 749, paras 1-2; contested except for war crimes by J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008), 192.

19 See Assembly of the African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, 30 June 2008 - 1 July 2008, Doc Assembly/AU/14 (XI), 1, para. 3; *id.*, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, 1-3 February 2009, Doc Assembly/AU/3, para. 3; Bassiouni, *supra* note 12, 154; Broomhall, *supra* note 7, 401-403.

as being "neo-colonialism".[20] It is hardly imaginable that an economically and/or politically dependent State initiated proceedings against a national of the more powerful State based on the principle of universal jurisdiction since this could and would be a cause for diplomatic casualties. Notwithstanding these difficulties, there are various cases in which the principle of Universal Jurisdiction has been used or acknowledged.[21]

II. Principle of Complementarity

The principle of complementarity is mainly read in connection to the International Criminal Court's jurisdiction, which is supposed to be complementary to the national jurisdictions. The basic idea of complementarity existed, however, already in the context of the treaty of Versailles in 1919, in which the Allies authorized the Germans to try some

[20] *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, Separate Opinion of Judge S. Bula-Bula, ICJ Reports 2002, 100 (where the exercise of Universal Jurisdiction was described as "neo-colonial intervention"); Bassiouni, *supra* note 12, 154-155; G. Bottini, 'Universal Jurisdiction after the Creation of the International Criminal Court', 36 *New York University Journal of International Law and Politics* (2004) 2/3, 503, 505-506; Cryer *et al.*, *supra* note 7, 52; Jalloh, *supra* note 1, 4; Sriram, *supra* note 16, 51.

[21] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A (Appeals Chamber), 2 October 1995, para. 62; *Prosecutor v. Bernard Ntuyahaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment, ICTR-98-40-T (Trial Chamber), 18 March 1999; *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15 AR 72(E)/SCSL-2004-16-AR72(E) (Appeals Chamber), 13 March 2004, paras 67-71; Belgium: *Public Prosecutor v. Abdoulaye Yerodia Ndombasi et al.*, Chambre de mises en accusation of Brussels, 16 April 2002; International Arrest Warrant for *Hissène Habré* of 19 September 2005; Germany: *Public Prosecutor v. Tadić*, German Federal Court of Justice (*Bundesgerichtshof*), Examining Magistrate, 13 February 1994, 1 BGs 100/94, 14 *Neue Zeitschrift für Stafrecht* (1994) 5, 232; *Public Prosecutor v. Djajić*, Bayerisches Oberstes Landesgericht, 3 St 20/96, 23 May 1997, 51 *Neue Juristische Wochenzeitschrift* (1998) 6, 392; Israel: *Attorney General of Israel v. Adolf Eichmann*, Jerusalem District Court, Judgement of 12 December 1961, 36 ILM 18, 26, para. 12 says "the jurisdiction to try crimes under international law is *universal*."; Spain: *Unión Progresista de Fiscales de Espana et al. v. Augusto Pinochet*, Audiencia Nacional, 5 November 1998, English translation in R. Brody & M. Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000), 95.

of the war criminals themselves in Leipzig, Germany.[22] In the following, complementarity will be discussed under two different aspects, first as an issue of admissibility before the ICC[23] (1.) and second as a State's right and obligation (2.). In addition, the basic rationale of complementarity is elaborated on (3.).

1. Art. 17 Rome Statute: Issue of Admissibility of Cases Before the ICC

The Rome Statute prescribes in Art. 17 that "the Court shall determine that a case is inadmissible where:

> "(a) The case is being investigated or prosecuted by *a State which has jurisdiction over it*, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".[24]

Accordingly, the Statute connects issues of admissibility with the (national) jurisdiction of States,[25] and grants primacy to the national jurisdiction as long as the State does not remain "wholly inactive",[26] there is

22 M. Bergsmo & P. Webb, 'International Criminal Courts and Tribunals, Complementarity and Jurisdiction', in R. Wolfrum (ed.), *The Max Planck Encyclopaedia of Public International Law,* Vol. 1 (2012), 688, 691, para. 12; M. El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), 11-18; General historical overview: *id.*, 11-154.

23 Opposed by F. Mégret, 'Why Would States Want to Join the ICC?: A Theoretical Exploration Based on the Legal Nature of Complementarity', in J. K. Kleffner & G. Kor (eds), *Complementary Views on Complementarity* (2004), 1, 42 (stating that "admissibility is in fact also a deeply jurisdictional issue in its own right"); general overview of the ICC's approach to complementarity: N. N. Jurdi, 'Some Lessons in Complementarity for the International Criminal Court Review Conference', 34 *South African Yearbook of International Law* (2009), 28.

24 *Statute of the International Criminal Court*, Art. 17 (1) (a), 17 July 1998, 2187 U.N.T.S. 3, 100 (emphasis added).

25 Stigen holds the view that it is the international jurisdiction that is referred to in Art. 17 Rome Statute, rather than the national jurisdiction, which nevertheless "typically will be required", Stigen, *supra* note 18, 190. His argument is not convincing, though, because it lacks authority and cannot be read into the Statute easily.

26 J. K. Kleffner & G. Kor, 'Preface', in *id.*, *supra* note 23, V, V; supporting this:

no deficiency in the domestic investigation or prosecution or there is an attempt to shield a person from such "criminal responsibility from crimes within the jurisdiction of the Court".[27] Often discussed among scholars is the question of a standard of the unwillingness or inability to genuinely carry out investigations or prosecutions,[28] however, more relevant to this work is the question of what kind of jurisdiction of the State is embraced.

Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-8 (Pre-Trial Chamber I), 10 February 2006, para. 29; D. Robinson, 'The Mysterious Mysteriousness of Complementarity', 21 *Criminal Law Forum* (2010) 1, 67, 102; W. A. Schabas & S. Williams, 'Article 17', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Note, Article by Article*, 2nd ed. (2008), 605, 615-616, para. 23; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 340-344 [Schabas, ICC Commentary]; supporting this: Office of the Prosecutor of the International Criminal Court (OTP), 'Paper on Some Policy Issues Before the Office of the Prosecutor' (September 2003), available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (last visited 28 January 2013), 5 [OTP, Paper on Some Policy Issues]; J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 103-105 [Complementarity in the Rome Statute]; Stigen, *supra* note 18, 199-202.

27 *Statute of the International Criminal Court*, Art. 17 (2) (b), *supra* note 24, 101.

28 Providing some information: OTP, *Paper on Some Policy Issues*, *supra* note 26, 4; Assembly of State Parties to the International Criminal Court (ASP), *Report of the Bureau on Stocktaking: Complementarity – Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap*, ICC-ASP/8/51, paras 9-11; see also: Benvenuti, *supra* note 16, 42-46; Cryer *et al.*, *supra* note 7, 128-129; El Zeidy, *supra* note 21, 163-207, 222-235; J. T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (2002), 667, 674-678; F. Jessberger, 'International v. National Prosecution of International Crimes', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), 208, 212; Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 126-158; El Zeidy, *supra* note 22, 163-170, 222-228; Schabas & Williams, *supra* note 26, 616, 623-625, paras 24 & 33; Schabas, *ICC Commentary*, *supra* note 26, 344-347; Stigen, *supra* note 18, 251-330.

2. As a State Obligation/Right

The principle of complementarity is implemented in paragraph 10 of the Preamble to the Rome Statute and in Art. 1 Rome Statute.[29] It needs to be clarified if the principle of complementarity provides for an obligation/duty on States, to investigate and prosecute crimes under their jurisdiction in addition to the right of a State to claim for priority in prosecuting a crime. Finally, it needs to be elaborated who is actually an addressee of the said principle.

a) A State's Obligation?

The States' primacy in investigations and prosecution based on complementarity results in an actual right of complementarity or primacy of the States. The principle of complementarity could nevertheless also be read as an obligation of States to become active.[30] This is partly based on paragraph six of the Preamble, which contains the Member States' duty to "exercise criminal jurisdiction".[31] It was stated that "complementarity, as established and governed by the Rome Statute, *was meant* to […] serve as 'a

29 Namely "shall be complementary to national criminal jurisdictions".

30 OTP, *Paper on Some Policy Issues*, *supra* note 26, 2; *id.*, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/04-01/07-1008-AnxA, 30 March 2009, 19 (note 24) [OTP, Informal Expert Paper]; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Art. 19 (2) (a) of the Statute, ICC-01/04-01/07-949 (Pre-Trial Chamber I), 11 March 2009, para. 48 [Situation in the Democratic Republic of the Congo, Defence Motion Katanga]; R. Kolb, *Droit international penal* (2008), 258; R. B. Philips, 'The International Criminal Court Statute: Jurisdiction and Admissibility', 10 *Criminal Law Forum* (1999) 1, 61, 64; W. A. Schabas, 'Complementarity in Practice: Some Uncomplementary Thoughts', 19 *Criminal Law Forum* (2008) 1, 5, 6 [Schabas, Complementarity]; contested by Broomhall stating "the Statute imposes no obligation on States Parties to prosecute the crimes it defines", Broomhall, *supra* note 7, 408.

31 Cryer *et al.*, *supra* note 7, 127; Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 241-247; Schabas, *Complementarity*, *supra* note 30, 6; Schabas & Williams, *supra* note 26, 606, para. 1.

catalyst for compliance'."[32] This assumption is nevertheless not possibly based on the mere words referring to complementarity in the Rome Statute, which explains that the jurisdiction of the ICC shall be "complementary" to national jurisdiction. However, it may be feasible to read the obligation and the corresponding right of complementarity of the States out of the notion of complementarity as such in conjunction with the State parties' obligations to "cooperate fully" with the court as stipulated in Arts. 86 and 88 Rome Statute.[33] These provisions are supposed to relate to the cooperation between States and the court after a case has been declared admissible already. One might nevertheless read the complementarity – taking place before and instead of a prosecution by the ICC – into these norms and understand the principle of complementarity as a right and obligation of the State, which may oblige a State to actively exercise its national jurisdiction in the sense of an effective complementarity even if this means that the work of the ICC would not exist anymore. Accordingly, right and obligation of States to nationally pursue the end of impunity for the crimes listed in the Rome Statute exist. How strong these are practically will be determined by future practice.

b) Addressees of the Principle of Complementarity as a State's Right/Obligation

Since the principle of complementarity is enshrined in the Rome Statute, one wonders if it can be expanded to non-member States to this treaty. As found above, complementarity is both, an obligation incumbent upon States and a right, accordingly the application of complementarity in its obligatory nature on third States would violate the rule that treaties cannot bind third States, as established in Art. 34 *Vienna Convention on the Law of Treaties* and reflected in customary international law.[34] On the other hand, the principle of complementarity as a **right** of States can be applied voluntarily by third States, which is likely because States will probably take

32 F. Gioa, 'Comments on Chapter 3 of Jann Kleffner', in Kleffner & Kor, *supra* note 23, 105, 106.

33 *Id.*

34 *Kasikili/Sedudu Island Case (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, 1045, 1059, para. 18.

the chance to exercise their sovereign right of jurisdiction over persons within their jurisdictional scope, an **obligation** to do so will most probably not be accepted by third States. Hence, States that implemented Universal Jurisdiction within their national laws will also exercise this linkage for prosecuting persons but based on their sovereign decision to do so.

3. The Rationale Behind the Principle of Complementarity

The **rationale** of the principle of complementarity – as an obligation and right as well as a part of admissibility – needs to be carefully established. It might be manifold: on the one hand it avoids proceedings on the international level, where the access to evidence, witnesses and local investigation organs is complicated and distant in favor of the virtually closer jurisdiction of the National State;[35] on the other hand it ensures that State parties to the Rome Statute keep their sovereign right to try crimes committed under their jurisdiction;[36] another reason is to close the gap between the prosecution on the international level, which are still only dedicated to few individuals, and the prosecution of the National States in their own legal systems, in order to actively fight against impunity by prosecuting a higher number of perpetrators.[37] One may come to the

35 OTP, *Paper on Some Policy Issues*, *supra* note 26, 2; *id.*, *Informal Expert Paper*, *supra* note 30, 3; Cryer *et al.*, *supra* note 7, 127; Schabas, *Complementarity*, *supra* note 30, 5.

36 OTP, *Informal Expert Paper*, *supra* note 30, 3; *Situation in the Democratic Republic of the Congo*, Defence Motion Katanga, *supra* note 30, paras 18-19; R. Cryer *et al.*, *supra* note 7, 127; El Zeidy, *supra* note 22, 159; Kolb, *supra* note 30, 259; Philips, *supra* note 30, 63-64; P. Sands, 'International Law Transformed? From Pinochet to Congo…?', 16 *Leiden Journal of International Law* (2003) 1, 37, 40; Schabas, *ICC Commentary*, *supra* note 26, 336; Schabas & Williams, *supra* note 26, 606, para. 1; Stigen, *supra* note 18, 15-18; L. Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court', 4 *Chinese Journal of International Law* (2005) 1, 121, 122; García Ramírez, *supra* note 4, 151; Mégret, *supra* note 23, 23, who at the same time describes complementarity as "a potent threat to State souvereignty".

37 OTP, *Informal Expert Paper*, *supra* note 30, 3; *Situation in the Democratic Republic of the Congo*, Defence Motion Katanga, *supra* note 30, para. 20; M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002), 55, para. 54; F. Jessberger & C. Powell, 'Prosecuting Pinochets in South Africa: Implementing the

conclusion that all of these reasons play a role for the implementation of the principle of complementarity into the Rome Statute.[38]

C. The Interplay Between the two Principles

I. Interplay Universal Jurisdiction/Complementarity as an Admissibility Issue Under Art. 17 Rome Statute

For a case to be admissible the requirements of Art. 17 Rome Statute need to be fulfilled. The possible interplay of complementarity and universal jurisdiction may be found in the wording of the Rome Statute only implicitly, when it refers to "a State which has jurisdiction over it". The State's jurisdiction could contain different ways of establishing such jurisdiction, including Universal Jurisdiction. Another issue is the question if the use of Universal Jurisdiction by a non-member State rendered a case inadmissible before the ICC.[39]

The analysis will be conducted on the basis of an example. For this purpose, the recent case of German arrests and prosecution under its

Rome Statute of the International Criminal Court', 14 *South African Journal of Criminal Justice* (2001) 3, 344, 347; Philips, *supra* note 30, 63-64; G. Strijards, 'The Institution of the International Criminal Court', 12 *Leiden Journal of International Law* (1999) 3, 671, 673.

38 Sands, *supra* note 36, 40.

39 Another question that arises is whether in case of a Security Council referral (Art. 13 (b) Rome Statute) the admissibility test of Art. 17 Rome Statute still applies. This is, however, unlikely to affect the relationship between complementarity and Universal Jurisdiction, therefore it will not be dealt with in more depth. The argument is made that the complementarity turns into being a "supremacy of the ICC" in such cases, see further: in favor of primacy: L. Arbour & M. Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in H. A. M. v. Hebel, J. G. Lammers & J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), 129, 139-140 ("It must be expected that the Council will give the Court jurisdictional primacy vis-à-vis the relevant national judicial systems when it makes a referral as an enforcement action under Chapter VII. The Security Council's power to conduct international judicial intervention derives from the Charter and is unaffected by the ICC-Statute."); Kolb, *supra* note 30, 258; A. Zimmermann, 'The Creation of a Permanent International Criminal Court', 2 *Max Planck United Nations Yearbook* (1998), 169, 220; against primacy: Stigen, *supra* note 18, 240; Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 165-166.

nationally incorporated *Weltrechtsprinzip* (Universal Jurisdiction),[40] of two Congolese men who were allegedly members of the militia *"Forces Démocratiques du Libération de Rwanda"* and responsible for war crimes and crimes against humanity, one of them as a leader/commander will be used.[41] Since the Democratic Republic of Congo is a situation before the ICC the possible conflict between the two systems, the national and the international can be illustrated. Assuming that these two men were sought after by the ICC Prosecutor and there was a pending decision of admissibility before the ICC. Would the ICC be barred from exercising its jurisdiction due to the principle of complementarity?

1. Does the Complementarity in Art. 17 Rome Statute Embrace All Different Linkages of the Member States?

It is clearly stated that the State that has jurisdiction over the crime committed, may investigate and prosecute with primacy over the ICC. What is, however, not clear is which linking principle will be accepted by the ICC. There are different possible scenarios, either the ICC will strictly refer to its own – limited – way of jurisdiction or it will accept whichever linkages the National States implemented into their legal systems, may it embrace universal jurisdiction or not.[42]

a) Only Active Personality and Territoriality (as in Art. 12 (2) (a), (b) Rome Statute)

The jurisdiction of the ICC is limited to cases of territoriality and active personality, thus to crimes committed on the territory of a State party to the Rome Statute, or by a national of a Member State, Art. 12 (2) (a), (b)

40 German *Code of Crimes against International Law* (*Völkerstrafgesetzbuch*), § 1, *supra* note 15.

41 German Federal Prosecutor General (ed.), 'Press Release of 17 November 2009', available at http://www.generalbundesanwalt.de/de/showpress.php?themenid=11&newsid=347 (last visited 28 January 2012).

42 Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 110-113.

Rome Statute.[43] This allows the assumption that the "framers" of the Rome Statute wanted to only accept these bases of jurisdiction in general, thus, also for the national jurisdiction mentioned in Art. 17 Rome Statute. [44] This may be because these are the most traditionally accepted ones or because this would constitute the strictest way of establishing jurisdiction. Lattanzi discusses the issue and concludes that

> *"[i]l paraît donc plus cohérent avec l'exigence d'une répression effective des "crimes les plus graves qui touchent l'ensemble de la communauté international […] que la complémentarité s'évalue seulement à l'égard de certaines jurisdictions nationales et en considération aussi des rapports que la Cour a avec les Etats les plus strictement reliés au crimes."*[45]

b) All Jurisdictional Links Which Are Accepted by the State

Since the wording of Art. 17 Rome Statute is not precise on the issue of jurisdiction of the State, it also allows the assumption that States are actually free to prescribe whichever principle in respect of jurisdiction they may like, be it passive personality or – more important for the purpose of this paper – universal jurisdiction. According to this idea, the language of

43 Leaving aside the possibility of a Security Council referral as foreseen in Art. 13 b) Rome Statute, and the acceptance of the ICC's jurisdiction by a third State.

44 German Federal Constitutional Court, *supra* note 1, 354; M. Henzelin, *Le principe de l'universalité en droit penal international* (2000), 447, para. 1419: "Le défaut majeur du Statut est cependant que le Préambule ne dit pas clairement que les Etats, compétent à titre complémentaire pour poursuivre et juger les crimes décrits, *le sont selon le principe de l'universalité*. Rien ne laisse en effet entendre que le Statut n'envisage pas tout simplement que les Etats soient compétents pour poursuivre et juger les crime décrits *selon leur compétence actuelle*, territorial, personnelle et de protection." (emphasis added and footnotes omitted); Schabas, *ICC Commentary*, *supra* note 26, 340.

45 F. Lattanzi, 'Compétence de la Cour pénale internationale et consentement des Etats', 103 *Revue Générale de Droit International Public* (1999) 2, 425, 431; whereas it was also held that "[t]he principle of complementarity obligates the Prosecutor to defer to national legal systems where the State that *normally* exercises jurisdiction is in the process of investigating or prosecuting the crime" leaving the character of said jurisdiction less clear (emphasis added); I. Stegmiller, *The Pre-Investigation Phase of the ICC* (2011), 284.

the Rome Statute seems to give the discretion to States regarding which principle of jurisdiction they believe are convincing and applicable under this concept. The jurisdiction of a State could easily have a very broad scope, including Universal Jurisdiction. The idea of including the nationally prescribed Universal Jurisdiction in the jurisdiction referred to in Art. 17 Rome Statute was supported by scholars.[46] *Arbour* even uses the term of "compulsory" Universal Jurisdiction based on the Rome Statute that obliges the Member States to implement Universal Jurisdiction within their national legislations, which leads to the assumption that it falls under the concept of jurisdiction in the sense of Art. 17 Rome Statute.[47] Further, it was found that because of the ICC's limited ability to try *all* perpetrators, in combination with the concerned States' expected unwillingness and inability to prosecute, "the sole choice remaining will often be between universal jurisdiction and impunity."[48]

c) Discussion

Owing to the lack of clear wording and clarifying jurisprudence on this issue, a deeper analysis is necessary. The dual understanding of "jurisdiction" finds some argumentative support and consequently the examination requires special scrutiny. Relying primarily on a systematic interpretation, the provisions of Arts. 1 and 17 Rome Statute and the Preamble thereto would need to be seen in the context of the Rome Statute as a whole and in relation to the other provisions dealing with jurisdiction. Under this approach, the accepted jurisdictional links, territoriality and active personality as addressed in Art. 12 (2) a) and b) Rome Statute, establish a rather clear system of accepted links of jurisdictions. Here, the Rome Statute is cautious and conservative concerning the developments in general international law, which would probably accept some more links to establish jurisdiction. In this line of argumentation, one needs to conclude

46 In the context of Art. 19 Rome Statute: C. K. Hall, 'Article 19', in Triffterer, *supra* note 26, 637, 649-650, paras 13 & 14; generally: E. David, 'La Cour pénal internationale', 313 *Recueil des Cours de l'Académie de Droit International* (2005), 325, 348-349; W. A. Schabas, *ICC Commentary*, *supra* note 26, 340.

47 L. Arbour, 'Will the ICC have an Impact on Universal Jurisdiction?', 1 *Journal of International Criminal Justice* (2003) 3, 585, 586-587.

48 Broomhall, *supra* note 7, 409.

that the system of the Rome Statute is coherently strict in providing the court with jurisdiction and it may be considered as being more coherent with this system to only accept the named links for jurisdiction within the national legal framework as well. Another argument in favor of this conclusion is that the assumption that within one treaty a specific term such as "jurisdiction" is used in one rather than in various different meaning.[49] This requires understanding "jurisdiction" in Art. 12 Rome Statute in the same way as in Art. 17 Rome Statute. Such a holistic approach is nevertheless difficult to maintain in regard to the Rome Statute, which was drafted by different groups dealing with different parts of it, hence the group that was in charge of the Jurisdiction within Art. 12 must not necessarily have been in charge for the wording of Art. 17 Rome Statute.[50]

There may be, however, other provisions that systematically point into another direction: Art. 18 Rome Statute stating that "the Prosecutor shall notify all States Parties and those States which [...] would normally exercise jurisdiction over the crimes concerned" in case there is enough basis to start investigations. Further, Art. 19 (2) c) and d) Rome Statute distinguish between those States that have jurisdiction over a case in accordance with Art. 12 Rome Statute and those having jurisdiction over a case "on the ground that it is investigating or prosecuting the case" which allows the conclusion that there are other jurisdictional links accepted generally by the Rome Statute, than only those of Art. 12, as e.g. the passive personality principle.[51] In conclusion, the systematic approach would probably point at a more restrictive jurisdiction for States, at least excluding Universal Jurisdiction, even though there is no definite answer that does not leave a slight ambiguity. Accordingly, the result of this interpretation is that the ICC could still exercise its jurisdiction over the two arrested men, not accepting the Universal Jurisdiction exercised by Germany as being covered by the

[49] Referred to as "Principle III: integration – that treaties are to be interpreted as a whole" M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 172, 183.

[50] W. A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (2007), 19-20.

[51] Hall, *supra* note 46, 649, para. 13, even including Universal Jurisdiction; D. D. N. Nsereko, 'Art. 18', in Triffterer *supra* note 26, 630-631, para. 9.

scope of Art. 17 Rome Statute as long as the principle of ne bis in idem does not prevent it from doing so.[52]

Using a teleological interpretation would require to regard the object and purpose of the principle of complementarity for the admissibility before the ICC. Here, the above mentioned rationale of the principle may help in order to evaluate the content: if one considers the remaining sovereignty for the States the main reason behind complementarity, it is essential to conclude that it is within the States' free discretion to prescribe Universal Jurisdiction within their national systems and apply it to those who possibly could be dealt with by the ICC. Hence, the Congolese men could be arrested and tried by Germany, without involving the ICC. A strong hint towards this approach is the general reluctance within the Rome Statute to restrict States in their sovereignty too much.[53] The fight against impunity as part of the rationale of complementarity does not clearly hint towards either of the possibilities because in the light of the end of impunity it does not matter if a case is tried by the ICC or the national legal systems, as long as there is criminal accountability. Under considerations of numbers, nevertheless, the ICC will not be able to deal with all perpetrators, thus the implementation of Universal Jurisdiction with the rationale of ending impunity could be relevant in those cases, where the ICC is "overloaded" with cases and the "classical" jurisdictional States are "unwilling" or "unable" to prosecute.[54] Considering the practical implications i.e. the close nexus to evidence, victims and witnesses and also to the concerned societies as the rationale renders it illogical to use Universal Jurisdiction instead of trying the perpetrators in front of the ICC.[55] However, the rationale behind the complementarity is manifold and can therefore not be reduced to one of the named aspects. With the teleological interpretation there is hence no clear outcome, although the reasoning of practical consequences might be – practically seen – very important.

52 The principle of *ne bis in idem* was raised by the Defense in *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Corrigendum to Defence Reply to the Observations of the Prosecutor and of Legal Representatives of the Victims on the Application Challenging the Admissibility of the Case, ICC-01/05-01/08-752-Corr (Pre-trial Chamber III), 14 April 2010, para. 24 (4).

53 As found *supra* B. II. 2 and B. II. 3. regarding the ICC's jurisdiction.

54 Amnesty International, *supra* note 7, 5; Broomhall, *supra* note 7, 409.

55 Generally on the practical problems of the use of Universal Jurisdiction: *id.*, 412-414.

There are two further points that need to be discussed: first there is the possibility that the ICC could be more effective in prosecuting and trying a case because there might be situations in which the ICC as an international court has simply more authority to obtain the necessary information and co-operation and second, based on human rights considerations proceedings in front of the ICC might be the more favorable and desirable solution for the accused, since the system of the ICC grants the accused a certain minimum standard regarding fair trial guarantees which could be disregarded in some States' legal systems, maybe especially in those which did not ratify the Rome Statute.[56] These minimum standards regarding a fair trial might even be part of the requirement of being genuinely willing and able to conduct investigations and eventually proceedings since efficiency of these proceedings logically includes minimum human rights standards, e.g. a confession that is achieved by torture hardly suffices the standard of efficient proceedings. Additionally, the international proceedings also guarantee for a public observance of international media.[57] Assuming that the Congolese men were arrested in a State that earns unfortunate fame for a system of ill-treatment and human rights violation during judicial proceedings, the prevalence of the ICC proceedings would be beneficial to the accused. Accordingly, this is another reason against the use of Universal Jurisdiction within the scope of Art. 17 Rome Statute. Even considering that the ICC is able to seize the case in accordance with Art. 17 (2) Rome Statute if the proceedings do not respect the "principles of due process recognized by international law" the application of universal jurisdiction at first leaves the concerned person in the situation where a due process is not provided for. Further, the ICC might be reluctant to seize cases which are already dealt with via Art. 17 (2) Rome Statute due to political and policy reasons.

Another argument in favor of implementing the Universal Jurisdiction into national jurisdiction referred to in Art. 17 Rome Statute is the Lotus principle which states that as long as international law does not prohibit something, it may be applied,[58] which means in the present discussion that as long as there is no internationally recognized prohibition of Universal Jurisdiction, the States may use it and the ICC would be obliged to respect this as national jurisdiction. This argument can be contended by the

56 See *infra* C. I. 2.

57 Principles 9 and 10 of Amnesty International's 14 Principles on the effective exercise of Universal Jurisdiction try to make sure that such situation does not occur.

58 *Lotus Case*, *supra* note 16, 19.

assumption that the Member States to the Rome Statute waived the use of this right.

There also could be a situation of concurrence between the ICC and two States wishing to deal with a case by using Universal Jurisdiction. Applied to the example: Germany has the men, Belgium wants them, in order to try them and the ICC conducts investigations as well. How to solve that? Wouldn't it be reasonable to ask Universal Jurisdiction-using Germany and Belgium to step back? In such situation a rule of subsidiary jurisdiction for at least the one State that does not have hold of the respective accused and thus would need to conduct in absentia proceedings in favor of the *forum deprehensionis* State would appear to be a reasonable solution.[59] No matter how the concurrence is solved between the States, the ICC would need to accept the principle of complementarity although it might be a diplomatic solution to allow the ICC to step in.

d) Conclusion

As a concluding answer to the question which forms of jurisdictional linkages are envisaged in Art. 17 Rome Statute for the States' jurisdictions it needs to be underlined that there is no clearly set standard of the ICC itself. The issue is still open and may come up in the future. Considering that the ICC still is a relatively young institution it might be important for it to acquire new cases. On the other hand – considering the geographical scope the ICC already has – its prosecutor won't be short of work in the near future and necessarily will restrict its work to those cases that concern the "big fish" and it will try to find agreements and solutions with the States. Also the policy paper on complementarity in its general tone is rather suggesting a broad understanding of the concept; hence, most probably there are not going to be clashes between the ICC and States that use Universal Jurisdiction. Accordingly, the tendency goes – as also seen in the national jurisdictions, accepting one by one the Universal Jurisdiction – towards accepting Universal Jurisdiction within the national framework and accepting it as well as a prevailing national jurisdiction, also, because the

[59] As done in Belgium, see: M. Rau, 'Das Ende der Weltrechtspflege?: Zur Abschaffung des belgischen Gesetzes über die universelle Verfolgung völkerrechtlicher Verbrechen', 16 *Humanitäres Völkerrecht* (2003) 4, 212, 213.

end of impunity is the *raison d'être* of the ICC as such. Thus, as long as one generally accepts the existence of Universal Jurisdiction, Art. 17 Rome Statute encompasses the notion of Universal Jurisdiction, if a Member State prescribed it within its national law earlier. With the help of the above mentioned example: the two Congolese men, arrested by the German Federal Prosecutor General will be tried within the German legal system and the ICC could not get hold of them, even if it would try to.

2. Does the Complementarity as an Admissibility Criterion Also Cover the Use of Universal Jurisdiction by Non-Member States?

Concerning the question whether a case is admissible before the ICC under the principle of complementarity even if there was a non-member State that exercised its nationally prescribed Universal Jurisdiction over that same case, the exemplifying case needs to be modified regarding the prosecuting State. Hence, it needs to be assumed that it was a non-member State, e.g. China that prosecuted the two men and still the ICC's Prosecutor prepares the prosecution of them in front of the ICC. First, as found above, the principle of complementarity binds Member States to the Rome Statute,[60] this even more if it is applied to the admissibility test of complementarity, which is a rather procedural rule of the Statute. If nevertheless China decides to prosecute with Universal Jurisdiction, the above raised concern of minimum standard of procedures comes up again. This, because especially for those States that did not join the Rome Statute, the international standard that was established by that treaty is not obligatory and therefore the advantage for the accused to be under the jurisdiction of the ICC rather than a random other State is a real argument against the acceptance of the exercise of the third States' Universal Jurisdiction by the ICC. Further, the application of the admissibility test of Art. 17 in its full fledged version, deciding about "inability" and "unwillingness" of the third State would constitute a violation of that third States' sovereignty since that State never accepted the ICC's and the Rome Statute's authority to evaluate the efficiency of that State's domestic legal system. Any decision of the ICC on the admissibility test would violate – at

[60] See *supra* B. II. 2. b).

least indirectly – the principle of *par in parem non habet iurisdictionem*. However, the role of the ICC as being a court of last resort would lead to the conclusion that even the third State's action would suffice to trigger inadmissibility.[61] Additionally, some practical considerations would also render it less important that the ICC deals with such a situation: justice is already done and there are presumably many other cases the ICC will be asked to deal with. Hence, the exercise of Universal Jurisdiction by China *e.g.* would be enough to block the ICC from declaring a case admissible.

II. Interplay of the Principles Regarding the States' Obligation/Right to Complementarity

It was mentioned that "[t]he main burden of enforcing international criminal law will in future rest not with the International Criminal Court and probably not with the countries of commission, but with *third* States willing to prosecute."[62] This presupposes for such cases where the third State uses Universal Jurisdiction, that its use and the right and obligation to complementarity are compatible. In the following it will be analyzed if there is an obligation of the State to prosecute a case if the only possible basis is Universal Jurisdiction (1.) and whether the use of one State's Universal Jurisdiction can be considered a violation of another State's right to complementarity (2.).

1. Is There an Obligation of the State to Investigate/Prosecute if Only Universal Jurisdiction Can Be Applied?

As it was concluded above that there is an obligation on the members to the Rome Statute to prosecute the crimes envisaged by the Statute in their national legal systems arising out of the principle of complementarity.[63] At this point, it needs to be evaluated if this obligation to nationally prosecute

61 David, *supra* note 46, 348-349.
62 Werle, *supra* note 16, 69, para. 200 (emphasis added).
63 See *supra* B. II. 2. a).

the Rome Statute's crimes is also tailored at the prosecution under Universal Jurisdiction. In short: can the complementarity of the Rome Statute oblige Member States to prescribe Universal Jurisdiction? Now, taking up the aforementioned example, is Germany not only able to prosecute the Congolese militia men with primacy over the ICC but rather obliged? One could argue that there is no such notion as obligatory Universal Jurisdiction under international law and therefore there is no obligation under the principle of complementarity to prosecute crimes using only Universal Jurisdiction.[64] There was, nevertheless also mentioned that "although the ICC Statute *does not oblige* states to exercise extraterritorial, in particular universal, jurisdiction over the international crimes in question, the system of international justice envisaged by the ICC Statute *will work* effectively *only* if states extend their jurisdiction to crimes committed extraterritorially."[65] This could be backed up with legal opinions holding for an obligatory use of Universal Jurisdiction, which then, under the above concluded obligation to prosecute as encompassed by complementarity in the Rome Statute, would be obliging members to the Statute to prosecute alleged crimes under Universal Jurisdiction nationally. Acknowledging the lack of strength of the obligation of complementarity as such, since not based on the mere wording of the Statute,[66] it would be an extension of the Statute to assume that there is an obligation on States to use Universal Jurisdiction to comply with their complementarity demands vis-à-vis the Rome Statute. As a conclusion, a State, such as Germany in the example, is not obliged but rather allowed to prosecute an alleged perpetrator under Universal Jurisdiction, since there is no internationally recognized obligation to implement Universal Jurisdiction into their legislative system, even if there may be a trend towards such implementation in some States.[67]

64 Philippe, *supra* note 7, 379.
65 Jessberger & Powell, *supra* note 37, 349.
66 See *supra* B. II. 2. a).
67 Rau, *supra* note 59, 214.

