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Editorial

Dear Readers,

The atrocities committed by Isis in Iraq and Syria, the conflict between Israel and Gaza, the crisis in the Ukraine: Rarely has the international news been almost completely dominated by topics related to international law as it is at the moment. The international community has been observing each of the three hot spots with utmost alertness. As different as these conflicts may be, they have in common that mid- or even long-term adjustments currently seem hardly feasible.

In the face of these facts it is not surprising that other news faded into the background, one of which was the International Criminal Court's announcement concerning the death of its judge Hans-Peter Kaul.[1] With his passing, the ICC lost one of its founding fathers, though his considerable contributions to a variety of decisions remain, substantially shaping international criminal law. The Editorial Board dedicates pages 8 and 9 of this issue to him.

With the beginning of the sixth volume, GoJIL has irrevocably grown up from its 'childhood'. The Editorial Board – largely comprised of a new team – gladly awaits the future challenges.

In the first article of this issue, *Frances Nguyen* sheds light on the often puzzling legal categorization of the crime of forced marriage and its opaque relation to sexual slavery and arranged marriage. Her article 'Untangling Sex, Marriage, and Other Criminalities in Forced Marriage' seeks to provide a better

[1] ICC, 'Passing of former ICC Judge Hans-Peter Kaul', ICC Press Release ICC-CPI-20140722-PR1032 (22 July 2014), available at http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1032.aspx (last visited 1 September 2014).

understanding of forced marriage's legal nuances, appealing for its increased criminalization and awareness thereof as a sex and gender-based crime that is on par with other similar prohibited acts, such as sexual slavery, enslavement, rape, and forced pregnancy. To that purpose, case studies of Sierra Leone, Uganda, and Cambodia are harnessed to illustrate the complexities and difficulties in prosecuting this egregious crime.

Then, in his article 'Bystander Obligations at the Domestic and International Level Compared', *Otto Spijkers* tracks the question whether there exists a so-called 'bystander State responsibility', a legal obligation of third States to intervene in cases of serious breaches of fundamental international obligations. The author provides answers to this question by means of a comparative analysis of domestic law and international law. This approach enables him to derive similarities that could be used to establish a legal framework on the international level.

Also within the topical heading 'Forms of Responsibility of States in International Law', *Raphaël van Steenberghe* reflects on a possible association of the responsibility to protect and the protection of civilians in armed conflict. Looking at both, similar characteristics as well as differences between the two notions, he concludes that the distinction between them has to be made clear, especially since there can be negative impact on international humanitarian law.

Two articles on international trade law round off this issue. While – yet unexpected for some – the agreement on the 'Bali Package' in December 2013 was celebrated as a milestone of the World Trade Organization (WTO),[2] the disillusionment after the latest failure of this first global free trade agreement since 1995 is all the more bigger.[3] Whether the opposition, especially of India,

[2] See, e.g., R. Fabi, 'WTO Overcomes Last Minute Hitch to Reach its First Global Trade Deal', *Reuters* (7 December 2013), available at http://in.reuters.com/article/2013/12/07/trade-wto-cuba-idINDEE9B602720131207 (last visited 1 September 2014); N.N., 'W.T.O. Reaches First Global Trade Deal', *New York Times* (7 December 2013), available at http://nytimes.com/2013/12/08/business/international/wto-reaches-first-global-trade-deal.html?_r=0 (last visited 1 September 2014).

[3] See, e.g., T. Miles, 'WTO Failure Points to Fragmented Future for Global Trade', *Reuters* (4 August 2014), available at http://reuters.com/article/2014/08/04/us-trade-wto-idUSKBN0G41KU20140804 (last visited 1 September 2014); K. Mehrotra & B. Wingfield, 'WTO Talks Fail Over Food-Subsidy Objections From India', *Bloomberg* (1 August 2014), available at http://bloomberg.com/news/2014-07-31/wto-talks-fail-over-food-subsidy-objections-from-india.html (last visited 1 September 2014).

which hindered the required consensus in the end, causes the 'collapse' of the 'Bali package' and thus a crisis for the WTO system remains to be seen.[4] From the agreement's proponents' point of view one can at least hope that the process of reflection of the delegations, which was demanded by Director-General Roberto Azevêdo for summer break,[5] brings about a quick resumption of negotiations. This is in particular requested by the developing countries, the main victims of the failure.[6]

Developing countries are then also at the center of attention in these last two articles of this issue:

Firstly, in 'The Least-Developed Countries Service Waiver: Any Alternative Under the GATS?', Claudia Manrique Carpio and Jaume Comas Mir examine the legal scope of the LDCs services waiver, approved by the WTO Ministerial Conference in 2011, as well as the viability of its implementation as a useful tool to boost LDC's participation in Trade in Services and engagement within the GATS. The ensuing analysis of whether the waiver has fulfilled its main objectives, finds that for reasons of regulatory concerns, it may not have a strong impact. Conversely, alternatives to enhance LDCs' integration with the GATS are conceivable.

Yet another aspect of international trade law of particular interest to developing countries is explored by Pananya Larbprasertporn in 'The Interaction Between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments'. Here, she determines the extent to which invoking the CDR principle may have a bearing on WTO legal disputes concerning said climate-related border tax adjustments. The author ultimately upholds the predominance of the non-discrimination principle

4 For a first analysis of the failure see also R. Howse, 'The Fallacy of the July 31 Deadline in the WTO TFA: Inventing a Crisis and Demonizing India's Democracy', *International Economic Law and Policy Blog* (1 August 2014), available at http://www.worldtradelaw.typepad.com/ielpblog/2014/08/the-fallacy-of-the-jul-31-deadline-in-the-wto-tfainventing-a-crisis-and-demonizing-indias-democracy.html (last visited 1 September 2014).

5 WTO, 'Azevêdo: Members Unable to Bridge the Gap on Trade Facilitation' (31 July 2014), available at http://wto.org/english/news_e/news14_e/tnc_infstat_31jul14_e.htm (last visited 1 September 2014).

6 See, e.g., S. Mazumdaru, 'WTO Faces Uncertain Future After Indian Veto', *Deutsche Welle* (1 August 2014), available at http://dw.de/wto-faces-uncertain-future-after-indian-veto/a-17827015 (last visited 1 September 2014).

within the WTO legal system, thus diminishing the formative power of the CDR principle and leaving the fairness of international climate change law vulnerable in this context.

We hope that this selection of thoroughly chosen articles provides an interesting read to our readership.

The Editors

in memoriam Hans-Peter Kaul

Not too long ago, members of the Editorial Board saw the twinkle in his eyes, as Judge Hans-Peter Kaul welcomed a group of students to the International Criminal Court, in order to discuss current challenges of the Court. The very Court that would not or, at least, not in its present form, exist without him. The very Court that he had shaped and contributed to significantly during those eleven years he served as judge and the four years as Second Vice-President. The International Criminal Court represents the work of a lifetime for Hans-Peter Kaul who has passed away on 21 July 2014.

What particularly struck us students was his depiction of the breakthrough in negotiations of the Rome Statute, which was arguably the biggest moment of his professional life. Hans-Peter Kaul took us back in time to July 1998 when he fought relentlessly for every wording of the treaty, dutifully honoring his responsibility as the German delegation's chief negotiator. At last, the idea of a permanent court, mandated to achieve greater justice for the victims of the most serious human rights violations, became reality.

Yet, this major success did not mark the end of his efforts to further effectuate the Rome Statute. With great emphasize he advocated for the inclusionof the crime of aggression, a crime regarded by him as the "the mother of all crimes",

into the statute. By virtue of the consensus at the Conference of the Contracting Parties in Kampala 2010, this goal had likewise been achieved.

This inclusion represents – as it can be gleaned from his contribution in the Goettingen Journal of International Law (Vol. 2, No. 2 (2010), 649-667) – a milestone, albeit obviously not undisputed, of international law. He, up until the very end, always firmly defended "his" Court against recurring criticism of its alleged incapability of reconciliatory adjudication, or such based on the exclusive treatment of African situations. His accounts and especially his concluding remark – that though the weakness of the Court might be self-evident, given the multitude of problems in the world, its very existence remains its greatest strength – left a long-lasting impression on us.

Quoting Judge Christoph Flügge, Hans-Peter Kaul's death is a huge loss for everyone sharing his belief in the power of law even in armed conflicts. His seminal contribution to the formation of International Criminal Law will without a doubt outlast his death. The following generations of scientists, practitioners, and State representatives now face the task to promote and further the International Criminal Law, just as Hans-PeterKaul did with that twinkle in his eyes.

The Editorial Board

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Untangling Sex, Marriage, and Other Criminalities in Forced Marriage

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Abstract

Over the past few decades, particularly with the rise of international criminal tribunals, there has been increased criminalization and greater awareness in gender and sex-based crimes among the international community. Crimes such as sexual slavery, enslavement, or rape have been successfully prosecuted under international law. Yet despite the increased recognition in the prohibition of sex and gender-based crimes, forced marriage remained marginalized until 2008, when the Special Court of Sierra Leone formally recognized forced marriage as an international crime. However, since the SCSL's ruling, no other criminal tribunal to date has successfully enforced and prosecuted perpetrators for committing forced marriage. This is particularly troubling considering the widespread reports of forced marriage in other States, such as Uganda and Cambodia. Part of the challenge stems in the SCSL's legal ruling which categorized forced marriage as an 'other inhumane act' under 'crimes against humanity'. This categorization is puzzling considering forced marriage often entails acts of sexual violence and disproportionately affects young women and girls. In addition, forced marriage is frequently compared to sexual slavery and arranged marriage, which poses more challenges for courts to distinguish forced marriage as a unique crime. Thus, this contribution calls for the increased criminalization and awareness of forced marriage as a sex and gender-based crime that is on par with other similar prohibited acts, including sexual slavery, enslavement, rape, and forced pregnancy. Case studies will be examined, such as Sierra Leone, Uganda, and Cambodia. Sierra Leone is examined due to the SCSL's seminal ruling on forced marriage. Cambodia is discussed because of the legal challenges presented before the Prosecutors at the Extraordinary Chambers in the Courts of Cambodia, especially as they try to convict the accused of alleged acts committed over three decades ago. Lastly, Uganda is observed to analyze why despite widespread reports, the ICC is not prosecuting senior militia leaders of forced marriage. These three cases seek to illustrate the complexities and difficulties in prosecuting forced marriage and also to analyze the definition and legal nuances behind forced marriage. In doing so, a better understanding is developed and raises awareness as to why forced marriage must be on the forefront in international criminal law to prosecute and convict perpetrators who are committing an egregious crime.

A. Introduction

From 1991 to 2002, Sierra Leone was embroiled in a civil war, which resulted in 70,000 casualties and the displacement of 2.6 million people.[1] While massive atrocities were prosecuted by the Special Court for Sierra Leone (SCSL), forced marriage remained a neglected problem until 2008.[2] That changed when the Appeals Chamber in *Prosecutor v. Brima and Others* identified forced marriage as a crime against humanity under Article 7 (1) (k) of the *Statute of the SCSL* for 'other inhumane acts'.[3] A year later, in *Prosecutor v. Sesay and Others*, the Appeals Chamber upheld the Trial Chamber's ruling on the conviction of forced marriage.[4]

While the decisions in Sierra Leone were a major step in advancing the proscriptions against gender-based crimes, case law remains insufficient in addressing forced marriage as a crime against humanity. Other than Sierra Leone, no other tribunal to date has prosecuted suspects accused of forced marriages. Furthermore, the International Criminal Court (ICC) has not codified forced marriage as a crime against humanity under Article 7 of the *Rome Statute*.[5] The lack of enforcement in subsequent case law and by the ICC demonstrates a lacuna in international law concerning forced marriage. To close the gap, the definition of forced marriage should be enumerated as a crime against humanity, so the prohibition thereof can solidify its robust status as a *jus cogens* norm and become an international crime recognized under customary international law. While advocates of criminalizing forced marriage believe it should be listed under 'other inhumane acts' of the *Rome Statute*, the crimes categorized in this article do not match the severity of forced marriages.[6] Due to the unique, multilayered nature of the crime and the combination of sexual and non-sexual elements, forced marriage should be enumerated under 'crimes against humanity'. By listing forced marriage as a distinct crime under 'crimes against humanity', it will help make the prohibition a part of customary international law and

1 M. Kaldor *et al.*, *Evaluation of UNDP Assistance to Conflict-Affected Countries* (2006), 71.

2 *Prosecutor v. Alex Temba Brima and Others*, Judgment, SCSL-2004-16-A, 22 February 2008, 65, para. 199 [Prosecutor v. Brima and Others, Appeals Chamber Judgment].

3 *Ibid.*, 66, para. 202.

4 *Prosecutor v. Issan Hassan Sesay and Others*, Judgment, SCSL-04-15-A, 14 October 2009, 259, 303 & 394, paras 726, 849 & 1104 [Prosecutor v. Sesay and Others, Appeals Chamber Judgment].

5 *Rome Statute of the International Criminal Court*, 17 July 1998, 2197 UNTS 3 [Rome Statute].

6 *Ibid.*, Art. 7 (1), 93.

develop its status as a *jus cogens* norm. In doing so, the universal recognition of forced marriage by the international community will gain ground, thus properly according the victims justice and effectively punishing the perpetrators.

Forced marriage is a complicated subject. The multilayered acts of brutality frequently overlap with sexual slavery, enslavement, rape, and arranged marriage.[7] This can create confusion, leading scholars, courts, and legal practitioners to either disregard forced marriage or shelve it into the category of 'other inhumane acts' under 'crimes against humanity'. A substantive discussion is necessary to elaborate upon the meaning of forced marriage and distinguish it from other enumerated crimes in the *Rome Statute*. The purpose of this contribution is to facilitate a proper discussion and address the legal complexities of forced marriage. More importantly, this article is also calling for a robust recognition of forced marriage as an international crime. Instead of putting forced marriage under the rubric of 'other inhumane acts', it should be placed alongside the enumerated crimes of sexual slavery, enslavement, and rape as a crime against humanity.

B. Road Map

Section C. discusses the spectrum of scholarship on forced marriage, from theories qualifying this crime as 'other inhumane act' to sexual slavery.[8] Section D. examines the statutory framework of crimes against humanity in the *Rome Statute*.[9] This part looks at the meaning of crimes against humanity, followed by a definition of 'other inhumane acts', a residual catch-all category of criminal acts not referenced under 'crimes against humanity'.[10] Section E. focuses on forced marriage during armed conflict. Forced marriage should be recognized as an international crime, whether it occurs during violent hostilities or during peace. However, if forced marriage happens during war, the legal analysis

7 M. Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime Against Humanity', 6 *Journal of International Criminal Justice* (2008) 5, 1033, 1036: "First, forced marriage, as described not only by the victims but also by numerous experts who were asked to give their opinion on this practice, is a *multi-layered crime*."

8 P. Viseur Sellers, 'Wartime Female Slavery: Enslavement?', 44 *Cornell International Law Journal* (2011) 1, 115, 138 [Viseur Sellers, Wartime Female Slavery], asserts the SCSL's ruling on forced marriage creates legal ambiguity because forced marriage is a form of enslavement.

9 International Criminal Court (ICC), *Elements of Crimes* (2011), 5-12 [ICC, Elements of Crimes].

10 *Ibid.*, 12.

changes due to the 1949 *Geneva Conventions*.[11] The *Geneva Conventions* regulate the conduct of armed conflicts and seek to limit its effects by protecting people who are not taking part in hostilities.[12] Since victims of forced marriage are not participating in combat, the *Geneva Conventions* would protect them during an armed conflict. Therefore, the application of international humanitarian law carries greater legal authority and enhances the prohibition of forced marriage. Hence, the *Geneva Conventions* can greatly strengthen the victims' case.

Sierra Leone and Uganda are examples of forced marriage which took place during armed conflict. In section F., Sierra Leone is discussed because of its seminal recognition and prosecution of forced marriage. In Sierra Leone, rebel groups such as the Armed Forces Revolutionary Council (AFRC) and Revolutionary United Front (RUF) pillaged villages and forced young women to marry their soldiers and/or commanders to serve their domestic and sexual needs under the 'legal' veneer of an exclusive and conjugal union.[13] Likewise, as explained in section G., which focuses on Uganda, the situation was similar in that the Lord's Resistance Army (LRA) would abduct young women and force them to marry their ranking officers.[14] The circumstances of geography, armed conflict, temporal and social factors illustrate how similar Uganda is to Sierra Leone with one significant exception. Whereas Sierra Leone has made an active effort to designate forced marriage as a crime against humanity, Uganda and the *Rome Statute* have not.[15] Despite the widespread reports of forced marriage, the situation in Uganda highlights how the international community has failed to sufficiently recognize or prosecute forced marriage as an international crime.

11 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 [Geneva Convention II]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 [Geneva Convention III]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 [Geneva Convention IV]; *Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 [Protocol I to the Geneva Conventions].

12 H.-P. Gasser & D. Thürer, 'Geneva Conventions I-IV (1949)', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IV (2012), 386, 386, para. 1.

13 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 65-66, paras 199-200.

14 K. Carlson & D. Mazurana, *Forced Marriage Within the Lord's Resistance Army, Uganda* (2008), 4.

15 *Rome Statute*, Art. 7 (1), *supra* note 5, 93.

Sierra Leone and Uganda are similar in terms of how forced marriage was implemented. Cambodia, which is discussed in section H., is different in several significant ways. Unlike Sierra Leone and Uganda, where forced marriages occurred during armed conflict and the perpetrators were non-state actors, in Cambodia, forced marriage was enforced by the State, the government of the Khmer Rouge, and did not occur during armed conflict, as legally understood and defined.[16] Also, whereas the victims in Sierra Leone were 'bush wives' or primarily young women and girls, both men and women were harshly affected by the Khmer Rouge's marriage policy.[17] Thus, Cambodia reveals how forced marriage can be expansively interpreted and how the crime can apply in various circumstances. Ultimately, while the situation in Cambodia was different from Sierra Leone and Uganda, the control the perpetrators had over their victims was similar and illustrates the universal brutality of forced marriage.