2. Can the Use of Universal Jurisdiction Cause a Clash Between Willing States and Violate the Right to Complementarity of a State?

Using the above cited example, it needs to be clarified if the use of Universal Jurisdiction by Germany establishes a violation of the right of complementarity of another State, e.g. Belgium which also wanted to prosecute the arrested men for the alleged crimes committed in the DRC. Even under the assumption that Belgium is not obliged to prescribe Universal Jurisdiction nationally, if complementarity entails a State's right, the exercise by Germany factually prevents Belgium from doing so itself. In this hunt for possible prosecution it is necessary to balance the different interests and to elaborate a strategy of who would have priority in the prosecutions. This problem was not discussed before in relation to complementarity and Universal Jurisdiction, it does seem to be reasonable, though, to consider the State of presence of the alleged perpetrators (*forum deprehensionis*) the privileged State to prosecute the perpetrators. Thus, the possible concurrence for the right to deal with criminals will probably be solved on the basis of practical considerations.

D. Conclusion

Finally, the statement of President Kagame is not reflecting the complete legal truth about Universal Jurisdiction and its use; it does nevertheless contain a little grain of truth – especially on the international relations level. Drawing a conclusion on the above raised question of how the two concepts work in relationship to each other, how they interplay, one needs to come to the result that the concepts are consistent with each other and help enforcing each other based on the above found reasons. By including nationally prescribed Universal Jurisdiction into the national jurisdiction referred to in Art. 17 Rome Statute the number of States that could nationally deal with a case increases, which thereby supports the idea that the ICC is a court of last resort. Also the use of Universal Jurisdiction of non-member States fulfils the inadmissibility criterion of art. 17 Rome Statute.

Concerning the obligation and the right evolving from complementarity, the use of Universal Jurisdiction cannot be obligatory on the States. Furthermore, the use of Universal Jurisdiction by one State is not

violating another State in its right to also use their right to complementarity, because in such situations some rule of subsidiary jurisdiction need to be applied. Although the present work leads to the conclusion that Universal Jurisdiction could and probably should be a major part of international criminal law, it is necessary to present some doubts concerning the practical implementation of this concept without being “biased” towards certain States or applying it in a “neo-colonial” manner. The basic idea of fighting impunity might need Universal Jurisdiction and States that are willing to implement and use it. It needs to be handled with caution regarding political stability and peaceful and friendly relations between the prosecuting and the “prosecuted” States. There are also situations, in which the ICC would do good in declaring a situation admissible for itself, instead of relying on Universal Jurisdiction of a State. This in cases where the judicial guarantees are not complied with, or the accused is not present and the Universal Jurisdiction is used in its *in absentia* version.

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Modes of International Criminal Justice and General Principles of Criminal Responsibility

Hiromi Satō*

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* Associate Professor, Department of International Relations, National Defense Academy; LLM (University of Tokyo), M.Litt. (University of Cambridge), Ph.D. (University of Tokyo).

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Abstract

International criminal justice now functions via two systems – a direct one led by the international tribunals and an indirect one driven by national courts. The difference between the two systems inevitably brings about further differentiation with respect to the substantive aspect of these laws. It is especially noteworthy that the indirect system has not been equipped with customary international rules on several topics relating to general principles of criminal responsibility, so it relies heavily on the national laws of States that prosecute serious international crimes. Meanwhile, customary international law applying irrespective of judicial forums has more or less been developed with regard to other topics of general principles of criminal responsibility. Thus, two types of customary international law would be observed in this field – the one peculiar to international proceedings and the other applying to both international and national proceedings. It should also be noted that the law of the International Criminal Court sometimes differs from either type of customary international law, which has partially been caused by the difference between the normative characteristics of conventional and customary laws.

A. Introduction

The establishment of the International Criminal Court (ICC) has brought about significant change in the structure of international criminal justice. It has drastically developed the system of direct application of international criminal law by international tribunals, which had already been introduced by the Nuremberg and Tokyo Trials as well as promoted with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) on the basis of the resolutions of the UN Security Council but not yet formulated into a permanent system.

The application of international criminal law has traditionally been realized only indirectly, with some exceptions such as the Nuremberg and Tokyo Trials. It has been applied and enforced within national legal orders with the support of international rules, especially those on judicial cooperation in criminal matters. In prosecuting international crimes, national courts have usually consulted a limited number of international conventions and closely examined relevant customary international law that is universally binding on national laws. Because of the paucity of

conventional rules in this field and the requirement of normative universality in the indirect system operating via national jurisdiction worldwide, customary international law has played a significant role with regard to this mode of international criminal justice. However, as relevant international rules remain far from fully developed, it has been necessary for national courts to rely heavily on their own national laws. On the other hand, the international tribunals have now been equipped with their own statutes that generally provide for the international rules required for prosecutions within their jurisdiction. Furthermore, these newly established judicial institutions have more or less represented the international society and obliged State parties to cooperate with them. The ICC may even expect the intervention of the United Nations (UN) Security Council in several aspects of its ordinary proceedings.[1]

The establishment of the ICC has not necessarily indicated a decisive change in the structure of international criminal justice as a whole. Instead, the Court restricts itself to playing a "complementary" role in relation to national courts; hence, there remains considerable scope for the indirect system driven by national courts to play significant roles in the regulation of serious international crimes. The principle of complementarity that has been specifically presented by the ICC Statute[2] even indicates that the indirect national judicial system has priority over the direct system of the ICC.

The co-existence of direct and indirect systems of international criminal justice has already specifically influenced the very substance of international criminal law applied at respective forums. The difference between the law of the ICC, for instance, and customary international law universally applying to national proceedings is especially conspicuous when it comes to procedural aspects. As noted already, the proceedings of the ICC anticipate the intervention of the UN Security Council, which may defer investigation or prosecution by the Court.[3] Such intervention is not ordinarily expected in national prosecution of international crimes. Regarding judicial cooperation with State parties, "surrender" of suspects to the ICC[4] is not identical to the traditional extradition process among States that is accompanied by several conditions such as the principle of double criminality and the rule of specialty.

1 See *Statute of the International Criminal Court*, Arts 13 (b) & 16, 17 July 1998, 2187 U.N.T.S. 3, 99-100.
2 See *id.*, Preamble, 91.
3 *Id.*, Art. 16, 100.
4 *Id.*, Art. 102, 149.

While the difference in procedural aspects between direct and indirect systems is readily apparent, their differences with respect to the substantive aspect of law are not obvious at a glance. However, the complexity of the modes of international criminal justice inevitably affects relevant substantive law, too.

The substantive aspect of international criminal law basically comprises two components – definition of crimes and general principles of criminal responsibility. With regard to the former, the accumulation of international conventions and other international legal instruments including resolutions of the UN organs and drafts prepared by the UN International Law Commission (ILC), national cases that applied international law, and the case law developed by international tribunals, have significantly contributed to the formulation of customary international law on the definition of war crimes, crimes against humanity, and genocide. Thus, for instance, the report by the UN Secretary General to the UN Security Council on the establishment of the ICTY stated that material jurisdiction of the Tribunal undoubtedly reflected concurrent customary international law.[5]

Contrastively, it can be said that comprehensive rules on general principles of criminal responsibility specifically appeared for the first time with the adoption of the ICC Statute. Relevant international conventions such as the *Geneva Conventions* of 1949[6], *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (1977) (Additional Protocol I)[7], and *The Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention)[8] lack comprehensive provisions on these topics. The Geneva Conventions do not provide for general principles of

5 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993, 9, para. 33.

6 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.

7 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 [Additional Protocol I].

8 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277.

criminal responsibility. Additional Protocol I only provides for command responsibility, and the Genocide Convention does not refer to general principles other than the rejection of official immunity. It is noteworthy that the Draft Statute for an International Criminal Court prepared by the ILC in 1994[9] did not deal with these topics. Provisions on general principles of criminal responsibility first appeared in comprehensive and specific manner in the Report of the Preparatory Committee on the Establishment of an International Criminal Court of 1996.[10] However, even this report did not present a conclusive proposal and remained a compilation of various ideas suggested by State parties. Relevant provisions of the ICC Statute were thus composed in a substantially short period. As a matter of course, it seems worth examining whether those provisions on general principles of criminal responsibility in the ICC Statute reflect corresponding customary rules, if any, of international law that are binding worldwide.

As will be seen below, it cannot actually be said that customary international law universally binding on national proceedings has afforded intricate substantive rules especially on general principles of criminal responsibility. Such legal circumstances would lead to the observation that international tribunals have been equipped with "customary international law" which only applies in the direct system. The inadequacy of the development of this type of customary international law should be supplemented by "general principles of law recognized by civilized nations" and arguably, "considerations of policy".[11] Thus, it could be said that customary international law on general principles of criminal responsibility comprises two different parts: the one which applies only in direct system and the other which applies in both direct and indirect systems.

Customary international law on criminal matters generally comprises State practice and *opinio juris* indicated in relevant international legal

9 *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, Yearbook of the International Law Commission (1994), Vol. II (2), 1, 18-87, paras 23-209, UN Doc A/49/10 (1994).

10 UN, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records*, Vol. 3 (2002), 5, UN Doc A/CONF.183/2.

11 *Prosecutor v. Dražen Erdemović,* Judgment (Appeals Chamber), IT-96-22-A, 7 October 1997, para. 19 [Erdemović Case, Judgment]; *id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras 73-78 [Erdemović Case, Joint Separate Opinion].

instruments, national legislation, case law of national courts, etc.[12] Case law of international judicial organs also significantly influences the formation of customary international law with "persuasive force".[13] However, considering the differences between direct and indirect systems and corresponding substantive laws, it seems necessary to further inquire "which" customary international law matters in examining these elements regarding criminal matters.

Furthermore, the difference with regard to principal applicable international laws in respective forums – conventional law for the ICC and customary international law for other international tribunals[14] and national courts – should also affect the substance of these laws. As will be seen below, the law of the ICC occasionally deviates from any type of customary international law and provides for *lex specialis* which is operable within its own jurisdiction.

Thus, this article argues that the meaning of "international criminal law" cannot but occasionally differ depending on the forum of judicial proceedings. Discussions on international criminal law do not seem to have paid much attention to the variation of this law even after the complex structure of international criminal justice was generally fixed in the 1990s. Although unnecessary diversity in the substance of international criminal law would jeopardize its integrity and should carefully be avoided, confusions of different "international criminal laws" could bring about injustice where such variation is inevitable or even appropriate. Discourse of international criminal law should, in the argument of the present author, be conscious of such diversity in pursuing its coherence.

In the following, this article tries to portray the layers of "international criminal laws" functioning in different judicial forums. The first section examines a possible vacuum of customary international law in the indirect system with regard to general principles of criminal

12 Although it has widely been sustained that customary international law comprises two elements of State practice and *opinio juris*, these elements usually merge with each other and the proof of the existence of *opinio juris* is required only in exceptional cases. See Committee on Formation of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000), available at http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376 (last visited 28 January 2013), 29-31.

13 *Id.*, 19.

14 The *ex post* characteristics of those tribunals generally restricts their applicable substantive laws to customary ones. As to this point, see Section D. I below.

responsibility, for which international judicial institutions can be said to have been developing their own customary rules applicable within their jurisdiction (Section B). Nonetheless, it will be noted that several rules on general principles of criminal responsibility have been well developed as customary international law that may apply irrespective of judicial forums where they operate (Section C). The third part deals with the law of the ICC as *lex specialis*, the substance of which differs from either type of customary international law (Section D).

B. The Vacuum of International Law Applying to National Proceedings: Voice of Autonomy on the Part of National Laws

National legislation on the regulation of serious international crimes is an important element that evinces State practice and *opinio juris* that formulate customary international law binding national judicial proceedings in this field. With regard to general principles of criminal responsibility, it is common for national legislation to stipulate specifically that national laws also apply in terms of these topics in the regulation of serious international crimes. As will be seen below, at least the majority of the national legislation accessible to the present author upholds, in principle, the application of national laws on general principles of criminal responsibility. On the other hand, national legislation that prioritizes relevant rules of the ICC Statute remains in the minority.[15]

As the ICC Statute does not strictly oblige State parties to incorporate provisions of the Statute, there seems to be nothing problematic with such tendencies of national legislation in terms of the implementation

[15] National laws of Uganda (*International Criminal Court Act, 2000*, in International Committee of the Red Cross (ed.), *International Humanitarian Law: National Implementation*, available at http://www.icrc.org/ihl-nat.nsf/WebLAW!OpenView (last visited 28 January 2013) [International Humanitarian Law]), Trinidad and Tobago (*International Criminal Court Act, 2006*, in *id.*), Samoa (*Act to Enable Samoa to Implement and Give Effect to its Obligations Under the Rome Statute of the International Criminal Court, and for Related Matters of 2007*, in *id.*), Kenya (*International Crimes Act of 2008*, in *id.*), and New Zealand (*International Crimes and International Criminal Court Act 2000*, in *id.*) allow the application of rules both of their own national laws and the ICC Statute, and give priority to the latter in case of the conflict between them.

of the ICC Statute. Meanwhile, it has widely been recognized that customary international law obliges States to punish serious international crimes such as war crimes and genocide. The Preamble of the ICC Statute recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The application of national laws regarding general principles of criminal responsibility in the national prosecution of serious international crimes implies that relevant States understand that the international "duty" to prosecute those crimes may be fulfilled in such manner.[16] In other words, it can be said that they do not recognize any international obligation to apply relevant provisions of the ICC Statute as well as other forms of international law on general principles of criminal responsibility in spite of their "duty" to prosecute serious international crimes.

I. The Law of the ICC and National Legislation

Examples of national legislation with respect to the implementation of the ICC Statute that clearly provides for the application of national laws on general principles of criminal responsibility include the *International Criminal Court Act 2001* and *International Criminal Court (Scotland) Act 2001* of the United Kingdom.[17] The former Act stipulates offences that correspond to those within the jurisdiction of the ICC and provides, "[i]t is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime."[18] In interpreting the definition of these crimes, the Elements of Crimes adopted in accordance with Art. 9 of the ICC Statute are taken into account. The Act then specifies

16 At the Berlin Conference of 2000 for the examination of the implementation of the ICC Statute, which was sponsored by the International Criminal Law Society, it was recognized that States would have "a greater degree of latitude" regarding the issues on general principles of criminal responsibility. See J. Schense & D. K. Piragoff, 'Commonalities and Differences in the Implementation of the Rome Statute', in M. Neuner (ed.), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (2003), 239, 252-254.

17 The legislations are available in V. Santori (ed.), 'Domestic Implementing Legislation and Related Documents' (CD-ROM), in C. Kreß *et al.* (eds), *The Rome Statute and Domestic Legal Orders*, Vol. II (2005).

18 *International Criminal Court Act 2001*, Sec. 51 (1), *supra* note 17. The *International Criminal Court (Scotland) Act 2001*, *supra* note 17 stipulates in the same manner in Sec. 1 (1).

in Section 56, under the title, "Saving for general principles of liability, etc", "[i]n determining whether an offence under this Part has been committed the court shall apply the principles of the law of England and Wales."[19] This section provides special rules for these crimes only in terms of command responsibility and mental element, which mostly reflect corresponding provisions of the ICC Statute. Thus, the UK national law makes clear that it principally applies its own general principles of criminal responsibility in national prosecution of international crimes in question, although these crimes are defined as stipulated in the ICC Statute. The Explanatory Notes to International Criminal Court Act, which were prepared by the Foreign and Commonwealth Office, explain on Section 56 of the Act that some differences exist between general principles of law provided by the ICC Statute and those of the UK national law and that UK courts will apply the latter "for consistency with other parts of national criminal law."[20]

The *International Criminal Court Act 2006*[21] of Ireland stipulates, "[a]ny person who commits genocide, a crime against humanity or a war crime is guilty of an offence."[22] Each offence is respectively called an "ICC offence".[23] Meanwhile, with regard to "[a]pplicable law", Section 13 (1) provides that "[t]he law (including common law) of the State shall […] apply in determining whether a person has committed an offence under this Part." Special rules on general principles of criminal responsibility for ICC offences are provided only with regard to command responsibility and official immunity, and "as appropriate and with any necessary modifications".[24]

The Canadian *Crimes Against Humanity and War Crimes Act* (*An Act Respecting Genocide, Crimes Against Humanity and War Crimes and to Implement the Rome Statute of the International Criminal Court, and to Make Consequential Amendments to Other Acts*)[25] of 2000 provides for defenses in Art. 11. It says, "the accused may […] rely on any justification,

19 *International Criminal Court Act 2001*, Sec. 56 (1), *supra* note 17. The same rule shall be applied also in Northern Ireland (*id.*, Sec. 63 (1)). The *International Criminal Court (Scotland) Act 2001* stipulates, in Sec. 9 (1), in the same manner as the *International Criminal Court Act 2001*.

20 Foreign and Commonwealth Office (ed.), 'Explanatory Notes to International Criminal Court Act', in Santori, *supra* note 17, para. 100 [Explanatory Notes].

21 The legislation is available at *International Humanitarian Law, supra* note 15.

22 *International Criminal Court Act 2006*, Sec. 7 (1), *supra* note 21.

23 *Id.*, Sec. 9 (1).

24 *Id.*, Sec. 13 (2).

25 The legislation is available in Santori, *supra* note 17.

excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings."[26] A specially provided rule for the prosecution of those crimes is restricted to command responsibility.[27] The Act does not clarify what sort of defenses are available under international law, and the accused may rely on a more favorable defense – in some cases possibly on the defense under Canadian law, the legal consequence of which may be different from the one under international law.[28]

The legislation of Burkina Faso[29] aims to repress international crimes proscribed by the ICC Statute, Geneva Conventions, and Additional Protocols to the said Conventions, as well as to cooperate with the ICC and repress violations of the administration of the ICC.[30] While the *Loi* mostly reflects the provisions of the ICC Statute regarding official immunity, criminal intent, mistake of fact and of law, other defenses, and command responsibility,[31] it specifically provides that criminal responsibility of minors is regulated by general rules *("droit commun")*.[32]

There is also legislation, which implicitly indicates the application of national laws on general principles of criminal responsibility. For example, through the *Law on Cooperation with the International Criminal Court* of 2007, Japanese legislation has adopted a so-called minimalist approach and mainly provides for procedural rules on cooperation with the ICC. As drafters understood that most of the criminal conduct stipulated by the ICC Statute was also criminalized as ordinary crimes by the Japanese *Keihō* (*Criminal Code*), the Law only provides for offences against the administration of justice of the ICC with respect to the substantive aspect of

26 *Crimes Against Humanity and War Crimes Act (An Act Respecting Genocide, Crimes Against Humanity and War Crimes and to Implement the Rome Statute of the International Criminal Court, and to Make Consequential Amendments to Other Acts)*, Art. 11, available at *International Humanitarian Law, supra* note 15 [Crimes Against Humanity and War Crimes Act].

27 *Id.*, Art. 5.

28 W. A. Schabas, 'Canadian Implementing Legislation for the Rome Statute: Jurisdiction and Defences', in Neuner, *supra* note 16, 35, 40-41.

29 *Loi No 052-2009/AN*, 3 December 2009. The legislation is available at *International Humanitarian Law*, *supra* note 15.

30 *Loi No 052-2009/AN*, Art. 1, *supra* note 29.

31 *Id.*, Arts 3, 7-13.

32 *Id.*, Art. 4.

the legislation.[33] Neither in the Law nor in the *Keihō* are there any special rules on general principles of criminal responsibility that are provided for the regulation of international crimes. In the light of the principle of legality that has strictly been interpreted in Japanese jurisprudence, it is highly unlikely that Japanese national courts directly apply customary international law on these topics.

II. The Vacuum of Customary International Law Binding National Proceedings

There is also national legislation that applies national rules on general principles of criminal responsibility in the national prosecution of serious international crimes in general, that is, not necessarily or exclusively for the implementation of the ICC Statute. Exceptionally provided rules are restricted to those regarding the superior orders defense, command responsibility, etc. This type of national legislation further indicates the understanding of relevant States that there is no binding set of complete international rules on general principles of criminal responsibility that oblige them to adjust their national laws.

The examples include the *Act of 19 June 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law* (*International Crimes Act*) of 2003 of the Netherlands that nationally criminalizes genocide, crimes against humanity, war crimes, and torture.[34] Sections 10-16 of the Act stipulate "[g]eneral provisions of criminal law and criminal procedure", but refer only to the superior orders defense with respect to general principles of criminal responsibility. It is noteworthy that although the Penal Code of the Netherlands slightly differs from international doctrine and case law on general principles of criminal

[33] See K. Arai, A. Mayama & O. Yoshida, 'Japan's Accession to the ICC Statute and the ICC Cooperation Law', 51 *Japanese Yearbook of International Law* (2008), 359; K. Takayama, 'Participation in the ICC and the National Criminal Law of Japan', 51 *Japanese Yearbook of International Law* (2008), 384; Y. Masaki, 'Japan's Entry to the International Criminal Court and the Legal Challenges it Faced', 51 *Japanese Yearbook of International Law* (2008), 409.

[34] *Act of 19 June 2003 Containing Rules Concerning Serious Violations of International Humanitarian Law (International Crimes Act)*, available in Santori, *supra* note 17, Secs 3-8 [International Crimes Act].

responsibility, the *Explanatory Memorandum* explains that it is practical for Dutch courts to rely on its own law because they are more familiar with it.[35]

Likewise, in Australia, the *Criminal Code Act 1995*[36] specifies that its provisions on the regulation of international crimes are "not intended to exclude or limit any other law of the Commonwealth or any law of a State or Territory."[37] General principles on criminal responsibility in the Code are principally applied when prosecuting international crimes.[38] Special rules for serious international crimes are exceptionally provided for in relation to the superior orders defense[39] and command responsibility.[40]

Germany's *Code of Crimes against International Law*, which makes stipulations for the regulation of serious international crimes as well as the implementation of the ICC Statute, provides for a general part that is distinctively applicable to the prosecution of these international crimes. Nonetheless, the majority of general principles of the ordinary German *Penal Code* shall still be applied,[41] and the exceptions are restricted to some special rules on the superior orders defense and command responsibility. National rules that are different from those of the ICC Statute may thus be applied for the prosecution of serious international crimes. For instance, the German *Penal Code* allows the defense of mistake of law if the mistake in question was "unavoidable", whereas Art. 32 (2) of the ICC Statute does not recognize such a defense except in the case where the mistake negates the mental element of the crime. With regard to this point, the German legislator argued that "the *principle of guilt*, which has constitutional rank in Germany, would bar the implementation of Article 32 (2)" of the ICC Statute.[42]

National laws of Finland, Poland, Sweden, Croatia, Russia, Israel, and South American countries also recognize that the general principles of

35 H. Bevers, J. Roording & O. Swaak-Goldman, 'The Dutch International Crimes Act (Bill)', in Neuner, *supra* note 16, 179, 183, 186-187.

36 The legislation is available at *International Humanitarian Law, supra* note 15.

37 *Criminal Code Act 1995*, Sec. 268.120, *supra* note 36.

38 See also A. Biehler & C. Kerll, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Australien', in A. Eser, U. Sieber & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 6 (2005), 19, 45 [Eser, Sieber & Kreicker, Nationale Strafverfolgung, Vol. 6].

39 *Criminal Code Act 1995,* Sec. 268.116, *supra* note 36.

40 *Id.*, Sec. 268.115.

41 M. Neuner, 'General Principles of International Criminal Law in Germany', in Neuner, *supra* note 16, 105.

42 *Id.*, 120-121.

criminal responsibility of their own laws, which are more or less different from those provided by the ICC Statute, will be applied for the regulation of serious international crimes.[43] For instance, the criminal laws of Poland, Sweden, and Croatia recognize the notion of *dolus eventualis* as a subjective element of crimes,[44] which only requires that the perpetrator be aware of the "risk" of the particular consequences related to an event and yet consciously takes the risk. Meanwhile, Art. 30 (2) and (3) of the ICC Statute, which stipulates the mental element of crimes, requires the perpetrator's awareness that a consequence "will occur in the ordinary course of events", in order for the committal of a crime to be established. The former is apparently a wider notion than that presented by Art. 30 (2) and (3) of the ICC Statute. Nonetheless, those countries do not see any problems in applying those national rules on the regulation of serious international crimes.[45]

Some other legislation may possibly be construed as indicating the application of national laws on this subject. The criminal codes of Estonia,[46]

43 As to Finnish law, see D. Frände, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Finnland', in A. Eser & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 2 (2003), 21, 53 [Eser & Kreicker, Nationale Strafverfolgung, Vol. 2]; as to Russian law, see S. Lammich, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Russland und Weißrussland', in Eser, Sieber & Kreicker, *Nationale Strafverfolgung,* Vol. 6, *supra* note 38, 351, 377; as to Israeli law, see M. Kremnitzer & M. A. Cohen, 'Prosecution of International Crimes in Israel', in A. Eser, U. Sieber & H. Kreicker (eds), *National Prosecution of International Crimes*, Vol. 5 (2005), 317, 368 [Eser, Sieber & Kreicker, Nationale Strafverfolgung, Vol. 5]; as to South American law, see K. Ambos & E. Malarino, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Lateinamerika: Einige vorläufige Erkenntnisse', in A. Eser, U. Sieber & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 4 (2005), 469, 478.

44 E. Weigend, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Polen', in Eser & Kreicker, *Nationale Strafverfolgung*, Vol. 2, *supra* note 43, 77, 122; K. Cornils, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Schweden', in Eser & Kreicker, *Nationale Strafverfolgung*, Vol. 2, *supra* note 43, 183, 224; P. Novoselec, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Kroatien', in A. Eser, U. Sieber & H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Vol. 3 (2004), 19, 49 [Eser, Sieber & Kreicker, Nationale Strafverfolgung, Vol. 3].

45 Weigend, *supra* note 44, 122; Cornils, *supra* note 44, 224; Novoselec, *supra* note 44, 49.

46 *Penal Code of the Republic of Estonia*, Chapter 8, § 88, available at *International Humanitarian Law, supra* note 15. It domestically criminalizes crimes against humanity, genocide, aggression, and war crimes, among others.

Macedonia,[47] and Fiji[48] do not refer to general principles of criminal responsibility to be exceptionally applied for international crimes such as war crimes, crimes against humanity, and genocide, other than those pertaining to the superior orders defense and command responsibility. They do not specify that principles of their own national laws will apply for the regulation of international crimes. However, it would not be natural to expect that complete international rules on general principles of criminal responsibility, if any, would apply to serious international crimes in those countries, considering the fact that special provisions have been introduced only with regard to the superior orders defense and command responsibility.

The *Criminal Law* of the Republic of Latvia domestically criminalizes genocide, crimes against humanity, war crimes, and crimes against peace,[49] while it does not provide for general principles of criminal responsibility exceptionally applied to these crimes. The Latvian *Criminal Law* comprises "General Part" dealing with general principles of criminal responsibility, sentences, etc. and "Special Part" dealing with definition of crimes. The silence on special rules for serious international crimes in "General Part" in spite of their criminalization in "Special Part" implies the application of general principles of criminal responsibility for those crimes. However, as it is difficult for the present author to examine the relationship between national law and customary international law within the national legal order of Latvia, determining which law is to be applied for the prosecution of international crimes is still problematic.

In the United States, genocide and war crimes have been criminalized by national legislation and it has been recognized that crimes against humanity are regulated within the traditional framework of domestic crimes.[50] As the US Code lacks general provisions on the principles of criminal responsibility, one needs to look at case law with regard to these

47 *Criminal Code* of the Republic of Macedonia, Art. 416- a, b, c, available at *International Humanitarian Law, supra* note 15. It domestically criminalizes genocide, crimes against humanity, war crimes, and aggression, among others.

48 *Crimes Decree 2009* of the Republic of Fiji Islands, Art. 98, available at *International Humanitarian Law, supra* note 15. It domestically criminalizes genocide and crimes against humanity, among others.

49 Chapter IX of the *Criminal Law* of the Republic of Latvia, available at *International Humanitarian Law, supra* note 15.

50 E. Silverman, 'Prosecution of International Crimes in the United States of America', in Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 5, *supra* note 43, 411, 430.

issues.[51] However, it is not clear if US courts may directly apply customary international law on general principles of criminal responsibility to international crimes cases without any specific national legislation.[52]

Most of the above-cited national legislation specifically or implicitly indicates the autonomy of their own national rules on general principles of criminal responsibility in the matter of national prosecution of serious international crimes. Notable exceptions are restricted to special rules on such issues as the superior orders defense and command responsibility.

National laws take liberties with formulating respective national legal orders that fix the relationship between national law and international law. However, violation of international obligations may incur State liability or other forms of international opprobrium. It would reasonably be expected that States more or less make efforts to adjust their national laws in line with relevant international law in order to avoid such negative reaction from other States. At least, it is highly unlikely for national laws to declare intentionally they are going to ignore and violate international obligations. The above examples of national legislation specifically provide for, or imply the application of a country's own national rules. They indicate that relevant States do not recognize any complete international rules on general principles of criminal responsibility, with the limited exception of rules on issues such as the superior orders defense and command responsibility, which are universally applicable and should be incorporated into respective national laws. If customary international law on general principles of criminal responsibility which binds national proceedings is substantially absent, the corresponding rules provided by the international tribunals would be categorized as those applying just within their jurisdiction.

III. Unitary Rules on General Principles of Criminal Responsibility for Serious International Crimes?

As seen above, a remarkable number of national laws make it clear that national rules on general principles of criminal responsibility applicable to ordinary crimes, which are often different from relevant rules of the ICC Statute, are also applicable to serious international crimes. Such State

[51] *Id.*, 447.

[52] W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), 57.

practices could be understood to indicate that those States do not recognize international rules, either the law of the ICC Statute or customary international law, as binding national proceedings on general principles of criminal responsibility except in relation to such topics as the superior orders defense and command responsibility.

Needless to say, the adoption of the ICC Statute is significant from the viewpoint of further development of customary international law with regard to general principles of criminal responsibility. Nonetheless, considering the variety and difference of the said principles among national laws, one cannot help but doubt the immediate formulation of customary international law binding both national and international proceedings on these topics. Discordance among national laws may easily be observed if one looks into the oft-mentioned difference between common law and civil law on this subject.[53] For instance, on the drafting of the Nuremberg Charter, the Anglo-American delegates acknowledged that "the principles of conspiracy as developed in Anglo-American law" were "not fully followed nor always well regarded by Continental jurists."[54] The ICTY, in the judgment of *Erdemović*, extensively examined national laws on the defense of duress and indicated that civil law countries recognize the said defense conditionally whereas common law countries categorically deny it in the case of serious crimes such as murder.[55] The divide between the two systems can also be seen on the issue of mistake of law. It is occasionally recognized in civil law countries that an unavoidable mistake of law may exempt the accused, whereas common law countries generally do not permit such an exemption.[56] Such differences among diverse legal systems would reach dizzying proportions when one takes into account Islamic law and other mixed jurisdictions.

In the light of such fundamental differences among various legal systems at the national level, the question to be answered is, as Alexander Greenawalt argues, "not how to eliminate inconsistency, but which form of

[53] See G. P. Fletcher, *The Grammar of Criminal Law, American, Comparative, and International,* Vol. 1 (2007), 43-58. Actually, tension among "national systems of criminal law" cannot necessarily be demonstrated as the discrepancy between civil and common law jurisdictions. It will persist rather "between the bipartite and tripartite systems" (*id.*, 53).

[54] *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (1945), vii, 296, 301.

[55] *Erdemović Case,* Joint Separate Opinion, *supra* note 11, paras 59-61.

[56] See Sec. D. II of this article.

consistency to privilege."[57] If one prioritizes consistency regarding general principles of criminal responsibility for serious international crimes, national laws should endure dual systems in which ordinary crimes and serious international crimes will be subject to different principles. On the other hand, consistency within respective national laws means a lack of uniformity on general principles of criminal responsibility for serious international crimes; national principles that are applicable for ordinary crimes would also apply for serious international crimes, and international tribunals need to develop their own laws applicable within their jurisdiction. Considering that international criminal justice has long operated through an indirect system of national judicial proceedings and that the direct system of the ICC now recognizes itself as complementary to national proceedings, one cannot but be cautious in the pursuit of complete uniformity on general principles of criminal responsibility, which brings about discrepancies in national legal orders.[58]

Even if one opted for unification of relevant rules, genuine hybridization of legal notions produced in various legal systems would be extremely difficult[59] and possible preferences for a certain legal system would generate a sense of inequity among States.[60] Some kind of hybridization is actually required for the direct judicial system led by the international tribunals.[61] However, hybridization within the jurisdiction of international tribunals is fundamentally different in its characteristics from

57 A. K. A. Greenawalt, 'The Pluralism of International Criminal Law', 86 *Indiana Law Journal* (2011) 3, 1063, 1102.

58 Greenawalt argues on this point that unification of international criminal law cannot be deemed indispensable in the light of major *raison d'être* of this law: securing additional bases of jurisdiction and punishment of wrongdoers (*id.*, 1095-1100). Direct and indirect systems function side by side in any event. He further observes that consideration for "rule of law values" such as consistency, legality, tribunal administration, normative development also does not legitimize unification at the international level (*id.*, 1100-1114).