Section I. refines the meaning of it by making distinctions between forced and arranged marriage. There is extensive overlap between these types of marriages but the differences are important to illustrate why forced marriage should be recognized as an international crime and arranged marriage should not. Section J. also explores the definition of forced marriage by noting the differences between forced marriage and sexual slavery. The contrasts are essential to demonstrate why forced marriage should be recognized as a crime against humanity. Otherwise, the criminalization of forced marriage will dissipate and remain enveloped under the rubric of sexual slavery, which is what the Trial Chambers initially ruled in Sierra Leone.[18] By noting the dissimilarities of both arranged marriage and sexual slavery compared to forced marriage, a comprehensively better definition can develop and will add greater depth to what the Appeals Chamber set out in *Brima and Others*.[19]

16 N. Jain, 'Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution', 6 *Journal of International Criminal Justice* (2008) 5, 1013, 1024, discusses the distinctions of forced marriage from other sex and gender-based crimes to elucidate the meaning of forced marriage.

17 B. A. Toy-Cronin, 'What is Forced Marriage? – Towards a Definition of Forced Marriage as a Crime Against Humanity', 19 *Columbia Journal of Gender & Law* (2010) 2, 539, 539-572, discusses that in order forced marriage to be recognized, it should be limited to the conferral of the status of the marriage and the ongoing effects of the victim. See also Frulli, *supra* note 7, 1037.

18 *Prosecutor v. Alex Tamba Brima and Others*, Judgment, SCSL-2004-16-T, 20 June 2007, 220, para. 713 [Prosecutor v. Brima and Others, Trial Chamber Judgment].

19 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 196 (in particular).

Section K. explains what *jus cogens* is and ties into how the recognition of forced marriage as a crime against humanity will enable the prohibition of forced marriage to become a *jus cogens* norm. Section L. provides an overview of customary international law and explains how forced marriage's inclusion will make significant inroads in its legal and statutory development. Section M. looks at slavery and how the prohibition against slavery became a *jus cogens* norm. Moreover, tying in slavery to forced marriage, and focusing on how the enslavement aspect creates the confined and deprived conditions for the victim, strengthens the argument that the criminalization of forced marriage should be a *jus cogens* norm. Section M. also looks at the evolution of rape from its initial status as an unspecified and unlabeled crime to its inclusion as a customary law. Rape was originally viewed as a vague crime and was not enumerated in any treaties, much like forced marriage is today. Thus, the jurisprudence of rape can serve as a successful prototype for forced marriage and show how the latter can jump out of the 'other inhumane acts' rubric to achieve full-fledged recognition as an international crime under customary law. By having the prohibition of forced marriage become a *jus cogens* norm and its criminalization be included in customary international law, the international community will commit to greater enforcement and greater attention to the victims' justice.

C. Scholarship on Forced Marriage

Overall, most of the literature asserts forced marriage should be a crime against humanity, but believes it should be contained in the 'other inhumane acts' category.[20] Scholars, such as Micaela Frulli, offer important insight in defining and describing the complexity of forced marriage.[21] However, despite such informed analysis, forced marriage needs to be more fully recognized for its multilayered nature and continual brutality.[22] Thus, it needs to be listed alongside rape, torture, and enslavement as an enumerated crime against humanity. Only in doing so will there be robust recognition for forced marriage to garner status as a *jus cogens* prohibition and become part of customary international law. Most importantly, it will help the victims by according them justice and

20 Frulli, *supra* note 7, 1036.

21 *Ibid.*, 1033-1042.

22 *Ibid.*, 1036; J. Gong-Gershowitz, 'Forced Marriage: A "New" Crime Against Humanity?', 8 *Northwestern University Journal of International Human Rights* (2009) 1, 53, 66: "Moreover, what distinguishes forced marriage in armed conflict from forced marriage in peacetime is not the absence of parental consent but rather the brutality of the violence and the scale of the crimes."

make significant progress in healing them and their local communities. The scholarship on forced marriage is varied in debate and reasoning. Scholars like Valerie Oosterveld acknowledge the multilayered complexity of gender-based crimes like forced marriage, which may include sexual and non-sexual aspects.[23] The sexual component has divided scholars on whether forced marriage should be included as an enumerated crime against humanity,[24] or whether it should be subsumed within the subcategory of sexual slavery.[25] The courts in Sierra Leone were also divided on this issue. The Trial Chamber found the prosecution's evidence of forced marriage proved elements of sexual slavery under Article 2 (g) of the *Rome Statute*.[26] Afterwards, the Appeals Chamber overturned the Trial Chamber's ruling and noted forced marriage was a distinct crime from sexual slavery and included it under the 'other inhumane acts' category of crimes against humanity.[27] The difference in opinions exemplifies the sharp debate concerning forced marriage.

One example that illustrates the differing opinions on forced marriage is sexual slavery. Some of the elements in forced marriage are akin to sexual slavery. Both sexual slavery and forced marriage contain an element in which the perpetrator forces an association over the victim and causes deprivation of the victim's physical liberty.[28] Also, a sexual act is required to prosecute and convict

23 V. Oosterveld, 'Lessons From the Special Court of Sierra Leone on the Prosecution of Gender-Based Crimes', 17 *American University Journal of Gender, Social Policy & the Law* (2009) 2, 407, 409. She discusses how gender-based crimes can serve as evidence of crimes against humanity, including seemingly gender-neutral crimes. *Ibid.*, 410 *et seq.*

24 Frulli, *supra* note 7, 1033-1042; Jain, *supra* note 16, esp. 1032.

25 Gong-Gershowitz, *supra* note 22, 54; K. Bélair, 'Unearthing the Customary Law Foundations of "Forced Marriages" During Sierra Leone's Civil War: The Possible Impact of International Criminal Law on Customary Marriage and Women's Rights in Post-Conflict Sierra Leone', 15 *Columbia Journal of Gender & Law* (2006) 3, 551, discussing the Special Court of Sierra Leone's decision to recognize force marriage as an international crime, but did not go as far to find sexual slavery violated a woman's sexual autonomy within a customary marriage.

26 *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 220, para. 713.

27 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64 *et seq.*, paras 197 *et seq*. See *Rome Statute*, Art. 7 (1) (k), *supra* note 5, 93.

28 ICC, *Elements of Crimes*, *supra* note 9, 8: Under sexual slavery, "[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty". See also *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64: "[F]orced marriage [...] compels a person by force, threat of force, or coercion to serve as a conjugal partner [...]."

a perpetrator for sexual slavery.[29] While a sexual act is not a requirement to criminalize forced marriage, it almost always happens.[30] Even though sex is not dispositive in forced marriage and should not be viewed through the prism of sexual slavery, some scholars believe otherwise. Jennifer Gong-Gershowitz fears placing forced marriage under the category of 'other inhumane acts' will have "the ironic effect of minimizing sexual violence and enslavement" because forced marriage might shield the perpetrator through the purported veneer of marriage since it is a legitimate social institution.[31] She argues forced marriage should be recognized explicitly as a particular form of sexual slavery.[32] Karine Bélair thinks that, while the Trial Chamber's decision in Sierra Leone was important in identifying forced marriage as a form of sexual slavery, they also did not go far enough.[33] She argues sexual slavery could take place in the framework of customary marriage, if and when a women's sexual autonomy is violated.[34] Despite their differences in legal analysis, Gong-Gershowitz and Bélair believe forced marriage should be framed under sexual slavery. In contrast, Patricia Viseur Sellers asserts forced marriage should neither be placed in the 'sexual slavery' or 'other inhumane acts' category.[35] Instead, Sellers argues forced marriage should be viewed as a crime of enslavement.[36]

Whereas Sellers examines the slavery component of forced marriage, Bridgette Toy-Cronin places emphasis on its *prima facie* elements.[37] Toy-Cronin thinks forced marriage should only be recognized if it is limited to the conferral of the status of marriage.[38] She believes crimes that occur as a result of forced

29 See ICC, *Elements of Crimes*, *supra* note 9, 8: "The perpetrator caused such person or persons to engage in one or more acts of a sexual nature."

30 J. Moore, 'In Africa, Justice for 'Bush Wives" (2008), available at http://csmonitor.com/World/Africa/2008/0610/p06s01-woaf.html (last visited 15 May 2014). Stephen Rapp, the chief prosecutor at the Special Court of Sierra Leone said, "[o]f course it [forced marriage] almost always involved sex, but it involved other things – an exclusive, essentially lifetime relationship under the control of a man, a demand that this individual [the wife] provide [...] household services, travel with the man, care for his needs, and everything else".

31 Gong-Gershowitz, *supra* note 22, 54.

32 *Ibid.*, 65.

33 Bélair, *supra* note 25, 606.

34 *Ibid.*

35 Viseur Sellers, 'Wartime Female Slavery', *supra* note 8, 135.

36 *Ibid.*

37 Toy-Cronin, *supra* note 17, 539-572.

38 *Ibid.*, 539.

marriage, such as slavery, rape, or torture should be prosecuted separately.[39] If not, Toy-Cronin fears the perpetrator's aim will be fulfilled since his or her criminal conduct will be hidden under the protective cloak of the term 'marriage'.[40]

Yet another scholar, Carmel O'Sullivan, believes the SCSL has achieved significant progress in recognizing forced marriage as a crime against humanity.[41] However, O'Sullivan noted the recognition of forced marriage remains limited in addressing the scope and gravity of the crime.[42] Furthermore, she argues forced marriage should be considered as a form of genocide since the act could be used as a method to exterminate a group.[43]

Neha Jain refines the definition by noting forced marriage is distinct from arranged marriage and sexual slavery.[44] His work is important because much of the debate over the inclusion of forced marriage as a crime against humanity stems from the overlap between forced marriage and sexual slavery. By distinguishing forced marriage from sexual slavery, the concept becomes unique making it easier for forced marriage to be recognized by the ICC and other current and future tribunals. For example, Micaela Frulli notes the inclusion of forced marriage can be tremendously influential in how potential forced claims in these cases are adjudicated before other criminal tribunals, such as the ICC, and can greatly contribute to international criminal law jurisprudence.[45]

To take forced marriage out of the 'other inhumane acts' category, the definition must be fleshed out to fully convey the scope and brutality of the act. According to the Appeals Chamber in the SCSL, "forced marriage involves a perpetrator compelling a person by force or threat of force, through words or conduct of the perpetrator, or those associated with him, into a forced conjugal association [...] resulting in great suffering, or serious physical or mental injury on the part of the victim".[46] The definition, which was first used by the Appeals Chamber, is a positive step in the jurisprudence of forced marriage. At the same time, the brief discussion in the Appeals Chamber decision also highlights the lacuna in international law. Thus, the Chamber's brief definition signifies

39 *Ibid.*, 578.

40 *Ibid.*

41 C. O'Sullivan, 'Dying for the Bonds of Marriage: Forced Marriages as a Weapon of Genocide', 22 *Hastings Women's Law Journal* (2011) 2, 271, discusses why forced marriage should be recognized as a method for genocide.

42 *Ibid.*, 271.

43 *Ibid.*, 271-272.

44 Jain, *supra* note 16, 1019-1020 & 1026-1027.

45 Frulli, *supra* note 7, 1033.

46 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.

the need for more specificity and distinction in its characterization of forced marriage, to add what the Appeals Chamber set out in the *Brima and Others* case.[47]

D. Forced Marriage as a Crime Against Humanity

According to the *Rome Statute*, a crime against humanity must contain the following elements:

> 1. The crimes are among the most serious crimes of concern to the international community as a whole.
> 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[48]

Although forced marriage has been recognized in case law from the SCSL as an 'other inhumane act' under 'crimes against humanity', it has not been explicitly codified in the *Rome Statute*.[49] Thus far, the SCSL has been the first and only international tribunal court which has recognized and prosecuted forced marriage as a crime against humanity.[50]

The way forced marriage is viewed affects how it is interpreted and applied under the *Rome Statute*.[51] Depending how forced marriage is interpreted under the *Rome Statute*, it could be viewed in various ways.[52] If forced marriage is viewed as a sexual crime, it could be construed as "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" under Article 7 (g).[53] For example, the Trial Chamber in Sierra Leone interpreted forced marriage as a predominantly sexual crime.[54] On the other hand, if forced marriage is not viewed as a predominantly

47 Frulli, *supra* note 7, 1033-1034.
48 ICC, *Elements of Crimes*, *supra* note 9, 5.
49 B. van Schaack & R. C. Slye, *International Criminal Law and its Enforcement: Cases and Materials*, 2nd ed. (2010), 426.
50 Frulli, *supra* note 7, 1034.
51 *Ibid.*
52 *Ibid.*, 1035.
53 *Rome Statute*, Art. 7 (1) (g), *supra* note 5, 93.
54 *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 217, para. 704.

sexual crime, it could be read as 'other inhumane acts' causing "great suffering, or serious injury to body or to mental or physical health" under Article 7 (k).[55]

In addition to the required elements needed to establish crimes against humanity, other conditions for 'other inhumane acts' include:

> 1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
> 2. Such act was of a character similar to any other act [...].
> 3. The perpetrator was aware of the factual circumstances that established the character of the act.[56]

The conduct must also be of comparable gravity to torture or rape, meaning it must cause serious mental or physical suffering or constitute a grave attack on human dignity.[57] The purpose of the 'other inhumane acts' provision was to serve as a residual, catch-all clause.[58] Treaty drafters were mindful that it was not possible to list and include every conceivable crime.[59] In fact, it was acknowledged that doing so restricts and limits the ability to prosecute, and therefore weaken the *Rome Statute*.[60] This makes it more difficult to prosecute the perpetrators for crimes that were initially unthinkable, which explains why the provision incorporates broad and inclusive language.

To date, examples of 'other inhumane acts' have included the plunder of Jewish property,[61] beatings and general inhumane treatment,[62] and sexual violence in the form of forced public nudity.[63] These examples demonstrate how the 'other inhumane acts' clause serves as an inclusive category for other crimes

55 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 198.

56 ICC, *Elements of Crimes*, *supra* note 9, 12.

57 *Prosecutor v. Clément Kayishema and Obed Rudzindana*, Judgment, ICTR 95-1-T, 21 May 1999, 60-62, paras 149-152.

58 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 198.

59 J. S. Pictet (ed.), *Commentary on the Geneva (I) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), 37, 54. See also *Prosecutor v. Tihomir Blaškić*, Judgment, IT-95-14-T, 3 March 2000, 80, para. 237 [Prosecutor v. Blaškić, Judgment].

60 Pictet (ed.), *supra* note 59, 54. See also *Prosecutor v. Blaškić*, Judgment, *supra* note 59, 80, para. 237.

61 M. Lippman, 'Crimes Against Humanity', 17 *Boston College Third World Law Journal* (1997) 2, 171, 201.

62 *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-T, 7 May 1997, 275, para. 730.

63 *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, 170, para. 697.

not specifically enumerated under 'crimes against humanity'. However, putting forced marriage under the 'other inhumane acts' box diminishes the severity of the crime, especially in contrast with the other crimes previously listed. Crimes such as beatings and forced public nudity are heinous and should be included under 'other inhumane acts'. However, forced marriage is a unique crime in terms of its combination of sexual and non-sexual factors. Because victims are forced into a conjugal union with their perpetrators or chosen spouses, they are vulnerable to being subjected to continuous physical, mental, and sexual abuse over a long duration of time.[64] The magnitude and duration of abuse and multilayered brutality under the veneer of 'marriage' illustrates why forced marriage should not be placed in the 'other inhumane acts' category.

In fact, such a classification fails to give this crime the recognition that it deserves. Indeed, this delays the criminalization of forced marriage from becoming a part of customary international law and will set it back from obtaining *jus cogens* status. For example, since the SCSL Appeals Chamber's ruling, neither the ICC nor other tribunal courts have subsequently criminalized forced marriage.[65] Moreover, when the ICC issued warrant arrests for Joseph Kony and high-ranking officers of the LRA, forced marriage was not listed among the charged crimes, despite widespread reports of pertinent cases in Uganda occurring during armed conflict.[66] Instances such as these have led to an effect, where the crime is set aside and not taken into account because it is not at the top of the prosecutorial agenda.

E. Forced Marriage During Armed Conflict

Forced marriage should be recognized as an international crime, whether or not it occurs during armed conflict. If forced marriage does not occur during armed conflict, then it should be prosecuted as a crime against humanity as long as it occurs during a widespread or systematic attack against a civilian population. However, if forced marriage occurs in armed conflict, the analysis will change because of the application of international humanitarian law. Common Article 3 (a) of the 1949 *Geneva Conventions* states that parties are prohibited from committing "violence to life and person, in particular murder

64 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 201.

65 Frulli, *supra* note 7, 1034.

66 *Situation in Uganda in the Case of the Prosecutor v. Joseph Kony and Others*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05 (Pre-Trial Chamber II), 27 September 2005, 12-19, para. 42 [Prosecutor v. Kony and Others, Warrant of Arrest].

of all kinds, mutilation, cruel treatment, and torture".[67] Common Article 3 (c) prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment".[68] Thus, while the *Geneva Conventions* do not make an explicit reference to forced marriage, it is arguably banned under the former because it can be classified as an attack on a civilian based on cruel treatment and an outrage on personal dignity. Furthermore, under Article 75 of *Protocol I to the Geneva Conventions*, acts committed against civilians, such as enforced prostitution, any form of indecent assault, and outrages upon personal dignity, are prohibited.[69]

Article 4 of *Protocol II to the Geneva Conventions* goes into greater detail. *Protocol II* bans "outrages of personal dignity, in particularly humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".[70] While the aforementioned provisions in the *Geneva Conventions* can be applied to forced marriage, *Protocol II* has wording with more direct application to forced marriage. Not only does *Protocol II* refer to and govern non-international armed conflict, but it is most explicit in outlining a ban on sexual assault. While forced marriage is not explicitly referenced, it could be applicable under the phrase "any form of indecent assault".[71] Although forced marriages can occur under international armed conflict, most if not all of the reported cases have occurred under internal hostilities. For example, in Sierra Leone and Uganda, the perpetrators of forced marriages were instigated by militia rebel groups within the country. In any case, the application of the *Geneva Conventions* and *Additional Protocols* under the analysis of forced marriage will not necessarily hinge on whether the conflict is international or domestic, but on whether forced marriage occurs during armed conflict.