59 Hybridization would be difficult both in substantive and procedural aspects. See P. S. Berman, 'Global Legal Pluralism', 80 *Southern California Law Review* (2007) 6, 1155, 1191.

60 Berman further criticizes the idea of universalist harmonization as it "may fail to capture the extreme emotional ties people still feel to distinct transnational or local communities" and "inevitably erases diversity." Such harmonization may ignore less powerful voices, fail to bring about normative innovation through multiple legal orders, and fail to provide an important model of tolerant society (*id.*, 1190-1191).

61 Regarding "juris generative" model of procedural mechanisms that manage hybridity, see *id.*, 1197-1201, 1210-1218.

that in customary international law binding both national and international proceedings. The latter duly requires national legal orders to incorporate newly-established international rules and national laws would possibly be forced to adopt foreign jurisprudence in criminal law. In any event, it would be far from realistic to expect for national criminal lawyers to modify general principles of national criminal laws that have been developed over centuries in respective cultural and political backgrounds. Fundamental changes in the general principles of national criminal laws for the sake of the establishment of international rules that also bind national proceedings would be realized only if some serious necessity, such as the one that the Allied Powers recognized during and after World War II, and an urgent need for international intervention into national legal orders are widely recognized in the international society.

C. Customary International Law Applying to Both International and National Proceedings

As already noted, the majority of the above-cited national legislation makes special provisions on some topics – notably the topics of the superior orders defense and command responsibility – while indicating that national rules on general principles of criminal responsibility will generally apply to cases of serious international crimes. This observation corresponds with the fact that the international society has actually formulated customary international law binding irrespective of judicial forums on these two topics.

I. Superior Orders Defense

With respect to the superior orders defense, by which the accused contends exemption from criminal responsibility because of the fact that he/she merely executed orders from his/her superiors, customary international law has established the principle that the mere fact of acting under orders should not be recognized as a ground for exemption.[62] This

[62] See Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965); P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law', 10 *European Journal of International Law* (1999) 1, 172, 172-188; G. Werle, *Principles of International*

principle of the rejection of automatic exemption was presented at the Nuremberg Trial and later adopted as one of the *Nürnberg Principles* by the UN General Assembly resolution.[63] Some important questions contingent on this defense – the legal consequence of mistake of law on the part of subordinates regarding the illegality of orders, lack of manifest illegality of orders, and coercion under which subordinates were placed because of orders – have not been completely settled. However, the very principle of the rejection of automatic exemption has mostly been upheld in the subsequent international rule-making process.[64]

The statutes of the international criminal tribunals established in the 1990s and their case law also show some discordance on the problem of conditional exemption. The statutes of the ICTY and ICTR categorically deny the superior orders defense[65] and the case law of the ICTY denies the defense of duress under which subordinates are placed because of superior orders.[66] In contrast, Art. 33 of the ICC Statute recognizes possible exemption on the grounds of the accused's mistake of law and the lack of manifest illegality of the order in question. Art. 31 (d) of the Statute also recognizes possible exemption on the grounds of coercion apart from the superior orders defense. Notwithstanding some discrepancies in relation to the problem of conditional exemption, however, it is noteworthy that those international instruments commonly reject automatic exemption by the superior orders defense.

Much of the national legislation examined in the previous section, which specifies or implies that national rules on general principles of criminal responsibility will apply to cases of serious international crimes, exceptionally provides for special rules on the superior orders defense. Such State practice objectively accords with the case that basic structures of relevant rules have already been established at the international level.

Criminal Law, 2nd ed. (2009), 213-218, paras 581-595; H. Satō, *The Execution of Illegal Orders and International Criminal Responsibility* (2011).

63 *Report of the International Law Commission on its Second Session*, Yearbook of International Law Commission (1950), Vol. II, 364, 375, UN Doc A/1316.

64 See Dinstein, *supra* note 62, 217-252; H. S. Levie, 'The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders', 30 *Revue de Droit Militaire et de Droit de la Guerre* (1991) 1-4, 183, 197-203; Satō, *supra* note 62, 103-146.

65 *Statute of the International Tribunal for the Former Yugoslavia*, Art. 7 (4), UN Doc S/25704 annex, 36, 39; *Statute of the International Tribunal for Rwanda*, Art. 6 (4), SC Res. 955 annex, UN Doc S/RES/955, 3, 6.

66 *Erdemović Case*, Judgment, *supra* note 11, para. 19.

Further, as will be seen below, the substance of special rules on the superior orders defense presented in the above-cited national legislation more or less reflect the corresponding international law that was just examined.

Some national legislation recognizes the superior orders defense on condition that subordinates did not know the illegality of the orders in good faith and that the orders were not manifestly illegal. Such combination of the subjective and objective conditions is upheld by the national legislation of the Netherlands. The Dutch national law,[67] while specifying that it will apply national rules on general principles of criminal responsibility for serious international crimes, exceptionally utilizes special rules on the superior orders defense that should be applied for such crimes. It provides that subordinates will not be criminally responsible "if the order was believed by the subordinate in good faith to have been given lawfully".[68] It is specified, however, that orders to commit genocide or crimes against humanity are deemed manifestly unlawful.[69] The German national law likewise provides that the superior orders defense will only be recognized "so far as the perpetrator does not realize that the order is unlawful and so far as it is also not manifestly unlawful."[70] Australian law[71] reflects the provision of the ICC Statute regarding the said defense and provides that it may be recognized only for cases of war crimes and if the accused "did not know that the order was unlawful" and "the order was not manifestly unlawful."[72] Latvian national law does not differentiate rules on the superior orders defense in the case of serious international crimes from those applied in the case of other national crimes, and recognizes the said defense only if the accused did not know the criminality of his/her conduct and if it was not manifest.[73]

There are also examples of simple rejection of the said defense. Estonian national law categorically rejects the superior orders defense for international crimes including war crimes, providing that "[c]ommission of an offence provided for in this Chapter pursuant to the order of a representative of State powers or a military commander shall not preclude

67 *International Crimes Act*, *supra* note 34.
68 *Id.*, Sec. 11 (2).
69 *Id.*, Sec. 11 (3).
70 Neuner, *supra* note 41, 123 (note 67).
71 *Criminal Code Act 1995*, Sec. 268.120, *supra* note 36.
72 *Id.*, Sec. 268.116 (3).
73 *Criminal Law* of the Republic of Latvia, Art. 34, *supra* note 49.

punishment of the principal offender."[74] Fijian national law provides that the superior orders defense cannot be recognized for genocide and crimes against humanity,[75] while it does not mention the case of war crimes.

The national laws that specially refer to the superior orders defense for cases of serious international crimes commonly do not recognize automatic exemption. They allow exemption by the said defense only conditionally or reject it completely. In any case, rules provided in these national laws can be said to be in line with the basics of concurrent international law – the rejection of automatic exemption.

This trend of State practices is also shared by other national laws referred to above that do not apparently provide for special rules on the superior orders defense in the case of serious international crimes, but seem to apply the same rules to both ordinary crimes and serious international crimes.

Examples of the combination of subjective and objective approaches in conditionally allowing the superior orders defense include the Finnish legislation. Finish law recognizes the superior orders defense unless subordinates knew the illegal character of orders that they had received and that the illegality of the orders was manifest.[76] US military law[77] likewise recognizes the superior orders defense conditionally. The *Rules for Courts-Martial* provide that the said defense can be allowed "unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[78]

Meanwhile, the legislation of Poland, Russia, and Belarus indicates subjective condition with regard to the decision on the superior orders defense. Polish law rejects the superior orders defense only if subordinates knew the illegal character of the orders they received.[79] The criminal laws of Russia and Belarus recognize the superior orders defense if subordinates did not know the illegality of the order in question.[80] Legislations which indicate objective condition include those of Croatia and Israel. In Croatian criminal law, the superior orders defense cannot be recognized for war crimes as well as for other serious crimes, or if the illegality of the order in

74 *Penal Code* of the Republic of Estonia, Chapter 8, § 88, *supra* note 46.
75 *Crimes Decree 2009* of the Republic of Fiji Islands, Art. 98, *supra* note 48.
76 Frände, *supra* note 43, 64-65.
77 Silverman, *supra* note 50, 465-467.
78 *Manual for Courts-Martial: United States* (2012), R.C.M. 916 (d), II-110.
79 Weigend, *supra* note 44, 128-129.
80 Lammich, *supra* note 43, 381-382.

question was manifest.[81] Israeli criminal law permits the defense only if the order received was not manifestly illegal.[82]

Swedish law does not recognize the superior orders defense for international crimes, but a mistake of law on the part of subordinates who received illegal orders may be considered in terms of mitigating the punishment.[83]

Legislation of other countries that denies the superior orders defense either conditionally or unconditionally includes that of Albania, Austria, Bangladesh, Belgium, Brazil, Cambodia, Congo, Egypt, Estonia, Ethiopia, France, Iraq, Lebanon, Luxembourg, Niger, Peru, Rwanda, Slovenia, Spain, Switzerland, and Yemen.[84]

The number of national laws examined above is limited, and their accurate analysis in respect to relevant rules perhaps not attained. However, it is still noteworthy that there has apparently been no categorical rejection of established international rules on the issues of the superior orders defense in these national laws. In any event, other States are likewise obliged under international law to incorporate those rules into their national laws, the rejection of which may occasionally lead to negative reaction by the international society.

II. Command Responsibility

Customary international law binding irrespective of judicial forums has also been formulated on the issue of command responsibility *stricto sensu*, that is, international criminal responsibility of commanders for their failure to supervise their subordinates.[85] Although the *Nürnberg Principles* adopted by the UN General Assembly did not provide for command responsibility, the legal notion of command responsibility *stricto sensu* was specifically examined and recognized in the Tokyo Trial, war crimes trials conducted by US military tribunals in occupied Germany, and other trials

81 Novoselec, *supra* note 44, 54.

82 Kremnitzer & Cohen, *supra* note 43, 381.

83 Cornils, *supra* note 44, 232.

84 J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. II (2005), 3822-3829, paras 898-941.

85 See Werle, *supra* note 62, 185-189, paras 496-504; G. Mettraux, *The Law of Command Responsibility* (2009), 3-33; C. Meloni, *Command Responsibility in International Criminal Law* (2010), 33-76.

conducted by national courts of the Allied Powers during and after World War II.[86] Those national courts presented varied understandings of the definition of command responsibility; some judgments stated that commanders were criminally responsible only if they had actually known of the illegal conduct of their subordinates and still had not taken effective measures to regulate them.[87] Other judgments stated that command responsibility was recognized even if superiors had not known of their subordinates' illegal conduct, since commanders had a duty to effectively supervise their subordinates, and their negligence regarding supervision should bring about criminal responsibility.[88]

The inconsistency of the arguments has carried over to the subsequent international rule-making process. Art. 77 of the Additional Protocol I of 1977 provides that commanders are criminally responsible "if they knew, or had information" that should have enabled them to notice the criminal conduct of their subordinates. Case law of the ICTY staggeringly demonstrated a similar view that command responsibility should be established if superiors noticed the "alarming information" of criminal conduct of their subordinates.[89] On the other hand, the law of the ICC is obscure on this point. Art. 28 (a) (i) of the Statute provides that military commanders are criminally responsible if "[t]hat military commander or person *either knew or*, owing to the circumstances at the time, *should have known* that the forces were committing or about to commit such crimes" (emphasis added by the present author). It is not clear whether or not the latter part of this phrase recognizes command responsibility only in case superiors noticed the risk of criminal conduct and excludes criminal

86 See J. S. Martinez, 'Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond', 5 *Journal of International Criminal Justice* (2007) 3, 638, 647-653; Meloni, *supra* note 85, 42-64.

87 For example, the *High Command* case, in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. XI, 1, 543-544 [Trials of War Criminals].

88 For example, the *Hostage* case, in *Trials of War Criminals*, *supra* note 87, 759, 1271.

89 *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga")*, IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 232; *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, paras 62-64. Cf. *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 332. See Martinez, *supra* note 86, 654-659; Meloni, *supra* note 85, 111-114.

responsibility of superiors for negligence regarding the supervision of their subordinates.[90]

Notwithstanding varied ideas on the mental element of superiors that is required to establish command responsibility *stricto sensu*, it can be said that the basic structure of the said responsibility has commonly been recognized: commanders are criminally responsible for their failure to properly regulate their subordinates' criminal conduct.

The specially provided rules on command responsibility *stricto sensu* in national legislation mentioned above match concurrent international law. For instance, UK national law that was cited before provides that commanders are criminally responsible if they "either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences".[91] The Explanatory Note for this provision explains that it reflects a "well known concept of international law".[92] The national law of Macedonia similarly recognizes command responsibility "if he/she [a military commander or other superior] knew or according to all circumstances was obligated and could know that they [subordinates] prepare or commit such crimes".[93] Irish national law provides that the provision of the ICC Statute on command responsibility "shall apply, as appropriate and with any necessary modifications" in determining criminal responsibility for ICC offences.[94] Canadian national law recognizes command responsibility if "the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence".[95] With regard to the responsibility of non-military superiors, the Canadian law recognizes their command responsibility if "the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person".[96] Australian national law

90 Cf. R. Arnold, 'Article 28', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article,* 2nd ed. (2008) [Triffterer, Commentary on the Rome Statute], 795, 828-830, para. 95.

91 *International Criminal Court Act 2001*, Sec. 65 (2) (a), *supra* note 17. Sec. 5 (2) (a) of the *International Criminal Court (Scotland) Act 2001* (*supra* note 17) stipulates in the same way.

92 *Explanatory Notes*, *supra* note 20, para. 104.

93 *Criminal Code* of the Republic of Macedonia, Art. 416- b (1), *supra* note 47.

94 *International Criminal Court Act 2006*, Sec. 13 (2), *supra* note 21.

95 *Crimes Against Humanity and War Crimes Act*, Sec. 5 (1) (b), *supra* note 26.

96 *Id.*, Sec. 5 (2) (b).

similarly provides that command responsibility be recognized if "the military commander or person either knew or, owing to the circumstances at the time, was reckless as to whether the forces were committing or about to commit such offences".[97] Regarding non-military superiors, it is required that "the superior either knew, or consciously disregarded information that clearly indicated, that the subordinates were committing or about to commit such offences".[98] German national law differentiates cases where superiors knew of the criminal conduct of their subordinates from other cases where superiors did not know of the criminal conduct. With regard to the former, the German law recognizes superiors as main (co-)perpetrators.[99] If superiors did not know of their subordinates' criminal conduct, command responsibility accrues from breaches of the duty to supervise their subordinates.[100] The national law of Estonia simply provides that superiors are criminally responsible if they failed to prevent their subordinates' criminal conduct.[101] The mental element that is required to be proved is not specified.

Most of these national laws recognize command responsibility *stricto sensu* if superiors knew of the criminal conduct of their subordinates and if they, especially the superiors in a military section, noticed the risk of the criminal conduct. Although the mental element that is required to be proved for command responsibility in respective national laws differs slightly one from the other, the basic notion that superiors are criminally responsible for their failure to supervise their subordinates is commonly upheld among them. This basic notion corresponds with that of international law on command responsibility.

As it was the case regarding the superior orders defense, this trend of State practice is also shared by other national laws that do not apparently provide for special rules on command responsibility in the case of serious international crimes, but seem to apply the same rules to both ordinary crimes and serious international crimes.

Some of this type of national laws stipulate that command responsibility is recognized even if commanders did not actually know, nor notice the risk of the criminal conduct of their subordinates. For instance,

97 *International Criminal Court (Consequential Amendments) Act 2002*, Sec. 268.115 (2) (a), available in Santori, *supra* note 17.
98 *Id.*, Sec. 268.115 (3) (a).
99 Neuner, *supra* note 16, 128.
100 *Id.*, 129.
101 *Penal Code* of the Republic of Estonia, Chapter 8, § 88, *supra* note 46.

Finnish criminal law equates command responsibility with complicity if commanders knew of the criminal conduct of their subordinates. If commanders did not know the fact of criminal conduct, they still bear responsibility for their negligence.[102] Croatian criminal law traditionally did not recognize command responsibility as the responsibility for negligence. However, its new criminal law revised in 2004 additionally recognizes command responsibility if commanders must have known of their subordinates' criminal conduct.[103] Under Israeli military law, commanders may be responsible as instigators or abettors regarding the criminal conduct of their subordinates. Commanders may also be responsible for negligence regarding the supervision of their subordinates.[104]

There are also examples of acknowledging command responsibility on the ground of the knowledge of criminal conduct or the recognition of the risk of such conduct. Polish criminal law recognizes command responsibility if commanders knew of the criminal conduct of their subordinates.[105] The criminal law of Belarus recognizes command responsibility if commanders do not prosecute their subordinates in spite knowing of war crimes committed by them.[106] Swedish criminal law also recognizes command responsibility if commanders could have foreseen the criminal conduct of their subordinates.[107]

The US legal instruments and case law pertaining to the military have not clarified the mental element of superiors that should be proved for the establishment of this type of responsibility. On the one hand, the US *Department of the Army Field Manual* states that superiors are responsible if they knew or should have known of their subordinates' criminal conduct.[108] The *Commander's Handbook on the Law of Naval Operations* recognizes command responsibility where an officer "failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur."[109] On the other hand, case

102 Frände, *supra* note 43, 63-64.

103 The revised rule has been inspired by the German *Criminal Code* (*Strafgesetzbuch*). See Novoselec, *supra* note 44, 53-54.

104 Kremnitzer & Cohen, *supra* note 43, 379-80.

105 Weigend, *supra* note 44, 128. Command responsibility of officials is accrued from the non-fulfillment of their obligations.

106 Lammich, *supra* note 43, 381.

107 Cornils, *supra* note 44, 230.

108 *Department of the Army Field Manual*, FM 27-10, 18 July, 178-179, para. 501.

109 *Commander's Handbook on the Law of Naval Operations*, July 2007, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, para. 6.1.3.

law on courts martial seem to require the actual knowledge of superiors regarding their subordinates' criminal conduct in order to establish command responsibility.[110]

Legislation of other countries that recognizes command responsibility unconditionally or when superior knew/could know/had reason to know/noticed the risk of subordinates' illegal act include that of Argentina, Armenia, Azerbaijan, Bangladesh, Belgium, Cambodia, France, Italy, Luxembourg, the Netherlands, Rwanda, Spain, Ukraine, and Yemen.[111]

As in the case of the superior orders defense, there has apparently been no categorical rejection of established international rules on command responsibility in these national laws. It can be said that State practices presented here mostly reflect concurrent international law.

III. Functional Immunity

Though not apparently indicated by the national legislation cited above, general principles of criminal responsibility on which basic rules have been formulated in customary international law applying to both international and national proceedings have not been restricted to those on the superior orders defense and command responsibility. The denial of functional immunity in the case of serious international crimes is another rule which States have an international obligation to incorporate into their national legal orders.

There are two aspects with regard to official immunity – personal immunity and functional immunity. The former is procedural/jurisdictional immunity for sitting senior officials and the latter is immunity in substantive law, which exonerates the officials in question and is recognized even after their period of office.[112] With regard to the former personal immunity, discussions do not yet seem concluded in both cases of direct and indirect application. In the aspect of direct application via international judicial forums, the ICJ presented its view, in *Arrest Warrant* in 2000, that personal

110 *United States v. Medina*, C.M. 427162 (A.C.M.R. 1971), cited in Silverman, *supra* note 50, 464-465. See also G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), 388.

111 Henckaerts & Doswald-Beck, *supra* note 84, 3745-3751, paras 621-648.

112 *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 25, para. 60 [Arrest Warrant Case].

immunity cannot be allowed in "proceedings before *certain* international criminal courts, where they have jurisdiction" (emphasis added by the present author).[113] The judgment thus implied that it depends on the type of international judicial forums whether or not personal immunity is recognized.[114] Meanwhile, the recent decision of the Pre-Trial Chamber of the ICC categorically stated that immunity "can not be invoked to oppose a prosecution by an international court."[115] In the aspect of indirect application, the judgment of *Arrest Warrant* delivered that sitting senior officials enjoy unconditional personal immunity in foreign national courts even in the case of serious international crimes.[116] Contrastively, in the United States, for instance, immunity of foreign heads of States is not

113 *Id.*, 25-26, para. 61.

114 For detailed discussions, see D. Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (2004) 3, 407, 415-419. See also S. Wirth, 'Immunity for Core Crimes?: The ICJ's Judgment in the Congo v. Belgium Case', 13 *European Journal of International Law* (2002) 4, 877, 889 (note 75).

115 *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 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, 12 December 2011, paras 22-36. See also A. Cassese, *International Criminal Law*, 2nd ed. (2008), 311-313 [Cassese, International Criminal Law]

116 *Arrest Warrant Case*, *supra* note 112, 20-21, 24, paras 51, 58. This argument of the Court was grounded on the "nature of the functions exercised by a Minister of Foreign Affairs" (*id.*, 21-22, para. 53). The judgment of *Arrest Warrant* has been supported by some recent national judgments as *Pinochet* (*R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (2000), 1 A.C. 147, 201-202 (2000)) and *Gaddafi (*in *Bulletin des arrêts de la Cour de Cassation, Chambre criminelle, Janvier 2001*, 218-219), which drew wide attention from the international society. National laws, for instance, of New Zealand (Sections 12 (1) (a) and 12 (1) (b) of the *International Crimes and International Criminal Court Act 2000*, *supra* note 15. See J. Hay, 'Implementing the Rome Statute: A Pragmatic Approach From a Small Jurisdiction', in Neuner, *supra* note 16, 13, 29), the Netherlands (Section 16 (a) of the *International Crimes Act*, *supra* note 34. See Bevers *et al.*, *supra* note 35, 194-195), Sweden (Cornils, *supra* note 44, 239-240), Croatia (Novoselec, *supra* note 44, 57), Serbia and Montenegro (M. Škulić, 'Grundlagen der Strafverfolgung völkerrechtlicher Verbrechen in Serbien und Montenegro', in Eser, Sieber & Kreicker, *Nationale Strafverfolgung,* Vol. 3, *supra* note 44, 211, 268), Greece (M. G. Retalis, 'Prosecution of International Crimes in Greece', in Eser, Sieber & Kreicker, *Nationale Strafverfolgung*, Vol. 5, *supra* note 43, 189, 271) also recognize the personal immunity of sitting senior officials of foreign countries in general manner.

guaranteed and is bestowed at the discretion of the US government.[117] However, it should be noted that such legal uncertainty has been peculiar to procedural/jurisdictional aspect of official immunity. The denial of functional immunity as substantive defense cannot be affected by such ambiguity of the rules on procedural defense.

The denial of functional immunity of State officials from prosecution for serious international crimes has been one of the most significant principles in international criminal law since the Nuremberg Trial. Art. 7 of the Nuremberg Charter specifically denied exemption or mitigation of punishment on the grounds of the official position of the accused, which substantially expanded personal jurisdiction in the trial of serious international crimes. This denial of official immunity was formulated into one of the *Nürnberg Principles* adopted by the UN General Assembly[118] and further provided for in the ILC Draft Code.[119] International conventions on the regulation of serious international crimes also occasionally reconfirmed this principle. Art. 4 of the Genocide Convention clarifies that "constitutionally responsible rulers, public officials" will be punished for genocide similar to private individuals. Art. 3 of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (Apartheid Convention)[120] adopted at the UN General Assembly in 1973 likewise provides that "[i]nternational criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State". Art. 1 (1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Torture Convention)[121] defines acts of torture as those "inflicted by or at the instigation of or with the consent or

117 Silverman, *supra* note 50, 474-477. The US court noted in *Noriega*, "simply because Noriega may have in fact run the country of Panama does not mean he is entitled to head of State Immunity, since the grant of immunity is a privilege which the United States may withhold from any claimant" (*United States v. Noriega*, 746 F. Supp. 1506, 1520 (1990)).

118 See *supra* note 63.

119 *Report of the International Law Commission on the Work of its Forty-Eighth Session*, Yearbook of the International Law Commission (1996), Vol. II (2), 1, 17, para. 50, UN Doc A/51/10 [Draft Code].

120 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 U.N.T.S 243.

121 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85.

acquiescence of a public official or other person acting in an official capacity."

Recent international case law of the ICTY also affirmed the denial of functional immunity in the case of serious international crimes.[122] It can be said that Art. 27 (1) of the ICC Statute which provides that, "[t]his Statute shall apply equally to all persons without any distinction based on official capacity", is a restatement of the well-developed principle on substantive defense in international criminal law which is binding irrespective of forums of judicial proceedings.[123]

[122] For instance, the ICTY judgment on *Blaškić* noted, "[t]he general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. […] These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity." (*Prosecutor v. Tihomir Blaškić*, IT-95-14, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Appeals Chamber), 29 October 1997, para. 41.) The ICTY also referred to this principle in the judgment of *Furundzija*: "[i]ndividuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7 (2) of the Statute and article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda, hereafter "ICTR" are indisputably declaratory of customary international law." (*Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgment (Trial Chamber), 10 December 1998, para. 140.)

[123] As to customary international law on the denial of functional immunity in case of serious international crimes, see S. Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?: The Ghaddafi Case Before the French Cour de Cassation', 12 *European Journal of International Law* (2001) 3, 595, 601-605; A. Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *European Journal of International Law* (2002) 4, 870-874; Wirth, *supra* note 114, 884-889; P. Gaeta, 'Official Capacity and Immunities', in A. Cassese, P. Gaeta & J. R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), 975, 979-983.

D. The Law of the ICC Differs from Customary International Law: Conventional versus Customary Norms

The previous sections discussed customary international law on general principles of criminal responsibility which applies to the international tribunals, as well as the one which universally applies irrespective of forums of judicial proceedings. Meanwhile, customary international law is not necessarily reflected in its entirety in the ICC Statute. Although rules provided by the ICC Statute widely correspond with concurrent customary international law, it is impossible to expect complete accordance between the basic instrument of the ICC and customary international law. The ICC Statute is a conventional law, which is basically static in nature, whereas customary international law is dynamically changing to reflect the transitions of social circumstances and the development of discussions at the international level. Moreover, multilateral legal instruments are drafted through significant political compromise, the outcome of which consequently does not necessarily mirror concurrent customary international law in a precise manner. The Rome Conference for the conclusion of the ICC Statute was not the exception to such political compromise.[124]

[124] One of the most contentious compromises achieved at the Rome Conference was on the definition of war crimes with regard to the use of weapons of mass destruction. The use of weapons of mass destruction such as nuclear, biological and chemical weapons apparently contradicts the principle of international humanitarian law – the prohibition of weapons "of a nature to cause superfluous injury or unnecessary suffering" (*Additional Protocol I*, Art. 35 (2), *supra* note 7, 21. See L. C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (2008), 153-156). However, the problem of the use of nuclear weapons has especially been a sensitive matter, and some States including the permanent members of the UN Security Council contended at the Conference that "no blanket prohibition was established under conventional or customary international law" for nuclear weapons (H. Hebel & D. Robinson, 'Crimes Within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 79, 115). An eventual compromise was reached by not providing for the prohibition of weapons of mass destruction in a comprehensive manner; only the prohibition of the use of poison and gas, which was recognized as unquestionably established, was reconfirmed in the Statute. Questions of other weapons of mass destruction were deferred until the future revision of this instrument (*id.*, 116).

Thus, Art. 10 of the ICC Statute states, "[n]othing in this Part [Part 2] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." The drafting process of the said article implies that such limited interpretation also prevails outside Part 2 of the Statute.[125] Furthermore, Art. 21 of the ICC Statute states that the Court shall apply, in the first place, the very Statute together with "Elements of Crimes and its Rules of Procedure and Evidence". The Pre-Trial Chamber of the ICC recently reconfirmed this point and emphasized that the Court is not necessarily bound by customary international law. The Chamber noted, "[p]rinciples and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution."[126]

Against this background, the ICC apparently takes liberties with formulating its own rules on general principles of criminal responsibility, besides those on the definition of crimes. For instance, the Pre-Trial Chamber of the ICC presented, in the decision on the confirmation of charges in *Germain Katanga and Mathieu Ngudjolo Chui,* its own argument regarding the distinction between principals and accessories on the ground of "the concept of control over the crime".[127] This argument of the ICC, although it should be noted that this is not a judgment but a decision at the pre-trial stage, differs from that of the ICTY,[128] which attaches primary priority to the subjective element of "common plan, design or purpose" among members of a joint criminal enterprise.[129] The law of the ICC also

125 O. Triffterer, 'Article 10', in *id.*, *Commentary on the Rome Statute*, *supra* note 90, 531, 535.

126 *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Confirmation of Charges (Pre-Trial Chamber), 30 September 2008, para. 508.

127 *Thomas Lubanga Dyilo,* ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber), 29 January 2007, para. 338.

128 *Id.*, paras 328-331, 338.

129 *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 185-229; *Radoslav Brđanin*, IT-99-36-A, Judgment (Appeals Chamber), 3 April 2007, paras 393-414. With regard to discussions on the theory of joint criminal enterprise, see generally, G. Sluiter, 'Foreword', 5 *Journal of International Criminal Justice* (2007) 1, 67; J. D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* (2007) 1, 69; H. v. d. Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', 5 *Journal of International Criminal Justice* (2007) 1, 91; A. Cassese, 'Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* (2007) 1, 109; K. Gustafson, 'Requirement of an Express Agreement for Joint Criminal Enterprise Liability', 5 *Journal of International*

apparently differs from the case law of the ICTY on the issue of the defense of duress; the former recognizes the said defense provided the accused did "not intend to cause a greater harm than the one sought to be avoided",[130] whereas the latter categorically denies the said defense in the case of the taking of innocent lives.[131]

It is worth examining whether or not these differences between the law of the ICC and customary international law are appropriate or, at least, unavoidable. The difference between the normative characteristics pertaining to the ICC Statute and customary international law does not automatically lead to the difference between the substances of these laws on general principles of criminal responsibility in whole. It is problematic that the priority to the ICC Statute over customary international law under Art. 21 of the ICC Statute brings about possible violation of the principle of *nullum crimen sine lege* where the substances of these laws are different. The ICC Statute allows prosecution of individuals without any basis of territoriality and nationality when the UN Security Council refers situations to the ICC (Art. 12 (2) of the ICC Statute) or when States that are not parties to the Statute declare that they accept the jurisdiction of the ICC for a specific crime (Art. 12 (3) of the ICC Statute).[132] In any event, from the viewpoint of securing coherence in the discussion of international criminal law, such discrepancies between the law of the ICC and customary international law with regard to substantive rules should carefully be evaluated.

Nevertheless, there seem to be several issues on general principles of criminal responsibility on which the law of the ICC would specifically be justified to deviate from corresponding customary international law in the light of the difference between the normative characteristics of the two laws.

Criminal Justice (2007) 1, 134; K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 *Journal of International Criminal Justice* (2007) 1, 159; E. v. Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', 5 *Journal of International Criminal Justice* (2007) 1, 184; K. Hamdorf, 'Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime', 5 *Journal of International Criminal Justice* (2007) 1, 208.

130 *Statute of the International Criminal Court,* Art. 31 (1), *supra* note 1, 107-108.

131 *Erdemović Case*, Judgment, *supra* note 11, para. 19.

132 See M. Milanović, 'Is the Rome Statute Binding on Individuals?: (And Why We Should Care)', 9 *Journal of International Criminal Justice* (2011) 1, 25, which suggests the primary application of customary international law regarding the prosecution of individuals in these cases.

This section deals with *lex specialis* of the ICC which in principle cannot accord with customary international law.

I. Operational Rules of the Principle of Legality

The international judicial proceedings held at Nuremberg and Tokyo after World War II were substantially sustained by the notion of "substantive justice".[133] The devastating and unprecedented ravages of war drew out theoretically lenient arguments on the principle of legality and introduced the notions of crime against peace and crimes against humanity at the international level. However, the argument of "substantive justice" faded away immediately after those trials and the strictly-defined principle of legality came to the fore instead.

The international society began formulating the principle of legality after World War II in the Declaration of Human Rights, which was adopted as the resolution of the UN General Assembly. Art. 11(2) of the Declaration reads:

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."[134]

The first part of the provision indicates the principle, *nullum crimen sine lege*, which prohibits retroactive application of criminal law. The latter part indicates the principle of *nulla poena sine lege*, which prohibits retroactive punishment. A major international convention that provides for the principle of legality is the *International Covenant on Civil and Political Rights*. Art. 15 of the Covenant mostly reiterates Art. 11(2) of the Declaration of Human Rights with an important proviso that it does not prejudice "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations" (para. 2).

133 See Cassese, *International Criminal Law*, *supra* note 115, 38-39.

134 *Universal Declaration of Human Rights*, Art. 11 (2), GA Res. 217A (III), UN Doc A/810, 71, 73.

The principle has also been upheld by the ILC Draft Code, which reads, "[n]o one shall be convicted under the present Code for acts committed before its entry into force."[135] Arts 22 and 23 of the ICC Statute can be deemed as reconfirmation of this firmly established principle of international law.[136]

Furthermore, national laws have widely supported the basic constituent of the principle of legality that has been established at the international level. According to the voluminous research by Kenneth Gallant, more than four-fifths of Member States of the UN accept the principle of *nullum crimen sine lege*, and more than three-quarters accept the principle of *nulla poena sine lege* in their constitutional laws.[137] Many other States uphold these principles in statutes other than constitutions, by implementing human rights treaties, etc.[138] At present, "virtually all states" recognize the prohibition of retroactivity both in terms of crimes and punishment.[139]

Thus, it can be said that the principle of legality has fundamentally been established in universally applicable customary international law. However, it should be noted that some operational rules of the said principle are different depending on whether it is applied to judicial proceedings of the ICC or of others that primarily apply customary international law.