If forced marriage does not occur during armed conflict, then, generally speaking, the *Geneva Conventions* do not apply. Since the *Geneva Conventions* would not apply, forced marriage would be framed as a crime against humanity

67 *Geneva Convention I*, Art. 3 (a), *supra* note 11, 32; *Geneva Convention II*, Art. 3 (a), *supra* note 11, 88; *Geneva Convention III*, Art. 3 (a), *supra* note 11, 138; *Geneva Convention IV*, Art. 3 (a), *supra* note 11, 290.

68 *Geneva Convention I*, Art. 3 (c), *supra* note 11, 34; *Geneva Convention II*, Art. 3 (c), *supra* note 11, 88; *Geneva Convention III*, Art. 3 (c), *supra* note 11, 138; *Geneva Convention IV*, Art. 3 (c), *supra* note 11, 290.

69 *Protocol I to the Geneva Conventions*, Art. 75 (2) (b), *supra* note 11, 37.

70 *Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, Art. 4 (2) (e), 1125 UNTS 609, 612 [Protocol II to the Geneva Conventions].

71 *Ibid.*

due to the severity and multilayered nature of the crime. While armed hostilities might increase the likelihood of forced marriage, such could occur at any time. No cultural gloss can excuse the violent nature of forced marriage. Victims must have ways to seek redress. Limiting forced marriage to being a crime exclusively under conditions of war will only narrow avenues for the victims to seek justice and provide a thicker shield for the perpetrators to get away with the act, particularly since it is cloaked with the status of 'marriage'. While more legal factors will be added to the analysis if forced marriages occur during armed conflict, it does not wipe away the severity of the crime if it occurs during peace time. Thus, the prohibition of forced marriage should be recognized as a *jus cogens* norm and become part of customary international law, whether it is taking place during armed conflict or in times of peace.[72]

F. Sierra Leone

In March 1991, a band of rebels supported by Liberian President Charles Taylor invaded Sierra Leone.[73] After years of fighting between the government and rebel groups, such as the AFRC and RUF, a peace agreement was signed in Abuja in May 2001 and led to a significant reduction in hostilities.[74] On 18 January 2002, President Kabbah officially declared that the civil war in Sierra Leone was over.[75]

In 2003, the SCSL was established.[76] The Special Court was created by an agreement between the United Nations and the government of Sierra Leone.[77] On 20 June 2007, the Court issued its first verdicts in the trial of the AFRC

72 *Universal Declaration of Human Rights*, Art. 16 (2), GA Res. 217 (III), UN Doc A/RES/217, 10 December 1948 [Universal Declaration of Human Rights]: "Marriage shall be entered into only with the free and full consent of the intending spouses." See also *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 10 December 1964, Art. 1 (1), 521 UNTS 231, 234: "No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law."

73 M. Kaldor & J. Vincent, 'Evaluation of UNDP Assistance to Conflict-Affected Countries: Case Study Sierra Leone' (2006), available at http://web.undp.org/evaluation/documents/thematic/conflict/SierraLeone.pdf (last visited 31 May 2014), 6.

74 *Ibid.*, 6-8.

75 *Ibid.*, 8.

76 *Ibid.*

77 *Statute of the Special Court for Sierra Leone*, SC Res. 1315, UN Doc S/RES/1315 (2000), 14 August 2000.

accused Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, all of whom were found guilty on 11 of 14 counts of war crimes and crimes against humanity.[78] The Trial Chamber did not find Brima, Kamara, and Kanu guilty of forced marriage as a crime against humanity.[79] The Trial Chamber found forced marriage to be completely subsumed by sexual slavery, a crime already listed as a crime against humanity under the *Rome Statute*.[80]

On 22 February 2008, the Appeals Chamber found Brima, Kamara, and Kanu guilty of forced marriage as a crime against humanity under 'other inhumane acts'.[81] This is in contrast to the Trial Chamber, which found forced marriage was subsumed by the crime of sexual slavery and that there was no lacuna in the law which would necessitate a seperate crime.[82] The Trial Chamber reasoned that the victims could not leave due to fear of persecution.[83] Thus, the captors had full control over the victims as their 'wives' and therefore had the intent to exercise their ownership rights over them.[84]

The Appeals Chamber disputed the Trial Chamber's argument, stating the perpetrators' intent was not to exercise ownership over the victims as their 'wives', but to impose a forced conjugal associations, and therefore forced marriage was not primarily a sexual-based crime.[85] Examples the Appeals Chamber mentioned as conjugal duties include regular sexual intercourse, forced domestic labor (e.g. cleaning and cooking for the 'husband'), and forced pregnancy.[86] Although the Trial Chamber noted the victim could be passed on or given to another rebel at the discretion of the perpetrator, the Appeals Chamber remarked that unlike sexual slavery, forced marriage implies an exclusive relationship between the 'husband' and 'wife', and not one where the victim could be easily discarded to another rebel. In fact, the 'wife' could suffer harsh punishment if she broke away from this type of arrangement.[87] Hence, the Appeals Chamber was persuaded by the prosecution's argument that forced marriage is a crime against humanity

78 *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18.
79 *Ibid.*, 220, para. 713.
80 *Ibid.*
81 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 66, para. 202.
82 *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 220, para. 713.
83 *Ibid.*, 218-219, para. 709.
84 *Ibid.*
85 *Ibid.*, 62, para. 190.
86 *Ibid.*
87 *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 219-220, para. 711; *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 62, para. 195.

and is distinct from sexual slavery.[88] The case set a historic precedent in gender-based crimes by holding forced marriage as a distinct category of crimes against humanity under international criminal law.[89] Nevertheless, judicial progress is further needed so forced marriage is specified as an enumerated crime rather than an 'other inhumane act'.

G. Uganda

In the late 1980s, a militia group, the LRA, led by Joseph Kony, was formed to fight against Ugandan President Yoweri Museveni's forces, the National Resistance Army (NRA).[90] Since the 1990s, the LRA has systematically targeted and abducted females with the intent to forcibly marry them to commanders and fighters.[91] Although the ICC issued a warrant for the arrest of Joseph Kony and other top-ranking military officers from the LRA in May 2005, Kony remains at large.[92] Many of the criminal acts committed during forced marriage, which were prevalent in Sierra Leone, were also widespread in Uganda.

However, Uganda has not taken affirmative steps in recognizing forced marriage as a crime against humanity. In 2000, Uganda proposed the *Amnesty Act*, which would allow immunity for rebel soldiers in exchange for abandoning armed struggle against the State.[93] This immunity would deny the opportunity for the victims, families, and communities to address their grievances and see the perpetrators punished for their crimes, including forced marriage.

The ICC is not tackling forced marriages either. Of the numerous crimes committed in northern Uganda, only three crimes have been charged with respect to gender and sexual violence: sexual enslavement, rape under 'crimes against humanity', and rape under war crimes.[94] Compared to the robust criminalization of international crimes by the SCSL, the ICC has not made as much progress in the jurisprudence and prosecution of international criminal law.[95] In addition, because forced marriage is not enumerated specifically as a

88 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 62, para. 195.
89 Jain, *supra* note 16, 1013. See also Frulli, *supra* note 7, 1034.
90 Carlson & Mazurana, *supra* note 14, 12.
91 *Ibid.*, 14 *et seq.*
92 *Prosecutor v. Kony and Others*, Warrant of Arrest, *supra* note 66. See also Carlson & Mazurana, *supra* note 14, 12.
93 Carlson & Mazurana, *supra* note 14, 7.
94 *Prosecutor v. Kony and Others*, Warrant of Arrest, *supra* note 66, 12-19, para. 42. See also Carlson & Mazurana, *supra* note 14, 44.
95 Carlson & Mazurana, *supra* note 14, 6.

crime, it makes it more difficult for the ICC to indict senior leaders of the LRA for committing such act. Despite the SCSL's criminalization of forced marriage, neither the ICC nor Uganda have taken any steps to codify it as a crime, let alone recognize it as a crime against humanity. Despite the similarity in circumstances between Sierra Leone and Uganda, the lack of will from Uganda and the ICC demonstrates that forced marriage is failing to evolve in terms of its proper recognition as a crime against humanity.

Despite community outreach efforts by civil society groups and NGOs, the lack of effort in criminalizing forced marriage at the ICC for Uganda is hindering the victims' effort to reintegrate back into their homes and communities.[96] The deficiency of recognition by the ICC is also reflected in statistics in which Uganda is ranked 14th for early and forced marriage prevalence rates in the world with 46 percent of women being married before 18.[97] Oftentimes, victims become pregnant and are forced to carry their pregnancies to term.[98] When they return to their villages, their communities would shun them.[99] The victims were not only spurned because of theirs marriages to the perpetrators, but also out of the community's fears that the perpetrators would return and seek out their wives and children.[100] While there is no denying that discrimination exists among victims of sexual crimes, such as rape and sexual slavery, the stigma for victims of forced marriage is arguably greater because of the victim's marriage to the perpetrator.[101] The consequences of forced marriage are incredibly difficult despite its variance across different circumstances and regions.

H. Cambodia

Forced marriages in Sierra Leone and Uganda were similar in terms of time frame, territory, and abuse committed by non-state actors. In contrast, forced marriage was applied differently during the Khmer Rouge's regime in Cambodia.[102] From 17 April 1975 to 7 January 1979, the Khmer Rouge, a radical group of Maoists led by Pol Pot, took over Cambodia and proceeded to strip

96 *Ibid.*, 13.
97 United Nations Population Fund, *Marrying Too Young: End Child Marriage* (2012), 74.
98 Carlson & Mazurana, *supra* note 14, 24.
99 *Ibid.*, 26.
100 *Ibid.*, 41.
101 *Ibid.*
102 Jain, *supra* note 16, 1024-1026.

all aspects of Cambodian culture and society down to its core.[103] Mass purges and killings led to 1.7 million estimated dead.[104] While extensive persecution occurred, approximately 400,000 Cambodians were forced into marriage.[105]

Forced marriages in Cambodia were implemented differently than in Sierra Leone. In Sierra Leone, forced marriage was brought upon by the policies of the militia and rebel groups who encouraged their soldiers to force young women into marriage as their reward for fighting in combat.[106] Thus, it was not the government of Sierra Leone that imposed this policy, but it was enforced by rebel militia groups, where active hostilities were taking place.[107] In contrast, forced marriage was imposed by the Khmer Rouge, who represented the State of Cambodia, otherwise known at that time as Democratic Kampuchea.[108]

Also, the implementation of forced marriage in Cambodia was different than in Sierra Leone. First, forced marriage in Sierra Leone mostly affected women and young girls in the country, and occurred more as a gender-related crime.[109] Male rebel soldiers would force young women into marrying them.[110] Thus, females were primarily impacted as the victims.[111] However, in Cambodia, both men and women were coerced into marriage through random selection by

103 *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003, Preamble, 2329 UNTS 117, 118 [ECCC Agreement]. See also B. Kiernan, 'External and Indigenous Sources of Khmer Rouge Ideology', in O. A. Westad & S. Quinn-Judge (eds), *The Third Indochina War: Conflict Between China, Vietnam, and Cambodia*, 1972-79 (2006), 187, 189-190.

104 K. M. Klein, 'Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia', 4 *Northwestern University Journal of International Human Rights* (2006) 3, 549, 549. The author discusses the legal problems with the ECCC due to the UN's agreement with the government of Cambodia to exercise local and international jurisdiction. *Ibid.*, 549-566.

105 *Prosecutor v. Nuon Chea and Others*, Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECCC-OCIJ, 15 July 2009, 6, para. 9 [Prosecutor v. Nuon Chea and Others, Second Request Concerning Forced Marriage].

106 Moore, *supra* note 30, 1.

107 *Ibid.*

108 Jain, *supra* note 16, 1024-1025.

109 Moore, *supra* note 30, 1.

110 *Ibid.*

111 *Ibid.*

the Khmer Rouge.[112] If the parties voiced dissent, they risked death.[113] Many Cambodians were affected by forced marriage.[114] In some instances, there were reports of Buddhist monks who were forced to disavow their celibacy, disrobe, and engage in sexual acts, all under the auspices of a forced marriage.[115]

In 2002, an agreement was reached between the United Nations and the government of Cambodia to establish a criminal tribunal to prosecute senior leaders of the Khmer Rouge for committing serious crimes based on Cambodian and international law.[116] Despite widespread and systematic acts of forced marriage committed during the Khmer Rouge's reign, this issue was not raised as a relevant crime until the Civil Party made a request to the Office of the Co-Investigating Judges to look into allegations.[117] In the Order, the Civil Party states:

> "Forced marriages were clearly carried out as a matter of state policy. There were used statewide as a measure to weaken and attack Cambodian families, to produce more children to join 'Angkar's' revolution, and to control sexuality and reproductive power. There were approximately 400.000 men and women married under the Khmer Rouge regime under the above-mentioned circumstances. Hence, the crimes were committed as part of a widespread and systematic attack against the civilian population."[118]

The OCIJ granted the Civil Party's Request after receiving a Supplementary Submission by the OCP, and forced marriage was eventually included as an indicted crime against the Defendants in Case 002.[119] The OCP focused on the coercive nature of forced marriage in addition to the lack of consent, noting that

112 Toy-Cronin, *supra* note 17, 541.

113 B. Ye, 'Forced Marriages as Mirrors of Cambodian Conflict Transformation', 23 *Peace Review* (2011) 4, 469, 469.

114 Toy-Cronin, *supra* note 17, 545.

115 L. Crothers, 'In Closing Statements, Horrors of Khmer Rouge Regime Laid Bare', *The Cambodia Daily* (17 October 2013), available at http://cambodiadaily.com/archive/in-closing-statements-horrors-of-khmer-rouge-regime-laid-bare-45304/ (last visited 15 May 2014).

116 *ECCC Agreement*, *supra* note 103.

117 *Prosecutor v. Nuon Chea and Others*, Second Request Concerning Forced Marriage, *supra* note 105, 3-4, para. 3.

118 *Ibid.*, 6, para. 9.

119 *Prosecutor v. Nuon Chea and Others*, Order on Request for Investigative Action concerning Forced Marriages and Forced Sexual Relations, 002/19-09-2007-ECCC-OCIJ, 18

> "[i]n the majority of cases [...] death threats were made, violence was used and people were even executed if they refused to marry. Many [...] state that they were too afraid to articulate their objection. [...] In some cases one party could request authorization to marry a person [...], but this does not detract from the element of coercion or force placed on the person [...]".[120]

Although forced marriage occurred under different circumstances in Cambodia, the facts indicate that it fits within the legal criteria and illustrates that the ECCC can make an effective argument against the accused for committing forced marriage. Regardless, forced marriage is still only prohibited as an other inhumane act at the ECCC.[121] Similar to the SCSL, developing the jurisprudence for forced marriage will remain limited until it is specified as an enumerated crime against humanity. Thus far, closing arguments in Phase One of Case 002 have completed with verdicts expected to be made some time in 2014 concerning forced marriage and other international-based crimes.[122]

I. Forced Marriage Is Distinct From Arranged Marriage

The considerable overlap between forced marriage and arranged marriage can create initial confusion. Forced marriage has been construed as an international crime that should be completely condemned by the international community, while arranged marriage is a custom that has been traditionally exercised for many centuries by many countries throughout the world and remains a widely practiced ritual. Both forms of marriages violate human rights to a certain degree, but crucial differences explain why forced marriage should be a crime against humanity and arranged marriage should not.

December 2009, 3 & 6, paras 2 & 17-18; *Prosecutor v. Nuon Chea and Others*, Closing Order, 002/19-09-2007-ECCC-OCIJ, 15 September 2010, 354-356, paras 1442-1447 [Prosecutor v. Chea and Others, Closing Order].

120 *Prosecutor v. Chea and Others*, Closing Order, *supra* note 119, 355-356, para. 1447.

121 *Ibid.*, 354, para. 1441.

122 *Prosecutor v. Nuon Chea and Others*, Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 002-19-09-2007-ECCC/TC, 26 April 2013, 70, dispositive section. See also L. Crothers, 'As Trial Ends, KR Defendants Defiant to the Very Last', *The Cambodia Daily* (1 November 2013), available at http://cambodiadaily.com/featured-stories/as-trial-ends-kr-defendants-defiant-to-the-very-last-46446/ (last visited 15 May 2014).

Consent is an absolute and essential right within the context of marriage. Article 16 (2) of the *Universal Declaration of Human Rights* reads, "[m]arriage shall be entered into only with the free and full consent of the intending spouses".[123] Consent is also an essential element to constitute a valid marriage under Article 23 of the *International Covenant on Civil and Political Rights*[124] and Article 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women*.[125] Furthermore, the then UN Secretary-General Kofi Annan, in his 2006 study on violence against women, defined forced marriage as one that "lack[s] the free and valid consent of at least one of the parties".[126] Since the lack of consent is an important element in defining forced marriage, it is crucial to show how it in does not meet the threshold necessary to elevate arranged marriage as a crime against humanity.

While the level of consent is diminished in both kinds of marriage, consent in arranged marriages still exists from the main parties, albeit in a reduced capacity. Potential oppression can undoubtedly occur in arranged marriages. In this type of marriage, the spousal parties may be entirely subordinate to their families' desires for their son or daughter to partake in a binding arranged marriage.[127] There might even be manipulation or emotional blackmail at play, with threats of abandonment or family excommunication if the son or daughter does not concede to the families' wishes.[128] However, even though an arranged marriage has elements that violate existing norms of human rights, the fiduciary aspect, in which parents act on behalf of their son or daughter, still lends a certain degree of consent.[129] It is an indirect form of consent based on the fiduciary duty of the families, but one that nonetheless exists. In contrast, there is absolutely no real consent in a forced marriage.[130]

Furthermore, arranged marriages are often found in the context of a private arrangement regarding the union of two families. It is a private act, which concerns a specific union that affects two individuals. In contrast, forced

123 *Universal Declaration of Human Rights*, Art. 16 (2), *supra* note 72.
124 *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 23 (3), 999 UNTS 171, 179.
125 *Convention on the Elimination of All Forms of Discrimination Against Women*, 3 September 1981, Art. 16, 1249 UNTS 13, 20.
126 UN General Assembly, *In Depth Study on all Forms of Violence Against Women: Report of the Secretary-General*, UN Doc A/16/122/Add.1, 6 July 2006, 40, para. 122.
127 Jain, *supra* note 16, 1028.
128 *Ibid.*
129 *Ibid.*
130 *Ibid.*

marriage can be a part of a widespread or systematic attack upon a civilian population.[131] Such possibility must have been known or intended by the perpetrator.[132] Thus, arranged marriage relates more to a private act between two specific individuals. In contrast, forced marriage is an institutionalized policy either created by the State, organizations, or groups that affect a wide swath of the civilian population, thus spilling out into the public sphere.