The ICC Statute not only provides *nullum crimen sine lege* in Art. 22 and *nulla poena sine lege* in Art. 23, but also non-retroactivity *ratione personae* in Art. 24. Art. 24 (1) stipulates, "[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." The ICC Statute actually provides for various rules that are only applicable within the jurisdiction of the ICC and do not necessarily correspond to customary international law. In the light of such legal circumstances, the restriction of the Court's jurisdiction to cases that arose after the entry into force of the Statute is vital from the viewpoint of the principle of legality.

135 *Draft Code*, Art. 13, *supra* note 119, 38.

136 B. Broomhall, 'Article 22', in Triffterer, *Commentary on the Rome Statute*, *supra* note 90, 713 and W. A. Schabas, 'Article 23', in Triffterer, *Commentary on the Rome Statute*, *supra* note 90, 731 for detailed discussions. See also P. Saland, 'International Criminal Law Principles', in Lee, *supra* note 124, 189, 194-196.

137 K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2009), 243-246.

138 *Id.*, 246-251.

139 *Id.*, 241.

The strict rule envisioned in Art. 24 of the ICC Statute can be deemed peculiar to the ICC. The ICTY and ICTR, together with other so-called hybrid tribunals, are judicial institutions established after the criminal conduct in question took place. The *ex post* characteristics of these tribunals' procedural aspect inevitably restricts their material jurisdiction, which basically reflects customary international law that has been binding long enough and worldwide.[140] Thus, the Report of the UN Secretary General that presented the Statute of the ICTY to the UN Security Council explained the material jurisdiction of the Tribunal as follows:

> "In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."[141]

It would be better from the viewpoint of legality, especially that of *lex scripta* and *lex stricta*,[142] to provide specifically as the ICC Statute does, for rules that will be applied to all criminal cases treated at the international level in advance. However, the establishment of the ICC has not excluded further creation of *ad hoc* international tribunals and hybrid tribunals that bear *ex post* characteristics in their procedural aspect. The supplemental rule of Art. 24 of the ICC Statute on the principle of legality will remain contrastive to what would be held by other international judicial institutions in criminal matters.

II. Mistake of Law

As will be seen in this section, customary international law on the issue of mistake of law does not seem to be established yet, in spite of the

140 See R. C. Pangalangan, 'Article 24', in Triffterer, *Commentary on the Rome Statute*, *supra* note 90, 735, 736-738.

141 *Report of the Secretary-General*, *supra* note 5, 9.

142 With regard to the principles *lex scripta* and *lex stricta* in international criminal law, see S. Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 99 *Journal of Criminal Law and Criminology* (2009) 4, 857.

fact that the law of the ICC specifically denies mistake of law as a defense in principle. The difficulty in distinguishing legal elements from other elements of crimes in customary international law makes relevant rules on defenses even more obscure. Nevertheless, it seems possible and worthwhile to advance some arguments on these subjects for the sake of their future development, in consideration of the difference of legal circumstances within and outside the ICC.

Customary international law on the defense of mistake of law has long been under construction. Judgments of the Nuremberg and Tokyo Trials did not substantially examine the issue of mistake of law as such.[143] As there did not exist any rules applicable at the international level, military tribunals and other national judicial organs of the Allied Powers had to apply their own national laws in their war crimes trials during and after World War II.[144] It is noteworthy that the United Nations War Crimes Commission indicated varied and incoherent analyses of those national trials on the treatment of the issue of mistake of law.[145]

International legal instruments developed after the two international trials that dealt with the regulation of serious international crimes have not provided for mistake of law except for the ICC Statute. Even the Draft Code of the ILC questions the stipulation of general defenses as a whole, as was referred to before. Whereas the commentary for Art. 14 of the Draft Code presents some arguments on international cases relevant to general defenses,

143 At the Nürnberg Trial, discussions on the issue of mistake of law were confined to those in terms of the superior orders defense. Regarding the Tokyo Trial, as it was proposed among defendants to avoid the prosecution of the Tennō (Japanese Emperor) and to prioritize the defense of the State over that of individuals, discussions on the superior orders defense were very limited and were not accompanied by those on mistake of law. See Satō, *supra* note 62, 58-71, 89-95.

144 The situation has not changed since then. For instance, the judgment of the oft-cited *Calley* case, which dealt with the killing of unarmed civilians by American soldiers during the Vietnam War, rejected the defense of mistake of law on the grounds of the case law of the US courts (*United States v. First Lieutenant William L. Calley, JR.*, 46 CMR, 1131, 1179-1180 (1973)).

145 For instance, the "Notes" on the *Karl Buck and Ten Others* case stated, "[t]here are some indications that this principle [*ignorantia juris neminem excusat*] when applied to the provisions of international law is not regarded universally as being in all cases strictly enforceable" (United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 5 (1948), 39, 44). On the other hand, the "Notes" on the *Max Wielen and 17 Others* case stated, "[i]n a case like this [mistake of law] the maxim *ignorantia iuris non excusat* certainly applies" (*id.*, *Law Reports of Trials of War Criminals*, Vol. 11 (1949), 31, 50).

it does not make any reference to the issue of mistake of law.[146] It is noteworthy that the ICTY recently delivered several judgments on this issue. For instance, in *Jović*, the Trial Chamber decided that the accused violated the orders of a Chamber by publishing transcripts that were rendered confidential and stated, "it is settled that a person's misunderstanding of the law does not excuse a violation of it."[147] However, the Chamber's argument was substantially restricted to that of mistake of legal element, "in knowing violation of an order of a Chamber" in the Rule 77 (A) (ii) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, as the contention of the accused was that he did not know that the Chamber's orders were legally binding on him as a journalist.[148] Moreover, the ICTY's denial of exemption on the ground of mistake of legal element contrasts with the recognition of possible exemption on the same ground by the ICC Statute.[149]

The stagnation of discussions at the international level on mistake of law seems to reflect the significant difference among national laws on this subject. Especially, the difference between civil and common law on the issue of mistake of law has occasionally been highlighted. National laws of many civil law countries such as Germany,[150] France,[151] Austria,[152] Switzerland,[153] and Portugal,[154] leave room for exemption on the ground of mistake of law where the mistake in question was unavoidable. Meanwhile,

146 *Report of the International Law Commission*, *supra* note 119, 39-42.

147 See *Prosecutor v. Josip Jović*, IT-95-14/IT-95-14/2-R77, Judgment (Trial Chamber), 30 August 2006, para. 21. See also *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Judgment on Allegations of Contempt (Specially Appointed Chamber), 14 September 2009, paras 63-67. With regard to the latter case, the Chamber eventually judged that relevant factors demonstrated the accused's knowledge of the law (*id.*, para. 66).

148 *Jović Case*, *supra* note 147, para. 16.

149 *Statute of the International Criminal Court*, Art. 32 (2), *supra* note 1, 108. The Pre-Trial Chamber of the ICC stated, in *Prosecutor v. Thomas Lubanga Dyilo*, that if the accused was "unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning)", his "defence of mistake of law can succeed under article 32 of the Statute" (*Thomas Lubanga Dyilo*, *supra* note 127, para. 316). It was eventually denied that the accused made such a mistake (*id.*).

150 § 17 of the German *Criminal Code* (*Strafgesetzbuch*).

151 Arts 122-123 of the French *Criminal Code* (*Code Pénal*).

152 § 9 (1) of the Austrian *Criminal Code*.

153 Art. 21 of the Swiss *Criminal Code*.

154 H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed. (1996), 468.

the national laws of countries having a common law, such as the United Kingdom and the United States, generally do not recognize exception to the maxim *ignorantia juris non excusat*, which denies exemption of the accused from punishment simply because he/she was not aware of the criminal character of his/her conduct at the time of the deed.[155]

It would not be possible to discuss *lex lata* the legal consequence of mistake of law in customary international law by examining relevant practices. As customary international law on the issue of mistake of law is ambiguous, it would be inappropriate to try examining the relationship between the relevant rules of the ICC Statute and customary international law. However, considering the apparent difference between the normative characteristics of conventional and customary law, it seems necessary first to develop some arguments on the variation of relevant rules.

Art. 32 (2) of the ICC Statute basically represents a widely recognized maxim, *ignorantia juris non excusat*. The provision reads, "[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility." Art. 32 (2) only recognizes a mistake of law "if it negates the mental element" required for the establishment of crimes within the jurisdiction of the Court.

The ICC deals only with "the most serious crimes of concern to the international community as a whole" – the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[156] In addition, the ICC Statute provides for specific definition of these crimes in advance. It would thus be difficult for the accused to contend that he/she did make a mistake as regards the criminal character of his/her conduct even in the case of war crimes, the definition of which are often technical and arguable. The Statute's principal rejection of the mistake of law defense can be said to have reflected such specific character of this international judicial organ and its basic legal instrument.

On the other hand, legal circumstances are fairly different outside the ICC. Customary international law is not as specific as conventional law and it is not easy to distinguish legal elements from other elements of crimes under customary international law. When deciding on criminal cases by applying customary international law, judges are required to determine and

155 See A. T. H. Smith, 'Error and Mistake of Law in Anglo-American Criminal Law', 14 *Anglo-American Law Review* (1985) 1, 3, 3-24; P. Matthews, 'Ignorance of the Law is no Excuse?', 3 *Legal Studies* (1983) 2, 174.

156 *Statute of the International Criminal Court*, Preamble, *supra* note 1, 91.

narrate relevant rules to be applied. There is no guarantee that the element of crime characterized as a legal element and as the ground for exemption by the ICC Statute will be treated as such in judicial forums other than the ICC – judges may freely decide the scope of a legal element, or its non-existence. For instance, the elements of crimes such as "military necessity",[157] "unlawfully and wantonly",[158] and "judicial guarantees which are generally recognized as indispensable",[159] which are treated as legal elements by the ICC Statute, may concretely be explained and narrated by judges outside the ICC. In such cases, even if mistake of legal element would be recognized as a defense under customary international law, the very rule cannot be applied as the said elements are not, in the first place, interpreted as "legal elements". At least, it is not guaranteed that these elements are treated exactly in the same way within and outside the ICC.

Furthermore, definitions of crimes given by customary international law are generally more ambiguous than those specified in the ICC Statute. The definitions presented by the ICC Statute are not necessarily identical to those under customary international law. Especially, the recent expansion of customary international law regarding the scope of war crimes in the context of non-international armed conflict is so drastic that it is fairly difficult to decide it precisely at a certain point in time. The ICTY Statute thus gave up providing for the specific definition of "violations of the laws or customs of war", listing only five of their examples and noting that the violations to be prosecuted shall not be limited to them (Art. 3). Eventually, the ICTY, by reviewing international and national State practices, formulated case law that widely recognizes war crimes in non-international armed conflict.[160]

157 *Id.*, Art. 8 (2) (a) (iv), 95.

158 *Id*.

159 *Id.*, Art. 8 (2) (c) (iv), 97.

160 See *Prosecutor v. Duško Tadić a/k/a "Dule"*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, paras 96-134. The ICC Statute does not fully reflect this recent development of international law and does not provide for the prohibition of attacks against civilian objects, attacks that cause excessive incidental damage to civilians, starvation of civilian populations, etc. in terms of non-international armed conflicts (Werle, *supra* note 62, 425-455, paras 1167-1256). The Statute likewise does not prohibit the use of weapons in non-international armed conflicts except for poison, gases, and bullets that expand or flatten easily in the human body, which was provided for in the amendments to the Statute in 2010 (*Amendments to Art. 8 of the Rome Statute*, Resolution RC/Res.5, 16 June 2010, 3).

The legal backgrounds of the ICC Statute and customary international law are apparently different in considering the problem of mistake of law. What is characterized as mistake of legal element in the ICC Statute would not necessarily be recognized as such under customary international law – its meaning may be deemed specific enough without any normative evaluation. There has actually been considerable vagueness in customary international law on the definition of serious international crimes, especially that of war crimes. The accused sometimes cannot be told in advance what specific conduct is regarded as crimes under customary international law. At first sight, it does not appear reasonable to adopt automatically the same rule on the mistake of law defense both in the ICC Statute and in customary international law. It seems to contradict the "principle of personal culpability" to deny the possibility of exemption where it was really unavoidable for the accused to make some mistake on the illegal character of his/her conduct, especially in the case of war crimes. The accused, in certain cases, could not be recognized as blameworthy in misunderstanding the highly technical demarcation between legal and illegal conduct of war. Although customary international law on the mistake of law defense has not yet been conclusively formulated, it seems necessary to consider the possible difference of this law from the law of the ICC in discussing its future development.[161]

E. Conclusion

A long period has elapsed since the trials at Nuremberg and Tokyo, and international criminal law has entered a new era with the establishment of international tribunals that substantially represent the international society. Today, international criminal law is expected to be implemented via two different judicial systems – direct and indirect. The latter functions on the basis of multilateral treaties and customary international law that roughly define international crimes and provide limited rules on general principles of criminal responsibility, but oblige State parties to incorporate them strictly as they are. Because of the paucity of relevant international rules thus presented, the indirect system also heavily relies on the national

[161] For detailed discussions on this subject, see H. Satō, 'Mistake of Law Within and Outside the International Criminal Court', 15 *Touro International Law Review* (2012) 2, 138.

laws of States that prosecute serious international crimes. On the other hand, the former direct system, especially that of the ICC, is equipped with international rules on judicial proceedings. However, the basic instruments of international judicial organs do not oblige States to implement their rules in whole within national jurisdiction. With regard to the ICC, the eventual implementation of its Statute is expected to be indirectly and leniently realized with the principle of complementarity.[162] Thus, direct and indirect systems are now overlapping in international criminal justice, and both respect a certain level of autonomy on the part of national laws.

The judicial system's complex structure inevitably influences substantive aspects of international criminal law. As seen in this article, the relationship between customary international law peculiar to international proceedings, customary international law applying to both international and national proceedings, and the law of the ICC exceptionally applying to this judicial organ is intricate. There remain some issues for which a body of customary international law applying in both direct and indirect systems has not yet been developed and international tribunals have formulated their own rules at the international level. Here, national laws play significant roles in their respective national jurisdictions with regard to the prosecution of serious international crimes in indirect system. Meanwhile, customary international law applying to both international and national proceedings also developed on such subjects as the superior orders defense, command responsibility, and functional immunity for State officials. Furthermore, some other issues exist with regard to which the ICC has provided *lex specialis* restrictively applying within its jurisdiction, which is different from corresponding rules of customary international law.

Since the complex structure of international judicial proceedings is a reality in concurrent international criminal law, the complexity in substantive law seems also to be inevitable or even reasonable in this field. Indifference to such legal circumstances would bring about discord in the substance of arguments under the same rubric of "international criminal law", possible claims for the intervention by international law into national legal order where this is not actually required, and possible unreasonableness as, for instance, was discussed with regard to the issue of mistake of law. Discussions on international criminal law need to keep up

[162] See J. K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* (2003) 1, 86.

with the differences among the two types of customary international law and *lex specialis* of the ICC. Considering that these differences influence the degree of intervention of international law into national legal orders, and States are especially sensitive with respect to the autonomy of their own criminal jurisdiction because criminal law is recognized as *ultima ratio*, it would be even more important to strike a careful balance among these laws operating in the direct and indirect systems. In order to realize a harmonious system of international criminal justice, conscious recognition of the differences among various modes of international criminal justice is apparently needed as well as caution against over-simplification of discussions on international criminal law.

Meanwhile, it would also be necessary to critically examine the differences among "international criminal laws" where they cannot immediately be justified in consideration of the complex of judicial proceedings. Especially, occasional discrepancy between the law of the ICC and corresponding customary international law apparently needs careful evaluation. International criminal justice traditionally cannot evade uncertainty on legal decisions among various jurisdictions; judgments cannot help varying more or less depending on which forum exercises jurisdiction on the case in question. However, pointless variety of judicial decisions at the international level is harmful to the coherent discourse of international criminal law and the construction of genuine universality with respect to the ICC.[163] The substance of *lex specialis* of the ICC and the two types of customary international laws is not static. It would be necessary to constantly reevaluate the development of respective laws as well as their relationship in order to strike a deliberate balance between the unity and diversity.

[163] As to the latter problem, see R. Wedgwood, 'The International Criminal Court: An American View', 10 *European Journal of International Law* (1999) 1, 93, 98-99.

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Non-Recognition of State Immunity as a Judicial Countermeasure to *Jus Cogens* Violations: The Human Rights Answer to the ICJ Decision on the *Ferrini* Case

Patricia Tarre Moser*

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* Patricia Tarre Moser earned her law degree from the Universidad Central de Venezuela and an LL.M in international human rights law from the University of Notre Dame. Ms. Tarre Moser is a lawyer at the Inter-American Court of Human Rights. The opinions expressed on this article do not reflect the opinions of the Inter-American Court of Human Rights or its registry. The author would like to thank Rose Rivera, Pier Pigozzi, Professor Mary Ellen O'Connell, and Professor Douglass Cassel for their valuable comments.

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Abstract

This paper examines whether the non-recognition of State Immunity, as a response to jus cogens violations committed by the wrong-doing State against its own citizens, can be a valid countermeasure. First, the paper clarifies the hypothesis being examined. Second, the paper considers what the conditions the according countermeasures have to comply with, are. Finally, the paper examines whether the non-recognition of State Immunity can be a lawful solidarity countermeasure.

The paper concludes that non-recognition of State Immunity can also be lawful and valid. Nonetheless, it must comply with certain important conditions. Additionally, an opportunity for the victims to have a remedy as well as to maintain the most important values of the international community arises when the non-recognition of State Immunity is properly accomplished.

A. Introduction

Houshang Bouzari, an Iranian citizen, was forcibly abducted by Iranian agents from his apartment in Tehran.[1] He was imprisoned for thirteen months without due process and was subjected to torture several times.[2] After living in a number of different countries, Mr. Bouzari and his family finally settled in Ontario, Canada.[3] Once there, he filed a civil complaint against the Islamic Republic of Iran for the human rights violations described above.[4] The Ontario Superior Court of Justice held that Iran was entitled to State Immunity and dismissed the action.[5] Mr. Bouzari appealed, and the Ontario Court of Appeal confirmed the decision of the trial court.[6]

One year after the final decision, in 2005, during discussion on the Canadian periodic report in the Committee against Torture, Canada faced the question of whether or not removing State Immunity in torture cases

1 *Bouzari v. Iran*, Can. Ont. C.A, [2004] O.J. No. 2800, paras 8-11 [Bouzari v. Iran Case].
2 *Id.*, paras 11-14.
3 *Id.*, para. 4.
4 *Id.*
5 *Id.*
6 *Id.*, para. 104.

violated the *Convention against Torture*.[7] The discussion focused on Article 14 of the *Convention against Torture* which establishes the right of torture victims to adequate reparation.[8] The Chairperson of the Committee against Torture, Fernando Mariño Menéndez, suggested that "as a countermeasure permitted under international public law, a State could remove immunity from another State - a permitted action to respond to torture carried out by that State."[9]

The Chairperson's idea was based on the concept of countermeasures. Countermeasures are otherwise internationally unlawful measures that are not considered to be violations of international law when taken in response to a previous violation of international law by another State.[10] Considering the decentralized nature of international law, countermeasures are a key element in the enforcement of international law as well as a tool for the injured State to assure cessation of the violation and reparation of the harm caused.[11] Since countermeasures have this function, the responsibility of the State taking the countermeasure is precluded even though the act is by itself unlawful.[12]

7 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 [UNCAT]. Although the Committee did not expressively refer to the case of Bouzari it has been understood in that way see T. Rensmann, 'Impact on the Immunity of States and Their Officials', in M. T. Kamminga & M. Scheinin (eds), *The Impact of Human Rights Law on General International Law* (2009), 151, 153.

8 See Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, UN Doc CAT/C/SR.646/Add.1, 1 May 2005, 8, paras 43-45. See also UNCAT, Art. 14, *supra* note 7, 116.

9 See Committee against Torture, *supra* note 8, 11, para. 67. Professor Fernando Mariño Menéndez was a member of the Committee against Torture from 2002 to 2009. He teaches Public International Law at Carlos II University, Madrid. Office of the High Commissioner for Human Rights, *Fernando Mariño Menendez*, available at http:// unhchr.ch/tbs/doc.nsf/0/d88c84298fa7f5dbc1256b440035c86e?OpenDocument (last visited 10 January 2013).

10 See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002), 281 [Crawford, International Law Commission's Articles on State Responsibility]; C. Tomuschat, *Human Rights Between Idealism and Realism*, 2nd ed. (2008), 271 [Tomuschat, Human Rights].

11 See E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984), 4.

12 *Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 30, GA Res. 56/83 annex, UN Doc A/RES/56/83, 28 January 2002, 2, 7 [Articles on State Responsibility].

Another important issue found in the case of Bouzari is the victim was not a national of the State that could have taken the countermeasure: Canada. Consequently, the possible countermeasure of not recognizing State Immunity would be taken by a State which was not directly injured by the violation of international law. Countermeasures were initially conceived within the framework of bilateral obligations between States; thus it was only the injured State who was entitled to take actions.[13] With the recognition of international human rights law and other community interests this conception of countermeasures began to change. International law began regulating State conduct where non-compliance did not clearly affect any particular State.[14] This lack of an injured State made the enforcement of these obligations more difficult.[15] It is from the combination of this inexistence of a clearly injured State together with the need to assure enforcement that the idea of using countermeasures for these cases came to the fore. The kind of countermeasure that Canada would have to have taken is referred as "solidarity measures" or "collective countermeasures."[16]

The lawfulness of solidarity countermeasures is broadly discussed,[17] particularly since the ILC decided not to specially include them in its *Articles on State Responsibility*.[18] International law includes no express

13 See J. A. Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law', 248 *Recueil des Cours de l'Académie de Droit International* (1994), 345, 353; E. Katselli, 'Countermeasures: Concept and Substance in the Protection of Collective Interests', in K. H. Kaikobad & M. Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice* (2009), 401, 402 [Katselli, Countermeasures].

14 See O. Schachter, *International Law in Theory and Practice* (1991), 196.

15 E. Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (2010), 1 [Katselli Proukaki, Enforcement in International Law].

16 See Katselli, *Countermeasures, supra* note 13, 402; L.-A. Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in J. Crawford *et al.*, *The Law of International Responsibility* (2010) [Crawford *et al.*, International Responsibility], 1137, 1137.

17 See for example J. A. Frowein, 'Collective Enforcement of International Obligations', 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1987), 67, 77 (limiting to "persistent and gross violations".); O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (1988), 58 [Elagab, The Legality of Non-Forcible Counter-Measures]; Katselli Proukaki, *Enforcement in International Law*, *supra* note 15, 110; Tomuschat, *Human Rights*, *supra* note 10, 274.

18 See *Articles on State Responsibility*, Art. 54, *supra* note 12, 13; M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *British*

prohibition on the possibility to take solidarity countermeasures. On the contrary, there is state practice supporting this possibility.[19] Additionally, the ICJ, in the case *Questions Relating to the Obligation to Prosecute and Extradite*, held that "the common interest in compliance [with an] obligation under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party"[20]. Even though the ICJ referred only to the possibility to bring claims for alleged violations of the Convention against Torture, the case endorsed the idea of a common interest existing among States to request cessation of a breach when *erga omnes* obligations are involved. Consequently, it is another argument in favor of the lawfulness of solidarity countermeasures. Nonetheless, this article will not develop further this discussion and will assume that solidarity countermeasures are permitted under international law.

The objective of this article is to examine whether the suggestion made by the Chairperson of the Committee against Torture is possible: whether the non-recognition of State Immunity, as a response to *jus cogens* violations committed by the wrong-doing State against its own citizens, can be a valid countermeasure. In order to accomplish this goal several questions must be resolved. First, it is necessary to clarify the hypothesis being examined. Second, it is necessary to consider what the conditions those countermeasures have to comply with are. Finally, this article will examine whether the non-recognition of State Immunity can be a lawful solidarity countermeasure.

It is also necessary to clarify that this article will only analyze the cases when there is a *jus cogens* violation, no State is directly injured, and no State is specially affected. This analysis leaves completely aside the cases of a violation of the *jus cogens* norm prohibiting aggression, since in

Yearbook of International Law (2001), 337, 341 [Koskenniemi, Solidarity Measures]; see also Katselli, *Countermeasures*, *supra* note 13, 410.

19 The practice included the actions of the United States against Uganda for genocide in 1978; the measures taken by the US and other western States against Poland and the Soviet Union for human rights violations in 1981; the action of the European Community, Australia, New Zealand and Canada in reaction to Argentine aggression in the Falkland islands; the suspension of the right of South African airlines to land in the US as a response to apartheid, and the embargos imposed on Iraq after the invasion of Kuwait, prior to the Security Council resolution. Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 302-304.

20 ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, 20 July 2012, para. 69 [ICJ, Belgium v. Senegal Case].

those cases there is always an injured State.[21] Additionally, the cases of *jus cogens* violations of one State against foreigners are not included since the State of which the victims are citizens from is considered the injured State.[22] Therefore, the main focus of this analysis will be violations of the fundamental rights of the human person that are recognized as *jus cogens* norms committed by a State against its own citizens.

This paper concludes that the non-recognition of State Immunity can be a lawful and valid countermeasure. Nonetheless, it must comply with certain important conditions. Additionally, when the non-recognition of State Immunity is properly accomplished as a countermeasure it represents an opportunity for the victims to have a remedy as well as an opportunity for the forum State to uphold the most important values of the international community.

B. Some Clarifications

An act amounting to a countermeasure would constitute an international wrongful act if viewed in isolation.[23] This is the main difference between countermeasures and retorsions, which are unfriendly but legal acts taken in response to the actions of another State.[24] Given that the question being examined is the removal of State Immunity as a countermeasure in response to *jus cogens* violations committed in another State, it is implied that the removal of State Immunity under these circumstances is an unlawful act.

The question of whether State Immunity applies or not in cases of *jus cogens* violations has been widely discussed of late.[25] Additionally, this

21 See G. Gaja, 'States Having an Interest in Compliance with the Obligation Breached', in Crawford *et al.*, *International Responsibility*, *supra* note 16, 957, 958 [Gaja, Interest in Compliance].

22 *Id.*

23 This is possible to conclude from the fact that countermeasures are a circumstance precluding wrongfulness. See *Articles on State Responsibility*, Art. 22, *supra* note 12, 6. For a further explanation of this argument see D. Alland, 'Countermeasures of General Interest', 13 *European Journal of International Law* (2002) 5, 1221, 1233.

24 See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 281; Zoller, *supra* note 11, 5-13.

25 See for example E. K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (2005), 34;

question was considered by the International Court of Justice (ICJ) in the *Ferrini case* (Germany v. Italy). The *Ferrini* case concerns the non-recognition of Germany's State Immunity by Italian courts. This non-recognition occurred in cases of violations of Italian citizens' human rights and international humanitarian law during Germany's occupation of Italy in WWII.[26] The ICJ concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict."[27] The ICJ explained that *jus cogens* norms and State Immunity are "two sets of rules [that] address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State", thus there is no conflict between these two sets of rules.[28] The same conclusion was reached in previous cases by the European Court of Human Rights,[29] the ILC,[30] and national

Rensmann, *supra* note 7, 151; A. Bianchi, 'Human Rights and the Magic of Jus Cogens', 19 *European Journal of International Law* (2008) 3, 491, 499-501.

26 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Application Instituting Proceedings, 23 December 2008 [ICJ, Jurisdictional Immunities of the State, Application Instituting Proceedings]. See also *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim Order, ICJ Reports 2010, 310, 314-315, para. 11.

27 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, para. 91 [ICJ, Jurisdictional Immunities of the State, Judgment].

28 *Id.*, para. 93.

29 *Al-Adsani v. United Kingdom*, ECHR, App. No. 35763/97, Judgment of 21 November 2001 [Al-Adsani v. United Kingdom Case]; *McElhinney v. Ireland*, ECHR, App. No. 31253/96, Judgment of 21 November 2001; *Kalogeropoulo et al. v. Greece & Germany*, ECHR, App. No. 59021/00, Judgment of 12 December 2002 (referring to Immunity of execution.).

30 The Working Group established that "this issue, although of current interest, did not really fit into the present draft articles. Furthermore, it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it. In any case, it would be up to the Sixth Committee itself, rather than the Working Group, to decide what course of action, if any, to take on the issue. In this connection, the view was also expressed that the issue […] rather than being a Sixth Committee matter, seemed to fall within the purview of the Third Committee of the General Assembly, particularly in connection with non-impunity issues dealt with by that Committee." ILC, *Convention on Jurisdictional Immunities of States and Their Property: Report of the Chairman of the Working Group*, UN Doc A/C.6/54/L.12, 12 November, 1999, paras 46-48.

courts of many other countries.[31] Following the aforementioned case law this article will assume the unlawfulness of not recognizing State Immunity in cases of *jus cogens* violations and consequently this article will examine the possibility of the non-recognition of State Immunity as a countermeasure.

It is also necessary to be clear that this article refers to immunity from jurisdiction and not to immunity from execution. The later concerns the immunity a State has from enforcement of judgments by the forum State against the assets of the respondent State.[32] This immunity is subject to fewer exceptions than immunity from jurisdiction due to the fact that it interferes more with State sovereignty.[33] Application of immunity from execution and application of immunity from jurisdiction are independent of each other. [34] The examination of immunity from execution is beyond the scope of this article.

C. Conditions for the Validity of Solidarity Countermeasure

Countermeasures are intrinsically unlawful acts. Therefore, to avoid being considered as wrongful, they must comply with certain conditions.[35]

31 In the US, see *Saudi Arabia v. Nelson*, [1993] 507 U.S. 349; *Siderman de Blake v. Republic of Argentina*, [1992] 965 F 2d 699 [Siderman de Blake v. Republic of Argentina Case]; *Princz v. Federal Republic of Germany*, [1994] 26 F.3d 1166. In Canada, see *Bouzari v. Iran* Case, *supra* note 1. In the U.K. see *Jones v. Saudi Arabia*, [2007] 1 A.C. 270 [Jones v. Saudi Arabia Case]; *Suleiman Al-Adsani v. Government of Kuwait and Others*, Court of Appeal, Judgment of 12 March 1996, [1997] 107 I.L.R. 537.

32 See A. Reinisch, 'State Immunity From Enforcement Measures', in Council of Europe *et al.* (eds), *State Practice Regarding State Immunities* (2006), 151, 151.

33 See *id.*, 156; and ICJ, *Jurisdictional Immunities of the State,* Judgment, *supra* note 27, para. 118. See also M. N. Shaw, *International Law*, 6th ed. (2008), 744.

34 See *United Nations Convention on Jurisdictional Immunities of States and Their Property*, Art. 19, GA Res. 59/38 annex, UN Doc A/RES/59/38, 2 December 2004, 9-10 [Convention on Jurisdictional Immunities of States]; ICJ*, Jurisdictional Immunities of the State,* Judgment, *supra* note 27, para. 113. See also Reinisch, *supra* note 32, 158-166; H. Fox, *The Law of State Immunity*, 2nd ed. (2008), 599-662.

35 See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 55-56, para. 83 [Gabčíkovo-Nagymaros Project Case]; Zoller, *supra* note 11, 103. It is important to mention that opposite to other circumstances that preclude wrongfulness, countermeasures are taken willingly. H. Lesaffre, 'Circumstances

If the countermeasure fails to meet these conditions the State taking the countermeasure will be responsible for any resulting violations.[36] The ICJ elaborated on the conditions that would be required such that the countermeasure would not be wrongful in the *Gabčíkovo-Nagymaros Project* case. These conditions were endorsed and elaborated further by the ILC in the *Articles on State Responsibility*.

The existing jurisprudence dealing with countermeasures has traditionally only concerned actions taken by injured States.[37] The *Articles on State Responsibility* also only regulated this kind of traditional countermeasures. Nonetheless, the conditions necessary for a traditional countermeasure can be applied to enforcement measures in general. Additionally, during the drafting of the Articles, when the solidarity countermeasures were included, the conditions of traditional countermeasures applied also to solidarity countermeasures.[38] Finally, there is no reason to believe that the requirements set for countermeasures taken by the injured State would be different from those applicable to solidarity countermeasures.[39] It would be contradictory if injured States would have to comply with more conditions than States acting in the name of a collective

Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures', in Crawford *et al.*, *International Responsibility*, *supra* note 16, 470, 470.

36 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 285.

37 See for example *Gabčíkovo-Nagymaros Project Case*, *supra* note 35; *Air Service Agreement of 27 March 1946 between the United States of America and France*, 27 March 1946, 18 R.I.A.A. 417 [Air Service Case]; *Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Portugal v. Germany)*, 31 July 1928, 2 R.I.A.A. 1011 [Naulilaa Case].

38 See Special Rapporteur on State Responsibility, *Sixth Report on the Content, Forms and Degrees of International Responsibility (Part Two of the Draft Articles); and "Implementation" (mise en oeuvre) of International Responsibility and the Settlement of Disputes (Part Three of the Draft Articles)*, Yearbook of the International Law Commission (1985), Vol. II (1), Art. 14 (I), 3, 13-14, UN Doc A/CN.4/389 and Corr. 1 & Corr. 2 [Special Rapporteur on State Responsibility, Sixth Report]; *id.*, *Fourth Report on State Responsibility*, Yearbook of the International Law Commission (1992), Vol. II (1), 1, 47-48, para. 146, UN Doc A/CN.4/444 and Add.1-3 (1992) [Special Rapporteur on State Responsibility, *Fourth Report*]; *id.*, *Third Report on State Responsibility*, Yearbook of the International Law Commission (2000), Vol. II (1), 3, 106, para. 406, UN Doc A/CN.4/507 and Add 1-4. Please notice that some draft articles included other additional conditions.