J. Forced Marriage Is not Simply Sexual Slavery

The Trial Chamber in Sierra Leone dismissed the prosecution's argument that forced marriage should be a crime against humanity under 'other inhumane acts' of Article 7 (1) (k).[133] Forced marriage was rejected as such because the evidence led in support of 'other inhumane' acts did not establish any offense distinct from sexual slavery.[134] According to the *Rome Statute*, sexual slavery under 'crimes against humanity' is when:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
> 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
> 3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
> 4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[135]

At first blush, some of the elements listed in sexual slavery seem to strongly overlap with the definition of forced marriage.[136] Like sexual slavery, forced marriage involves the use of coercion or force to get the victim into a

131 *Ibid.*
132 *Ibid.*
133 *Prosecutor v. Brima and Others*, Trial Chamber Judgment, *supra* note 18, 220, 713.
134 *Ibid.*
135 ICC, *Elements of Crimes*, *supra* note 9, 8.
136 Jain, *supra* note 16, 1029.

relationship with the perpetrator.[137] However, the Appeals Chamber found that forced marriage is distinct from sexual slavery.[138] Sexual slavery entails ownership of a person to engage in acts that are predominantly sexual in nature. In contrast, while forced marriage may include forms of sexual violence such as rape and enslavement, these were not dispositive as to whether forced marriages occurred or not.[139] Also, while forced marriage and sexual slavery have ownership of the individual in which the person's liberty is severely deprived, the method of acquiring possession of the victim is different.[140] In sexual slavery, ownership is obtained through "purchasing, selling, lending or bartering" the person.[141] This element is dispositive in determining whether or not the slavery component of sexual slavery is fulfilled. In forced marriage, the ownership of a person through purchase, sale, or barter is not a required factor.[142] Instead, the perpetrator acquires ownership of the victim through the coercive threat of marriage.[143]

Nevertheless, the distinction between forced marriages and sexual slavery has caused considerable debate among the international courts and scholars as to whether there is a clear line between these crimes or whether forced marriage is subsumed within the category of sexual slavery. For example, Jennifer Gong-Gershowitz argues forced marriage should not be a separate category and should be placed within sexual slavery.[144] In fact, Gong-Gershowitz notes physical and sexual violence were the dominant features of crimes committed against young girls in Sierra Leone, not conjugal duties such as cooking and cleaning.[145] She voices concern that recognizing forced marriage will minimize the criminality of sexual violence and enslavement.[146] Gong-Gershowitz's concern is valid, in the sense that critics fear forced marriage might shield the perpetrators from being convicted of sexually violent crimes because their conduct occurred under the veneer of marriage.

137 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 61 & 64, paras 189 & 195.
138 *Ibid.*, 64, paras 195-196.
139 Jain, *supra* note 16, 1019.
140 ICC, *Elements of Crimes*, *supra* note 9, 8; *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.
141 ICC, *Elements of Crimes*, *supra* note 9, 8.
142 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.
143 *Ibid.*
144 Gong-Gershowitz, *supra* note 22, 76.
145 *Ibid.*, 68.
146 *Ibid.*, 54.

However, forced marriage is a multilayered act and may entail both sexual and non-sexual elements, such as domestic servitude and conjugal duties, which are associated with marriage. Also, the public's perception of the victim in the marriage is significant. Whatever circumstances that fell upon the victim to marry the perpetrator, there is a prejudice that is associated with the victim because he or she is *married*. A bias exists because in essence, by being a part of the marriage, however sham or coerced it may be, the victim carries the burden of the institution of marriage on his or her shoulders. Thus, society is going to look at a married individual differently than a sexual slave.

While victims of sexual slavery or rape encounter discrimination due to the stigma associated with sexual violation, communities can still view the victim with more sympathy.[147] They can separate the violent acts of the perpetrator from the victim, who does not have a personal relationship with the perpetrator. Hence, if the victim was either engaged in an isolated incident with the perpetrator or enslaved by the perpetrator for chattel or sexual purposes, then communities can easily distinguish the victim from the perpetrator. However, a forced marriage connotes an exclusive conjugal union between the perpetrator and the victim, regardless of how the marriage began under coerced and violent circumstances.[148] Victims are subjugated to the perpetrators' violent whims and conjugal needs over a potentially long period of time. Thus, the longer the victim is involved with the perpetrator, the more intimately the victim is tied with the perpetrator, creating difficulties for communities to separate the victim from the perpetrator. Hence, it creates the unfortunate perception that the victim is collaborating with the enemy.[149]

K. *Jus Cogens*

Under Article 53 *Vienna Convention of the Law of Treaties*, *jus cogens* is

> "a preemptory norm of general international law [and] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and

147 Carlson & Mazurana, *supra* note 14, 41.
148 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.
149 Carlson & Mazurana, *supra* note 14, 41.

> which can be modified only by a subsequent norm of general international law having the same character".[150]

Thus, *jus cogens* is a mandatory norm of general international law from which no nation may exempt themselves of responsibility.[151] No treaty or domestic law may deviate from a *jus cogens* norm unless it is amended by a subsequent norm of the same character.[152] Modern examples of *jus cogens* prohibitions include genocide, piracy, slavery, and torture.[153] Thus, *jus cogens* can take a norm rooted in moral principle and transform a norm by giving it compelling universality, one which the international community has to value and protect.[154]

Currently, there is no consensus as to how *jus cogens* is created.[155] Some scholars believe *United Nations Conventions*, scholarship opinions, and moral principles provide evidence of the existence of certain *jus cogens* norms.[156] Other scholars argue international treaties are required for *jus cogens* to come into existence.[157] While scholars are divided on how a *jus cogens* is developed, its transformative effect in turning a compelling principle into international law carries great weight. In fact, the enforcement of *jus cogens* can surpass treaties,

150 *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 53, 1155 UNTS 331, 344.

151 B. A. Garner (ed.), *Black's Law Dictionary*, 9th ed. (2009), 937.

152 *Report of the International Law Commission on the Work of Its Eighteenth Session*, Yearbook of the International Law Commission (1966), Vol. II, 24.

153 See, e.g., D. Shelton, 'International Law and 'Relative Normativity", in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 141, 153-154. See also P. Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape', 34 *Case Western Reserve Journal of International Law* (2002) 3, 287 [Viseur Sellers, Sexual Violence and Peremptory Norms], discussing why rape is not a *jus cogens*, despite increased recognition and enforcement as an international crime.

154 See generally G. A. Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society', 28 *Virginia Journal of International Law* (1988) 3, 585, discussing how *jus cogens* is formed in international law. The author also discusses the conceptual limitations of *jus cogens*.

155 E. A. Reimels, 'Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty – The U.S. Wants to Play the Human Rights Game, but Only if it Makes the Rules', 15 *Emory International Law Review* (2001) 1, 303, 332, discusses *jus cogens* and its role on international treaty law pertaining to juvenile death penalty.

156 D. Adams, 'The Prohibition of Widespread Rape as a Jus Cogens', 6 *San Diego International Law Journal* (2005) 2, 357, 361 (note 20) with further references. The article discusses how widespread rape should become a *jus cogens*. *Ibid.*, 357-398.

157 *Ibid.*, 361 (note 20) with further references.

leading to more widespread enforcement of crimes such as slavery and piracy. Thus, transforming forced marriage into a *jus cogens* prohibition will do much in spreading of its recognition as a monstrous act and will lead to greater enforcement against it as an international crime.

L. Customary International Law

Customary international law is the widespread practice of States derived from a sense of legal obligation, even in the absence of official legal documents or treaties.[158] Customary international law is a guide as to how States should conduct and operate themselves in the realm of international relations.[159] Customary international law requires evidence of two components, namely State practice and *opinio juris*.[160] *Opinio juris* can be found in resolutions of international organizations, leading scholarly writings on international law, UN practice, and treaty law.[161] In addition, the sources for customary international law can include diplomatic relations between States, incidents between States, the practice of international organizations or agencies, State laws, decisions of State courts, and State military or administrative practices.[162]

Forced marriage is recognized as prohibited by law in many States, indicating a widespread practice among the international community. For example, the criminal codes of Afghanistan, Austria, Ghana, Norway, and Serbia criminalize forced marriages.[163] Other countries such as Algeria, Belarus, Canada, Colombia, Estonia, Finland, Germany, Guatemala, Israel, Italy, Lithuania, Mauritius, Moldova, and the United Kingdom have enacted laws specifying that an act of forced marriage may be subject to criminal proceedings for other related crimes, such as human trafficking, sexual exploitation, abduction,

158 See, e.g., L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (1979), 33.

159 A. Y. Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law', 39 *Virginia Journal of International Law* (1999) 2, 303, 311. The article discusses slavery and its evolution in customary international law. *Ibid.*, 303-352.

160 See, e.g., A. Kaczorowska, *Public International Law*, 4th ed. (2010), 35; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 24-27.

161 See, e.g., J. Klabbers, *International Law* (2013), 29.

162 See, e.g., A. Pellet, 'Article 38', in A. Zimmermann *et al.* (eds), *The Statute of the International Criminal Court of Justice: A Commentary*, 2nd ed. (2012), 731, 814, para. 217; T. Treves, 'Customary International Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. II (2012), 937, 942 & 947, paras 23 & 50 (for example).

163 Jain, *supra* note 16, 1027.

prostitution, and rape.[164] Thus, the widespread practice of criminalizing forced marriage indicates the positive legal progression in its inclusion as part of customary international law. Yet, while States have made strides in criminalizing forced marriage, there is still a lacuna in international law in this regard. What can really establish forced marriage in becoming a definitive part of customary international law is for it to be included under a distinct, enumerated category as a crime against humanity. Although there remain obstacles for forced marriage to be listed as a crime against humanity, the legal development of rape in its inclusion as customary international law gives insight as to how forced marriage can be recognized as a crime against humanity.

M. Forced Marriage, Slavery, and Rape

Forced marriage, with its multilayered acts of brutality and the continuous state of domestic and sexual slavery, coercion, and abuse all committed under the 'legitimacy' of marriage creates great physical and mental suffering for the victim.[165] Furthermore, the perception of the individual's marriage to the perpetrator, regardless of the subjugation into a conjugal union, creates prejudice toward the victim.[166] The victim is intimately associated with the perpetrator over a long duration of time, which leads to discrimination toward the victim upon return to the victims' families, homes, and communities.[167] The heinous conduct of forced marriage makes it necessary to recognize it as a crime against humanity.

Due to its similarity to slavery, forced marriage should be recognized as a crime against humanity and should also be included in customary international law. Slavery, as defined in the 1926 *Slavery Convention*, "is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[168] Moreover, the *Rome Statute* defines enslavement as a crime against humanity under Article 7 (1) (c) and Article 7 (2) (c) as such:

> "The exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power

164 *Ibid.* See also Human Rights Council, *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, UN Doc A/HRC/4/23, 24 January 2007, 9, para. 20.

165 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, 195.

166 Carlson & Mazurana, *supra* note 14, 26.

167 *Ibid.*, 26.

168 *Slavery Convention*, 25 September 1926, Art. 1 (1), 60 LNTS 253, 263.

> in the course of trafficking in persons, in particular women and children."[169]

The definition of slavery is similarly aligned with the definition of forced marriage. Forced marriage

> "involves a perpetrator compelling a person by force or threat of force, through [...] words or conduct of the perpetrator, or [anyone] associated with him, into a forced conjugal association [...] resulting in great suffering [...] or serious physical or mental injury on the part of the victim".[170]

The act of compelling a person by force into a forced conjugal association is similar to the idea of exercising powers attaching the right of ownership over a person. By coercing a person into marriage, the perpetrator is essentially exercising ownership over the victim. Thus, slavery and forced marriage share an inherent commonality.

Slavery was one of the first international crimes to achieve *jus cogens* status.[171] From the early 1800s onwards, more than seventy-five multilateral and bilateral conventions were signed and ratified to ban slavery and slave trade.[172] However, the prohibition of slavery was not formally codified on a multilateral level until the 1926 *Slavery Convention* through the League of Nations.[173] Slavery has all but disappeared in the twentieth century, and that may well have made it possible for States to recognize the application of the theory of universal jurisdiction (to prosecute slave traders) to what has heretofore been essentially universally condemned.[174] Thus, the history of treaties and customary State practice demonstrates how slavery has evolved from a domestic crime into a *jus cogens* norm.

169 *Rome Statute*, Art. 7 (1) (c) & (2) (c), *supra* note 5, 93-94.

170 *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 64, para. 195.

171 A. T. Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', 49 *Virginia Journal of International Law* (2009) 4, 789, 799.

172 *Ibid.*, 799-800.

173 *Ibid.*, 800.

174 M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* (2001) 1, 81, 112-115 (for example). The article generally discusses universal jurisdiction and how it is applied under *jus cogens* norms. *Ibid.*, 81-162.

Whereas forced marriage contains certain aspects of slavery, rape is not a required factor. Although rape can certainly occur within forced marriage, it is not dispositive to determine its existence. It is significant to note that while rape can be prosecuted as a war crime or as a crime against humanity committed on a widespread and systematic scale, it can also be prosecuted as a one-time act. In contrast, forced marriage often enables the perpetrators to continually force sexual and violent acts on their victims over a long duration of time because both parties are under the auspices of marriage. Thus, if rape can be prohibited as an international crime even if it only occurred once, then forced marriage should be an enumerated crime against humanity due to the continuous act and long duration of involvement the victim has with the perpetrator.

Unlike slavery, rape's progression as an international crime was more of a modern phenomenon. Historically, rape was used as an instrument of policy to inflict suffering upon a civilian population, particularly women.[175] During Second World War, Nazi and Japanese practices of forced prostitution and rape on a large scale became the most egregious examples of such policies.[176] After Second World War, despite the inclusion in the *Fourth Geneva Convention* and the *Additional Protocols*,[177] rape was not listed among the grave breaches subject to universal jurisdiction.[178] It was not until the widespread acts of rape in the former Yugoslavia during the 1990s that progress was made in recognizing rape as a prohibition under customary international law.[179] In 1998, the ICC included rape as a crime against humanity under the *Rome Statute*.[180] Rape is also considered of high importance as a prosecutorial strategy of the Office of the Prosecutor (OTP).[181] The eventual recognition of rape as a crime against humanity illustrates how much rape has evolved from a private crime prosecuted under domestic law to its vaulted position as an international crime. Thus, the

175 T. Meron, 'Rape as a Crime Under International Humanitarian Law', 87 *American Journal of International Law* (1993) 3, 424, 425.

176 *Ibid.*

177 *Geneva Convention IV*, Art. 27, *supra* note 11, 306; *Protocol I to the Geneva Conventions*, Art. 76 (1), *supra* note 11, 38; *Protocol II to the Geneva Conventions*, Art. 4 (2) (e), *supra* note 70, 612.

178 *Geneva Convention IV*, Art. 147, *supra* note 11, 388. See also Meron, *supra* note 175, 426.

179 Meron, *supra* note 175, 425-427.

180 *Rome Statute*, Art. 7 (1) (g), *supra* note 5, 93.

181 H. N. Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals', 12 *Human Rights Review* (2011) 1, 109, 109. The article compares the prosecution of rape between the ICTY and the ICTR and argues while the ICTY has shown a willingness to place rape of high importance to prosecute, the ICTR has not been as successful. *Ibid.*, 109-132.

inclusion of rape under the *Rome Statute* as a crime against humanity demonstrates how the prohibition of rape has progressed into customary international law.

Nevertheless, critics who assert forced marriage should not be recognized as a crime against humanity place too much emphasis on the sexual factor of it and do not give sufficient attention to the confined aspects of slavery in forced marriage. Also, despite the positive development that has been made in rape's inclusion as a crime under customary international law, rape arguably still is not recognized as a *jus cogens* prohibition.[182] If the slow inclusion of rape as an international crime is any indication, focusing more on the sexual component of forced marriage will likely delay the process for the prohibition of the latter to become a *jus cogens* norm. On the other hand, the criminalization of slavery has always been recognized as a *jus cogens* norm alongside piracy. If forced marriage can be posited under the framework of slavery as opposed to rape, sexual slavery, or another form of a sexual crime, then a stronger and more compelling argument can be made for the prohibition of forced marriage to be recognized as a *jus cogens* norm.

In the end, what makes forced marriage dispositive as a crime against humanity and as a *jus cogens* prohibition is not necessarily rape or a sexual act, but based on the deprived liberties and confined nature of enslavement. It is through this lens that forced marriage can to become a *jus cogens* prohibition and increase its legal recognition as an international crime. The criminalization of forced marriage will enable the courts to prosecute and convict the perpetrators. As a result, justice will be accorded to the victims, the stigma of forced marriage can be lifted from their shoulders, and hopefully communities will be better motivated to help reintegrate the victims back into society.

N. Conclusion

Putting forced marriage under the rubric of 'other inhumane acts' of crimes against humanity is not sufficient. In fact, while the SCSL established a courageous precedent in recognizing forced marriage as a crime against humanity, labeling the crime as an 'other inhumane act' has allowed forced marriage to remain in greater obscurity compared to other international crimes. In fact, even though the ICC has issued arrest warrants for Ugandan warlord Joseph Kony and his cronies, none of them have been prosecuted for forced marriage, despite widespread reports.[183]

182 Viseur Sellers, 'Sexual Violence and Peremptory Norms', *supra* note 153, 289.

183 *Prosecutor v. Kony and Others*, Warrant of Arrest, *supra* note 66, para. 42.

To elevate forced marriage as an international crime, it must be labeled as such and recognized in the *Rome Statute* as a distinct enumerated category under 'crimes against humanity'. Furthermore, it should also become a *jus cogens* prohibition. It is through these means that a ban on forced marriage will become part of customary international law and close the current lacuna under international criminal law. Thus, the criminalization of forced marriage will have widespread implications for the victims, such as Fatmata Jalloh. Fatmata Jalloh was selling pancakes off the side of a road when she was kidnapped and forced into marriage and endured sexual and physical abuse for two years.[184] Despite her horrifying ordeal, Jalloh is no longer associated with her perpetrator.[185] She has successfully recovered and is happily married.[186] For Jalloh, hearing the SCSL's ruling that forced marriage is a crime against humanity, made her happy.[187] "Now they can try to abolish the thing [forced marriage]," she said.

Jalloh's personal story ended with a happy marriage, but for many forced marriage victims, the path to rehabilitation and recovery is hindered by prejudices from their homes and communities for marrying their captors.[188] Unfortunately, in gender-based crimes such as forced marriage, female victims are still frequently misunderstood and marginalized not only by their local communities, but also by the international criminal legal system.[189] For example, the crime of forcing child soldiers to fight in combat has received widespread condemnation from the international community.[190] This has led to the creation of rehabilitation programs to allow the victims, who are predominantly young men and boys, to recover and heal after experiencing extensive physical and psychological trauma.[191] Moreover, the SCSL convicted former Liberian President Charles Taylor for eleven counts of international crimes, including

184 Moore, *supra* note 30, 1.
185 *Ibid.*, 1.
186 *Ibid.*, 2.
187 *Ibid.*
188 Carlson & Mazurana, *supra* note 14, 41.
189 See H. Charlesworth & C. Chinkin, 'The Gender of Jus Cogens', 15 *Human Rights Quarterly* (1993) 1, 63, 65, argues under international law, *jus cogens* is not universal and its development has privileged the experiences of men over those of women, and it has provided a protection to men that is not accorded to women.
190 K. Hill & H. Langholtz, 'Rehabilitation Programs for African Child Soldiers', 15 *Peace Review* (2003) 3, 279, 281-285, discusses how aid agencies have implemented solutions to rehabilitate child soldiers.
191 *Ibid.*

the forced recruitment of child soldiers.[192] In contrast, since the SCSL's ruling in 2008 and last conviction in 2009, no subsequent court has prosecuted and convicted perpetrators for committing forced marriage.[193]

The lack of prosecution is an unfortunate development for the victims of forced marriage. Whether it is through physical or sexual coercion, the perpetrator's control over the victim's bodily autonomy is devastating.[194] The most powerful tool to heal the victims after experiencing such devastation is empowerment. If more local communities established rehabilitation programs for forced marriage victims, then societies will progress in assisting the victims. Thus, the victims, who are predominantly young women and girls, can realize their self-worth and reclaim their personal autonomy. The local and international community has achieved success in socially reintegrating young men and boys back into their societies after fighting in combat as child soldiers.[195] After the years of hardship, pain, and trauma, the victims of forced marriage should receive as much treatment and respect as their male counterparts. This will create a powerful social weapon to combat forced marriage.

192 *Prosecutor v. Charles Ghankay Taylor*, Judgment, SCSL-03-1-T, 18 May 2012, 2475-2478, para. 6994. See also K. Ambos & O. Njikam, 'Charles Taylor's Criminal Responsibility', 11 *Journal of International Criminal Justice* (2013) 4, 789, 791.

193 See *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2. See also *Prosecutor v. Sesay and Others*, Appeals Chamber Judgment, *supra* note 4, 259, para. 726 (for example).

194 ICC, Elements of Crimes, *supra* note 9, 6 & 8; *Prosecutor v. Brima and Others*, Appeals Chamber Judgment, *supra* note 2, 65, para. 199.

195 Hill & Langholtz, *supra* note 190, 281 & 284.

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Bystander Obligations at the Domestic and International Level Compared

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Abstract

This article examines whether States have a legal obligation to assist victims of serious breaches of fundamental obligations owed to the international community as a whole. This so-called 'bystander State responsibility' is compared with a similar legal obligation to assist victims at the domestic level. First, the method of comparing the legal obligations of international bystander States with the legal obligations of domestic bystanders is examined. Is it appropriate to compare the two legal frameworks, and why (not)? What can we learn from such a comparison? After these preliminary remarks, the types of situation in which bystander intervention is – or ought to be – legally required are identified in general terms. This is followed by an *exposé* of the *raisons d'être* of bystander obligations. After having looked at reasons why bystanders ought to intervene in theory, the article analyzes justifications for not intervening in practice, both at the domestic and international level. Finally, the different stages of bystander intervention are compared. First, the bystander must be aware of the need to intervene, then the bystander must accept personal responsibility to do so, and then the bystander has to choose the appropriate type of assistance.

A. Introduction

In her opening statement to the Human Rights Council in September 2013, United Nations High Commissioner for Human Rights Navi Pillay said the following about the situation in Syria:

> "The International Community is late, very late, to take serious joint action to halt the downward spiral that has gripped Syria, slaughtering its people and destroying its cities. This is no time for powerful States to continue to disagree on the way forward, or for geopolitical interests to override the legal and moral obligation to save lives by bringing this conflict to an end. This appalling situation cries out for international action, yet a military response or the continued supply of arms risk igniting a regional conflagration, possibly resulting in many more deaths and even more widespread misery. There are no easy exits, no obvious pathway out of this nightmare, except the immediate negotiation of concrete steps to end the conflict. States, together with the United Nations, must

> find a way to bring the warring parties to the negotiating table and halt the bloodshed."[1]

Of course, the State of Syria is obligated to protect its own people from slaughter and destruction, and *a fortiori* prohibited from committing such offenses itself. But Pillay was not addressing the State of Syria here. She was instead referring to the responsibilities of other States to 'do something'. These States can be referred to as bystander States, since they are not directly involved in the conflict. So what must such bystander States do? Pillay referred to "the legal and moral obligation to save lives";[2] an obligation, presumably, that rests on the shoulders of all States, but especially on those of the most powerful. What exactly does this legal obligation to save lives entail, if it exists at all in the present international legal order? This is the question this article seeks to discuss. In order to explore this question in general terms, the international legal framework on bystander State responsibility will be compared with the obligations of bystanders in domestic legal systems, especially that of the Netherlands.

First, the method of comparing international bystander States to domestic bystanders is examined (section B.). Is it appropriate to compare the two legal systems, and why (not)? What can we learn from such a comparison, and is there a tradition of making such comparison of two categorically different types of bystanders? After this preliminary section, the types of situations where bystander intervention is – or ought to be – legally required are identified in general terms (section C.). This is followed by an *exposé* of the *raisons d'être* of bystander obligations (section D.). After having looked at theoretical reasons why bystanders ought to intervene, the article analyzes justifications for *not* intervening in practice, both at domestic and international levels (section E.). Finally, the different stages of bystander intervention are compared. The bystander must be aware of the need to intervene (section F.), then the bystander must accept personal responsibility to do so (section G.), and then the bystander has to choose the appropriate type of assistance (section H.). The article ends with a conclusion (section I.).

1 United Nations High Commissioner for Human Rights, 'Opening Statement at the Human Rights Council 24th Session' (9 September 2013), available at http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13687&LangID=E (last visited 31 July 2014).

2 *Ibid.*

B. Comparing International and Domestic Bystanders

I. Framing the Question

In this section, the appropriateness of comparing the international legal framework on bystander intervention with the domestic legal framework is assessed in a general sense. Can the situation of the international community of States, witnessing a terrible event in a specific part of the world and contemplating what to do about it, be compared with the situation of a group of human beings witnessing a fellow human being in mortal danger, and wondering whether to rescue that person? This article claims that such a comparison is indeed meaningful. It explores how the lessons learned relating to the obligations of so-called bystanders at the domestic level can be applied at the international level.

At the domestic level, the behavior and legal responsibilities of bystanders have been studied for many years. Admittedly, this has not led to a single approach to bystander responsibility adopted by all States in the world. Quite the opposite: the legal systems vary fundamentally. Many States do not have a provision at all in their criminal code making standing idly by when a crime is being committed a criminal offense. These States, essentially the Anglo-American legal systems, believe that the law should not enforce such acts of altruism on people. You cannot legally oblige people to be a hero, so it is said, and put them in prison if they refuse to be one. And among the States that *do* make standing idly by a criminal offense, there is considerable disagreement on the type of situation requiring bystander intervention.[3] The Netherlands has decided to make it a criminal offense not to intervene when a fellow human being is in *mortal* danger;[4] but the *German Criminal Code* already requires individuals to intervene when witnessing accidents, a common danger or an emergency.[5] Since the aim of this article is to look at the domestic approach in order to derive applicable lessons for the international legal order, it is not necessary to engage extensively in an exercise of comparative research and look in detail at the variations that exist in the domestic legal frameworks. In the remainder of this article, the provision on bystander intervention in the *Dutch Penal Code* will be referred to, as example of a domestic approach to bystander criminal responsibility.

3 See also *infra* section D. I.

4 See *Dutch Penal Code*, Art. 450. Cited according to L. Rayar & S. Wadsworth (transl.), *The Dutch Penal Code* (1997). See also *infra* section C. I.

5 *German Criminal Code*, Sec. 323c. Cited according to M. Bohlander (transl.), *The German Criminal Code: A Modern English Translation* (2008).

Although the responsibility of bystanders has been studied and developed mainly at the inter-individual level, it has been referred to many times *by analogy* in discussions on obligations of the international community to 'do something'. It was used to urge the United States of America (U.S.) to help Haiti in the 1980s;[6] to encourage the international community to stop Syria's destruction of Lebanon in 1989;[7] to encourage the United Nations Interim Force in Lebanon (UNFIL) to actively intervene;[8] to encourage the international community to intervene in the (civil) war in the former Yugoslavia in the 1990s;[9] to urge the US to rescue Colombia from drug related violence;[10] to critically evaluate the role of the United Nations and NATO in the reconstruction of Afghanistan and the fight against the Taliban;[11] to criticize the international community's lack of commitment to the peace talks between the government of Uganda and the Lord's Resistance Army, held in Juba, in Southern Sudan;[12] it was used in a critique of the slow response of the US and its allies to the events unfolding in Libya in 2011;[13] and finally, the US was qualified as bystander for its reluctance

6 A. Schlesinger Jr., 'Yes, Washington, There Is a Haiti', *The New York Times* (9 September 1987), available at http://nytimes.com/1987/09/09/opinion/yes-washington-there-is-a-haiti.html (last visited 31 July 2014).

7 J. Kirkpatrick, 'Lebanon is a Victim of World Indifference', *St. Louis Post-Dispatch* (3 September 1989).

8 N.N., 'Not-So-Innocent Bystanders', *Investor's Business Daily* (1 August 2006), available at http://news.investors.com/080106-421924-not-so-innocent-bystanders.htm (last visited 31 July 2014).

9 R. Ryan, 'Doing Nothing Sends a Dangerous Message to Other Hot Spots: Time to Act in Yugoslavia', *Boston Globe* (2 July 1992); M. C. Bernstein, 'Lessons of New York Apply to Sarajevo', *St. Louis Post-Dispatch* (20 September 1992); S. Bykofsky, 'Don't Watch in Silence While People Are Killed', *Atlanta Journal and Constitution* (28 January 1993), A13. See also P. Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (2002), 411-467.

10 C. Marquis, 'Facing Facts: Aid to Colombia; America Gets Candid About What Colombia Needs', *The New York Times* (25 February 2001), available at http://nytimes.com/2001/02/25/weekinreview/facing-facts-aid-to-colombia-america-gets-candid-about-what-colombia-needs.html (last visited 31 July 2014).

11 N.N., 'Gutless NATO Action Suggests Alliance', *The Star Phoenix* (16 September 2006).

12 A. Bradbury & P. J. Quaranto, 'Uganda: Not So Innocent Bystanders to Juba Talks', *The Monitor* (27 January 2008), available at http://allafrica.com/stories/200801280273.html (last visited 31 July 2014) .

13 L. M. Elkin, 'Libya and the "Bystander Effect"', *Business Insider* (14 March 2011), available at http://businessinsider.com/libya-and-the-bystander-effect-2011-3 (last visited 31 July 2014).

to intervene in Syria in the civil war that started in 2011.[14] The bystander-effect was also referred to in order to defend the US invasion of Iraq in 2003, as follows:

> "For years the Iraqi people had been screaming, in effect: 'Oh, my God. Please help me! Please help me! I'm dying!' How could America have answered, 'We don't want to get involved'? We are the biggest kid on the playground. If we won't help, who will?"[15]

The intervention in Iraq was supposedly an example of how things ought to be done: a bystander accepted its responsibility and intervened.[16]

These were all commentaries to specific events. But bystander State responsibilities were also invoked in order to criticize the inaction of States in response to more abstract evils. One such evil is the continuing environmental degradation,[17] and another is climate change.[18] And it was also invoked to make a more general point, not related to any specific incident. For example, transnational corporations were considered bystanders to human rights violations,[19] and Vetlesen looked at the role of bystanders to concrete acts of

[14] C. Krauthammer, 'While Syria Burns, Obama Stands Idly by', *Chicago Tribune* (30 April 2012), available at http://articles.chicagotribune.com/2012-04-30/news/ct-oped-0430-krauthammer-20120430-15_1_economic-squeeze-major-announcement-president-barack-obama (last visited 31 July 2014). See also S. Mohamed, 'Omissions, Acts, and the Security Council's (In)Actions in Syria', 31 *Boston University International Law Journal* (2013) 2, 415, 415-416. In the article Mohamed looks at whether such a comparison is fruitful and makes any sense.

[15] D. Gelernter, 'Bush's Greatness', *The Weekly Standard* (13 September 2004), available at http://weeklystandard.com/Content/Public/Articles/000/000/004/580vwath.asp?pg=2 (last visited 31 July 2014).

[16] Apparently, one of the biggest influences at the time, Paul D. Wolfowitz, also used the Kitty Genovese syndrome to convince the US to intervene. See F. Kools, 'Hameren op Aambeeld Irak', *Trouw* (6 December 2002), available at http://trouw.nl/tr/nl/5009/Archief/archief/article/detail/2580603/2002/12/06/Hameren-op-aambeeld-Irak.dhtml (last visited 31 July 2014).

[17] C. Cavendish, 'Wake up and Smell the Smoke of Disaster: Why Are We so Cool About Climate Change?', *The London Times* (8 November 2007), available at http://thetimes.co.uk/tto/opinion/columnists/camillacavendish/article2052032.ece (last visited 31 June 2014).

[18] G. Marshall & M. Lynas, 'Why we Don't Give a Damn', *New Statesman* (1 December 2003), available at http://newstatesman.com/node/146820 (last visited 31 July 2014).

[19] J. M. Amerson, 'What's in a Name? Transnational Corporations as Bystanders Under International Law', 85 *Saint John's Law Review* (2011) 1, 1, esp. 13-14.

genocide.[20] Grünfeld extensively researched the obligations of bystander States, especially in the face of genocide.[21] Scholarly discussions of the doctrines of just war, humanitarian intervention, and the responsibility to protect have also included references to bystander State responsibilities.[22]

II. Comparing the Domestic and International Legal Order

Do these comparisons have significance beyond the rhetoric effect? Can you really compare a State, witnessing an act of aggression committed against a neighboring State, with a man witnessing a murder in his neighbor's apartment? And can you compare the legal frameworks that regulate the rights and obligations of such witnesses? Of course, there are many differences between the two scenarios, but it is the similarities that are most striking and illuminating.

Much has been said about the similarities between the domestic and international legal order in general. The basic principles of the international legal framework are still to a large extent a copy of the basic principles of private domestic law. This was the case in the early days and it is still the case now. It has been suggested that the international legal order has become more 'public' or more '*sui generis*' in recent years. For example, Simma wrote in 2009 that the international legal order "begins to display more and more features which do not fit into the 'civilist', bilateralist structure of the traditional law", and that instead the international legal order was "on its way to being a true *public* international

20 A. J. Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander', 37 *Journal of Peace Research* (2000) 4, 519.

21 See F. Grünfeld, *Vroegtijdigoptreden van Omstanders ter Voorkoming van Oorlogen en Schendingen van de Rechten van de Mens* [Early Action of Bystanders to Prevent Wars and Violations of Human Rights], available at http://arno.unimaas.nl/show.cgi?fid=3830 (last visited 31 July 2014) [Grünfeld, Vroegtijdig Optreden van Omstanders]; A. Smeulers & F. Grünfeld, *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook* (2011) [Smeulers & Grünfeld, International Crimes and Other Gross Human Rights Violations]; F. Grünfeld & A. Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders* (2007) [Grünfeld & Huijboom, The Failure to Prevent Genocide].

22 See, e.g., G. Kent, 'Rights and Obligations', 34 *Natural Hazards Observer* (2010) 3, 1, 20; R. G. Wright, 'A Contemporary Theory of Humanitarian Intervention', 4 *Florida International Law Journal* (1989) 3, 435, 447; G. R. Lucas Jr., '"New Rules for New Wars": International Law and Just War Doctrine for Irregular War', 43 *Case Western Reserve Journal of International Law* (2011) 3, 677, 680-681.

law".[23] This is an ongoing process and the introduction of bystander State responsibility actually is part of that process.

After all, bystander responsibilities at the domestic level are not part of private law: doing nothing when someone is being murdered is itself considered a crime, not a mere tort or delict. Crimes are breaches of norms compliance with which people owe to their community as a whole, and not to other specific individuals. In this sense, criminal responsibility is *public* responsibility. When the domestic legislator decides to make standing idly by when faced with someone in mortal danger a criminal offense, the legislator thereby regards the obligation to intervene in such extreme situations as something owed to society as a whole, and not to the particular victim who is in mortal danger.