39 See Alland, *supra* note 23, 1225.

interest.[40] Therefore, this article will examine the existing conditions for countermeasures taken by an injured State as applicable to solidarity countermeasures, making special considerations where appropriate.

Countermeasures are a tool for the enforcement of international law. Consequently, the first condition for a countermeasure to be valid is that it must be a response to a previous wrongful act that has already occurred and must be directed at the State responsible for that previous violation.[41] The previous wrong must have already occurred.[42] As stated in the *Naulilaa* case, "the first condition – sine qua non – of the right to exercise reprisals is a motive created by a preceding act which is contrary to the law of nations."[43] Thus, it is not possible to take a preventative countermeasure.[44] Furthermore, it is enough that the determination of whether an international wrongful act has occurred is done by the State resorting to countermeasures. No previous assessment by a Court or special agreement between the States is needed.[45]

The second condition is related to the object of the countermeasure. Countermeasures must be taken to persuade the wrong-doing State to cease the violation and/or make reparations.[46] The object of the countermeasure cannot be to punish the wrong-doing State.[47] If the wrong-doing State has already ceased the violation and repaired the harm, countermeasures cannot be taken.[48] Additionally, the ILC explains "[c]ountermeasures shall, as far

40 R. Omura, 'Chasing Hamlet's Ghost: State Responsibility and the Use of Countermeasures to Compel Compliance with Multilateral Environmental Agreements', 15 *Appeal: Review of Current Law and Law Reform* (2010) 1, 86, 106.

41 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 55-56, para. 83.

42 *Id.*

43 *Naulilaa Case*, *supra* note 37, 1027.

44 See M. Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes* (2005), 55-56; Elagab, *The Legality of Non-Forcible Counter-Measures*, *supra* note 17, 52-55.

45 See Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 6, para. 2.

46 See *Articles on State Responsibility*, Art. 49 (1), *supra* note 12, 11. Please note that the *Articles on State Responsibility* referred to the obligations under Part II of the articles that include the obligation to cease the act and to make reparations. *Id.*, Arts 28-41, 7-9.

47 Crawford, *supra* note 10, 284.

48 See *Articles on State Responsibility*, Arts 49 (2) & 52 (3) (a), *supra* note 12, 11-12; Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 285.

as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."[49] Thus, countermeasures should be reversible and allow the State taking the countermeasure to return to the prior situation and continue complaint with its international obligations. As showed by the use of the expression "as far as possible", this requirement is not absolute.[50]

In the case of solidarity countermeasures, the countermeasure should have the same object. The difference is that the State taking countermeasures cannot request reparation for itself.[51] Normally there is neither moral nor material damage that affects the State, thus there cannot be a right to compensation when no damage has occurred.[52] Instead, the State may demand reparations in the name of those injured: the victims.[53] This issue will be explained further in Part III of this article.

The third condition is that the State must request the wrong-doing State to cease or to repair before taking any countermeasure.[54] The *Articles on State Responsibility* added that the State must notify "of any decision to take countermeasures and offer to negotiate with that State."[55] Even though this requirement was not mentioned by the ICJ in the *Gabčíkovo-Nagymaros Project* case, the facts of that case showed that the wrong-doing State knew that the other State was going to take countermeasures.[56]

The State resorting to countermeasures has the right whether or not to specify what the countermeasures may be.[57] Furthermore, there is no specific timing for the notification; in fact, the State could notify and take

49 See *Articles on State Responsibility*, Art. 49 (3), *supra* note 12, 12.

50 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 286.

51 C. Hillgruber, 'The Right of Third States to Take Countermeasures', in C. Tomuschat & J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006), 265, 269.

52 Gaja, *Interest in Compliance*, *supra* note 21, 961.

53 Institute of International Law, 'Resolution: Obligations Erga Omnes in International Law', Arts 2 & 5 (c)' (2005), available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf (last visited 28 January 2013), 2.

54 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 56, para. 84; *Articles on State Responsibility*, Art. 52 (1), *supra* note 12, 12.

55 *Id.*, Art. 52 (1) (b), 12. See also the general provision regarding the obligation to give notice by an injured State: *id.*, Art. 43, 10.

56 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35.

57 See Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 13, para. 21.

the countermeasure at the same time.[58] It is important to mention one exception where prior notice is not necessary. This is when, if notified, the countermeasure would become ineffective;[59] for example, when the countermeasure is to freeze the financial assets of one State.[60] This is because, if the wrong-doing State is previously notified, then the wrong-doing State would withdraw all of those financial assets.

The ILC also included also as a condition that there is no "dispute […] pending before a court or tribunal which has the authority to make decisions binding on the parties."[61] The ILC clarified that this condition does not apply "if the responsible State fails to implement the dispute settlement procedures in good faith."[62] Similarly, the *Articles on State Responsibility* also require that a State taking countermeasure complies with any obligations arising from "any dispute settlement procedure applicable between it and the responsible State."[63] The objective of these provisions is to ensure that recourse to countermeasures do not weaken any dispute settlement, which, after all, is a more civilized manner of resolving controversies.

In addition there are certain norms that cannot be affected by countermeasures.[64] Firstly, considering that *jus cogens* norms prevail over other norms, a countermeasure may not affect norms with *jus cogens* character.[65] Along the same lines, the ILC specified that a State cannot use force or threaten to use force as a countermeasure beyond the scope of self-

58 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 298.

59 *Articles on State Responsibility*, Art. 52 (2), *supra* note 12, 12.

60 See Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 11-12, para. 16; J. Crawford, 'Counter-Measures as Interim Measures', 5 *European Journal of International Law* (1994) 1, 65, 73-74 [Crawford, Interim Measures]; Y. Iwasawa & N. Iwatsuki, 'Procedural Conditions', in Crawford, *International Responsibility*, *supra* note 16, 1149, 1154.

61 *Articles on State Responsibility*, Art. 52 (3) (b), *supra* note 12, 12. See also *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466, 503, para. 103; and *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Order, P.C.I.J. Series A/B, No. 79 (1939), 193, 199.

62 *Articles on State Responsibility*, Art. 52 (4), *supra* note 12, 12. To determine whether the negotiation is not being done in good faith see generally *Affaire du Lac Lanoux (Spain v. France)*, 16 November 1957, 12 R.I.A.A. 281.

63 *Articles on State Responsibility*, 50 (2) (a), *supra* note 12, 12.

64 *Id.*, Art. 50, 12.

65 *Id.*, Art. 50 (1) (d), 12.

defense under the *Charter of the United Nations*.[66] Additionally, the State must continue "to respect the inviolability of diplomatic or consular agents, premises, archives and documents."[67]

Considering the special nature of human rights and international humanitarian law, countermeasures may not affect them either.[68] Furthermore, Professor Antonio Cassese suggests that this prohibition "also extends its reach to rules protecting the interests of needs of human beings."[69] For example, a countermeasure may not terminate a treaty of economic aid, if this would have an impact on human rights.[70] This idea is similar to the new conception taken by the United Nations and its use of economic sanctions, where it is taken into account the effect the sanction would have on the population and its needs.[71] In the case of solidarity countermeasures taken in response to human rights violations, this prohibition of affecting human rights eliminates the possibility of responding strictly reciprocally as to do so would be a violation of international human rights law.[72]

The final and more controversial condition is the proportionality of the countermeasure. This requirement gives countermeasures some

66 *Id.*, Art. 50 (1) (a), 12. Before the UN Charter entered into force, the use of other countermeasures beside the use of force or the threat of use of force was not as common as today. Zoller, *supra* note 11, 4-5.

67 *Articles on State Responsibility*, Art. 50 (2) (b), *supra* note 12, 12. See also O. Y. Elagab, 'The Place of Non-Forcible Counter-Measures in Contemporary International Law', in G. S. Goodwin-Gill & S. Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999), 125, 138-140 [Elagab, The Place of Non-Forcible Counter-Measures]; similarly see *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 38, paras 82 & 83.

68 See *Naulilaa Case*, *supra* note 37, 1026; *Articles on State Responsibility*, Art. 50 (1) (b & c), *supra* note 12, 12.

69 A. Cassese, *International Law in a Divided World* (1994), 243.

70 *Id.*

71 See W. M. Reisman & D. L. Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes', 9 *European Journal of International Law* (1998) 1, 86.

72 See G. Gaja, 'Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts', in J. H. H. Weiler, A. Cassese & M. Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989), 151, 156.

predictability, which is necessary in all acts of enforcement.[73] If a State is entitled to take countermeasures but the methods chosen are disproportionate, then the countermeasure becomes unlawful.[74]

In the arbitration awards of *Nauililaa* in 1928 and of *Air Service Agreement* in 1978, it was stated that countermeasures could not be disproportional.[75] The ILC, while drafting the *Articles on State Responsibility*, included this conception.[76] This was changed in 1997 when the ICJ rendered its judgment in the *Gabčíkovo-Nagymaros Project* case. The ICJ required the countermeasure to be proportional instead of not being disproportional.[77] This change of words made the proportionality standard a stricter one. Not every non-disproportional measure is necessarily a proportional measure, just as not every non-tall person is a short person.

Furthermore, the ICJ established that the measure must be "commensurate with the injury suffered, taking account of the rights in question."[78] The *Articles on State Responsibility* endorsed the approach of the ICJ, but added a new consideration. Specifically, Article 51 establishes: "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[79] From this explanation it is possible to conclude that the primary relationship that must be analyzed for proportionality is that of the countermeasure and the injury suffered, but without leaving aside the

73 E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *European Journal of International Law* (2001) 5, 889, 889-890.

74 See T. M. Franck, 'On Proportionality of Countermeasures in International Law', 102 *American Journal of International Law* (2008) 4, 715, 716.

75 See *Air Service Case*, *supra* note 37, 483; *Naulilaa Case*, *supra* note 37, 1028.

76 See for example Special Rapporteur on State Responsibility, *Sixth Report*, Art. 9 (2), *supra* note 38, 11; *id.*, *Fourth Report*, *supra* note 38, 47, para. 146; *Report of the International Law Commission on the Work of its Forty-Eighth Session*, Art. 49, Yearbook of the International Law Commission (1996), Vol. II (2), 1, 64, UN Doc A/CN.4/L.528/Add 2.

77 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 56, para. 85. Please note that the language used in the French version of the judgment makes this assertion clearer.

78 *Id*.

79 *Articles on State Responsibility*, Art. 51, *supra* note 12, 12. For a critique of the definition used by the ILC, see D. J. Bederman, 'Counterintuiting Countermeasures', 96 *American Journal of International Law* (2002) 4, 817, 821-822.

gravity of the wrongful act and the rights involved. This definition given by the ILC is now considered customary international law.[80]

The final *Articles on State Responsibility* made the measure of proportionality less broad than its previous drafts.[81] The commentaries to the Articles specified that there are factors besides the quantitative ones that must also be taken into account to assess proportionality.[82] This was done to avoid inequitable results.[83] To understand the definition the four elements it includes must be analyzed: the word commensurate, as well as the phrases "the injury suffered", "gravity of the internationally wrongful act", and "the rights in question."

First, the meaning of the word 'commensurate', used in the *Gabčíkovo-Nagymaros Project* case and in the *Articles on State Responsibility*, was given neither by the Court nor by the ILC. The ordinary meaning of the word is "equal in measure or extent."[84] Nonetheless, since the assessment of proportionality also takes into account qualitative factors, it is impossible to find strict equality. There is no mathematical formula; the objective should be to find harmony.[85]

The second element has to do with the meaning of the phrase "the injury suffered." The idea is to make sure the damage caused by the countermeasure is not greater than the previous damage caused by the wrong-doing State.[86] In cases where the rights of people are involved, the question becomes whether the injury suffered by the State is the one that should be taken into account or the injury suffered by its citizens. To answer this question, the case of the *Air Service Agreement* becomes relevant. The case concerned the measures taken by the United States "prohibiting flights by French designated carriers to the US west coast from Paris via Montreal."[87] This action was a countermeasure to the refusal of French authorities to allow the passengers of a Pan American flight to disembark in

80 R. O'Keefe, 'Proportionality', in Crawford *et al.*, *International Responsibility*, *supra* note 16, 1157, 1157.

81 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 296.

82 *Id.*, 295.

83 *Id.*, 296.

84 Merriam Webster Inc. (ed.), *Webster's Third New International Dictionary on the English Language Unabridged* (1986), 456.

85 Zoller, *supra* note 11, 128 & 131.

86 O'Keefe, *supra* note 80, 1160.

87 *Air Service Case*, *supra* note 37, 417-421.

Paris.[88] While assessing the proportionality of the measure the Arbitration Tribunal stated that, "in a dispute between States, [it is important] to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach."[89] Therefore, if in countermeasures taken by injured States the injured individuals become relevant; in cases of solidarity countermeasures, when there is no injured State, the injury suffered must refer to the injury suffered by the victims of the human rights violations.

When dealing with the issue of the injury suffered, the injury caused by the countermeasure to the wrong-doing State is not taken into account. This can be concluded from the fact that the countermeasure is commensurate with the injury suffered. If this injury suffered includes the injury caused by the countermeasure it would mean that the countermeasure would have to be measured against something that has not yet occurred. Additionally, the fact that the ILC did not refer to "the injuries suffered" but instead used the singular form, also shows that it is only the injury of one of the States involved that must be considered.

Furthermore, the meaning of "gravity of the internationally wrongful act" is indicative as well. The commentaries of the ILC made no reference to the meaning of this phrase. The Special Rapporteur Gaetano Arangio-Ruiz who proposed this phrasing on an earlier draft stated:

> "The degree of gravity of an internationally wrongful act should be determined by reference to a number of factors, including the objective importance and subjective scope of the breached rule, the dimension of the infringement, the subjective element, inclusive of the degree of involvement of the wrongdoing State's organizational structure and of the degree of fault (ranging from *culpa levis* or *levissima* to negligence, gross negligence and wilful intent) and, ultimately, the effects of the breach upon both the injured State and the "object of the protection" afforded by the infringed rule."[90]

88 *Id.*, 420.

89 *Id.*, 483.

90 Special Rapporteur on State Responsibility, *Seventh Report on State Responsibility*, Yearbook of the International Law Commission (1995), Vol. II (1), 3, 13, para. 47, UN Doc A/CN.4/469 and Add.1-2.

The footnote to this statement explains that the "object of the protection" includes "the damage, injury or harm suffered by individuals as a consequence of the violation of human rights obligations."[91] Gaetano Arangio-Ruiz explains that, even if the degree of fault is not taken into account for regular international wrongful acts, it has to be taken into account for international crimes since it is a "sine qua non feature of a crime."[92] Although the concept of an international crime was finally rejected by the ILC,[93] the ILC still accepts that the intent can be taken into account to differentiate between violations of peremptory norms and serious violations of peremptory norms.[94] Consequently, the intent should be taken into account when assessing the gravity of the violation.

Fourth is the significance of "the rights in question." The commentaries to the Articles on States Responsibility states that this phrase "has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration."[95] In other words, the rights violated by the wrongful act and by the countermeasure, as well as the rights of any other State that might be affected, must be taken into account. This explanation, however, must be adapted to apply to solidarity countermeasures, where it would be necessary to consider, as proposed by Roger O'Keefe, "the internationally-guaranteed rights of individuals, be they victims of the responsible State's breach or persons likely to be affected by the countermeasure."[96] For example, where economic sanctions would endanger the wrong-doing State's compliance with its obligations regarding economic, social, and cultural rights, it would be important to take the rights of individuals into account.

Some contend that this definition of proportionality proposed by the ILC is contrary to the object of a countermeasure.[97] As mentioned previously, the object of a countermeasure is to pressure the wrong-doing

91 *Id.*, 13 (note 15).
92 *Id.*, 14, para. 49.
93 See *Articles on State Responsibility*, *supra* note 12. This rejection was due to the lack of penal consequences to States in current international law. See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 243.
94 *Id.*, 247.
95 *Id.*, 296.
96 O'Keefe, *supra* note 80, 1164.
97 Cannizzaro, *supra* note 73, 892.

State to comply with its obligations.[98] Consequently, the proportionality of any countermeasures used should be equivalent to what is needed to accomplish that goal.[99] However, this could mean countermeasures might be disproportionate to the injury suffered.[100] Certainly the contradiction exists. Nevertheless, the ILC article concerning proportionality shall be interpreted as the *lex specialis* in the subject of proportionality. Consequently, the measures needed to ensure compliance need not be taken into account when determining the proportionality of the action.[101] Instead, the requirements established in ILC Article 51 are the applicable ones.

In the case of solidarity countermeasures, scholars have discussed whether the proportionality must be measured taking into account the actions of all the States taking countermeasures as a whole or of each State individually, regardless of the actions of other States.[102] In this respect, the Special Rapporteur, James Crawford, suggested that "it could become chaotic if a number of States began demanding different things under the rubric of State responsibility."[103] He thus proposed as a solution that "where more than one State takes countermeasures […] those States shall cooperate in order to ensure that the conditions […] for the taking of countermeasures are fulfilled."[104] Other members of the ILC proposed that "the principle *non bis in idem* could be applied by analogy [to the case of several States taking countermeasures as a response to the same violation] so as to prevent the possibility of multiple sanctions for the breach."[105] Regardless of whether the *non bis in idem* principle is applicable or not, to consider proportionality individually and not collectively would be against the whole idea underlying the requirement of proportionality. The requirement of proportionality does not aim at measuring how far the State taking the measures can go. Instead,

98 *Articles on State Responsibility*, Art. 49 (1), *supra* note 12, 11.

99 Cannizzaro, *supra* note 73, 892.

100 *Id.*

101 See Bederman, *supra* note 79, 822; J. Calamita, 'Sanctions, Countermeasures and the Iranian Nuclear Issue', 42 *Vanderbilt Journal of Transnational Law* (2009) 5, 1393, 1420.

102 See Crawford, *Interim Measures*, *supra* note 60, 66; Katselli, *Countermeasures*, *supra* note 13, 416.

103 *Report of the International Law Commission on the Work of its Fifty-Second Session*, Yearbook of the International Law Commission (2000), Vol. II (2), 1, 57, para. 352, UN Doc A/55/10 [Report Invocation of Responsibility].

104 Special Rapporteur on State Responsibility, *Third Report*, *supra* note 38, 108, para. 413.

105 *Report Invocation of Responsibility*, *supra* note 103, 60, para. 369.

what is being measured is what is lawful, such that it is an enforcement measure and not a punishment. Consequently, States taking solidarity countermeasures have the additional burden of making sure their measures, together with all the other measures responding to the same violation, are proportional.[106] This idea is supported by the inclusion on the Articles of State Responsibility of a duty of cooperation in bringing "to an end through lawful means any serious breach [of a peremptory norm of general international law]."[107]

All of this should be taken into account when dealing with the main question regarding proportionality of countermeasures: how to measure it? The judgments normally do not explain the reasons behind their decisions.[108] As Professor Mary Ellen O'Connell states, "[t]here seems to be unanimity about the requirement for proportionality, but also agreement that no formula exists for demanding what actually is proportional."[109]

D. Non Recognition of State Immunity as a Judicial Countermeasure

In cases where States have taken solidarity countermeasures the measures have generally been economic sanctions, suspension of landing rights for planes, and the freezing of State assets.[110] This author was unable to find any cases where the countermeasure was the non-recognition of State Immunity, not even where the measure was taken by an injured State. Nonetheless, this does not mean that such a hypothetical situation is not possible.

106 See Special Rapporteur on State Responsibility, *Third Report*, *supra* note 38, 106, para. 406.

107 *Articles on State Responsibility*, Art. 41 (1), *supra* note 12, 9. It must be noted that the ILC in its commentaries stated that "It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 [of Article 41] in that respect may reflect the progressive development of international law". Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 249.

108 See for example, *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 56, para. 85.

109 See M. E. O'Connell, *The Power and Purpose of International Law* (2008), 253. See also Cannizzaro, *supra* note 73, 889-890.

110 See N. White & A. Abass, 'Countermeasures and Sanctions', in M. D. Evans (ed.) *International Law*, 3rd ed. (2010), 531, 535.

The case for the non-recognition of State Immunity has been supported not only by the Chairperson of the Committee against Torture, Fernando Mariño Menéndez, but also by other scholars.[111] This article will examine the peculiarities of State Immunity to determine whether its non-recognition is feasible as a countermeasure.

First, it is necessary to examine the nature of State Immunity to determine whether its non-recognition could constitute a countermeasure. Particularly, since a countermeasure necessarily involves the breach of an international norm, it is necessary to determine whether or not State Immunity is a norm in international law such that failure to recognize it could constitute a countermeasure.

Currently, there is no universal treaty in force that covers the topic of State Immunity. In 2004, the General Assembly adopted the UN State Immunity Convention. This convention will come into force pending sufficient State ratifications.[112] Europe has a convention that is already in force and regulating the subject, called the *European Convention on State Immunity*.[113] The significance of this is that State Immunity is a norm under international law for those State parties to the European Convention on State Immunity. For the other States, the obligation to recognize State Immunity is found in customary international law. In this respect, the ICJ recognized in the *Ferrini* case that State Immunity was customary international law.[114]

111 See C. Forcese, 'De-Immunizing Torture: Reconciling Human Rights and State Immunity', 52 *McGill Law Journal* (2007) 1, 127, 167; A. Atteritano, 'Immunity of States and Their Organs: The Contribution of Italian Jurisprudence over the Past Ten Years', 19 *Italian Yearbook of International Law* (2009), 33, 36; A. Gattini, 'To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?', 1 *Journal of International Criminal Justice* (2003) 2, 348.

112 See *Convention on Jurisdictional Immunities of States*, *supra* note 34.

113 *European Convention on State Immunity*, 16 May 1972, 1495 U.N.T.S. 182.

114 ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 55. Likewise the UN *State Immunity Convention* recognizes State Immunity as a principle of customary international law. See *Convention on Jurisdictional Immunities of States*, *supra* note 34, Preamble, 2-3. Sir Lauterpacht argued in 1951 that it could not be a binding rule of international law since it depended on reciprocity. H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *British Yearbook of International Law* (1951), 220, 228. Although this might have been true in 1951, it is not true anymore as the recognition of Immunity does not depend on reciprocity. See Bankas, *supra* note 25, 327-338. Jasper Finke describes State Immunity as a principle instead of a rule since States agree on the general idea of State Immunity but have not agreed on the particularities. See J. Finke, 'Sovereign Immunity: Rule, Comity or Something Else?', 21 *European Journal of International Law* (2010) 4, 853. Even if

Additionally, many States have recognized State Immunity as a principle of customary international law in national courts or by enacting legislation.[115] Regardless of whether a particular State is bound by customary international law or by treaty law to recognize State Immunity, the status of State Immunity as a binding norm of international law signifies that a State could violate this norm, and in turn signifies that the violation of this norm could constitute a countermeasure.[116] The exception would be if international law prohibited State Immunity from being subjected to countermeasures. In this respect, the existing treaties on the subject do not include any provision regarding countermeasures.[117] Additionally, as described in Part II, countermeasures may not affect *jus cogens* norms, human rights law, or diplomatic law. However, State Immunity relates to none of these types of law. It is clear that State Immunity is not a *jus cogens* norm and that it does not exist to protect human rights.

Regarding diplomatic law, the scope of this prohibition was progressively limited during the drafting of the *Articles on State Responsibility*. In 1992, the Special Rapporteur Gaetano Arangio-Ruiz, first proposed including among the prohibited countermeasures those posing "serious prejudice to the normal operation of bilateral or multilateral diplomacy."[118] Although this argument could be used to justify any countermeasure, it can be debatable whether the non-recognition of State Immunity could damage bilateral or multilateral relations, therefore becoming a prohibited countermeasure. The Special Rapporteur later

this is the case, the principle of State Immunity would be part of international law and as such it can be subjected to countermeasures.

115 For example, United States, United Kingdom, and Singapore. For a list of domestic legislation regarding State Immunity, as of 2005, see Bankas, *supra* note 25, 328.

116 In this respect, see *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 73, 1155 U.N.T.S. 331, 350 (stating that it does not regulate issues of State Responsibility). Additionally the ILC while drafting the convention clarified that the right to invoke termination or suspension of a treaty arises "independently of any right of reprisal". *Report of the International Law Commission to the General Assembly,* Yearbook of the International Law Commission (1966), Vol. II, 169, 255, UN Doc A/CN.4/191.

117 M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006, 77-78, para. 146. See also *European Convention on State Immunity*, *supra* note 113; *Convention on Jurisdictional Immunities of States*, Preamble, *supra* note 34, 2-3.

118 Special Rapporteur on State Responsibility, *Fourth Report*, *supra* note 38, 35, para. 96.

clarified that this prohibition only included those countermeasures violating the rights of diplomats.[119] To avoid further confusions, this was specified in the subsequent drafts and it now reads "[a] State taking countermeasures is not relieved from fulfilling its obligations [….] [t]o respect the inviolability of diplomatic or consular agents, premises, archives and documents."[120] The commentaries to the Articles explained that this prohibition "is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including during armed conflicts. The same applies, *mutatis mutandis,* to consular officials."[121] Since State Immunity does not relate to the rights of diplomatic or consular agents but of the State itself, State Immunity is not affected by this prohibition.

Additionally, it is necessary to mention that during the drafting of the *Articles on State Responsibility*, Gaetano Arangio-Ruiz also suggested that countermeasures could not affect "the independence, sovereignty or domestic jurisdiction of the wrongdoer."[122] He gave as an example "the submission to the jurisdiction *ratione personae* [of the injured State] of responsible officials of the target State, who would otherwise be protected by immunity."[123] This suggestion could have meant the prohibition of the non-recognition of State Immunity as a countermeasure. Nonetheless, the Drafting Committee decided that this proposal was too broad and it amounted "to a quasi-prohibition of countermeasures."[124] Thus, the Committee limited it by stating that the countermeasure could not be an "extreme economic coercion designed to endanger the territorial integrity or political independence of the State which has committed an international wrongful act."[125] Unfortunately, no further reference was made to the

119 *Report of the International Law Commission on the Work of its Forty-Fourth Session*, Yearbook of the International Law Commission (1992), Vol. II (2), 1, 32, para. 220, UN Doc A/47/10.

120 *Articles on State Responsibility*, Art. 50 (2) (b), *supra* note 12, 12.

121 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 294.

122 Special Rapporteur on State Responsibility, *Fifth Report on State Responsibility*, Yearbook of the International Law Commission (1993), Vol. II (1), 1, 51, para. 230 (b), UN Doc A/CN.4/453 and Add.1-3.

123 *Id.*, 51-52, paras 233 & 234.

124 ILC, *Summary Records of the 2318th Meeting*, Yearbook of the International Law Commission (1993) Vol. 1, 140, 144, para. 27, UN Doc A/CN.4/SER.A/1993.

125 *Id.*, 140, para. 3, (Art. 14 (b)).

example given by the Special Rapporteur. This provision was not included in the final draft, but without doubt the effect the non-recognition of State Immunity may have in the sovereignty of the wrong-doing State must be taken into account when assessing the proportionality.

The other issue that may be argued against the non-recognition of State Immunity as a countermeasure is that, since State Immunity is a procedural norm applied by States, it cannot be subject to countermeasures. In order to analyze this issue it is necessary to distinguish procedural norms from substantive norms. In this respect, a substantive norm imposes duties by regulating actions human beings or States are "required to do or abstain from [doing] whether they wish to or not".[126] A procedural norm "define[s] the procedure to be followed" when determining if a substantive norm has been violated.[127]

The ICJ in the *Ferrini* case held that "[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State."[128] The same has been determined by the European Court of Human Rights.[129] Nonetheless, some scholars have argued that State Immunity is both a substantive and procedural norm.[130]

This article proposes to compare State Immunity with the principle of equality in domestic law, which is a substantive norm, but has procedural effects. The procedural effects of the equality principle are no longer the equality principle itself but an expression of it. For example, the equality of arms is no longer the equality principle but a procedural rule expressing, within a procedure, the equality principle. The same is true of State Immunity; it is not a substantive norm but a procedural expression of a substantive norm, the sovereign equality principle. Therefore, as held by the

126 H. L. A. Hart, *The Concept of Law* (1961), 78-79. Hart refers to substantive rules as primary rules and procedural rules as one kind of secondary norm. This author uses the terms substantive and procedural rules to be in accordance with the terms used by the ICJ *infra.*

127 *Id.*, 92 & 94.

128 ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, paras 58 & 93. See also *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 25, para. 60 [Arrest Warrant Case].

129 *Al-Adsani v. United Kingdom Case*, *supra* note 29, para. 48. See also *Jones v. Saudi Arabia Case*, *supra* note 29, para. 24.

130 See Dissenting Opinion of Judge Al-Khasawneh, *Arrest Warrant Case*, *supra* note 128, 97, para. 5; Atteritano, *supra* note 111, 37.

ICJ and the European Court of Human Rights, State Immunity is a procedural norm.

Consequently, the question becomes whether the fact that State Immunity is a procedural norm, thus preventing States from using it as a countermeasure. To answer this question, we must look to see whether there is a prohibition against taking countermeasures that affect procedural norms.[131] It must be remembered that, apart from the exceptions already mentioned, there are no other established restrictions that delimit which norms may be affected by countermeasures. Also, there is no provision stating that countermeasures can only affect substantive norms.[132] Thus, there is nothing in the nature of State Immunity that prevents the potential of its non-recognition as a countermeasure.

I. Legality of Judicial Countermeasures

Traditionally, the executive branch decides when to take a countermeasure. There have also been cases of countermeasures taken by the legislative branch.[133] In the case of State Immunity, domestic courts are

131 It is necessary to mention, however, that State Immunity is probably the only example whereby a State could affect a procedural norm as a countermeasure. Other procedural norms within a domestic trial are not part of international law, and thus its non-recognition would not constitute a countermeasure. See *Articles on State Responsibility*, Arts 3 & 22, *supra* note 12, 2, 6. Moreover, a suspension of other procedural norms, as for example, the right to contest evidence, may render the judicial procedure unfair. As explained *infra* a judgment against a State for *jus cogens* violations is an enforcement of international law. As such, it must comply with basic fairness rules. See O'Connell, *supra* note 109, 363. With respect to the other secondary norms regulating remedies within international law, the International Court of Justice may impose a procedural sanction to a State that did not comply with an interlocutory decision. See *id.*, 310. Whether this is a countermeasure or not depends on whether the ICJ is a subject of international law, and whether the procedural rules can be considered as international law norms. The examination of this statement is beyond the scope of this article.

132 See for example L. Oppenheim, *International Law: A Treatise*, Vol. II, 7th ed. (1952), 308; C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), 20-21.

133 For example, in 2010, the US Congress approved sanctions against Iran that went beyond a Security Council Resolution. This sanction had to be signed by the President, but that is part of the general procedure for the approbation of a law in the US. See P. Baker, 'Obama Signs Into Law Tighter Sanctions on Iran', *The New York*

the ones normally in charge of recognizing immunity or denying it when appropriate.[134] There may be some States where the executive branch decides whether immunity should apply or not and the domestic court must follow the executive's decision. In those cases, the decision to non-recognize immunity as a countermeasure would be taken by the executive branch, which is not different from what usually happens. However, in the majority of the domestic jurisdiction that is not the case, since the domestic courts are the ones deciding when immunity applies, and thus the decision not to recognize State Immunity as a countermeasure would be taken by the judicial branch. An argument that might be posed against the non-recognition of State Immunity as a countermeasure is that countermeasures cannot be taken by the judicial branch.[135] Therefore it is necessary to analyze whether the judicial branch can also take countermeasures.

The executive branch is usually responsible for employing countermeasures probably because it is in charge of conducting foreign policy. This special position of the executive branch is recognized by international law.[136] For example, unilateral declarations are only binding upon States when made by the Head of State, Heads of Government, Ministers for Foreign Affairs, or when made by other representatives of the State on specific cases.[137]

Notwithstanding this special position of the executive for certain matters, this special position has no application on questions of state responsibility.[138] The *Articles on State Responsibility* established that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions. […] An organ includes any person or entity which

Times (1 July 2010), available at http://www.nytimes.com/2010/07/02/world/middleeast/02sanctions.html?_r=1 (last visited 10 January 2013).

134 See Bankas, *supra* note 25, 13. See also Rensmann, *supra* note 7, 157.

135 See Atteritano, *supra* note 111, 36 (arguing, without further explanation, that the non-recognition of State Immunity as a countermeasure "it is a problem for countries in which the denial of Immunity is usually decided by the courts rather than by governments").

136 See A. Peters, 'Treaty Making Power', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 56, 71, para. 81.

137 ILC, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, UN Doc A/61/10, 367, 368, para. 4.

138 *Report of the International Law Commission on the Work of its Forty-Ninth Session*, Yearbook of the International Law Commission (1997), Vol. II (2), 1, 65, para. 200, UN Doc A/52/10.

has that status in accordance with the internal law of the State."[139] The domestic independence of the branches have no impact on whether the conduct is attributable to the State or not. This is referred to as the principle of the unity of the State for international law.[140] This principle is related to the general rule that a State cannot invoke its domestic law to justify a violation of international law.[141] Taking all of this into account, it is possible to conclude that the actions and omissions of courts are attributable to the State, thus they may entail the State's international responsibility.[142] For example, when a domestic court wrongly lifts the immunity of another State, the forum State is internationally responsible for that wrongful act.[143]

With regard to countermeasures, the *Articles on State Responsibility* do not appear to limit who can take them. Therefore, presumably any individual whose acts are attributable to the State is capable of taking countermeasures. This idea is reinforced by the fact that countermeasures are included within the set of articles that regulate circumstances precluding wrongfulness. Presumably, the *Articles on State Responsibility* set forth the full set of circumstances under which countermeasures may be taken and the Articles do not limit the possibility to take countermeasures to any particular set of individuals or organs. Consequently, one can assume that any organ whose acts are attributable to the State is capable of taking countermeasures, no matter their hierarchical position or state function. Just as is the case with a violation that is committed out of necessity, the responsibility of the State is precluded regardless of which entity within the State committed the wrongful act. There is no reason to believe that the situation is different with respect to countermeasures. The responsibility of the State is precluded when the action is taken as a countermeasure and complies with the special conditions, regardless of who committed the act. Consequently, although in principle a policeman acting in his official capacity could also take countermeasures, since his actions are attributable to the State, it is unlikely

139 *Articles on State Responsibility*, Art. 4, *supra* note 12, 2-3.