Applying this rationale at the international level presupposes that there is such a thing as public responsibility, i.e. responsibility owed to the international community as a whole, also in international law. An affirmative answer to such a question has far-reaching consequences, because it requires a legal framework outlining the consequences of a breach of such obligations owed to society. Considering its importance, it is not so surprising that the question has been discussed extensively by the International Law Commission (ILC). What the ILC was after, was a special legal framework regulating the consequences of serious breaches of particularly serious obligations. This set of rules is not directly applicable to bystander State obligations, because doing nothing to help a victim is generally not considered to be such a serious breach of a particularly serious obligation. Rather, it is the perpetrator that is held responsible for the serious breach of the particularly serious obligation. The responsibility of bystander States is a derivative or a consequence of the perpetrator's aggravated responsibility.

This can best be explained by briefly summarizing the decade-long discussion on the applicable legal framework for aggravated responsibility. The first attempt to come up with such a legal framework, of 1976, was to build it around the concept of 'State crime'. A State crime was defined as a breach by a State of an international obligation essential for the protection of fundamental interests of the international community. Examples of State crimes provided by the ILC at the time included aggression, the maintenance by force of colonial domination, slavery, genocide, *apartheid*, and massive pollution of

[23] B. Simma, 'Universality of International Law From the Perspective of a Practitioner', 20 *European Journal of International Law* (2009) 2, 265, 268.

the atmosphere or of the seas.[24] It was believed that it was in the interest of the international community and all its members that such breaches were never committed. Standing idly by when such a State crime is being committed is not itself a State crime. Rather, the obligation of bystander States to intervene when witnessing the commission of a State crime is one of the particular consequences triggered by the commission of such a crime. This is where the State crime provision differs from the domestic provision, which regards standing idly by itself also as a criminal offense.

In any case, the concept of State crime was generally believed not to be the suitable term for what the ILC really wanted to introduce into the world of State responsibility, namely the idea that "breaches could be committed by States [...] which might affect all States, so that it was up to the community of States as a whole to respond to them".[25] In other words, those who defended the concept of State crime did so, not because they wanted the perpetrator State to be 'punished', but because they believed the international community as a whole and all its members ought to have the possibility – and perhaps even obligation – to respond when its fundamental interests were under attack.[26] In 1996, the ILC provisionally adopted the *Draft Articles on State Responsibility*,[27] and despite all the objections to the concept of 'State crime', the 1996 *Articles* still included the concept introduced in 1976, virtually left unchanged.[28] It was only in 1998 that a new Special Rapporteur on State Responsibility, James Crawford, suggested that the ILC either use the word 'State crime' and adapt its rules accordingly (by

[24] ILC, *Report of the International Law Commission on the Work of its Twenty-Eighth Session*, Yearbook of the International Law Commission (1976), Vol. II (2), 95-96.

[25] ILC, *Summary Records of the Meetings of the Forty-Sixth Session*, Yearbook of the International Law Commission (1994), Vol. I, 89 (para. 64). When the Special Rapporteur (Mr. Arangio-Ruiz) later summarized the debate, he failed to mention the many objections to the use of the word 'crime'. Only after various objections to his summary did the Rapporteur indicate he was willing to "to refer to 'crimes' as *la chose* (the thing)". *Ibid.*, 139 (para. 59).

[26] According to Mr. Pambou-Tchivounda, "Article 19 [...] had divided the victims of internationally wrongful acts into two categories: in the case of an international delict, the victim could be one or more States; in the case of an international crime, the victim was the international community of States as a distinct legal entity. Thus the nature of the victim was the touchstone for determining whether the internationally wrongful act concerned constituted a delict or a crime. In that way, the codification exercise had helped to promote the international community to the status of, as it were, a quasi-public legal authority." See *ibid.*, 77 (para. 30).

[27] See *Draft Articles on State Responsibility*, Yearbook of the International Law Commission (1996), Vol. II (2), 58.

[28] *Ibid.*, Art. 19, 60.

establishing punitive sanctions, means to determine guilt, State imprisonment, etc.), or drop it,[29] and focus instead on some alternative approach, based on *erga omnes* and *jus cogens* as guiding concepts in distinguishing certain fundamental norms and obligations from ordinary ones.[30] Now that the choice was phrased in such clear language, most ILC members realized the absurdity of the idea of State crimes – how can you put a State in prison? – and the concept was quickly dropped.

Crawford then suggested, as an alternative approach, to introduce a chapter on "serious and manifest breach[es] by a State of an obligation owed to the international community as a whole" to the ILC *Articles on State Responsibility*.[31] This formulation was meant to replace the concept of State crime.[32] Based on Crawford's suggestions, the ILC's Drafting Committee proposed a new set of two articles on the consequences of particularly serious breaches of particularly serious norms.[33] The first of these two articles introduced a new category of breaches, i.e. "serious breach[es] by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests".[34] Obligations owed to the international community as

[29] Crawford in fact came up with five suggestions. See ILC, *Report of the International Law Commission on the Work of its Fiftieth Session*, Yearbook of the International Law Commission (1998), Vol. II (2), 66-67, paras 252-259. See also ILC, *Summary Records of the Meetings of the Fiftieth Session*, Yearbook of the International Law Commission (1998), Vol. I, 97-99 (paras 2-10) [ILC, Summary Records of the Meetings of the Fiftieth Session].

[30] ILC, *Summary Records of the Meetings of the Fiftieth Session*, *supra* note 29, 97 (paras 78-81).

[31] ILC, *Third Report on State Responsibility: Addendum*, UN Doc A/CN.4/507/Add.4, 4 August 2000, 24, para. 412. See also ILC, *Summary Records of the Meetings of the Fifty-Second Session*, Yearbook of the International Law Commission (2000), Vol. I, 303 (para. 8) [ILC, Summary Records of the Meetings of the Fifty-Second Session].

[32] See ILC, *Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Fifty-Fifth Session Prepared by the Secretariat*, UN Doc A/CN.4/513, 15 February 2001, 19-21, paras 89-94.

[33] On 8 August 2000, the *Articles* were referred to a Drafting Committee. See ILC, *Summary Records of the Meetings of the Fifty-Second Session*, *supra* note 31, 338 (para. 63). Gaja, Chairman of the Drafting Committee, presented a complete draft to the Commission on 17 August 2000. *Ibid.*, 386 (para. 1). The Drafting Committee's report is available as *State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading*, UN Doc. A/CN.4/L.600, 21 August 2000 [ILC, Draft Articles Provisionally Adopted by the Drafting Committee].

[34] ILC, *Draft Articles Provisionally Adopted by the Drafting Committee*, Art. 41 (1), *supra* note 33, 14. The *Articles* further defined a serious breach as "a gross or systematic failure by the

a whole are generally referred to as obligations *erga omnes*, and this Latin phrase was thus what replaced the references to State crime. In response to such breaches of obligations *erga omnes*, all States had a (1) duty of non-recognition; (2) a duty not to assist the responsible State; and (3) a duty to cooperate in bringing the breach to an end.[35] It is especially the latter obligation which reminds one of the duty of the bystander State to come to the assistance of the victim.

Crawford had some difficulty convincing his fellow ILC members of this new approach. Many of Crawford's colleagues preferred to see breaches of peremptory norms (*jus cogens*), and not breaches of obligations *erga omnes*, as triggering a duty for all other States to act in cooperation in order to bring such breach to an end. This view became more and more influential, and ultimately prevailed. The ILC *Articles on State Responsibility* as adopted in 2001 proclaim that States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law.[36] The concept used is thus peremptory norms (*jus cogens*), not obligations owed to the international community as a whole (*erga omnes*). Since the collection of peremptory norms and the collection of obligations *erga omnes* overlap, this sudden change of approach does not have any dramatic consequences in practice.

What is important is that the ILC embraced the idea that all States have a duty to act together to bring to an end any serious breach of a norm considered to be fundamental by the international community.[37] The acceptance of such an obligation makes the comparison with the obligation to act of a bystander at domestic level apt and interesting.

responsible State to fulfill the obligation, risking substantial harm to the fundamental interests protected thereby". *Ibid.*, Art. 41 (2), 14.

35 *Ibid.*, Art. 42 (2), 14-15.

36 *Articles on Responsibility of States for Internationally Wrongful Acts*, Arts 40 & 41, GA Res. 56/83 annex, UN Doc A/RES/56/83, 12 December 2001, 9 [Articles on Responsibility of States for Internationally Wrongful Acts].

37 It must be pointed out that the ILC did believe this was an example of progressive development, not a codification of existing customary international law. At the same time, the International Court of Justice has already referred to the obligations described in these articles – but without referring to the articles explicitly. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 200, paras 159-160.

C. When Bystander Intervention is Legally Required

I. Bystander Obligations at the National Level

Article 450 *Dutch Penal Code* states that any person who sees someone in immediate mortal danger, must provide support, if he can do so without endangering himself or others.[38] If he refuses to do so, and if the death of the victim follows, the bystander will be punished with imprisonment not exceeding three months.[39] Article 450 is addressed to everybody, but only those (1) witnessing a perpetrator assaulting a victim and (2) able to provide assistance to the victim, will breach the provision if they do nothing. As Article 450 clearly states, the bystander will only have committed the offense if the victim eventually dies, but it is not necessary that a causal link is established between the failure to act of that particular bystander and the death of the victim.[40] The Netherlands is not alone in this approach. In many other States, standing idly by when someone is in immediate mortal danger is equally a criminal offense.[41]

II. Bystander Intervention at the International Level

At the Dutch domestic level, a bystander is only legally required to intervene if the victim is in *mortal* danger.[42] In other words, such an obligation

38 Rayar & Wadsworth, *supra* note 4, 268.

39 See also Grünfeld, *Vroegtijdig Optreden van Omstanders*, *supra* note 21, 35.

40 There is not so much case law on Art. 450 *Dutch Penal Code*, and the existing cases are all about rather atypical events, in which the bystander is for some reason or another already quite involved in the events leading up to the death of the victim. There is a judgment of the Dutch Supreme Court of 25 March 1997 (the bystander sees another man lying down in the garage box of the bystander's father but does not look to see if the man needs help), a judgment of the The Hague Appeals Court of 1 December 2010 (police officers fail to rescue a man from being beaten to death), and a judgment of the District Court of 's-Hertogenbosch of 10 June 2003 (a so-called bystander does not 'rescue' a woman in the process of committing suicide) (copy of cases on file with author).

41 See for a comparative study F. J. M. Feldbrugge, 'Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue', 14 *American Journal of Comparative Law* (1966) 4, 630. In an appendix (*ibid.*, 655-657) to the article, Feldbrugge provided English translations of an impressive number of national law provisions from all over the world criminalizing people passing by when a fellow human being is in serious danger.

42 As mentioned above, this is the case in the Netherlands. Not all domestic jurisdictions restrict bystander responsibilities to situations involving mortal danger. For example, *German Criminal Code*, Sec. 323c, *supra* note 5, 200, stipulates that "[w]hosoever does not render assistance during accidents or a common danger or emergency although it

only exists in the most extreme of all cases. In international law, it is appropriate to define the obligation to intervene just as narrow.

One of the best-known attempts to define the type of situation requiring bystander State intervention at the international level is the Responsibility to Protect doctrine. In 2005, the United Nations General Assembly identified "genocide, war crimes, ethnic cleansing and crimes against humanity" as requiring an immediate response from the international community and all States.[43] The exact legal nature of this doctrine is still disputed. There is also debate about the rights and obligations that follow from the doctrine, both for the perpetrator and for all other States.[44] The responsibility of States to protect individuals from the so-called atrocity crimes listed above can, at least partly, be derived directly from the relevant treaties, in particular the *Genocide Convention* and the *Geneva Conventions on the Laws of War*. The former states that "the Contracting Parties confirm that genocide [...] is a crime under international law which they undertake to prevent and to punish",[45] and the latter proclaims that "the High Contracting Parties undertake to respect and to ensure respect for

is necessary and can be expected of him under the circumstances, particularly if it is possible without substantial danger to himself and without violation of other important duties shall be liable to imprisonment of not more than one year or a fine". For other examples, see Feldbrugge, *supra* note 41, esp. 655-657.

43 *2005 World Summit Outcome*, GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005, 30, paras 138-139. These four crimes taken together are nowadays generally referred to as 'atrocity crimes'.

44 In a series of reports, UN Secretary-General Ban Ki-moon has tried to shed some light on these questions. See UN Secretary-General, *Implementing the Responsibility to Protect*, UN Doc A/63/677, 12 January 2009; UN Secretary-General, *Early Warning, Assessment, and the Responsibility to Protect*, UN Doc A/64/864, 14 July 2010; UN Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*, UN Doc A/65/877, 28 June 2011; UN Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, UN Doc A/66/874, 25 July 2012 [UN Secretary-General, Responsibility to Protect, UN Doc A/66/874]; and UN Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, UN Doc A/67/929, 9 July 2013. On bystander responsibilities, these reports are very carefully worded. Instead of talking about obligations of all States to protect, reference is made to instruments available for States to assist each other to meet their responsibilities to their own populations. The reports say very little about legal obligations of bystander States to make use of these instruments. An exception is the reference to the ICJ judgment of 2007 on the genocide in Srebrenica of 1995 (*infra* note 47) in UN Secretary-General, *Responsibility to Protect*, UN Doc A/66/874, *supra* this note, 11, para 40.

45 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Art. 1, 78 UNTS 277, 280.

the present Convention in all circumstances".[46] This still does not provide much clarity as to the precise rights and obligations of bystander States, but at least it is clear that States must do 'something' when serious breaches of humanitarian law or genocide are being committed. This obligation was reaffirmed by the International Court of Justice (ICJ) when it explained that the obligation of States parties to the *Genocide Convention* is "to employ all means reasonably available to them, so as to prevent genocide so far as possible".[47]

The Responsibility to Protect doctrine is very important in the discussion on the responsibilities of State bystanders, and most of the literature on bystander States is about genocide, war crimes, ethnic cleansing, and crimes against humanity – especially genocide. But the Responsibility to Protect doctrine does not cover all events requiring bystander State intervention, and it does not tell the whole story. There remains a need for a more general approach.

The search is thus for a category of breaches of international law so serious that States should not be permitted to stand idly by when witnessing such breaches. We know that States cannot stand idly by in the face of atrocity crimes, but is that all? Above, we referred already to the ILC *Articles on State Responsibility*, and more specifically the article that proclaimed the duty of all members of the international community to cooperate to bring to an end any serious breaches of peremptory norms.[48] It could be argued that this provision implicitly suggests that whenever a serious breach of a peremptory norm is committed, all States in the world are under an obligation to jointly do

46 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 1, 75 UNTS 31, 32; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Art. 1, 75 UNTS 85, 86; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 1, 75 UNTS 135, 136; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 1, 75 UNTS 287, 288. The commentary to these conventions of 1952 explains that, "in the event of a [State] failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention". J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. I (1952), 26.

47 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, 182, para. 430 [ICJ, Application of the Genocide Convention]. On the obligation to prevent genocide, see also M. Vashakmadze, 'Shared Responsibility for the Prevention of Genocide?', *SHARES Research Paper* No. 14 (2012), available at http://sharesproject.nl/wp-content/uploads/2012/11/SHARES-RP-14-final.pdf (last visited 31 July 2014).

48 *Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 41 (1), *supra* note 36, 9.

'something'. It thus appears that bystander State responsibilities are engaged not only in cases of atrocity crimes, but more generally: whenever a serious breach of a peremptory norm has been committed. This still does not provide us with a list of such obligations, but it does show that international law has at least a legal framework to identify the type of breaches and the type of norms triggering bystander State responsibility.

D. *Raisons d'être* of Making Bystander Intervention a Legal Obligation

I. *Raisons d'être* of Bystander Obligations at Domestic Level

According to the *travaux préparatoires*, Article 450 was included in the *Dutch Penal Code* because citizens, when witnessing someone in mortal danger, ought to do what the representatives of public authority would have done if only they were present.[49] When the authorities are absent, the citizen standing by has a duty to act.

The article was included in the *Dutch Penal Code* in 1880. Inclusion of this article was defended at the time with the argument that the 'popular consciousness' was offended by the impunity of people standing by when fellow citizens were dying.[50] Feldbrugge, who analyzed the theoretical justifications of similar provisions in domestic criminal legislation all over the world, concluded that "many legislators have come to realize that certain behavior with regard to persons in danger is so offensive to the moral feelings of a community that the interference of criminal law is called for".[51] This view is not universally embraced, not even in the Netherlands in 1880. When the Dutch legislator discussed the article, there was some resistance. A minority of the Members of Parliament believed that

> "[t]he act of omission which [Article 450] criminalizes is as a rule more due to shiftlessness rather than negligence, and when [the omission] results from mercilessness, it is better to leave it

[49] H. J. Smidt (ed.), *Geschiedenis van het Wetboek van Strafrecht: Volledige Verzameling van Regeeringsontwerpen, Gewisselde Stukken, Gevoerde Beraadslagingen, etc.* [History of the Netherlands Criminal Code: A Complete Collection of Draft Legislation, Exchanged Documents, Records of Deliberations, etc.], Vol. 3, 2nd ed. (1892), 290.

[50] *Ibid.*

[51] Feldbrugge, *supra* note 41, 654.

> to the indignation of the public than to punish the perpetrator as lawbreaker".[52]

The principal representative of this minority, Member of Parliament Donner, believed that the article demanded an act of "noble self-sacrifice" of the bystander, and it would be strange to make this a legal obligation.[53] You cannot legally oblige people to be a hero, and put them in prison if they refuse to be a hero. Instead of using legal means to punish a person standing idly by when someone was being killed, Donner "would prefer to leave such an inhuman monster [i.e. the passive bystander] to the punishment of the little grain of humanity that was left in him, and to the indignation of the public about such an act".[54]

In defense of what was to become Article 450 *Dutch Penal Code*, it was noted that in an 'ordered society' it was justified to make it a legal obligation to help in such extreme cases. Moreover, it was believed, very realistically, that "on many merciless individuals, a threat of criminal punishment might exert greater pressure than the fear of public opinion".[55] The Dutch Minister of Justice explained that

> "[t]he official protection of society, which generally guards and protects us, is at a certain moment temporarily absent, while we find ourselves in agony due to an accident. The government and the police are absent. The individual or individuals who happen to be present and who are the only ones able to provide assistance, represent society for the unfortunate. Upon them rests the duty to grant the assistance only they can provide."[56]

The *raisons d'être* of a legal obligation of bystanders to intervene are thus as follows: in the absence of representatives of public authority, individual members of society who happen to be present have to act on behalf of the society. If such bystanders do not do so, this is offensive to the moral feelings of a community.