140 See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 95.

141 *Vienna Convention on the Law of Treaties*, Art. 27, *supra* note 116, 339. For an explanation see Shaw, *supra* note 33, 133-134.

142 See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, 62, 87-88, para. 62.

143 See A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts', 101 *American Journal of International Law* (2007) 4, 760, 764.

that his actions would comply with the required special conditions, for example that of prior notification.

Accordingly, under international law, countermeasures can also be taken by domestic courts. The status of the court is also not relevant. However, it must be taken into account that, if the decision is taken by a lower court, it is not a final decision until all the possible remedies are exhausted.[144] Furthermore, domestic courts play an important role in the enforcement of international law in general.[145] For example, courts enforce arbitral awards and judge persons that have committed crimes regulated by international law, *i.e.* piracy.[146] Countermeasures are just a different enforcement tool.

To differentiate between countermeasures taken by the executive, the countermeasures taken by the judicial branch will be referred to as judicial countermeasures. Although this article only analyzes the possibility of domestic courts to take countermeasures under international law, it must be noted that the scope of judicial countermeasures is very limited due to constraints imposed by domestic law, including the rules of jurisdiction and procedure. First of all, there must be a lawsuit against another State. In most jurisdictions, a court cannot start a proceeding against a State *motu propio.* As a consequence, a decision to take a judicial countermeasure is not only based on political will but also on the pre-existence of a lawsuit. Moreover, the fact that the decision is taken by an impartial and independent organ brings some additional legitimacy not present when the decision is taken by the executive.

Consequently, there is nothing that *a priori* eliminates the possibility to non-recognize State Immunity as a countermeasure.

II. Compliance With the Conditions of Validity of Countermeasures

As explained in Part II of this article, countermeasures must comply with certain conditions to be valid. This part of the article will therefore analyze if the judicial countermeasure of non-recognition of State Immunity

144 See *id.*, 766.
145 See O'Connell, *supra* note 109, 328.
146 *Id.*, 329.

could comply with such conditions. It would also try to give some guidance on how this could be done.

Prior to analyzing these conditions, it is necessary to mention that, for a State to have the possibility to take the judicial countermeasure of non-recognizing State Immunity, it is necessary that there be the initiation of a complaint by an individual and that the domestic court has the jurisdiction to hear such a complaint.

The application of State Immunity depends first on the prior ascertainment of jurisdiction.[147] International law provides for four bases under which a State is entitled to exercise jurisdiction: territorial, nationality (of the victim or of the perpetrator), protective, and universal.[148] Unless other links exist in the specific cases, in case of *jus cogens* violation, the domestic court could base its jurisdiction on the universality principle.

It is widely accepted that most, if not all, substantive rules which possess *jus cogens* status are also the ones that, when violated, give ground to States to claim universal jurisdiction.[149] Nonetheless, traditionally the jurisdiction being analyzed is criminal. The cases where State Immunity may come into play are civil proceedings. Alexander Orakhelashvili proposes that, "if an act attracts universal criminal jurisdiction, it is unclear why it cannot attract universal civil jurisdiction."[150] Following this line of thought, it is possible to conclude that international law does not prevent States from exercising this kind of jurisdiction, but it would also be necessary that the national laws of the State allow the court to do so, too.[151]

147 See A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 340-341.

148 For an explanation see J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 458-462.

149 J. T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta & J. R. W. D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), 667, 668. In this respect, it must be noted that universal jurisdiction does not arise from the concept of *jus cogens* but from international legal rules on jurisdiction. See ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 95.

150 Orakhelashvili, *supra* note 147, 308.

151 See *id.*; J.-F. Flauss, 'Compétence civile universelle et droit international général', in Tomuschat & Thouvenin *supra* note 51, 385, 392-394; D. F. Donovan & A. Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', 100 *American Journal of International Law* (2006) 1, 142, 163; B. Stephens, 'Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?', 60 *Albany Law Review* (1997) 3, 579, 601. See also, *D. M. E. Filartiga & J. Filartiga v. Americo Noberto Pena-Irala*, [1980] 630 F.2d 876 (exercising universal civil jurisdiction in a case of torture).

In addition, domestic law may restrain courts from non-recognizing State Immunity as a countermeasure.[152] For example, many States have enacted national laws regulating the exceptions to State Immunity.[153] For the courts of these States it might be more difficult to take countermeasure involving State Immunity. However, if the court decides to do so in contravention of national law, this fact does not affect the validity of the countermeasure.[154]

There are certain conditions a judicial countermeasure of non-recognition of State Immunity would need to comply with to be valid. The first one is that it must be a response to a prior wrongful act and it must be directed at the State responsible for that previous violation.[155] In the situation at hand, the judicial countermeasure is in response to a *jus cogens* violation. However, whether the violation in fact occurred is yet to be established by the domestic court. The question is whether a domestic court can take a countermeasure, particularly the non-recognition of State Immunity, for an alleged violation of international law before establishing that the violation of international law actually occurred.

The ICJ analyzed a similar situation in the *Ferrini* case when examining whether the gravity of an alleged violation could affect State Immunity:

> "the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious

152 See Rensmann, *supra* note 7, 157.

153 For example, United States, United Kingdom and Singapore. For a list of domestic legislation regarding State Immunity as of 2005 see Bankas, *supra* note 25, 328. See also *Argentine Republic v. Amerada Hess Shipping Corp.*, [1989] 488 U.S. 428, 434 and *Jones v. Saudi Arabia Case*, *supra* note 31, 287-288, para. 22.

154 Regarding *ultra vires* acts see *Articles on State Responsibility*, Art. 7, *supra* note 12, 3.

155 See *Gabčíkovo-Nagymaros Project Case*, *supra* note 35, 55-56, para. 83.

> violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim."[156]

The ICJ's analysis was in response to Italy's argument that "international law [does not accord] immunity to a State, or at least restricts its immunity, when that State has committed serious violations of the law of armed conflict".[157] In that case, and according to Italy's argument, the non-application of State Immunity could only have occurred where it was established that serious violations of international law had in fact occurred. Thus, it was impossible to resolve this preliminary issue of state immunity without analyzing the merits of the claim

The situation in the *Ferrini* case must be distinguished from the hypothesis at hand. It must be recalled that, when a State is taking a countermeasure, it is knowingly acting against international law, and it is also illegally subjecting the wrong-doing State to the trial process. The existence of a previous violation by the wrong-doing State is assumed by the State taking the countermeasure. If afterwards it is established that the violations that brought about the countermeasure did not exist, then the countermeasure becomes unlawful. Consequently, the national court, in deciding to take the judicial countermeasure of non-recognition of State Immunity would be presuming that the alleged violation of international law occurred.

Therefore, in this hypothetical, just like with other issues of admissibility, the court must do a *prima facie* assessment of the existence of the violation. If it finds *fumus boni iuris* of the existence of the violation and its attribution to the State it would assume it for admissibility purposes and the Court may take the judicial countermeasure. This analysis needs some degree of evidence; the "skilful construction of the claim" is not enough. Then if, while examining the merits, it is established that the violation did

156 ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 82.
157 *Id.*, para. 81.

not occur, the countermeasure taken loses its basis and becomes unlawful.[158] In that situation, the responsibility of the forum State is not precluded and the victim State should be compensated.[159] This compensation could be ordered by the court to be paid by the plaintiff. Evidently, since the assessment that a violation of *jus cogens* occurred was made by a domestic court and not an international court, it is not final in international law. The States concerned may, for example, bring the manner before an international court.

The second difficulty is posed by the object of the judicial countermeasure. Countermeasures should be taken to persuade the wrong-doing State to cease the violation and make reparations.[160] Nonetheless, it is necessary to examine whether the forum State has the right to exercise pressure through a judgment against the wrong-doing State to make reparations to the victims. When States have taken solidarity countermeasures the object has been only to request cessation; this, however, does not mean that it is not possible for States to request reparations for individuals.[161] This is related to the fact of whether international law recognizes an obligation to make reparations to individuals.

In the *Chorzow Factory* case the Permanent Court of International Justice recognized that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[162] It is never mentioned that the duty does not exist if the injury is suffered by individuals.[163] This idea was welcomed by the ICJ in its advisory opinion regarding the *Legality of the Wall*, where

158 See Elagab, *The Place of Non-Forcible Counter-Measures*, *supra* note 67, 52-55; Special Rapporteur on State Responsibility, *Fourth Report, supra* note 38, 6, para. 2.

159 See Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 285.

160 See *Articles on State Responsibility*, Art 49 (1), *supra* note 12, 11. Please note that the *Articles on State Responsibility* referred to the obligations under Part II of the articles that include the obligation to cease the act and to make reparations. *Id.*, Arts 28-41, 7-9.

161 C. Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in A. Randelzhofer & C. Tomuschat (eds), *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights* (1999), 1, 5 & 6. See also Frowein, *supra* note 13, 431.

162 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, P.C.I.J. Series A, No. 17, 29 (1928).

163 See Orakhelashvili, *supra* note 147, 246.

it declared that Israel "has the obligation to make reparation for the damage cause to all the natural or legal persons concerned."[164] Unfortunately, the ICJ only considered material damage.[165] Furthermore, in the recent case *Ahmadou Sadio Diallo* the ICJ examined the damages suffered by one individual while assessing the reparations owed to the State[166].

The United Nations General Assembly has also recognized "the victims' right to benefit from remedies and reparation."[167] Additionally, this principle is included in human rights treaties, such as the *European Convention on Human Rights* and the *American Convention on Human Rights*.[168] It is not explicitly included in the *International Convention for Civil and Political Rights*, but the Human Rights Committee has declared the existence of this right.[169]

The *Articles on State Responsibility* established that "[t]he obligations of the responsible State […] may be owed to another State, to several States, or to the international community as a whole."[170] However, this stipulation does not affect "any right, arising from the international responsibility of a State, which may accrue directly to any person."[171] The commentaries exemplified the case of violation of human rights treaties, in which the individual victims should be "the ultimate beneficiaries [and] the holder of the relevant rights."[172] By analogy the same applies in cases of violations of *jus cogens* related to basic human rights.[173]

164 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 198, para. 152.

165 *Id.*, 198, para. 153.

166 ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 19 June 2012.

167 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Preamble, GA Res. 60/147 annex, UN Doc A/Res/60/147, 16 December 2005, 2, 2-4 [Basic Principles].

168 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 50, 213 U.N.T.S. 221, 248; *American Convention on Human Rights*, 22 November 1969, Art. 63, 1144 U.N.T.S. 123, 159.

169 *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 2 (3), 999 U.N.T.S. 171, 174; Human Rights Committee, *General comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, 6, para. 16.

170 See *Articles on State Responsibility*, Art. 33 (1), *supra* note 12, 8.

171 *Id.*, Art. 33 (2), 8.

172 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 209. See also R. Pisillo-Mazzeschi, 'Impact on the Law of Diplomatic

Once the existence of the duty to repair is established, it is necessary to determine whether a State can claim the duty of the wrong-doing State to make these reparations. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights allow the possibility of a State bringing a case against another State for human rights violations committed to its own citizens.[174] Also, the *Articles on State Responsibility* in its provision concerning the invocation of responsibility by a State other than an injured State establishes that the State is entitled to demand reparation "in the interest […] of the beneficiaries of the obligation breached."[175]

Since the *Articles on State Responsibility* do not regulate solidarity countermeasures, they do not clarify whether a State can take countermeasures to demand reparations owed to the individuals. Nonetheless, considering that it was already established that States can take solidarity countermeasures, and that it is recognized that non-injured States may claim reparations for the victims, it is possible to conclude that a solidarity countermeasure can demand reparations for the victims. Therefore, the non-recognition of State Immunity as a countermeasure would comply with the object of the countermeasure.

It is also necessary to clarify that since countermeasures cannot be aimed at punishing the wrong-doing States, in the jurisdictions where it is possible, courts must refrain from ordering punitive damage. Doing so would transform the countermeasure into a punishment.

Another requirement for the validity of a countermeasure is the prior notification to the wrong-doing State. In the case of judicial countermeasures this can be easily accomplished, for example by a notification issued by the court to the State's embassy in that country. This notification must be done before the countermeasure is actually taken. Therefore, the court must notify the respondent State of its willingness to

Protection', in Kamminga & Scheinin, *supra* note 7, 211, 218 [Pisillo-Mazzeschi, Diplomatic Protection].

173 See Tomuschat, *Human Rights, supra* note 10, 274; Orakhelashvili, *supra* note 147, 248. See also R. Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims', in Randelzhofer & Tomuschat, *supra* note 161, 149, 172.

174 *International Covenant on Civil and Political Rights*, Art. 41, *supra* note 169, 182-183; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 24, *supra* note 168, 236; *American Convention on Human Rights*, Art. 45, *supra* note 168, 155; *African Charter on Human and People's Rights*, 27 June 1989, Art. 49, [1982] 21 I.L.M. 58, 66, OAU Doc CAB/LEG/67/e rev. 5.

175 See *Articles on State Responsibility*, Art 49 (2), *supra* note 12, 11.

non-recognize the State's immunity as a countermeasure at the same time it notifies it of the civil complaint pending against it in the national courts.

The last requirement is whether the non-recognition of State Immunity as a response to a *jus cogens* violation is proportional. As stated in Part B, international law does not provide any formula for this calculation. The only guidance given by the ILC is that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[176] To facilitate the explanation, this article will use the facts of the case of Bouzari v. Iran described in the introduction. Prior to analyzing the proportionality of the countermeasure, it is necessary to examine what is behind each of these elements.

Firstly, with respect to the injury suffered, the relevant one is the injury suffered by Mr. Bouzari. Bouzari alleged he was tortured, starting that he was:

> "blindfolded, beaten with fists, whipped with steel cables and subjected to electric shocks to his genitals. He was deprived of food, sleep and sanitation. His head was forced into a bowl full of excrement and held there. He was subjected to several fake executions by hanging. He was suspended by the shoulders for lengthy periods. His ears were beaten until his hearing was damaged."[177]

The Court in that case decided to assume the veracity of these allegations to determine the admissibility of the case.[178] The same assumption must be made while determining the proportionality of the judicial countermeasure.

Secondly, within the gravity of the international wrongful act, it must be recalled that international law has long attached a special stigma to

176 *Id.*, Art. 51, 12.

177 *Bouzari v. Iran Case*, *supra* note 1, para. 12.

178 This assumption is normally made during the admissibility phase of procedure; it would also have to be made when assessing the injury suffered to apply a countermeasure. *Id.*

torture.[179] The General Assembly declared in 1975 that "[a]ny act of torture […] is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."[180] Furthermore, the State's obligation not to torture is considered *jus cogens*.[181]

Lastly, the rights in question include the rights of all the parties involved. On one side, there is Iran's right to immunity from jurisdiction. As explained above, this right is a procedural consequence of State equality. This principle of sovereign equality is essential to international law and it is so recognized in the United Nations Charter.[182] The existence of its procedural consequence, State Immunity, facilitates the diplomatic relations between States since it is a demonstration that no State has power over any other State.[183]

On the other side, there is Canada's right to enforce the *erga omnes* obligations arising out of the *jus cogens* character of torture. All *jus cogens* norms create *erga omnes* obligations.[184] The main procedural consequence of an *erga omnes* obligation is "that all states are entitled to invoke State responsibility in case of breach,"[185] and, if the legality of solidarity countermeasures is accepted, all States are able to enforce *jus cogens* norms through countermeasures. In the case of human rights obligations with *jus*

179 See for example *Ireland v. United Kingdom*, ECHR, App. No. 5310/71, Judgment of 18 January 1978, para. 167; *Selmouni v. France*, ECHR, App. No. 25803/94, Judgment of 28 July 1999, para. 96.

180 *Declaration on the Protection of all Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 2, GA Res. 3452 (XXX) annex, UN Doc A/RES/3452 (XXX), 9 December 1975, 2, 2.

181 *Belgium v. Senegal Case, supra* note 20, para. 99; *Prosecutor v. Furundzija*, Judgment, IT-95-17/1-T, 10 December 1998, para. 144; *Siderman de Blake v. Republic of Argentina Case*, *supra* note 31, 717; and Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 246.

182 Art. 2 (1) Charter of the United Nations.

183 The ICJ, when determining the existence or not of Immunity to a sitting Minister of Foreign Affairs, took into account the impact the non-recognition of his Immunity could have upon Congo's international relations. *Arrest Warrant Case*, *supra* note 128, 21-22, para. 53-55. See Bankas, *supra* note 25, 255.

184 ILC, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.702, 18 July 2006, 22-23, para. 38. See also M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 190-194.

185 *Id.*

cogens character, this enforcement entails the request by the State to repair the injury to the victim. The enforcement of any *erga omnes* obligations is an embracement of the fundamental values it represents for the international community. The recognition of torture as a *jus cogens* norm creating *erga omnes* obligation is a recognition that the obligation exists beyond State-individual relations. The international community is concerned with its compliance. Consequently, it can be concluded that Canada has a right to protect and enforce the freedom from torture.

Additionally, there are the rights of Mr. Bouzari. He had the right not to be tortured, which was presumably violated by Iran. He also has the right to obtain adequate reparations. The UNCAT in its article 14 establishes that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation".[186] Whether this right exists in a situation like the one Mr. Bouzari was in, when the torture was committed by a State and the victim is demanding redress in another State, is a discussed question. The UNCAT did not specify the applicability of this article. The object and purpose of the Convention, ratified by its *travaux preparatoires*, might be interpreted as obliging Canada to ensure the existence of a civil remedy for Bouzari even outside the country where he was subjected to torture.[187] Nonetheless, the majority of States have not endorsed this position.[188] In any case, as stated above, international law recognizes in general the right to reparations by the State responsible for the violation. According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, these reparations should include "verification of the facts and public disclosure of the truth to the extent that such disclosure does not cause further harm"[189] and "[i]udicial and administrative sanctions against persons liable for the violations."[190] This latter obligation is included in the UNCAT and is applicable also when a

186 UNCAT, Art. 14, *supra* note 8, 116.

187 See D. F. Donovan & A. Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', 100 *American Journal of International Law* (2006) 1, 142, 148.

188 See *id.* (referring to the United States as the only exception). See also M. Nowak & E. McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), 492-502.

189 *Basic Principles*, *supra* note 167, 8, para. 22 (b). See also UNCAT, Art. 13, *supra* note 7, 116; and *Jones v. Saudi Arabia Case*, *supra* note 31, 286 *et seq.*, 293, para. 20 *et seq.* & 46.

190 *Basic Principles*, *supra* note 167, 8, para. 22 (f).

State is aware that a person who allegedly has committed torture in another State is now within its territory.[191] Thus, Mr. Bouzari's right to remedy, justice, truth, and reparation must also be taken into account.

With all these elements in mind, it is now possible to put them into practice and measure the proportionality of the judicial countermeasure of non-recognizing State Immunity. As previously stated, the formula to measure proportionality does not provide a conclusive answer on how it should be done. Nonetheless, proportionality is not a requirement exclusive to countermeasure or to international law. It comes into play each time it is necessary to balance two contrasting principles. Therefore, it is possible to look elsewhere for formulas to determine the proportionality of a measure.[192] For example, the Human Rights Committee has pointed out three specific elements that must be taken into account. The restrictions on rights "must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."[193] Similar explanations are used by the Inter-American Court of Human Rights and the European Court of Human Rights.[194] Although these theories are used to determine the proportionality of a restriction imposed on a human right, its applicability to countermeasures will become obvious once each of these elements is analyzed.

First, it is necessary to analyze the suitability of the measure, in this case non-recognizing State Immunity, so as to determine whether this countermeasure is able to protect the rights of Canada to enforce *erga*

191 See UNCAT, Art. 7, *supra* note 7, 115. See also *Belgium v. Senegal Case*, *supra* note 20, paras 89-117.

192 For an example of a comprehensive formula to measure the proportionality of an act see R. Alexy, *A Theory of Constitutional Rights* (2002), 397-410.

193 Human Rights Committee, *General Comment No. 27: Freedom of Movement (Article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9, 2 November 1999, 3, para. 14 [Human Rights Committee, General Comment No. 27].

194 The Inter-American Court of Human Rights takes into account whether the measure affects "the strict legality" necessary for restrictions; whether it "serves a legitimate purpose;" "whether such measure is necessary," and whether it is strictly proportional. See *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H. R., Series C, No. 177 (2008), para. 58. The European Court of Human Rights considers that "the limitations applied [cannot] restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation [must] pursue a legitimate aim and [there must be a] reasonable relationship of proportionality between the means employed and the aim sought to be achieved." See *Al-Adsani v. United Kingdom Case*, *supra* note 29, para. 53.

omnes obligations and the rights of Mr. Bouzari to have a remedy, as well as his right to truth, to justice, and to receive compensation. As stated by Professor Michael Ewing-Chow, "[i]f the measure does not or is unlikely to achieve the results it is intended to achieve it should be seen as a measure lacking in proportionality."[195]

The non-recognition of State Immunity can mean that the national court renders a subsequent judgment in favor of the victim, which will recognize their right and the possibility of obtaining reparations. Regarding the rights of Bouzari, the judgment this is by itself a form of reparation, since it helps to reveal the truth of the facts and brings some justice to the case.[196] The judicial recognition of the violation is also "an important form of recognition and closure to victims."[197] Regarding compensation, it is true that this does not necessarily mean that he will effectively receive compensation, since Iran will have immunity from execution. Nonetheless, considering that it is impossible to actually enforce judgments against States even with judgments rendered by international tribunals, this possibility is not enough to jeopardize the suitability of the countermeasure.

Regarding the rights of Canada in enforcing the *erga omnes* obligations emerging from the torture prohibition, a judgment of this kind will affirm the "interest manifested in the norms that the community is prepared to enforce."[198] Additionally, the judgment will serve as a tool against impunity and as a guarantee of non-repetition. This in turn would reinforce the importance of *jus cogens* norms. Consequently, the non-recognition of State Immunity is also suitable toward this end.

The second step is to compare the measure with other equally suitable measures and ensure the one selected is the least intrusive one.[199] Thus, it is necessary to examine other suitable measures to realize the same goals mentioned above.

Among these measures may be, for example, a diplomatic complaint by Canada to Iran to request reparation for Bouzari. This would be less

195 M. Ewing-Chow, 'First Do no Harm: Myanmar Trade Sanctions and Human Rights', 5 *Northwestern University Journal of International Human Rights* (2007) 2, 153, 169.

196 See *Almonacid Arellano et al. v. Chile*, Judgment, Inter-Am. Ct. H. R., Series C, No. 154 (2006), para. 161; *Ximenes Lopes v. Brazil*, Judgment, Inter-Am. Ct. H. R., Series C, No. 149 (2006), para. 236.

197 See Donovan & Roberts, *supra* note 187, 154.

198 *Id.*

199 For an application of this factor within countermeasures see Elagab, *The Legality of Non-Forcible Counter-Measures*, *supra* note 17, 90.

intrusive, but it could not achieve the same goal of embracing the international importance given to freedom from torture. On the other hand, Canada could seize some of Iran's assets within its jurisdiction and grant them to Bouzari. This measure would be more intrusive than that proposed in this article, since the measure of non-recognition of State Immunity only concerns immunity from jurisdiction and does not have this impact. Compliance with the judgment will depend on Iran's will to do so. Consequently, by not being able to find other equally suitable measures less intrusive, the point is proven.

The last element is that it "must be proportionate to the interest to be protected."[200] The injury that is caused by the countermeasure cannot be greater that the injury it seeks to protect. On one side, there is the torture suffered by Mr. Bouzari, which constituted a *jus cogens* violation. This demonstrates that the international community deems its compliance extremely important, so important that no State can derogate from it.[201] Nonetheless, within the violations of *jus cogens* norms, the ILC in the *Articles on State Responsibility* recognized special consequences for serious violations of *jus cogens* norms, recognizing therefore that some violations of *jus cogens* are more serious than others.[202] Article 40 (2) defined a serious breach as one "involv[ing] a gross or systematic failure by the responsible State to fulfil the obligation."[203] The commentaries clarified that

> "[t]o be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term 'gross' refers to the intensity of the violation or its effects, it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule."[204]

200 Human Rights Committee, *General Comment No. 27*, *supra* note 193, 3, para. 14.

201 See *Vienna Convention on the Law of Treaties*, Art. 53, *supra* note 116, 344. See ILC, *Draft Articles on State Responsibility: Comments to Article 19*, Yearbook of the International Law Commission (1976), Vol. 2 (2), 95, 102, para. 17 [ILC, Comments to Article 19].

202 *Articles on State Responsibility*, Art. 40, *supra* note 12, 9. The commentaries said that aggression and genocide "by their very nature require an international violation on a large scale". Therefore, their breaches are always serious. Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 248.

203 *Articles on State Responsibility*, Art. 40 (2), *supra* note 12, 9.

204 Crawford, *International Law Commission's Articles on State Responsibility*, *supra* note 10, 247. *S*ee ILC, Comments to Article 19, *supra* note 201, 110, para. 34. Although, this reference concerns when the serious violations were called

Bouzari did not argue that his case was an example of the systematic torture applied by Iran, although this might have been the case.[205] Regardless of whether this case constitutes a serious breach to a *jus cogens* norm, the mere fact that it is a *jus cogens* violation is objectively serious *per se.*

On the other hand, there is the injury that Iran might suffer if the countermeasure is applied. The recognition of State Immunity allows States to perform their public function and international relations without the interference of any other State.[206] In this sense, the European Court of Human Rights stated that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."[207]

Nonetheless, State Immunity and State sovereignty are not absolute. There are cases when a State can be judged by another State, for example when the claim concerns a commercial activity or a tort committed in the territory of the forum State.[208] Even though State Immunity is a procedural consequence of the sovereign equality principle, its non-recognition in those cases does not mean the perpetual inequality between the forum State and the State subjected to its jurisdiction. In fact, States can themselves decide to be subject to the jurisdiction of another State by waiving its immunity.[209] This, however, does not mean it is a minor interference. For example, the Supreme Court of France recognized in 1849 that "the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without

international crimes, the differentiation between *jus cogens* violations and serious breaches of *jus cogens* norms already exited. See E. Wyler, 'From 'State Crimes' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norm of General International Law'', 13 *European Journal of International Law* (2002) 5, 1147, 1158.

205 Regarding the state of human rights protection in 1992 see Human Rights Watch, *World Report 1993: Iran*, available at http://www.hrw.org/legacy/reports/1993/WR93/Mew-03.htm#P178_84839 (last visited 10 January 2013).

206 See Fox, *supra* note 34, 477.

207 This was stated while analyzing whether the restriction imposed to the right to remedy by State Immunity was legitimate. See *Al-Adsani v. United Kingdom Case*, *supra* note 29, para. 54.

208 See for example *Convention on Jurisdictional Immunities of States*, Arts 10-12, *supra* note 34, 6-7.

209 See *id.*, Art. 7, 5.

impairing their mutual relations."[210] In more recent times, the fact that Italian courts were exercising jurisdiction against Germany disturbed Germany so much that it decided to initiate a complaint before the ICJ.[211] That case, however, has to be distinguished from the measure proposed in this article since the Italian courts were not only disregarding Germany's immunity from jurisdiction but also its immunity from executions, which creates a strong interference with sovereign equality. Therefore, although the non-recognition of State Immunity affects sovereign equality, it is not an extremely harsh affectation.

The importance given to *jus cogens* norms and violations that cause in detriment to human dignity outweighs the harm the wrong-doing State would suffer due to the non-recognition of its State Immunity. Consequently, by commensurating both injuries suffered and taking into account the gravity of the violation together with the rights of Iran, Canada, and Mr. Bouzari it is possible to conclude that the non-recognition of State Immunity as a countermeasure to torture is proportional.

E. Conclusion

The non-recognition of State Immunity as a countermeasure to violations of *jus cogens* represents a solution for victims of *jus cogens* violations. Many victims around the world have no possibility of having a court sit in judgment against their own State. Of the victims who lack a remedy in their country, the possibility of an internationally binding judgment is limited to the States that are party to the relevant systems of human rights protection. There are systems of protection available to all the citizens of State members of the United Nations as for example, the request for action to the Special Rapporteur. However, these procedures cannot be used to find a judicial remedy and States are not obliged to comply with them. Accordingly, national courts of other States are their only choice left if they want to have a binding judgment against their State.

210 French Supreme Court, *Spanish Government v. Lambège et Pujol*, [1849] Recueil Dalloz, Part 1, 5, 9, cited in J. M. Sweeney, *The International Law of Sovereign Immunity* (1963), 20.

211 ICJ, *Jurisdictional Immunities of the State*, Application Instituting Proceedings, *supra* note 26.

Although the non-recognition of State Immunity can be employed as a countermeasure, this does not necessarily mean that victims will effectively receive reparations. Nonetheless, it is still beneficial for them. The judgment will confirm the existence of a violation and uphold the victim's claim. This in turn will have an important impact on the protection of the victim's right to truth. In instances where the case being decided by the court takes into account the potential to employ countermeasures, the judgment will also contribute to the collective right to truth. Additionally, a judgment against a State could influence civil society to demand justice in the State against which the judgment was rendered.

The importance of this option for the victims does not mean that States are obliged to offer it in every case; States are not obliged to take countermeasures in general.[212] Thus, they are also not obliged to refuse to recognize State Immunity in cases of *jus cogens* violations. In this respect, the situation is similar to the principle of diplomatic protection. States have the right to represent their citizens when their citizens' rights are violated by other States; however, States are not obliged to do so,[213] and their citizens have no right to be represented by them.[214] Countermeasures, like diplomatic protection, are left to the discretion of the State. In the case of judicial countermeasures, the exercise of this discretion given to the States by international law would depend on the national laws the national courts are obliged to apply.

This discussion of whether the non-recognition of State Immunity as a countermeasure is a right or a duty becomes extremely relevant when analyzing the decisions of the European Court of Human Rights. In these decisions, the issue was whether the forum State was violating the right to a remedy by recognizing immunity in cases of *jus cogens* violations.[215] Rights are the other side of obligations, but not of discretions. Accordingly, accepting the lawfulness of the non-recognition of State Immunity as a countermeasure does not contradict these precedents of the European Court,

212 See Koskenniemi, *Solidarity Measures*, *supra* note 18, 344.

213 *Articles on Diplomatic Protection*, Art. 2, GA Res. 62/67 annex, UN Doc A/RES/62/67, 8 January 2008, 2. See also Tomuschat, *Human Rights*, *supra* note 10, 266-267.

214 See Pisillo-Mazzeschi, *Diplomatic Protection*, *supra* note 172, 224. Nonetheless he argues that this might be changing. *Id.*, 221. On this respect see also P. Okowa, 'Issues of Admissibility and the Law on International Responsibility', in Evans, *supra* note 110, 472, 477-478.

215 *Al-Adsani v. United Kingdom Case*, *supra* note 29. See also Finke, *supra* note 114, 855.

instead it confirms them. The non-recognition of State Immunity as a countermeasure confirms the existing exceptions to State Immunity and the unlawfulness of its non-recognition if it is based solely on the *jus cogens* character of the norm violated. It also confirms that States have no obligation to grant the judicial remedy when State Immunity applies; it is a matter of discretion to revoke recognition as a countermeasure.

The same reasoning applies to all the national cases that have refused to lift immunity in cases of *jus cogens* violations. Additionally, in the case of national courts, it must be considered that they have decided in accordance with their domestic law. A court taking a countermeasure has to first admit that what it is doing is unlawful. If a court does not recognize immunity, thinking that its actions are lawful in international law like the Greek and the Italian courts, the chances are that the court is not complying with its obligation to prior notification necessary for the validity of the countermeasure.

The non-recognition of State Immunity as a countermeasure does not go against what the ICJ decided in the *Ferrini* case, but instead it reaffirms it by assuming the illegality of non-recognizing State Immunity. Neither Italy nor Greece presented the argument of precluding their responsibility for the non-recognition of State Immunity as a countermeasure. Thus, the ICJ did not analyze this possibility.

The ICJ did analyze, however, whether "the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed".[216] The ICJ held that customary international law does not condition State Immunity "upon the existence of effective alternative means of securing redress [for the victims]."[217] Nonetheless, the possibility of not recognizing State Immunity as a solidarity countermeasure does not require that international law set any conditions to State Immunity law, as Italy's argument of last resort would. Additionally, the ICJ determined that, if the such a condition "indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the [Ferrini] case, when claims have been the subject of extensive intergovernmental discussion" and agreements.[218] The same can be said about not recognizing State Immunity

[216] ICJ, *Jurisdictional Immunities of the State*, Judgment, *supra* note 27, para. 98.
[217] *Id.*, para. 101.
[218] *Id.*, para. 102.

as a judicial countermeasure. If the wrong-doing State has already taken measures to repair the damage caused or settled with other States regarding the reparations, the countermeasure would not be unlawful.

As explained throughout this article, the non-recognition of State Immunity as a countermeasure is not contrary to international law. This judicial countermeasure can be a valid one. Also, its application does not contradict the international decisions examining the consequences of State Immunity and *jus cogens* violations. Even though it may be considered an unorthodox strategy,[219] it provides a method of enforcing human rights norms that is essential in cases of *jus cogens* violations.

[219] Professor Christian Tomuschat argues that "[o]nly one thing is certain: there will be many attempts in the future to use unorthodox strategies with a view to enforcing rights which are not capable of being enforced in the country of origin." Tomuschat, *Human Rights*, *supra* note 10, 386.

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National Investigations of Human Rights Between National and International Law

Roee Ariav*

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* LL.M. student, Hebrew University. LL.B Hebrew University, M.A. in International Relations, Hebrew University. I wish to thank Yael Naggan, Sasha Cherniavsky, and Michelle Lesh for their very helpful comments. All remaining mistakes are my own.

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Abstract

This essay will examine the interplay between international and national law with regards to investigations of human rights violations. The duty to investigate violations of international law touches upon issues that up until recently were considered beyond the reach of international law. Since its recognition by the European Court of Human Rights in 1995, the procedural aspect of the right to life, i.e. the duty to investigate, has developed rapidly. In turn, also due to the unique legal relationship between the ECtHR and national courts, these developments have affected, and are still affecting, national law. This ongoing process of dialogue between national courts and international tribunals has greatly contributed to the development of the duty to investigate certain violation of international law, and the manner in which these investigations should be conducted.

A. Introduction

The duty to investigate, through the domestic law enforcement systems of States, certain violations of international law, especially certain violations of human rights law, is considered today to be virtually uncontested and self-evident. It is also commonly accepted that international law influences the way that those national investigations should be conducted. This view is shared by, amongst others, the European Court of Human Rights (ECtHR),[1] the Inter-American Court of Human Rights (Inter-American Court),[2] the Human Rights Committee,[3] the Committee Against Torture,[4] various United Nations fact finding missions,[5] scholars,[6] and NGOs.[7]

1 See for example, *McCann and Others v. the United Kingdom*, ECtHR, Judgment, Appl. No. 18984/91, 27 September 1995 [McCann].

2 See for example *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. Series C, No. 4 (1988) [Velasquez Rodriguez Case].

3 See for example *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, UN Doc CCPR/C/OP/2 (1990), 192 [Herrera v. Colombia].

4 See for example *Parot v. Spain*, UN Doc CAT/C/14/D/6/1990, 2 May 1995 [Parot v. Spain].

5 *Report of the International Commission of Inquiry on Libya*, UN Doc A/HRC/19/68, 2 March 2012. *Report of the Secretary-General's Panel of Experts on Accountability in*

This essay will focus on the duty to investigate under the *European Convention on Human Rights* (*European Convention*) and examine the development of international law's reach into national investigations, its influence upon procedures taken by national law enforcement mechanisms, and the relationship between national and international law. First, this essay will present a short background on the history of the duty to investigate violations of international law; it will be followed by an analysis of the development of the duty, as well as its guiding principles and procedures in the case law of the ECtHR. The essay will then briefly present a few examples of the way the jurisprudence of the ECtHR has influenced national courts in the United Kingdom (UK).

Sri Lanka (31 March 2011), available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (last visited 28 January 2013).

6 N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', 78 *California Law Review* (1990) 2, 449; D. F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Law Journal* (1991) 8, 2537; J. E. Méndez, 'Accountability for Past Abuses', 19 *Human Rights Quarterly* (1997) 2, 255; C. C. Joyner, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability', 26 *Denver Journal of International Law and Policy* (1998) 4, 591; K. E. Irwin, 'Prospects for Justice: The Procedural Aspect of the Right to Life Under the European Convention on Human Rights and Its Applications to Investigations of Northern Ireland's Bloody Sunday', 22 *Fordham International Law Journal* (1998) 4, 1822; J. E. Méndez & J. Mariezcurrena, 'Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection', 26 *Social Justice* (1999) 4, 84; A. Mowbray, 'Duties of Investigation under the European Convention on Human Rights', 51 *International & Comparative Law Quarterly* (2002) 2, 437; J. Chevalier-Watts, 'Effective Investigations Under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?', 21 *European Journal of International Law* (2010) 3, 701.

7 Human Rights Watch, 'Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya' (May 2012), available at http://www.hrw.org/sites/default/files/reports/libya0512webwcover_0.pdf (last visited 28 January 2013); Amnesty International, 'Iraq: New Order, Same Abuses: Unlawful Detentions and Torture in Iraq' (13 September 2010), available at http://www.amnesty.org/en/library/asset/MDE14/006/2010/en/c7df062b-5d4c-4820-9f14-a4977f863666/mde140062010en.pdf (last visited 28 January 2013).

B. Background

While most of the major human rights treaties came into force in the 1950s and 1960s,[8] the duty of States to domestically investigate certain violations of those treaties was only fully recognized in the 1990s, through a binding judgment of the ECtHR. As will be elaborated below, the *European Convention* does not specifically mention a duty to conduct national investigations in certain cases or with regards to certain rights.[9] In fact, the word 'investigation' does not explicitly appear in any other major human rights treaty, with the exception of the *Convention Against Torture*.[10]

Several international actors have begun discussing the duty to investigate certain violations of international law, especially human rights violations, since the early 1980s. For example, the Human Rights Committee, as early as 1982, determined that States had an implied "duty to investigate in good faith all allegations of violations of the Covenant made

8 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 [European Convention]; and, though not a formal treaty, the *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810, 71.

9 Hence the need for a Court's judgment to establish the duty to investigate.

10 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85. The Convention states in Art. 12: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." It is interesting to note that even after first establishing the duty to investigate, as will be elaborated below, the ECtHR specifically compares the explicit obligation to investigate contained in the *Convention Against Torture* and the lack of such obligation under the *European Convention*. It then goes on to establish an implied duty to investigate: "Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails […] a thorough and effective investigation capable of leading to the identification and punishment of those responsible […]. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed […]. However, such a requirement is implicit in the notion of an 'effective remedy' under Article 13." *Aydin v. Turkey*, ECHR, Judgment, Appl. No. 23178/94, 25 September 1997, para. 103 [Aydin v. Turkey].

against it and its authorities".[11] The early development of the duty to investigate was promoted, in particular, through the case law of the Inter-American Court,[12] further decisions of the Human Rights Committee,[13] the Committee Against Torture,[14] the UN Committee on the Elimination of Racial Discrimination,[15] and various other soft law[16] instruments such as a 1982 General Comment of the High Commissioner for Human Rights, articulating the duty to investigate disappearances,[17] or the United Nations *Principles on the Effective Prevention and Investigation of Extra-Legal*, Arbitrary and Summary Executions (1989)[18] and its Manual (1991).[19]

C. The Duty to Investigate Under the *European Convention*

The duty to investigate first received wide attention and greater status only when it was made legally binding upon parties to the *European Convention* in *McCann*, decided in September 1995 by the ECtHR.[20] The

11 *Bleier v. Uruguay*, Communication No. 30/1978, UN Doc CCPR/C/15/D/30/1978, 29 March 1982, para. 13.3.

12 Such as the *Velasquez Rodriguez Case*, *supra* note 2.

13 Such as *Lopez Burgos v. Uruguay*, Communication No. 52/1979, UN Doc CCPR/C/13/D/52/1979, 29 July 1981; *Barbato v. Uruguay*, Communication No. 84/1981, UN Doc CCPR/C/17/D/84/1981, 21 October 1982; *Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, UN Doc CCPR/C/OP/2, 21 July 1983; *Herrera v. Colombia*, *supra* note 3; *S. E. v. Argentina,* Communication No. 275/1988, UN Doc CCPR/C/38/D/275/1988, 26 March 1990.

14 *Parot v. Spain*, *supra* note 4.

15 *L.K. v. Netherlands*, UN Doc CERD/C/42/D/4/1991, 16 March 1993.

16 For a definition of "soft law", see for example: "[t]he realm of 'soft law' begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation." K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organizations* (2000) 3, 421, 422.

17 Human Rights Committee, 'General Comment 6: Article 6', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 (1994), 6.

18 *United Nations Principles on the Effective Prevention and Investigation of Extra-Legal,* Arbitrary and Summary Executions, ECOSOC Res. 1989/65, 24 May 1989.

19 United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs*, United Nations Manual on the Effective Prevention and Investigation of Extra-Legal*, Arbitrary and Summary Executions, UN Doc E/ST/CSDHA/.12, 1991.

20 *McCann*, *supra* note 1. Note how the House of Lords explains that it was inconceivable in 1988 that the right to life would include a procedural aspect: "The

position of the UK government presented before the Court indicates the landmark nature of the decision. The UK implied that the duty to investigate does not derive from the Convention, urged the Court not to impose specific rules upon such investigation, and rejected the assertion that deviation from international standards for investigation, preliminary and under-developed as they were then, will result in a violation of the right to life:

> "The Government submitted that the inquest more than satisfied any procedural requirement *which might be read* into Article 2 para.1 of the Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations […] should be assessed. Finally, they invited the Court to reject the contention [...] that a violation of Article 2 para.1 will have occurred whenever the Court finds serious differences between the UN Principles on Extra-Legal Executions and the investigation conducted."[21]

meaning of the word 'how' in this legislation was, as stated, first established in *Ex p Rubenstein* in 1982. Not only was the 1988 Act (in which the present provision appears) itself a consolidating Act (and concerned, therefore, to enshrine the existing law) *but it was enacted at a time when Parliament can have had no thought that one day the United Kingdom might be under a procedural obligation to enquire into deaths pursuant to article 2 of the Convention*. As already observed*, it was not until 1995* that the European Court of Human Rights in *McCann* itself identified any such Convention duty." (emphasis added). *R (on the Application of Hurst) (Respondent) v. Commissioner of Police of the Metropolis (Appellant)*, Appellate Committee of the House of Lords, [2007] UKHL 13, paras. 28, 50 [Hurst]. See also Mowbray, *supra* note 6, 437. *R (on the Application of JL) (Respondent) v Secretary of State for Justice (Appellant)*, Appellate Committee of the House of Lords, [2008] UKHL 68, para. 22 [R (JL) v Secretary of State for Justice].

21 *McCann*, *supra* note 1, para. 158 (emphasis added). Note the very similar position presented by Uruguay, and the response of the Committee, in *Rodriguez v. Uruguay*, Communication No. 322/1988, UN Doc CCPR/C/51/D/322/1988, 19 July 1994, paras 8.5, 12.3: "the duty to investigate *does not appear in the Covenant* or any express provision, and there are consequently no rules governing the way this function is to be exercised […]. The Committee cannot agree with the State party that it has no obligation to investigate violations of Covenant rights by a prior regime, especially when these include crimes as serious as torture" (emphasis added). Or the position taken by Denmark in *Habassi v. Denmark*, Communication No. 10/1997, UN Doc CERD/C/54/D/10/1997, 17 March 1999, para. 7.5: "The State party argues that the police investigation in the present case satisfies the requirement *that can be inferred* from the Convention and the Committee's practice" (emphasis added).

However, the Court famously rejected the UK's position and stated that the duty to investigate is implied in the Convention:

> "The obligation to protect the right to life […] read in conjunction with the State's general duty under Article 1 of the Convention [...] requires *by implication* that there should be *some form of effective official investigation* when individuals *have been killed* as a result of the use of force by, *inter alios*, agents of the State."[22]

The Court in *McCann* therefore only established a rather narrow obligation: to investigate cases of death resulting from the use of force, *inter alia*, by State agents.[23] However, even this narrow duty is different *in kind* than other duties explicitly enshrined in Art. 2 of the *European Convention* and, arguably, not necessarily what the States had in mind when concluding the Convention.[24] It is interesting to note that the Court acknowledged that

[22] *McCann*, *supra* note 1, para. 161. This line of reasoning, taken by the ECtHR, is identical to the one adopted by the Human Rights Committee with regard to the duty to investigate under the ICCPR in its General Comment No. 20: "Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant [...]. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective." See Human Rights Committee, 'General Comment 20: Article 7', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, *supra* note 17, 30. However, the Human Rights Committee has sometimes, while taking a similar analytical approach, relied instead on the Optional Protocol and not on the Covenant: "It is *implicit* in article 4, paragraph 2, of the Optional Protocol [which stipulates that: 'the […] State shall submit to the Committee written explanations or statements clarifying the matter'] that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fail to investigate fully allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication." See *Herrera v. Colombia*, *supra* note 3, para. 10.5 (emphasis added). It is also similar to the approach taken by the Inter-American Court of Human Rights in the case of *Godínez Cruz v Honduras*, Int.-Am. Ct. H. R. Series C, No. 5 (1989), para 175. Though this reasoning was developed more than a decade before *McCann*, it was not relied on, or even mentioned, by the ECtHR.

[23] *McCann*, *supra* note 1.

[24] See the quote from *Hurst* in *supra* note 20.

the duty to investigate is only implied in the Convention, and it did not rely on any external source for that determination.[25]

Nevertheless, since *McCann*, the duty to investigate is no longer implied but an established obligation. In fact, the Court frequently turns to this procedural aspect of the right to life,[26] and, as the Court's jurisprudence developed, of other rights enshrined in the *European Convention*. The Court in *McCann*, though setting forth the new dictum with regards to the obligation to investigate, did not eventually hold the UK in violation of the right to life with regards to the investigation conducted. This case turned out to be an exceptionally rare determination by the Court that an investigation conducted by a State had met the (as yet not fully articulated) procedural requirements of Art. 2.[27]

25 Though, as mentioned above, at the time *McCann* was given there were several other sources establishing a duty to investigate human rights violations, such as the Inter-American Court, decisions of the Human Rights Committee, and the UN *Principles on the Effective Prevention and Investigation of Extra-Legal*, Arbitrary and Summary Executions, (these principles are only briefly mentioned earlier in the judgment ant explicitly relied on by the ECtHR). Several of these sources were already referred to above (see for example *supra* notes 11-15). Furthermore, even after *McCann*, when establishing a duty to investigate under Art. 13 of the European Convention, the Court still referred to an implied obligation. See *Aydin v. Turkey*, *supra* note 10.

26 See, as an example, the list of cases dealing with the duty to investigate between *McCann* in September 1995 and *McKerr* in May 2001: *Kurt v. Turkey*, ECHR, Judgment, Appl. No. 24276/94, 25 May 1998 [Kurt]; *Güleç v. Turkey*, ECHR, Judgment, Appl. No. 21593/93, 27 July 1998 [Güleç]; *Ergi v. Turkey*, ECHR, Judgment, Appl. No. 23818/94, 28 July 1998; *Yaşa v. Turkey*, ECHR, Judgment, Appl. No. 22495/93, 2 September 1998; *Kaya v. Turkey*, ECHR, Judgment, Appl. No. 22729/93, 19 February 1998 [Kaya]; *Assenov and Others v. Bulgaria*, ECHR, Judgment, Appl. No. 24760/94, 28 October 1998; *Oğur v. Turkey*, ECHR, Judgment, Appl. No. 21594/93, 20 May 1999; *Çakıcı v. Turkey*, ECHR, Judgment, Appl. No. 23657/94, 8 July 1999; *Tanrıkulu v. Turkey*, ECHR, Judgment, Appl. No. 23763/94, 8 July 1999; *Mahmut Kaya v. Turkey*, ECHR, Judgment, Appl. No. 22535/93, 28 March 2000; *Ertak v. Turkey*, ECHR, Judgment, Appl. No. 20764/92, 9 May 2000; *Timurtas v. Turkey*, ECHR, Judgment, Appl. No. 23531/94, 13 June 2000 [Timurtas].

27 "The Commission found by a majority that there had been no violation. But the Court held, following the opinion of the Commission, that article 2 of the Convention required by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the state: *This procedural or investigative obligation as it came to be called, if foreshadowed at all by previous jurisprudence, had not been generally appreciated*. But the Court found, on the facts, that various shortcomings in the conduct of the inquest of which complaint had been made had not 'substantially hampered the carrying out of a thorough, impartial and careful examination of the

It is important to note that the Court qualified its assertion in *McCann*: i) it restricted this obligation to cases of death, and ii) refused to comment on the exact procedure an investigation should follow, and limited itself to requiring 'some form of effective investigation'.[28] However, as the Court's jurisprudence in this area has developed, these self-imposed restrictions have diminished. For example, on the question of the circumstances that give rise to the duty to investigate, the Court expanded the obligation to investigate to cases of severe injury that do not result in death[29] and cases of disappearances (even where there is no evidence concerning the fate of the missing person).[30]

On the procedural requirements from an investigation, the ECtHR had begun to develop its case law, and to instruct States as to exactly how to fulfill their obligation in that regard. In a long line of cases, dealing with various situations ranging from death to torture to disappearances, the Court laid down principles to be followed and even specific investigative steps that States should take if they wish to meet the Court's requirement for an 'effective investigation'. It is arguably on this procedural aspect that the Court most deviated from its initial statement, and developed requirements that far surpass those of other international fora in their specificity. Furthermore, it is this aspect that affects national law in a way not contemplated in the past by States. It demonstrates the significant influence by international law on areas of law once reserved for the State's sole discretion.

Very early in the post-*McCann* case law, the Court specified several general principles[31] that an investigation must fulfill in order to meet the procedural requirements implied in the Convention, and in the Court's terminology, to amount to an 'effective investigation'. By way of

circumstances surrounding the killings'". *Jordan (AP) (Appellant) v. Lord Chancellor and Another (Respondents) (Northern Ireland)*, Appellate Committee of the House of Lords, [2007] UKHL 14, para. 28 (emphasis added) [Jordan v. Lord Chancellor]. It is far more common for the Court to determine that an investigation has not met the requirements of the Convention.

28 *McCann, supra* note 1, para. 161.

29 Addressed either through the right to life enshrined in Art. 2 of the *European Convention* or through the prohibition against torture or inhumane treatment in Art. 3, depending on the circumstances.

30 See *Timurtas*, *supra* note 26, paras 81-90. Ironically, other international fora recognized the obligation to investigate this category of cases in an opposite order, before establishing an obligation to investigate cases of death.

31 Now sometimes referred to as 'universal principles'.

interpreting this phrase, the Court determined that an investigation must be independent and impartial,[32] prompt,[33] thorough,[34] allow public scrutiny,[35] and involve the next-of-kin of the victim.[36] The Court further added that the purpose of an investigation is to establish the facts of the incident and lead, where appropriate, to the accountability of those involved in wrongdoing. The Court then went on to articulate each of these broad principles and establish specific rules for conducting an 'effective investigation' while referring to highly detailed investigative actions. Examples of such specific steps include autopsies conducted by specialized pathologists,[37] the exact timing of questioning witnesses,[38] forensic measures to detect gunpowder traces,[39] etc. According to the Court, a deviation from the principles that were determined as required for the effectiveness of the investigation or lack of a specific investigative step might lead to a determination that a violation of the duty to investigate has occurred.

The Court's approach to investigations might be said to reach an almost final level of theoretical articulation in the cases of *Hugh Jordan*[40] and *McKerr*,[41] both given less than six years after *McCann*.[42] The detailed analysis of the principles of an 'effective investigation' symbolizes the great advancement made in this area, especially when remembering the thin reasoning given by the Court in *McCann* and its statement that what is

32 First established in February 1998 in *Kaya*, *supra* note 26, para. 87.

33 First established in May 1998 in *Kurt*, *supra* note 26, para. 124.

34 First established in July 1998 in *Güleç* , *supra* note 26, paras 82-83.

35 First established in February 1998 in *Kaya*, *supra* note 26, para. 87.

36 First established in May 2001 in *Hugh Jordan v. the United Kingdom*, ECHR, Judgment, Appl. No. 24746/94, 4 May 2001, para. 133 [Jordan v. United Kingdom, ECHR]. These two principles could be described as two aspects of transparency.

37 *Tanlı v. Turkey*, ECHR, Judgment, Appl. No. 26129/95, 10 April 2001, para. 150.

38 *McKerr v. the United Kingdom*, ECHR, Judgment, Appl. No. 28883/95, 4 May 2001, para. 126 [McKerr v. United Kingdom, ECHR].

39 *Kaya*, *supra* note 26, para. 89.

40 *Jordan v. United Kingdom*, ECHR, *supra* note 36.

41 *McKerr v. United Kingdom*, ECHR, *supra* note 38.

42 "Nor, moreover, could he be said to have breached the procedural obligation to hold a sufficient inquiry into the death – an obligation which the ECtHR first found to be implicit in Article 2 in *McCann v United Kingdom* [...] and has developed in subsequent caselaw to the point now reached in this very case, *McKerr v. United Kingdom* [...] (and the other three Northern Ireland cases determined in parallel with it)." *In re McKerr (AP) (Respondent) (Northern Ireland)*, Appellate Committee of the House of Lords, [2004] UKHL 12, para. 90 [McKerr v. United Kingdom, House of Lords].

required from States is just 'some form of effective official investigation'.[43] The principles developed and elaborated from this obscure phrase of 'effective investigation' are:

> "For an investigation [...] to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be *independent* from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence [...]. The investigation must also be *effective* in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified [...] and to the identification and punishment of those responsible [...]. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident [...]. A requirement of *promptness* and reasonable expedition is implicit […] there must be a sufficient element of *public scrutiny* [...] to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the *next-of-kin of the victim* must be involved in the procedure [...]."[44]

The development of the Court's approach is easily visible, and quite remarkable when considering the short period of time between *McCann* and *Jordan*.[45] The effect of this detailed jurisprudence of the ECtHR regarding the requirements of international law upon national courts and law will be briefly presented below. While there is evidence to suggest that the ECtHR's jurisprudence regarding the duty to investigate has influenced

43 This language is still being used by the Court, though today, when considering the elaborated requirements posed by the Court, it might be considered to be mere lip-service to earlier case law.

44 *Jordan v. United Kingdom*, ECHR, *supra* note 36, paras 106-109 (emphasis added).

45 This is so despite the fact that the Court continues to state that: "It is not for this court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by state agents [...]. Nor can it be said that there should be one unified procedure satisfying all requirements". *McKerr v. United Kingdom*, ECHR, *supra* note 38, para. 159. While the Court does not oblige a single procedure, its requirements for 'effective investigation' limit the procedural options available for the States.

several European national jurisdictions, such as Spain,[46] Germany[47] and Slovenia[48] (which have explicitly referred to and relied on the ECtHR in such matters), the following part of the essay will focus on UK courts as an example of the way domestic courts have internalized the ECtHR's requirements.[49]

D. National Laws

Despite the lack of States' explicit consent to be bound by this duty, UK national courts, mostly due to unique characteristics of the *European Convention* and Court,[50] have internalized this obligation, which is now a part of the UK's national law. Through this process, developments in the interpretation of international law by the ECtHR are incorporated

46 *Dorprey v. First Instance Criminal Court N 7 of Valencia*, Constitutional Appeal, ILDC 1418 (ES 2007). Directly referring to: *Martinez Sala and Others v. Spain*, ECHR, Judgment, Appl. No. 58438/00, 2 November 2004. See also *Falcón Ros v. Section N 4 of the Provincial Court of Murcia*, Constitutional Appeal Judgment of the Constitutional Court, ILDC 1421 (ES 2008).

47 *Duty to Investigate Case*, Final Judgment, Federal Constitutional Court, 2 BvR 2307/06, ILDC 1569 (DE 2010).

48 *Constitutional Complaint*, Decision of the Slovenian Constitutional Court, Up-555/03-41; Up-827/04-26, ILDC 631 (SI 2006) [Constitutional Complaint]. Subsequent references to this decision are based on a translation prepared by Oxford Reports on International Law and can be found at http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/lawildc631si06&recno=30&module=ildc&category=Sources,%20foundations%20and%20principles%20of%20international%20law (last visited 28 January 2013).

49 The UK was selected for more detailed research since language considerations enabled greater access to domestic court decisions but also because of the relatively large volume of ECtHR cases involving the UK. As a comparison, the ECtHR found that the UK violated Art. 3 in 48 cases, while it found Spain to violate Art. 3 in 'only' 15 cases, Germany in 14, and Slovenia in 14. The differences are even greater with regard to Art. 2 violations. The UK was found to violate this Art. in 40 cases, while Slovenia was 'only' found to violate this Art. in 5 cases, and no violations of Art. 2 were found with regard to Spain or Germany.

50 According to Art. 53 of the *European Convention*, *supra* note 8, 248 "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties" and according to the UK *Human Rights Act 1998*, domestic courts must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights (see *Human Rights Act* 1998, Art. 2)

completely into national law and are enforced by national courts.[51] In this dialogue between States and various international actors, States generally wish to retain their sovereignty[52] and international actors[53] seek to impose upon States unified procedures for effective investigations. This dialogue between national and international courts is constantly changing on the question of the procedural scope of the duty to investigate.

As early as 2003,[54] the House of Lords has relied exclusively on the jurisprudence of the ECtHR to establish the relevant law for conducting an investigation into a crime committed: "The issue in this appeal is whether the United Kingdom has complied with its duty under article 2 of the European Convention [...] to investigate the circumstances in which this crime came to be committed."[55] In a different case, it relied on the

51 The importance of the close cooperation of national courts and the ECtHR was addressed by the Slovenian Constitutional Court: "The ECrtHR operates according to the principle of subsidiarity. In other words: the application of EConvHR to all 46 member states of the Council of Europe, in which 800 million people live, cannot be carried out by the ECrtHR itself. [...] Hence, it follows that states themselves by means of their regulations and the operation of regular and constitutional courts provide for the application of EConvHR. The particularity of EConvHR is that it is an act that is constantly evolving and being augmented by means of the case-law of the ECrtHR, which is its undisputable guardian and master." *Constitutional Complaint*, Concurring Opinion of Judge Dr. Ciril Ribičič *supra* note 48.

52 Note the approach taken by the House of Lords: "Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg." *McKerr v. United Kingdom*, House of Lords, *supra* note 42, para. 65.

53 The ones most relevant for the purpose of the duty to investigate are UN bodies, international tribunals, and NGOs.

54 As noted above, the jurisprudence of the ECtHR on this issue only matured in 2001.

55 *Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC) (Appellant)*, Appellate Committee of the House of Lords, [2003] UKHL 51, para. 1 [Regina v. Secretary (Amin)]. Compare to a similar approach taken by the Slovenian Constitutional Court: "According to the ECrtHR, in cases in which the allegation of the violation of Articles 2 and 3 of EConvHR is probable, the notion of an effective remedy [...] also entails a thorough and effective investigation [...] including effective access by the injured party or his/her relatives to the investigatory procedure [...]. According to the case-law of the ECrtHR, a prompt and thorough investigation is particularly important, as an incomplete investigation is tantamount to undermining the effectiveness of any other remedies that may have existed. The

jurisprudence of the ECtHR, as opposed to relying on previous UK case law, for articulating relevant requirements for conducting an investigation in order to ensure public confidence that justice has been upheld.[56] For example, the Court discussed independence,[57] public scrutiny,[58] and involvement of next-of-kin,[59] as developed by the ECtHR.

The House of Lords summarized its decision by stating:

> "[the State] was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must [...] be a measure of flexibility in selecting the means of conducting the investigation. But [the Appellant] was right to insist that the Court [...] has laid down minimum

above-mentioned right is not explicitly guaranteed by the Constitution [...]. In view of the above-mentioned, Article 15 § 4 of the Constitution is to be understood in a manner such that it also includes the right to an independent investigation [...]. Although Article 15 § 4 of the Constitution guarantees the judicial protection of human rights, in view of the above-mentioned case-law of the ECrtHR with reference to Article 13 of EConvHR, only an investigation conducted outside the scope of judicial proceedings that is independent and guarantees effective participation to the persons affected suffices in the above-discussed situations." *Constitutional Complaint*, *supra* note 48, paras 30-39.

56 "It is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight [...]. The Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure [...]. But it is 'indispensable' (*Jordan*, paragraph 144) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force". *Regina v. Secretary (Amin)*, *supra* note 55, para. 20.

57 "[F]or an investigation [...] to be effective, it may generally be regarded as necessary (*Jordan*, paragraph 106) 'for the persons responsible for and carrying out the investigation to be independent from those implicated in the events…This means not only a lack of hierarchical or institutional connection but also a practical independence…'" *Id.*

58 "While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2 (*Jordan*, paragraph 121), there must (*Jordan*, paragraph 119) 'be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case'." *Id*.

59 "'In all cases', as the Court stipulated in *Jordan*, paragraph 109: 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.'" *Id*.

> standards which must be met, whatever form the investigation takes."[60]

In subsequent cases, the House of Lords has also, while discussing issues related to investigations, resorted to the principles and rules established by the ECtHR.[61] A recent case might exemplify the way the House of Lords is relying, interpreting, and elaborating upon the case law of the ECtHR while determining the content of national law:

> "[T]he Appellate Committee of the House of Lords [...] summarised the Strasbourg jurisprudence as to the effect of this provision:
> The procedural obligation requires a State, of its own motion, to carry out an investigation […] that has the following features: i) [...] a sufficient element of public scrutiny [...] ii) [...] conducted by a tribunal that is independent [...] iii) The relatives of the deceased must be able to play an appropriate part in it. iv) It must be prompt and effective [...] These features are derived from the Strasbourg jurisprudence."[62]

These cases are an illustration of the process in which a national court is interpreting concepts derived from international law, for the purpose of implementing them into the national legal system, while an international tribunal can guide and redirect this interpretation into directions it thinks are

60 *Id.*, para. 32.

61 *Regina v. Police Complaints Authority (Respondents) ex Parte Green (FC) (Appellant)*, Appellate Committee of the House of Lords, [2004] UKHL 6; *McKerr v. United Kingdom*, House of Lords, *supra* note 42; *Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and Another (Appellant) ex Parte Middleton (FC) (Respondent)*, Appellate Committee of the House of Lords, [2004] UKHL 10; *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant); Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, Appellate Committee of the House of Lords, [2007] UKHL 26 [Al-Skeini v. Secretary of State for Defence, House of Lords]; *Jordan v. Lord Chancellor*, *supra* note 27; *Hurst*, *supra* note 20; *R (on the application of Gentle (FC) and another (FC)) (Appellants) v. The Prime Minister and others (Respondents)*, Appellate Committee of the House of Lords, [2008] UKHL 20. *R (JL) v. Secretary of State for Justice*, *supra* note 20.

62 *R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another*, United Kingdom Supreme Court, [2010] UKSC 29, paras 63-64.

more correct and proper. It is not a dialogue between equals since, according to the *European Convention* and UK law the ECtHR is the final interpreter of Convention rights and its rulings are binding upon domestic courts.[63] As the House of Lords so eloquently phrased their role: "It has often been said that our role in interpreting the Convention is to keep in step with Strasbourg, neither lagging behind nor leaping ahead: no more, as Lord Bingham said […] but certainly no less: no less, as Lord Brown says […] but certainly no more."[64]

International law's influence even upon lower courts, either directly through the jurisprudence of the ECtHR or through the power of national precedent of the House of Lords, is also visible, for example, in a recent decision by the Court of Appeals in the case of *Zaki Mousa*.[65] In this case, an investigative mechanism established by the UK was struck down based on the ECtHR's interpretation of the principle of 'independence'.[66]

63 A judge at the Slovenian Constitutional Court went even further and suggested that domestic courts should consider, hypothetically, what would the ECtHR decide in a given case while assessing their own decision: "It can be predicted with great probability on the basis of ECrtHR judgments that the ECrtHR, had it decided on the merits of the present case, would have established a violation of Articles 2 or/and 3 of EConvHR. For me there is no doubt that the ECrtHR would have established that Slovenia has violated the aforementioned provisions of EConvHR, if such violation had not been established by the Constitutional Court in the present decision. The ECrtHR judgment in the Case of Lukenda v. Slovenia is a convincing illustration of the manner how a state which in its regulations and case–law is not willing to consistently respect the case-law of the ECrtHR is condemned for such [...]. It is important also from this point of view that the Constitutional Court granted the constitutional complaints in the present case." *Constitutional Complaint*, Concurring Opinion of Judge Dr. Ciril Ribičič, *supra* note 48.

64 *Al-Skeini v. Secretary of State for Defence*, House of Lords, *supra* note 61, para. 90, see also: "As there has been cross-fertilisation between the regulatory regimes applicable in Northern Ireland and England and Wales, so there has been cross-fertilisation between the lines of authority in the two jurisdictions. But both have also been strongly influenced by the impact of decisions made in Strasbourg." *Jordan v. Lord Chancellor*, *supra* note 27, para. 22.

65 *The Queen (oao) Mousa v Secretary of State for Defence & ANR*, Judgment, Court of Appeal (Civil Division), [2011] EWCA Civ 1334 [Zaki Mousa]. Ironically, *Zaki Mousa* doesn't deal with the right to life but with allegations of torture and inhumane treatment.

66 "The law on independent investigations – [...] it is appropriate to set out some of the legal principles, although they are not significantly in dispute [...] In Jordan v United Kingdom, it was stated by the ECtHR [...] in these terms: '[...] it may generally be regarded as necessary for the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not

It is noteworthy that the court begins its description of 'the law' with the standard set by the ECtHR, despite precedent set by previous House of Lords cases mentioned here previously. The Court explicitly states that the principles articulated by the ECtHR are not disputed. This is quite remarkable in light of the position taken by the UK government in *McCann* just 15 years earlier.[67]

The fact that a large number of cases that deal with the duty to investigate and the procedures of such investigations continue to be discussed before the ECtHR, and the reliance on that jurisprudence by UK national courts, is an interesting matter to explore. What does it reveal about the dialogue between this international tribunal and national courts? Is it an indication that there are discrepancies between the content given to the principles by national courts and law enforcement authorities and the ECtHR Is it an indication that the ECtHR constantly develops and refines its procedural demands so that it keeps 'raising the bar' for national courts? Or, is it an indication that the process of internalization of the duty to investigate has yet to be finalized? Arguably, it may be that the answer lies, to a certain extent, in a combination of all those factors.