52 Smidt, *supra* note 49, 290 (translation by the author).
53 *Ibid.*, 291 (translation by the author). See also H. G. van der Werf, 'Ben ik Mijn Broeders Hoeder?', *Executief: Maandblad Voor Burgerlijke Rechtsvordering* (1996) annex, 42-44.
54 Smidt, *supra* note 49, 292 (translation by the author).
55 *Ibid.*, 290-291 (translation by the author).
56 *Ibid.*, 293 (translation by the author).

Counterarguments were that you cannot impose such 'moral feelings' on people through legal means.

II. *Raisons d'être* of Bystander Obligations at Inter-State Level

What are the *raisons d'être* of legal responsibility to intervene at the international level? Here too, the main reason is that doing nothing in extreme cases is offensive to the moral feelings of an international community, and thus intervention should be a legal obligation. This does presuppose a sense of community, of 'togetherness'.

It has been suggested that the question of the responsibilities of bystanders in the international (legal) order only arose after this order started to look more like an international community in which all States lived together. It is, of course, debatable when such community started to emerge, but it is clear that the issue of bystander responsibility only arises when other States are actually considered as bystanders, i.e. as people 'present' at an emergency, and 'witnessing' it. If the international community is a patchwork quilt of isolated islands, then of course all States live on their own island, and nobody is bystander to anything. Lucas suggested that the shift came with the end of the Cold War:

> "[After the end of the Cold War] [t]he questions centered no longer on legal or moral *permissions* or the legal license to carry out conventional military campaigns of the sort that current international law pertaining to self-defense and collective security exclusively addresses. Instead, the even more troubling question in these new cases was, when should member-nations in the so-called 'international community' recognize an *obligation* to come to the aid of vulnerable nations or victimized populations? What sets of conditions or criteria would constitute, for example, not so much a 'just cause' for going to war, as an *overriding obligation* to come to the aid of vulnerable victims? And, upon whom would such an obligation fall?"[57]

It was this new approach to international responsibilities which made people compare State inaction with the inaction of the witnesses at the domestic

[57] G. R. Lucas, '"New Rules for New Wars" International Law and Just War Doctrine for Irregular War', 43 *Case Western Reserve Journal of International Law* (2011) 3, 677, 680-681 (footnotes omitted).

level. Commentators "wondered, by analogy, what sort of 'community' the international community was, if its member-states consistently turned a blind and uncaring eye away from such tragic and seemingly avoidable cases of genocide".[58] For these same reasons, the idea that all States have a responsibility to do something, or to 'protect', in case of grave human rights violations, also became popular after the end of the Cold War.

The introduction of the legal obligation for bystanders to intervene in order to save fellow-human beings in mortal danger in the Netherlands in the 1880s, was in part motivated by the acknowledgment that the State cannot be represented everywhere and all the time. It was thus sometimes up to individuals to 'represent' society in the absence of formal representatives, such as the police. At the international level, such formal representatives are practically non-existent. There is no global police force. The need for more formal representation of the international community – through United Nations organs? – has often been put forward, especially as a more institutionalized way to publicly defend compliance with *erga omnes* obligations,[59] but it does not currently exist. And thus it is *always* up to individual members of the community – i.e. States – to 'represent' the international community. This makes it even more urgent to have a provision similar to Article 450 *Dutch Penal Code* at the international level.

E. Why Bystanders Generally Prefer not to Intervene

I. Reasons for Bystanders not to Intervene at Domestic Level

Although intervening when someone else is in mortal danger might be the 'right thing to do', there are also many reasons not to intervene.[60] Rescue operations might end badly, with both the victim and the rescuer seriously harmed. This is a very likely scenario, if one keeps in mind that major incidents are rare and potential rescuers are generally not prepared, equipped or trained to intervene successfully, unlike the authorities.[61] And even if a rescue is successful,

58 *Ibid.*, 681.

59 P.-M. Dupuy, 'A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', 13 *European Journal of International Law* (2002) 5, 1053, 1066.

60 See J. M. Darley & B. Latané, 'Bystander Intervention in Emergencies: Diffusion of Responsibility', 8 *Journal of Personality and Social Psychology* (1968) 4, 377, 382, mentioning the fear of physical harm and public embarrassment) [Darley & Latané, Bystander Intervention in Emergencies].

61 B. Latané & J. M. Darley, *The Unresponsive Bystander: Why Doesn't He Help?* (1970), 30 [Latané & Darley, The Unresponsive Bystander].

nobody is really any better off than before the victim got into trouble. The victim will probably have suffered some harm already and the rescuer might be traumatized or physically hurt because of the rescue.[62] And thus, "the bystander to an emergency is in an unenviable position [and] [...] [i]t is perhaps surprising that anyone should intervene at all".[63]

II. Reasons for Bystanders not to Intervene at the International Level

The reasons not to intervene apply *a fortiori* at the international level. We saw that rescue operations involve great risks and costs. The rescuer can make matters worse, and not oversee the long-term consequences of his actions. Rescue operations can also fail to achieve their objective.

A painful example of the latter is the role of the United Nations and the Netherlands in the genocide in Srebrenica in 1995.[64] Grünfeld rightly pointed out that the Netherlands had at least attempted with good intentions to respond to the atrocities in Bosnia, while most other States literally stood idly by. When the Dutch government resigned over responsibility for what happened in Srebrenica, the Dutch Prime-Minister emphasized that it was the international community as a whole that had failed to provide adequate protection to the people in the 'safe areas', and the Netherlands, being a member of the international community, thus also failed.[65] The resignation was not in recognition of any special responsibility of the Netherlands. This makes good sense. After all, there is no reason why a State engaging in a failed rescue attempt is more responsible than bystanders who did absolutely nothing. In fact, at the domestic level only the bystanders that did nothing would be criminally prosecuted. You do not end up in prison if you attempt to save someone's life, but you ultimately fail to do so. At the international level, in practice it does not always work that way. All the bystander States in the world are left alone, whilst the Netherlands, which was part of a failed rescue attempt, is traumatized and is still facing various law-suits.[66] One can compare this with a man trying to save

62 *Ibid.*, 29.

63 *Ibid.*, 31.

64 See also Grünfeld, *Vroegtijdig Optreden van Omstanders*, *supra* note 21, 43-47.

65 *Ibid.*, 43-45.

66 See O. Spijkers, 'The Immunity of the United Nations before the Dutch Courts', 51 *Military Law and the Law of War Review* (2012) 2, 361; O. Spijkers, 'The Netherlands' and the United Nations' Legal Responsibility for Srebrenica Before the Dutch Courts', 50 *Military Law and the Law of War Review* (2011), 3/4, 517; and O. Spijkers, 'Legal

someone from drowning at sea, with lots of people watching from the beach. If the rescuer's attempts fail because of their apparent clumsiness, the 'rescuer' will be traumatized and criticized, including by all those watching from the beach doing nothing. But it is the people doing absolutely nothing that face criminal prosecution.

Even if a rescue attempt is entirely successful – which rarely happens at the international level – there seem to be little rewards for the rescuer. The rescuer is generally not recompensed for the costs of the rescue operation. This raises the question as to whether it is not wise for the rescuer to consider its own particular interests in a rescue.

F. Bystander Awareness of the Need to Intervene

I. Bystander Awareness at the Domestic Level

Whenever an event occurs, the bystander first has to notice it, and then interpret it as a situation obliging him to intervene.[67] In order to commit the offense of Article 450 *Dutch Penal Code*, the bystander must have had a certain awareness or consciousness of the danger the victim was in. Since intervening is not an attractive option (as explained just above), most bystanders will do their best to interpret what appears to be a victim in trouble as, in fact, a normal course of events.[68] When other bystanders do not intervene, this makes it even easier to interpret what is happening as not warranting intervention.[69] This way, a collective of bystanders can fool themselves. After all, the indecisiveness of other bystanders – and bystanders can remain indecisive for a very long time[70] – is then interpreted as a *decision* not to intervene. And if all others appear to have decided not to intervene, it is easier to do the same. This phenomenon is referred to as "pluralistic ignorance".[71]

Mechanisms to Establish Accountability for the Genocide in Srebrenica', 1 *Human Rights & International Legal Discourse* (2007) 2, 321, for more on Srebrenica and the many legal claims submitted in relation to it.

67 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 31.

68 *Ibid.*, 33.

69 *Ibid.* See also *ibid.*, 88-89 & 69-77.

70 *Ibid.*, 100. Latané and Darley discovered in an experiment they did that "non-intervening subjects had not decided *not* to respond [...] [but] they were still in a state of indecision and conflict concerning whether to respond or not". *Ibid.* Interestingly, the longer a bystander remains indecisive, the harder it becomes to make the decision to intervene. *Ibid.*, 122.

71 *Ibid.*, 42 & 110.

II. Bystander Awareness at the International Level

The argument that a State 'did not know something was going on' is untenable. Smeulers and Grünfeld believe that in the international community it is impossible not to notice the type of event warranting bystander intervention – think of genocide, war crimes, colonial domination by force, systemic torture, etc.[72] If a State fails to notice such and similar events, this can only be explained as a conscious and deliberate decision to look the other way, and remain ignorant. This is especially true with the improved capacities of various NGOs, journalists, and the United Nations to issue early warnings, especially when genocide is concerned. Such early warnings effectively oblige all bystanders to make a decision: to decide whether the event constitutes the type of event obliging bystander States to intervene, and then to either become rescuer, or collaborator. Early warnings are generally forthcoming; there is no shortage of such early warnings for those that wish to see them. Grünfeld and Huijboom thus conclude that, "generally speaking, it is not early warning that is lacking, but early action".[73]

In defense of the States standing idly by, it could be argued that it is perhaps easy to notice 'something' is happening, but that it is often very difficult at the international level to find out exactly who is doing what and what exactly needs to be done about it. To state the problem as a choice between doing nothing and thereby facilitating the serious breach of a peremptory norm, and doing the right thing and thereby becoming the *deus ex machina* that solves the problem, is of course an oversimplification.[74] It is often very difficult to decide on the right action, in such tragic contexts with lots of uncertainty and confusion.

G. Bystander Responsibility to Intervene

I. Bystander Responsibility to Intervene at Domestic Level

If the event is interpreted as the kind of event which obliges the bystander to intervene, the bystander has to accept that it is his *personal* responsibility to intervene. Once again, one must keep in mind the unattractiveness of intervention.

72 Smeulers & Grünfeld, *International Crimes and Other Gross Human Rights Violations*, *supra* note 21, 335-337.

73 Grünfeld & Huijboom, *The Failure to Prevent Genocide*, *supra* note 21, 14.

74 This is also why Hakimi does not believe that being a bystander is essentially the same as being a collaborator, or as being complicit in the crime. There is always a space between being a rescuer and a collaborator. See M. Hakimi, 'State Bystander Responsibility', 21 *European Journal of International Law* (2010) 2, 341, 354.

And thus the bystander will still try to find excuses for not-intervening. One excuse – or perhaps it can be called a justification[75] – for not intervening is to convince oneself that the victim somehow deserved it, or was asking for it.[76] In general, this justification is not accepted. As Feldbrugge concluded, "where the victim himself is to be blamed, entirely or in part, for having placed himself in a dangerous situation, there is no fundamental change in the duty of potential rescuers."[77] But there are exceptions. An extreme example is a person who is about to commit suicide. In the Netherlands, Article 450 *Dutch Penal Code* does not oblige a bystander to 'rescue' a person who attempts to commit suicide.

Other excuses are based on the idea that, even though a particular bystander might be 'somewhat responsible', others are 'even more responsible'. Some others might have a special relationship with the victim, and some others might be more competent to intervene.[78] Feldbrugge noted that the ability – and thus responsibility – to help depends on the bystander's "nearness to the danger, [...] [his] awareness of the danger, and [...] the existence of the possibility of effective interference".[79] It has been suggested that some people are more eager to intervene than others because they are – or feel – more competent. An experiment by Ted Huston gave the impression that "[p]eople who are able to suppress fear, or who feel less fear than others, perhaps as a result of a sense of competence, may be most apt to intervene in highly threatening situation".[80]

A related question is whether the perpetrator, after having wounded the victim, has a duty to provide assistance to that victim. There is no reason to suggest that the perpetrator can leave his victim to die when innocent bystanders

75 The difference between an excuse and a justification is that a claim of justification proposes that the act or omission was *objectively* defensible, i.e. it was the right thing to do; whilst a claim of excuse acknowledges that the act or omission was not defensible, but that the actor is not responsible for this act. Arguments referring to the diffusion of responsibility are thus excuses, not justifications, since the right thing to do was to act. See, e.g., K. M. McGraw, 'Avoiding Blame: An Experimental Investigation of Political Excuses and Justifications', 20 *British Journal of Political Science* (1990) 1, 119, 120-121; K. Greenawalt, 'Distinguishing Justifications From Excuses', 49 *Law and Contemporary Problems* (1986) 3, 89.

76 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 33-34.

77 Feldbrugge, *supra* note 41, 639.

78 See also L. May, 'Collective Inaction and Shared Responsibility', 24 *Noûs* (1990) 2, 269, 274-275, who argues that some members are better at motivating the entire group to intervene – and thus more responsible for the group's inaction.

79 Feldbrugge, *supra* note 41, 634.

80 L. Huston *et al.*, 'Bystander Intervention Into Crime: A Study Based on Naturally-Occurring Episodes', 44 *Social Psychology Quarterly* (1981) 1, 14, 22.

have an obligation to assist the victim. Feldbrugge had an interesting solution to this dilemma:

> "Where the danger to the victim has been caused intentionally [e.g. an attempt to murder the victim], the lesser offense of failure to rescue is 'absorbed' by the greater offense of attempted homicide or infliction of bodily harm. Where, however, the danger to the victim has been caused by negligence or accident [e.g. the perpetrator ran over the victim with his car], the failure to extend aid is the result of an independent decision of the potential rescuer, and as such deserves separate punishment."[81]

In any case, in almost all cases in which there is more than one person standing by when someone is in mortal danger, each bystander will ask him or herself: 'someone needs to do something, but why does it have to be me?' This question follows directly from what psychologists call a diffusion of responsibility: if many bystanders are all equally responsible, nobody is particularly encouraged to act.[82]

The situation is different if one of the bystanders has a special relationship with the victim, because then this particular bystander is "somehow closer to the victim than any of the other subjects", and cannot "diffuse his responsibility onto them so easily".[83] Sometimes the relationship is so close, that the bystander ceases to be a bystander. Take, for example, the example of the mother who refuses to feed her own starving child. This has little to do with bystander responsibility to rescue a person in mortal danger. The bystander is someone who happens to pass by, and it is clear that somewhere a line should be drawn between intentional homicide by omission, and failure to rescue.[84]

81 Feldbrugge, *supra* note 41, 638.

82 Diffusion of responsibility might also encourage action, but only if all others act. Then responsibility for the consequences is diffused among the participants. Think, for example, of a decision to join an existing "coalition of the willing". See A. L. McAlister, 'Moral Disengagement: Measurement and Modification', 38 *Journal of Peace Research* (2001) 1, 87, 88.

83 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 108. This also has legal consequences. See Mohamed, *supra* note 14, 425.

84 Feldbrugge, *supra* note 41, 649.

The situation is also different if (some of) the bystanders know each other, or constitute a recognizable group.[85] In such a case, instead of shared responsibility, one may speak of collective responsibility: the bystanders consider themselves united, as a collective, and responsibility is not diffused.[86] And finally, the situation also looks much better if the bystanders have an opportunity and incentive to talk to each other about what to do.[87]

II. Bystander Responsibility to Intervene at the International Level

This subsection is essentially about the 'why me?' question, raised this time at the international level. If the obligation breached is owed to the international community as a whole, and this community as a whole has an obligation to do something, then all bystander States might say: 'yes, the international community should do something, but that's not me; so why do *I* have to intervene?'

In principle, *all* States must cooperate to bring to an end any serious breach of a peremptory norm. Above, we saw that there are some reasons to single out a particular bystander at the domestic level. One such reason is that the bystander has a special relationship with the victim or perpetrator, or that the bystander is particularly competent to intervene. Such special relationships also exist at the inter-state level. Special relationships can be based on historical ties, shared values or interests, or even a shared language. An example of the latter is the group of francophone States. At the opening of the *jeux de francophones* in September 2013, the French Prime-Minister Hollande reminded the representatives of the other francophone States that France will not forget the francophone peoples, whenever their fundamental freedoms are violated and security is threatened. "Yesterday it was Mali, today it may be the Central African Republic or the Democratic Republic of Congo," said Hollande, "wherever a francophone country's rights are violated, we must, we the francophone States, be the first to provide them our solidarity and our support".[88] These are not empty phrases. France did indeed assist the Government of Mali when the country was

85 See also J. C. Hackler, K.-Y. Ho & C. Urquhart-Ross, 'The Willingness to Intervene: Differing Community Characteristics', 21 *Social Problems* (1974) 3, 328, 331-332.

86 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 106-107. They did not really manage to test this theory. See also May, *supra* note 78, esp. 269.

87 Even though the actual experiment did not test this hypothesis, it was suggested in Darley & Latané, 'Bystander Intervention in Emergencies', *supra* note 60, 382-383.