E. Conclusion

The procedural aspect of the duty to investigate certain human rights violations symbolizes the reach of international law into new and widening areas of national law, which, until recently, was exclusively reserved for States' discretion. It is noteworthy in this context that States have given their consent, explicitly in the form of a treaty, to regulate and restrict their national laws with regards to the *substantial* protection of the right to life *vis-a-vis* their own population. Some 30 years after this contractual agreement, due to developments in international law and judicial

only a lack of hierarchical or institutional connection but also a practical independence.'" *Id.*, para. 12.

67 "The Government submitted that the inquest more than satisfied any procedural requirement *which might be read* into Article 2 para. 1 of the Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations […] should be assessed. Finally, they invited the Court to reject the contention [...] that a violation of Article 2 para. 1 will have occurred whenever the Court finds serious differences between the UN Principles on Extra-Legal Executions and the investigation conducted" (emphasis added). *McCann*, *supra* note 1, para. 158.

interpretation, this substantial duty was construed by the ECtHR, and by other international judicial and semi-judicial bodies before it, to imply a *procedural* duty to investigate cases of death, and, later on, of various allegations not involving death.[68] This procedural duty is not mentioned in this contractual agreement or in almost any other contractual agreement into which States have voluntarily entered. Ironically, the only treaty that does mention a duty to investigate predates the ECtHR's recognition of the duty to investigate alleged violations of the right to life and does not deal with that right at all but with the prohibition against torture and inhumane treatment.

Apart from being a different kind of duty, procedural instead of substantial, implied as opposed to explicit, the duty to investigate is, of course, broader than the State's duty to protect the right to life, or any other human right for that matter. While not every death by a law enforcement agent constitutes a violation of the right to life, it appears that every death that bears some minimal connection to the State, either by causation or by failing to prevent it, and even cases not resulting in death, triggers the obligation to investigate.

However, as we have seen, the expansion of international law's reach into national law has not been limited to the mere imposition of the duty to investigate. It was developed to regulate the specifics of national criminal procedure and internal regulation used to investigate certain alleged human rights violations. From that moment on, international law has had an influence over detailed questions relating to the conduct of an investigation, such as the timing of witness statement collection, whether and when to conduct an autopsy, what is the proper organ to investigate law enforcement agents, etc.

In a very short time frame, international law's requirements were diffused down to national courts. Within a few years after *McCann*, we can see complete reliance by the UK's national courts on the ECtHR when discussing the law relevant for conducting an investigation where there was an alleged violation of human rights.

In my view, this expanded influence of international jurisprudence on national law exemplifies the spread of international law's reach into areas once considered to be completely beyond its sphere of influence. The process of dialogue between international tribunals and national courts is

[68] As mentioned above, the order was reversed in the case law of the Inter-American Court and the Human Rights Committee.

mutually beneficial and contributes to both two bodies of law, and in this specific case, to a better protection of human rights.

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The Need to Alleviate the Human Rights Implications of Large-scale Land Acquisitions in Sub-Saharan Africa

Semahagn Gashu Abebe*

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* Semahagn Gashu Abebe, LL.M. (Amsterdam), LL.M. (Goettingen), Doctor Juris, Faculty of Law, University of Goettingen, currently Bank of Ireland Post Doctoral Fellow, Irish Centre for Human Rights, National University of Ireland, Galway.

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Abstract

In the last few years, large agricultural investment ventures in Sub-Saharan Africa have brought their own opportunities and risks. On the one hand, large-scale land investments can offer opportunities for development, given their potential for creating infrastructures and employment, transfer of capital and technology as well as improving food security in the region. On the other hand, uncontrolled agricultural investment ventures primarily undermine the rights related to rural livelihood such as the right to property, development, and the right to self-determination as well as having adverse impacts on the environment. Though there is no easy way out of the paradox related to international agricultural investment ventures, there are a number of things to be done to alleviate the problem. At the international level, international human rights groups and organizations need to highlight the importance of access to land as a human right, work on the coming into effect of an international agreement that stipulates standards and obligations with respect to international agricultural investment ventures, as well as exposing illicit land dealings and making an effort to promote the rights of indigenous groups that have been threatened by 'land grab' activities. At the national level, the most important steps that need to be undertaken to minimize the impact of land grab activities include improving good governance, ensuring the security of rural communities to land entitlement, payment of appropriate compensation, and allowing freedom of association at local the level.

A. Introduction

In the last few years, the interest of foreign investors for the acquisition of agricultural land in the developing world has shown a marked increase.[1] According to World Bank estimates, direct foreign investment in agricultural farmland amounted to an estimated fifty-six million hectares before the end of 2009.[2] It has also been found that up to twenty million

1 Special Rapporteur on the Right to Food, *Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, UN Doc A/HRC/13/33/Add.2, 28 December 2009, 5, para. 11 [Special Rapporteur on the Right to Food, Large-scale Land Acquisitions and Leases].

2 K. Deininger *et al.*, Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits' (2005), xiv.

hectares of land have been the subjects of land dealings of foreign investors since 2006.[3] Such agricultural investments have been widely practiced in Latin America, Southeast Asia, Eastern Europe and most significantly, Sub-Saharan Africa.

Due to various political and economic factors peculiar to Sub-Saharan Africa, the adverse implications of land grabs in the region are immense. In the last decade, a number of African countries have been targeted by multi-national companies for acquisition of huge plots of agricultural land. The problem of land grabbing is particularly chronic in countries such as Cameroon, Ethiopia, the Democratic Republic of Congo, Madagascar, Mali, Somalia, Sudan, Tanzania, and Zambia.[4] It is believed that "developing countries in general, and Sub-Saharan Africa in particular, are targeted because of the perception that there is plenty of land available, because the climate is favorable to the production of crops, because local labour is inexpensive and because the land is still relatively cheap."[5] The extent of granting land to foreign companies in some countries is staggering. In Ethiopia for instance, in the period between 2003 and 2009, some 500 foreign investors were granted land amounting to one million hectares either on their own or as part of joint ventures with local business.[6] Until recently, the "Ethiopian government has already transferred about 3.5 million hectares of land to investors and is now taking measures to transfer a similar amount in the next five years."[7]

Different issues have been raised as triggering factors for the surge of land grabs in the last few years. The primary factor in recent years is challenges related to global food security and the steady increase in the price of food items globally. Some international companies are attracted by the lucrative investment in agricultural food due to such heightened demand in the international market. In addition to this, some of the countries that are involved in land grabs depend on imports of agricultural commodities, and have started to purchase or lease land in developing countries. The demand for biofuels as an alternative source of energy is also another impetus that

3 Special Rapporteur on the Right to Food, *Large-scale Land Acquisitions and Leases, supra* note 1, 5, para. 11.

4 *Id.*, 5-6, para. 11.

5 *Id.*, 6, para. 11.

6 D. Rahmato, 'Land to Investors: Large-Scale Land Transfers in Ethiopia' (2011), available at http://www.landgovernance.org/system/files/Ethiopia_Rahmato_FSS_0.pdf (last visited 28 January 2013), 12.

7 *Id.*, 25.

pushed companies to grab land in Africa. This has been particularly facilitated by the policies of Western governments, which provide financial incentives to the private sector for the development of biofuels.[8] It has also been reported that, following the recent financial crisis, different financial companies resorted toward land as a source of solid financial returns.[9] In addition to this, speculation on future rises of the price of farmland has created incentives for multinational companies to engage in land grabs.[10]

In addition to such economic factors, which have increased land dealings in the last few years, many of the countries targeted by international companies are those where there is loose government control and a lack of strong civil society that counter-balances the impacts of such investments. In such countries, it is easier to move quickly since there are few regulations and the regimes are largely unconcerned about the interests of the people and the protection of the environment.[11] Furthermore, the fact that the land dealings in Sub-Saharan Africa are offered at a very low price (twenty dollars per hectare in some cases) contributed to the surge of companies coming to Africa.

Such international agricultural investments have provided some opportunities and posed different challenges. Primarily, large-scale land investments can be an opportunity for development, given their potential for creating infrastructure and employment, increasing public revenues and improving farmers' access to technologies and credit.[12] That is because, for

8 Under Commission Directive 2009/28EC, OJ 2009 L 140/16, each Member State of the European Union is obligated to adopt a national renewable energy action plan establishing Member States' national targets for the share of energy from renewable sources consumed in transport, electricity and heating and cooling (see L. Cotula *et al.*, *Land Grab or Development Opportunity?: Agricultural Investment and International Land Deals in Africa* (2009), 54).

9 A. Graham *et al.*, 'Advancing African Agriculture: The Impact of Europe's Policies and Practices on African Agriculture and Food Security' (June 2010), available at www.future-agricultures.org/papers-and-presentations/doc_download/1292-the-role-of-the-eu-in-land-grabbing-in-africa-cso-monitoring-2009-2010-advancing-african (last visited 28 January 2013), 6.

10 Special Rapporteur on the Right to Food, *Large-scale Land Acquisitions and Leases, supra* note 1, 7, para. 12.

11 D. Dasgupta, 'India, Once Colonised, has Turned Into a Coloniser' (7 October 2011), available at http://www.outlookindia.com/article.aspx?278583 (last visited 28 January 2012).

12 Special Rapporteur on the Right to Food, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right of Development*, A/HRC/12/31, 21 July 2009, 13, para. 21.

many years, agriculture has been neglected both in domestic policies and in development cooperation as well as having failed to attract foreign direct investment.[13] In light of this gap, more investment in rural areas can be particularly effective in reducing poverty, creating employment, improving the access of local producers to the markets, and increasing public revenues through taxation and export duties.[14] The significance of agricultural investment is immense in terms of ensuring food security in Sub-Saharan Africa. Generally, increased investment in agriculture is believed to bring about economic development and improvements in livelihood in rural areas.[15]

Despite the apparent benefits of large agricultural investment in Sub-Saharan African countries, the endeavor has posed different challenges. The major risk of such investments is to the welfare of the rural poor, to whom land is the main asset from which to derive a livelihood. In light of the dependence of the rural poor on the land for their livelihood, it is concerning that the potential impacts of agricultural investment through multi-national companies include the eviction of the rural poor from their land. The selling out of large plots of land to investors is particularly detrimental for farmers and pastoralists who depend on access to land and natural resources for their sustenance.

As governments make land available to investors, the most serious implication of the move is that local people lose access to the land on which they depend for their food security.[16] Ethiopia is a typical instance in this respect. The country has been affected by extreme drought that has recently left some twelve million people in danger of starvation. On the other hand, the Ethiopian government is leasing out large plots of land to foreign firms which risks deteriorating the food security situation of millions of people living in the drought-struck regions of the country.[17] According to a study released by the Oakland Institute, two hundred thousand people might have

13 Special Rapporteur on the Right to Food, *Large-scale Land Acquisitions and Leases*, *supra* note 1, 12, para. 28.

14 *Id.*, 7, para. 13.

15 Cotula *et al.*, *supra* note 8, 15.

16 *Id.* beginning on page 5.

17 J. Vaughan, 'Ethiopia Land Lease Risks Displacement: Report', (29 July 2011), available at http://reliefweb.int/report/ethiopia/ethiopia-land-lease-risks-displacement-report (last visited 28 January 2012).

been displaced through the leasing out of 300,500 hectares of land since 2008.[18]

The impacts of such large-scale agricultural investments have become more threatening in Sub-Saharan Africa due to the lack of legal and institutional mechanisms to alleviate the spillover risks of such investments. In particular, lack of good governance in the region has complicated the socio-economic problems including the land holding system. The problem of good governance is particularly chronic in relation to the land tenure system and the administration of natural resources in Sub-Sahara Africa. In many countries of Sub-Saharan Africa, due to the fact that much of the land is owned and controlled by the government, the rights of farmers are not properly secured.[19] Such State-owned forms of land tenure system is characterized by insecure use rights, complicated registration procedures, legal lacunas in the legal system, and compensation being paid to expropriation of the land is very limited.[20]

In the absence of a strong land tenure system that provides security to rural farmers, evictions from the land will largely continue without any appropriate redress. Many countries do not have in place legal or procedural mechanisms to protect the rights of local communities in case of eviction. Even in some of the countries where there is a legal requirement for consultations to be undertaken with the community, the process is not largely observed.[21] In addition to this, due to the absence of an accountable system of government, elites exploit the opportunity for short-term benefits rather than focusing on the long term social and economic development of the community.[22] Lack of transparency and checks and balances in contract negotiations has further exacerbated the problems related to land dealings. In light of the opportunities and challenges that large agricultural investment ventures pose in Sub-Saharan Africa, this article attempts to highlight the human rights implications of such ventures and to put forward some measures that may be undertaken at the national and international levels.

18 *Id.*

19 Rapporteur on the Right to Food, *Large-scale Land Acquisitions and Leases*, *supra* note 1, 10, para. 23; J. Felicio, 'Global Land Grabbing: The Impact on Human Rights' (12 June 2011), available at http://wphr.org/2011/jillfelicio/global-land-grabbing-the-impact-on-human-rights/ (last visited 28 January 2012).

20 Cotula *et al.*, *supra* note 8, 7.

21 *Id.*

22 Felicio, *supra* note 19.

B. Human Rights Implications of Large-scale Land Acquisitions

Throughout the history of mankind, land is considered as a primary source of wealth as well as the foundation for shelter, food, and other economic activities.[23] Particularly, land is the most significant provider of employment opportunities in rural areas. Given that the majority of the population is living in rural areas in many Sub-Saharan African countries, the significance of access to land for rural livelihoods is crucial. Realizing the importance of land to development, the UN reiterates:

> "Land [...] cannot be treated as an ordinary asset, controlled by individuals and subject to the pressures and inefficiencies of the market. Private land ownership is also a principal instrument of accumulation and concentration of wealth and therefore contributes to social injustice; if unchecked, it may become a major obstacle in the planning and implementation of development schemes. [...] The provision of decent dwellings and healthy conditions for the people can only be achieved if land is used in the interests of society as a whole. [...] Public control of land use is therefore indispensable [...]."[24]

In light of the significance of land to the overall development of society in general and to the rural poor in particular, large-scale agricultural ventures that are widely practiced in Sub-Saharan Africa have different human rights implications. The implications could be categorized under three broad human right issues: namely rights related to livelihood, environmental rights, and the right to self-determination of peoples.

Large-scale agricultural investment activities in Sub-Saharan Africa have primarily threatened the rights of livelihood of rural families. Such uncontrolled investment ventures seriously undermine the rights related to rural livelihood such as the right to property, development, and food. The right to property is one of the basic human rights principles that are

[23] Food and Agriculture Organization of the United Nations (ed.), *Gender and Access to Land* (2002), 3.

[24] *The Vancouver Action Plan: D. Land*, Preamble, UN Doc A/CONF/70/15, 11 June 1976.

protected by domestic as well as international human rights regimes. Though there is ideological divide between the east and the west on the scope of the right to property, it basically involves entitlement to the peaceful enjoyment of one's possessions and prohibition of any arbitrary denial of the right. Though such rights of property may be limited where the public interest is involved, the right to property involves the right to adequate compensation in case of expropriation. In addition to this, an appropriate system of protecting of property rights significantly contributes toward alleviating poverty and the creation of income for the poor.[25]

In light of this, the arbitrary eviction of the rural poor basically denies their right to property which is essential to their livelihood. Though such evictions may be justified when an overriding public interest is involved, there has to be appropriate compensation made to people who may be affected by the eviction. Many of the countries of Sub-Saharan Africa are selling rural land in the belief that the large investments in agriculture promotes the public interest, since such investments involve the transfer of technology and capital, and enhance production as well as creating job opportunities. Though there are promises made by governments to compensate farmers that may be affected by the process of implementing agricultural investment ventures, such promises have not been largely kept.

The loss of land by rural farmers not only undermines the socio-economic base of the community but also it deprives the people their power of bargain.[26] Since much of the land in Sub-Saharan Africa is controlled by the government, the right of farmers to the land is only an usufruct right that could be terminated at any time. In addition to this, in countries such as Ethiopia, access to land is largely determined by political partisanship rather than merit since land is used as a political weapon. Unless farmers vote for the party in power during elections or refrain from openly expressing their dissent, the regime's political machinery in rural areas threatens farmers with the loss of their land possession rights. In such restrictive political contexts, the land grab rush conducted by multinational companies exacerbates the already deteriorated property rights regime in these countries.

The other implication of the uncontrolled land grab in Africa is that it seriously undermines the right to development of the rural poor. According

25 K. Boudreaux, 'Paths to Property: Creating Property Rights in Africa' (February 2007), available at https://www.montpelerin.org/montpelerin/members/documents/KarolBoudreaux.pdf (last visited 28 January 2013), 3.

26 Rahmato, *supra* note 6, 26.

to the *Declaration on the Right to Development*, "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in [and] contribute to[,] and enjoy economic, social, cultural, and political development[,] in which all human rights and fundamental freedoms can be fully realized."[27] In rural Africa, it is only through appropriate access to land for rural communities that sustainable development can be achieved as the livelihood of the rural poor is closely linked with access to land. In addition to this, access to land is also an essential element of ensuring food security. Under Art. 11 of the *International Covenant on Economic, Social and Cultural Rights*, every State is obliged to "ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."[28] In light of this international standard, land grab undertakings in Sub-Saharan Africa dispossess the poor from the land on which their food security depends.

The environmental implications of large agricultural concessions are also immense. It is believed that intensive agricultural projects seriously affect the biodiversity, carbon stocks, as well as land and water resources in the area.[29] In particular, aggressive use of land resources by multinational companies has seriously affected the natural environment due to the aggressive use of chemicals and other agricultural technologies to achieve larger output. The environmental implications related to large-scale agricultural investment in Sub-Saharan Africa is further exacerbated by the absence of any appropriate assessment of the environmental impact of such ventures and the absence of capacity on the part of State machinery to regulate the activities of agricultural companies due to a corrupted government system and a lack of trained manpower and resources.

In addition to undermining rights related to the livelihood of the poor and having environmental implications, big agricultural concessions have also serious impacts on the cultural and religious rights of communities. It is believed that "there is a strong correlation in many societies between the

[27] *Declaration on the Right to Development*, Art. 1, GA Res. 41/128 annex, UN Doc A/RES/41/128, 4 December 1986.

[28] *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12*, UN Doc E/C.12/1999/5, 12 May 1999, para. 14.

[29] J. v. Braun and R. S. Meinzen-Dick, '"Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities' (April 2009), available at http://www.ifpri.org/sites/default/files/publications/bp013all.pdf (last visited 28 January 2013).

decision-making powers that a person enjoys and the quantity and quality of land rights held by that person".[30] Access to land is particularly linked to the right to self-determination of peoples that is widely recognized under national and international human rights instruments. The principle of self-determination is prominently embodied in Article I of the *Charter of the United Nations*. The right is also recognized as a right of all peoples in the first Article of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which both entered into force in 1976. Paragraph 1 of this Article provides "[a]ll peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development." In addition to this, the national constitutions of some countries, such as Ethiopia, provide wider recognition of the right to self-determination. The right to self-determination of peoples has also been recognized in many other international and regional instruments, including the *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States* adopted by the UN General Assembly in 1970, the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe (CSCE) in 1975, the *African Charter of Human and Peoples' Rights* of 1981, the CSCE *Charter of Paris for a New Europe* adopted in 1990, and the *Vienna Declaration and Programme of Action* of 1993.

In particular, access to land for indigenous communities has been given specific forms of protection under international law. Articles 13 to 19 of the 1989 ILO *Indigenous and Tribal Peoples Convention* provide principles concerning Indigenous and Tribal Peoples' right of access to the land. Furthermore, under Article 8 of the *United Nations Declaration on the Rights of Indigenous Peoples*, States are required to provide effective mechanisms for prevention of [...] "[a]ny action which has the aim or effect of dispossessing indigenous peoples of their lands, territories or resources."[31] Under Article 10 of the Declaration, indigenous groups are guaranteed the right "not to be forcibly removed from their lands or territories [...] [,] [n]o relocation shall take place without the free, prior and informed consent" and any relocation could only be effected after agreement on just and fair compensation.[32]

30 Food and Agriculture Organization of the United Nations, *supra* note 23, 3.

31 *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 8 (2) (b), GA Res. 61/295 annex, UN Doc A/RES/61/295, 13 September 2007, 4.

32 *Id.*, Art. 10, 5.

Furthermore, Articles 25 and 26 of the Declaration recognize the "distinctive spiritual relationship of indigenous peoples with their traditionally owned lands" and their right "to own use, develop and control the[se] lands".[33] Accordingly, States are required to give legal recognition and protection to these lands, territories, and resources, with due respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned.[34] Article 32 of the Declaration further embodies the principle of free, prior, and informed consent before any action that affects the interests of indigenous communities is undertaken.[35] Article 32 para. 2 further reiterates "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[36]

Despite the availability of such diverse international human rights instruments, agricultural investment ventures of multinational companies continue to undermine the livelihood of indigenous communities. The problem is particularly chronic in Sub-Saharan Africa, where agricultural concessions are largely in areas where indigenous communities are living. The deprivation of indigenous communities' access to land not only results in the loss of the material possession of their territory but also of the basic foundation for the development of their culture. Since their cultural and religious rituals are enjoyed in relation to their ancestral land, eviction of the indigenous community from the land is simply uprooting the identity of the people from their ancestral heritage.

To illustrate the impact of foreign agricultural interventions to the right to self-determination of indigenous communities in Sub-Saharan Africa, examining the example of the Ethiopian case clarifies the extent of the problem. The unprecedented agricultural land sale in Ethiopia is predominately conducted in a fertile region of Gambella. The region is inhabited by several ethnic minority groups, of which the three major ones are the Annuak, the Nuer, and the Majangir. The customary system of property relations among all three groups is founded on communal ownership of natural resources. The arrival of multi-national companies is

33 *Id.*, Arts 25 & 26, 7-8.
34 *Id.*
35 *Id.*, Art. 32 (2), 9.
36 *Id.*

currently marginalizing and uprooting the people from their land and effectively denying their right to self-determination recognized under the Ethiopian constitution. Even though the Ethiopian constitution provides for the right to self-determination of ethnic groups to self-determination including the right to secession, in practice such arbitrary decisions undertaken by the regime have seriously undermined the right to self-determination of peoples.

C. Measures Necessary to Alleviate Human Rights Implications of Large-scale Agricultural Concession

In the preceding discussion, it has been established that there are conflicts of interests in relation to the granting of large plots of land to international corporations in Sub-Saharan Africa. On the one hand, large agro-investments have the potential to boost African agricultural performance through increasing agricultural output, transfer of technology, and creating new opportunities. On the other hand, these ventures involve a number of risks. Such projects may not only result in the eviction of the rural poor from their livelihood, but they also have a serious environmental impact and deprive indigenous communities of their right to self-determination. Due to the complexities involved in agro-industry business in Sub-Saharan Africa, there are no ready-made solutions that can effectively balance these two conflicting interests. However, it is important to come up with some remedial policy measures that may greatly alleviate the impacts of land grab activities in Sub-Saharan Africa. Such remedial measures need to be undertaken at the international, national, and local levels.

At the international level, there are a number of measures that need to be undertaken to alleviate the challenges of land grabs in Sub-Saharan Africa. The most significant contribution of the international community to alleviate the adverse impacts of selling out large plots of land to foreign corporations is through setting international standards. In the past, international organizations and civil society groups have been instrumental in setting standards for human rights principles. Since the end of World War II, international human rights principles have largely been developed by the United Nations and other regional institutions. Though there has been controversy over the meaning and scope of human rights in the West and other parts of the world, these international human rights instruments have contributed a lot in terms of widening the concept of human rights through influencing domestic legal systems as well creating global awareness on

human rights issues. In light of such a track record, international organizations primarily need to develop international standards that may serve as guidelines in regulating international agricultural ventures. One such effort that needs to be made is with regard to the development of an internationally recognized convention or system that recognizes the right to land access as a human right. Since there has never been a consensus as to whether access to land is a human right, international recognition of the right could not be achieved. The development of a principle on the right to land may greatly contribute in terms of protecting the rights of the poor in rural communities through providing international standards in light of which national land policies may be measured.

In addition to this, international organizations may play a significant role in terms of developing international norms to be followed by international agricultural investment companies. Though there have been different international rules and systems that aimed at safeguarding and regulating foreign direct investment, there have never been any guidelines that need to be observed by the multinational companies as well as the host States engaged in international agricultural investments. Despite the fact that the rules on international investment are also applicable to agricultural investments, the rules are largely aimed at protecting the interests of the investor rather than the rural poor. International investment rules are increasingly becoming influential by constraining the power of host States to control the activities of multinational companies. In light of the special nature of international agricultural investments and their implications, there is a need to develop a system that balances the interests of the investor on the one hand and the needs of the people that may be affected by such investments on the other. In light of the importance of having international norms on agricultural investment ventures, international organizations may develop some form of convention or treaty that clearly stipulates the rights and duties of the investor as well as the rights of the people who may be affected by such investments.

There have been different attempts made by international institutions to develop principles and codes of conduct to regulate international investment ventures. The most prominent among these is the World Bank-led Principles for Responsible Agricultural Investment that Respect Rights, Livelihoods and Resources (RAI). RAI recognizes different principles such as land and resource rights, participation of those who may be affected by investment projects, transparency of land dealings, and social and environmental sustainability of investments. Not only are the principles non-binding but also the principles are largely denounced by different

groups claiming that the initiative is largely legitimizing the occupation of land by international corporations. The most advanced code of conduct is the one that has been recently developed by the United Nations Food and Agricultural Organization (FAO). The Voluntary Guidelines on the Responsible Governance of Tenure developed in May 2012 deals with the legal recognition and allocation of tenure rights and duties, transfers and other changes to tenure rights and duties, administration of tenure, responses to climate change and emergencies, and promotion, implementation, monitoring, and evaluation.[37]

The principles that have been enshrined in the guideline are significant in terms of alleviating the widespread violations of human rights in relation to agricultural investments in Sub-Saharan Africa. But due to the non-binding nature of the guidelines, the significance of the document is very limited. A more forceful code of conduct on agricultural investments needs to be issued by other influential institutions such as the World Bank. In addition to setting standards, the other important contribution of the international institutions and civil society groups is through conducting advocacy activities for promoting the rights of rural communities.[38]

The most important responsibility of ensuring the rights of the communities affected by land grabs is the host State itself. There are a number of measures that could be undertaken by the government to accrue the benefits of agricultural investment ventures as well as addressing the negative implications of the investments. Primarily, the problem of land grabs in Sub-Saharan Africa is closely related to the absence of good governance. The existence of good governance ensures that "political, social and economic priorities are based on broad consensus in society and that the voices of the poorest [...] are heard in decision-making over the allocation of development resources".[39] Good governance in particular entails the

37 Food and Agriculture Organization of the United Nations (ed.), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012), iii.

38 For instance, human rights reports released by human rights groups such as Amnesty International and Human Rights Watch have contributed in terms of checking the human rights records of governments. In the same token, emergence of an established international institution that watches over international agricultural investment may contribute a lot in terms of improving the human rights implications of land grabs in Sub-Saharan Africa.

39 United Nations Development Programme (ed.), 'Good Governance and Sustainable Human Development', available at http://mirror.undp.org/magnet/Docs/!UN9821.PDF/!GOVERNA.NCE/!GSHDENG.LIS/!sec1.pdf (last visited 28 January 2012), 3.

existence of efficient and accountable institutions regulating the political, judicial, administrative, and economic activities as well as promoting development, protection of human rights and respect for the rule of law, and ensuring that people are free to participate and be heard on decisions that affect their lives.[40]

Due to the chronic problems of governance in Sub-Saharan Africa, sustainable development has not been achieved in these countries. The problems of good governance in the region have various aspects. First of all, since leaders come to power through deceit or through the barrel of the gun, not only are they corrupt but they are also not accountable to the public or to the law of the land. Secondly, since institutions are weak, their oversight of the activities of government is lacking, and the economic and social policy decisions of the government are largely flawed and ineffective. Thirdly, due to the absence of the rule of law, citizens do not have any effective redress for the acts of maladministration that are committed by government officials. Fourthly, the problem of rampant corruption has made policy initiatives in Africa seriously flawed. In addition to this, problems related to protection of human rights in Africa have made ordinary Africans undergo harassment, unlawful detention, torture, and the restriction of their liberties and democratic rights. In light of such problems in the region, there cannot be any isolated remedy for the challenges of land grabs in Sub-Saharan Africa. Improving the overall problems of good governance and protection of human rights will ultimately assist in addressing the impacts of land grabs in Africa. Improving governance in Africa is thus a fundamental remedy to curb the adverse impact of huge agricultural ventures in the region.

Though the most effective remedy to root out the problems related to land grabs is through improving governance, there are also other specific measures that need to be undertaken in relation to the allocation and regulation of agricultural investment ventures. The primary measure that needs to be implemented is having an effective land tenure system. Since in many of the Sub-Saharan African countries the rural poor do not have security for their entitlement to the land they possess, they are subject to various abuses. Due to a lack of entitlement of land rights guaranteed to farmers, central and regional authorities do not have any obligation to safeguard the rights of indigenous communities. Unless farmers have a

[40] K. R. Hope, 'Toward Good Governance and Sustainable Development: The African Peer Review Mechanism', 18 *Governance* (2005) 2, 283, 285.

guaranteed entitlement to their rural land holding that improves the bargaining position of the rural communities, the poor rural community cannot be in a position to stand for their rights.

The other important measure that needs to be undertaken by the government before granting concessions to multinational companies is conducting an impact assessment on the potential benefits and risks of such investments. Such assessment is particularly helpful to weigh the various advantages and risks of the investment, particularly in terms of alleviating the dislocation of families and the impact of the project to the environment. In addition to this, all project dealings need to be conducted in a transparent fashion. The dealings need to be open to the public, the media, and civil society groups. In many African countries, land dealings and the terms of the contract are largely secretive and without scrutiny by the public, media, or civil society groups. The other measure that may be undertaken by African governments that are involved in an agricultural land lease is to ensure the participation of the people during the implementation of the projects. The projects may be organized in a way to integrate the community into the development process as well as undertaking effective resettlement programs. Particularly, the government has to ensure that appropriate compensation be paid to the families that may be affected by the multinational agricultural projects.

The other vital responsibility of the government is to enhance its capacity to regulate such projects. Unless the government has allocated the necessary resources and manpower to supervise the implementation of the projects, the projects will not only fail to bring about the desired results but also the projects entail far-reaching impacts such as environmental degradation and threatening the livelihood of the poor. Oversight of the projects ensures whether the investment has accrued the desired transfer of knowledge, creation of jobs, or output that may increase earnings in foreign currency to the country. The other important institutions that are essential to address problems of land grabs are civil society groups. Local civil society groups need to be given access to work at the grass-roots level by advocating the rights of rural communities and creating awareness among the rural communities about their rights.

The other important step that may be helpful to alleviate the problems of land grabs is organizing the rural community to stand for their rights. The restrictive measures of governments towards civil and political rights in many Sub-Saharan African countries present a challenge to such freedom of association. In countries such as Ethiopia, local civil society groups or communities are not only barred from raising any human rights violations,

but also any dissent against the government is viewed as a crime. Due to such restrictive measures, rural communities are not allowed to organize themselves to defend their rights; as a result, they are subjected to maladministration and injustices. Relaxing the rights of citizens to organize themselves including in rural communities is thus an essential step that needs to be undertaken by governments in Sub-Saharan Africa.

D. Conclusion

Due to the challenges of food security and increasing attention given to biofuels, there has been a surge in land grab activities in Sub-Saharan Africa and elsewhere. The agricultural investment ventures in Sub-Saharan Africa have brought their own opportunities and risks. When such large agricultural investment ventures are properly implemented, they can be used to facilitate the flow of capital and technology as well as improving the food security situation of these countries. But the rush by multinational companies to purchase land in Sub-Saharan Africa has posed a number of challenges. Primarily, large agricultural land concessions have resulted in the eviction of rural communities from their land. In many instances, people are evicted from their land without appropriate compensation or a resettlement program. In addition to this, since access to land for rural communities is essential to enable them to exercise their right to self-determination, the dislocation of families from their ancestral land may result in the violation of their right to self-determination that is recognized in international, regional, and nation human rights instruments. Furthermore, the extensive use of the land by multinational companies using different chemicals contributes toward the serious degradation of the balance of local ecosystems.

Though there is not an easy way out from such deadlock; there are a number of measures that should be undertaken to alleviate the problem. At the international level, international human rights groups and organizations need to highlight the importance of access to land as part of the human rights system, work on the coming into effect of an international agreement that stipulates standards and obligations with respect to international agricultural investment ventures, and make a concerted effort to expose illicit land dealings and promote the rights of indigenous groups that have been threatened by land grab activities. At the national level, the most important guarantee against the adverse impacts of land grab activities in Africa is ensuring good governance in these countries. Due to the absence of

accountability, transparency, and the rule of law at the central and local government level, leadership is largely characterized by dictatorship and rampant corruption. The most important step that needs to be taken to minimize the impact of land grab activities in Sub-Saharan Africa is thus improving aspects of governance at various levels.

In addition to this, important measures such as ensuring the property rights of rural communities to access land, payment of appropriate compensation, allowing farmers to organize themselves and stand up their rights, as well as providing sufficient political space to local civil society groups to promote the rights of rural communities, are also essential measures that need to be undertaken by host States. In conclusion, though the land grab phenomenon is likely to continue due to the crumpling global food security situation, it is argued that the measures that have been pointed out in this article could significantly undermine the adverse impacts of land grab ventures in Sub-Saharan Africa.