88 A Nice, 'François Hollande ouvre la 7e édition des Jeux de la francophonie', *Radio France Internationale* (7 September 2013), available at http://rfi.fr/france/20130908-nice-francois-hollande-ouvre-7e-edition-jeux-francophonie (last visited 31 July 2014) (translation by the author).

threatened by extremist groups in 2012. Similarly, it could be argued that a State sharing a cultural tie with the perpetrator – as opposed to the victim – could have a special responsibility. In fact, according to Hakimi, it is the bystander State's relationship with the perpetrator, and not the State's relationship with the victim, which essentially determines whether the bystander State has an obligation to protect.[89]

When it comes to genocide, the ICJ has provided some guidance on how to apply this idea of allocating special responsibility to particular States at the international level. As noted earlier, the obligation of States parties to the *Genocide Convention* is "to employ all means reasonably available to them, so as to prevent genocide so far as possible".[90] This general obligation applies to all States party to the *Genocide Convention*. But what does that mean exactly? It means, explains the Court, that a State can only be said to have failed to meet its obligations, when that State "manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide."[91]

Important in the assessment of whether a bystander State has tried hard enough to rescue the victim is the State's "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", a capacity which

> "depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events."[92]

These criteria were later reiterated by the United Nations Secretary-General.[93] They echo the remarks made earlier about the importance of any special relationship the bystander might have with the victim, the perpetrator, or both.

Interestingly, in the assessment of whether the bystander State has done enough, the Court deems it "irrelevant whether the State whose responsibility is

89 Hakimi, *supra* note 74, esp. 355-367.
90 ICJ, *Application of the Genocide Convention*, *supra* note 47, 182, para. 430.
91 *Ibid.*
92 *Ibid.*
93 GA, *Responsibility to Protect: Timely and Decisive Response: Report of the UN Secretary-General*, UN Doc A/66/874, 25 July 2012, esp. 11, para. 40.

in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide".[94] This is especially so since "the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce".[95] Again, this is identical to the situation at the domestic level: if a bystander fails to intervene, the prosecutor does not have to prove that if the bystander would have done what he could have done that the victim would have been saved.

At the domestic level, a special kind of responsibility exists when (some of) the bystanders know each other, or constitute a recognizable group, to which the victim is also in some way affiliated. At the international level, one could think of organizations applying the 'musketeer principle' – all for one and one for all! – such as the North Atlantic Treaty Organization (NATO). Article 5 of the 1949 *North Atlantic Treaty of April* proclaims that an armed attack against one or more of the NATO members shall be considered an attack against them all and consequently they agree that they will all assist the victim State.[96] Such pledge of course makes NATO members responsible for the protection of fellow members when victim of a particularly serious breach of a peremptory norm: inter-state aggression.

H. Choosing the Appropriate Type of Bystander Assistance

I. Choosing the Appropriate Type of Bystander Assistance at Domestic Level

If the bystander decides to intervene, he must consider the appropriate type of assistance. Considering his lack of skills and training, it is not unlikely he will make the wrong choice. Feldbrugge noted, on the consequences of "negligent execution of the duty to rescue", that "the decisive factor in this respect is the rescuer's motivation".[97] In other words, a bystander cannot be blamed for a very clumsy rescue attempt, as long as he seriously meant to rescue the victim.

But even if he makes the right choice, his lack of experience and the lack of proper equipment makes it likely he will not be able to implement his strategy

94 ICJ, *Application of the Genocide Convention*, *supra* note 47, 182, para. 430.
95 *Ibid.*
96 *North Atlantic Treaty*, 4 April 1949, Art. 5, 34 UNTS 243, 246.
97 Feldbrugge, *supra* note 41, 645.

effectively. True enough, Article 450 of the *Dutch Penal Code* only asks of the bystander that he makes an *attempt* to rescue the victim; the effectiveness of the assistance or lack thereof is not taken into account. However, nobody likes to make a fool of himself in public. In the words of Latané and Darley:

> "[T]he bystander to an emergency is offered the chance to step up on stage, a chance that should be every actor's dream. But in this case, it is every actor's nightmare. He hasn't rehearsed the part very well and he must play it when the curtain is already up. The greater the number of other people present, the more possibility there is of losing face."[98]

Almost all reasons for not-intervening stated above get more convincing with each added bystander.[99] As Latané and Darley put it, "[i]f each member of a group of bystanders is aware that other people are also present, each will be less likely to notice the emergency, less likely to decide that it is an emergency, and less likely to act even if he thinks there is an emergency".[100] In States, such as the Netherlands, which have a legal obligation to assist, we may add that the bigger the group, the smaller the chance that you – of all people – will be criminally prosecuted for standing idly by. According to Latané and Darley, the inaction of a large group of people witnessing an incident which requires bystander intervention is most of all due to the diffusion of responsibility referred to above.[101]

II. Choosing the Appropriate Type of Bystander Assistance at International Level

What can the bystander State do when it decides to intervene? The ILC *Articles on State Responsibility* proclaim that all States must cooperate to bring to an end any serious breach of a peremptory norm. But how? Much can be – and has been – said about this question, especially in the context of the Responsibility to Protect. Here, the focus is on the general legal framework developed by the ILC.

98 Latané & Darley, *The Unresponsive Bystander*, *supra* note 61, 40.

99 *Ibid.*, 125, for a summary of all reasons why intervention is less likely in large groups of bystanders.

100 *Ibid.*, 38. The suggestion that people are less likely to notice the emergency in a group is later qualified a little.

101 *Ibid.*, 90. See also *ibid.*, 111.

It has been suggested that all States could – or perhaps even should – take "'collective countermeasures'"[102], "solidarity measures",[103] or "countermeasures in the general interest"[104] in response to serious breaches of norms whose compliance is considered fundamental by the international community as a whole. These were all different names for the same idea: measures that would normally be unlawful but whose unlawfulness was precluded because they were taken with the aim to rescue the victim of a breach of a fundamental obligation owed to the international community as a whole. But such ideas proved very controversial.

A few States believed that collective countermeasures were legal and desirable,[105] but many others strongly disagreed. For example, China believed that "'collective countermeasures' could become one more pretext for power politics in international relations, for only powerful States and blocs of States are in a position to take countermeasures against weaker States".[106] Similarly, Russia remarked that "[i]t would be unacceptable for any State to take countermeasures at the request of any injured State, because that would give the big Powers the opportunity to play the role of international policemen".[107] Some States did not reject collective countermeasures *per se*, but demanded more safeguards against abuse.[108] For example, the Republic of Korea suggested that "further efforts should be made to find a way to reduce arbitrariness in the process of their implementation, and to alleviate the influence of the more powerful States".[109]

102 According to Crawford, "responses to breaches of obligations to the international community as a whole could be responses adopted by one State or by a number of States [and thus] [t]heir collective character was determined by the nature of the obligations and the breach in relation to which they responded, rather than the fact that they were acting as a group". See ILC, *Summary Records of the Meetings of the Fifty-Second Session*, *supra* note 29, 337 (para. 56).

103 M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *The British Yearbook of International Law* (2001), 337.

104 D. Alland, 'Countermeasures of General Interest', 13 *European Journal of International Law* (2002) 5, 1221, 1222.

105 One example is Spain. See ILC, *State Responsibility: Comments and Observations Received From Governments*, UN Doc A/CN.4/515, 19 March 2001, 54 [ILC, State Responsibility, UN Doc A/CN.4/515].

106 *Ibid.*, 69. See also GA, *Summary Records of the Sixth Committee: 14th Meeting*, UN Doc A/C.6/55/SR.14, 10 November 2000, 8, para. 40.

107 See GA, *Summary Records of the Sixth Committee: 18th Meeting*, UN Doc A/C.6/55/SR.18, 4 December 2000, 9, para. 51.

108 See also C. Annacker, 'The Legal Régime of Erga Omnes Obligations in International Law', 46 *Austrian Journal of Public and International Law* (1994) 2, 131, 160-161.

109 ILC, *State Responsibility*, UN Doc A/CN.4/515, *supra* note 105, 89.

And Iran "stressed that countermeasures should not be used by powerful States as a means of coercing smaller nations".[110] Many States expressed their desire for some provisions on dispute settlement, presumably as a means to prevent the abuse of (collective) countermeasures.[111]

The ILC members shared the hesitations of many States when it came to the article on collective countermeasures. Brownlie remarked that these collective countermeasures had no basis in existing international law, and that, if the ILC *Articles* would expressly allow them, they "provided a superficial legitimacy for the bullying of small States on the claim that human rights must be respected", and that "it would install a 'do-it-yourself' sanctions system that would threaten the security system based on Chapter VII of the Charter of the United Nations".[112]

The idea of explicitly allowing collective countermeasures did not survive all this criticism. In the end, the article on collective countermeasures in response to serious breaches in the ILC *Articles on State Responsibility* was replaced by a 'saving clause', the application of which is not restricted to serious breaches and which does not even mention countermeasures (it mentions "lawful measures"[113]).[114] As the Chairman explained, "[w]ith that saving clause, the Commission was not taking a position on the issue and had left the matter to the development of international law".[115] As Gaja rightly noted, the ILC thus

110 See GA, *Summary Records of the Sixth Committee: 15th Meeting*, UN Doc A/C.6/55/SR.15, 13 November 2000, 3, para. 13. See also statement by Israel, *ibid*., 5, para. 25.

111 See ILC, *Report of the International Law Commission on the Work of its Fifty-Second Session (2000): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Fifty-Fifth Session Prepared by the Secretariat*, UN Doc A/CN.4/513, 15 February 2001, 11, paras 19-21.

112 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, Yearbook of the International Law Commission (2001), Vol. I, 35 (para. 2) [ILC, Summary Records of the Meetings of the Fifty-Third Session].

113 According to Alland, the fact that it mentions only 'lawful measures' can actually mean that the 'without prejudice' does not cover countermeasures. But this depends on what 'lawful measures' means exactly, and that is not clear. See Alland, *supra* note 104, 1233.

114 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, *supra* note 112, 110 & 112-113 (paras 48 & 64). In the commentary, the conclusion was that "there appears to be no clearly recognized entitlement of States [whose legal interest is affected because they are member of the international community] to take countermeasures in the collective interest". ILC, *Report of the International Law Commission on the Work of its Fifty-Third Session*, Yearbook of the International Law Commission (2001), Vol. II (2), 139 (para. 7).

115 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, *supra* note 112, 112-113 (para. 64).

clearly "back-pedalled" to reach consensus,[116] and finally agreed to disagree.[117] Pellet believed this to be a "deeply regrettable" act of "regressive or recessive development" of international law,[118] but many others welcomed the initiative. It is regrettable that the ILC failed to make up its mind about what surely ought to have been the most far-reaching consequence of the recognition of norms whose compliance is of fundamental importance for the entire international community: the right – or obligation – of the international community to cooperate to bring such breach to an end by together taking countermeasures in response.[119]

I. Conclusion

The aim of this article was to examine the legal obligations of bystanders at the domestic level – with the legal framework of the Netherlands chosen as example – and to see whether the lessons learned could be applied, *mutatis mutandis*, to establish a legal framework of bystander State responsibility at the international level.

In the Dutch domestic legal order, it is a criminal offense to stand idly by, when a fellow human being is in immediate mortal danger, and the bystander can provide support without endangering himself or others. The Netherlands is not the only State with such a provision; many States in the world have it.

What can we learn from this legal framework for the international level? The first issue to examine is how to define a situation requiring bystander State intervention. At the Dutch domestic level, a bystander is only legally obliged to intervene when a victim is in mortal danger. In other words, it only applies in

116 M. G. Gaja (Rapporteur), 'Obligations and Rights Erga Omnes in International Law', 71 *Annuaire de l' Institut de Droit International* (2006) 2, 81, 105.

117 Some scholars nonetheless claim that solidarity measures are lawful. See C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), 250. See also 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), 195, 422. C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours de l'Académie de Droit International* (1993), 325, 366-367 is more cautious.

118 ILC, *Summary Records of the Meetings of the Fifty-Third Session*, *supra* note 112, 114 (para. 70).

119 See also L.-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13 *European Journal of International Law* (2002) 5, 1127, 1140-1144. Tams also expressed his disappointment. See C. J. Tams, 'All's Well That Ends Well: Comments on the ILC's Articles on State Responsibility', 62 *Heidelberg Journal of International Law* (2002), 759, 789-790.

the most extreme of emergencies. It was suggested that this should also be the case at the international level. It could be argued that international law already obliges bystander States to intervene in cases of genocide and war crimes, but there is no reason to stop there. It was suggested to define a situation requiring bystander State intervention in general terms as a serious breach of a fundamental obligation owed to the international community as a whole, or to follow the ILC and refer to serious breaches of peremptory norms.

The next issue was the *raison d'être* of a legal obligation for bystander States to intervene. The relevant Dutch article was included in the *Dutch Penal Code* with the argument that the 'popular consciousness' was offended by the impunity of people standing by when fellow citizens were dying. We saw that a similar argument can be made to recognize a legal responsibility to intervene at the international level: doing nothing in extreme cases is offensive to the moral feelings of an international community, and thus intervention should be a legal obligation.

Although intervening might in theory be the 'right thing to do', we saw that in practice there are good reasons not to intervene, both at the national and international level. Rescue operations often end badly, with both the victim and the rescuer traumatized and physically harmed. And even successful rescue operations leave their scars, both on the victim and the rescuer. Looking specifically at the international level, it was noted that the intervening State is seldom rewarded for its intervention, even if the intervention is entirely successful, which is rarely the case at the international level.

Finally, the different decision-making stages a bystander has to go through were examined. In order to commit the offense of Article 450 *Dutch Penal Code*, the bystander must have noticed the event, and he must have had a certain awareness of the danger the victim was in. At the international level, it is almost impossible not to notice an event of the type requiring bystander State intervention, such as genocide, war crimes, inter-state aggression, etc. However, disagreements might arise as to whether a specific event legally requires States to intervene. One often hears that terrible things have happened, but 'was it really genocide?' In other words, States are generally hesitant to intervene and thus they prefer not to qualify a certain event as legally requiring their intervention.

If the event is interpreted as one which obliges the bystander to intervene, the bystander has to accept that it is his particular responsibility to intervene. And if the bystander decides to intervene, he must consider the appropriate type of assistance. When choosing the appropriate type of intervention, bystander States sometimes have to follow the rules of a particular regime set-up for particular events requiring bystander State intervention. If there is no particular

regime, the bystander State has to resort to the general legal framework, which is applicable to all (other) events requiring bystander State intervention. In short, this comes down to a right – or perhaps even an obligation – to cooperate with all other States in the world to bring the breach to an end. Such collective action might include the taking of countermeasures against the perpetrator State, in the interest of the victim and the international community as a whole. Whether such countermeasures taken in the general interest are lawful under existing international law is still disputed.

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The Notions of the Responsibility to Protect and the Protection of Civilians in Armed Conflict: Detecting Their Association and Its Impact Upon International Law

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Abstract

The article focuses on the recent trend evidenced in United Nations and State practice towards associating the responsibility to protect with the protection of civilians in armed conflict. It analyzes whether such a trend is well-founded by shedding light on the common and distinct features of the two notions. In addition, it examines the normative impacts of such association on international law, mainly on international humanitarian law since the protection of civilians in armed conflict is founded upon this law.

The article concludes that, although the responsibility to protect and the protection of civilians in armed conflict share similar features, such as the ultimate objective that they pursue and the general content of their protection, a closer look reveals significant differences between the two notions, mainly due to their specific underlying logic. It observes that their association has precisely led to export the reaction aspects peculiar to the responsibility to protect into the field of the protection of civilians in armed conflict. Such association may have the potential not only to influence the nature of the responsibility to protect by enabling it to evolve from a political to a legal concept, but also and more probably to have an impact on international humanitarian law. This could have the advantage of both clarifying and putting the accent on the possibility and necessity of coercive intervention of the international community in case of violations of the international humanitarian law rules related to the protection of civilians. However, such evolution is not without risk for this law. In particular, it may affect its neutral nature or lead to conflate the primary and collective responsibility that it provides with the ones under the responsibility to protect.

A. Introduction

The notion of Responsibility to Protect (R2P) is well-known by international lawyers. It originates from the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS).[1] The Commission was established under the initiative of Canada in order to meet the serious concerns raised by the United Nations (UN) Secretary-General (SG) after the controversial NATO intervention in Kosovo in 1999. In his 2000 *Millennium Report* to the UN General Assembly (UN GA), the UN SG emphasized the problem of "respond[ing] to a Rwanda, to a Srebrenica — to gross and systematic violations

[1] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001) [ICISS, The Responsibility to Protect].

of human rights that offend every precept of [...] [the] humanity" if humanitarian intervention was "an unacceptable assault on sovereignty".[2] The Commission proposed to substitute the broader notion of R2P with this controversial concept of humanitarian intervention. This proposition was welcomed by most non-governmental organizations (NGOs).[3] As a result of the lobbying activities of those organizations,[4] the notion of R2P developed significantly. It has been referred to in numerous documents, including binding texts: the first references appeared in the 2004 *Report of the High Level Panel on Threats, Challenges and Change*[5] as well as in the report delivered the following year by the UN SG and entitled 'In Larger Freedom: Towards Development, Security and Human Rights for All'.[6] Those documents propose a very progressive approach to R2P,

2 General Assembly (GA), *We the Peoples: The Role of the United Nations in the Twenty-First Century: Report of the Secretary-General*, UN Doc A/54/2000, 27 March 2000, 35, para. 217.

3 See the many roundtable consultations which have been organized with NGOs by the ICISS during the drafting of the report on the responsibility to protect (R2P). Cf. ICISS, *The Responsibility to Protect: Research, Bibliography, Backrgound* (2001). See also roundtables organized with NGOs by the World Federalist Movement-Institute for Global Policy (WFM-IGP) on the ICISS report. WFM-IGP, 'Civil Society Perspectives on the Responsibility to Protect: Final Report' (30 April 2003), available at http://responsibilitytoprotect.org/files/WFM_Civil%20Society%20Perspectives%20on%20R2P_30Apr2003.pdf (last visited 15 August 2014); WFM-IGP, 'Global Consultative Roundtables on the Responsibility to Protect: Civil Society Perspectives and Recommendations for Action' (February-August 2008), available at http://responsibilitytoprotect.org/files/Interim%20Report-R2P%20Roundtables%202008.pdf (last visited 15 August 2014); WFM-IGP, 'Global Consultative Roundtables on the Responsibility to Protect: Western African Perspectives' (30-31 July 2008), available at http://responsibilitytoprotect.org/files/Ghana%20Civil%20Society%20report%20--Discussion%20Draft.pdf (last visited 15 August 2014); WFM-IGP, 'Global Consultations on the Responsibility to Protect: Roundtable for SADC NGOs' (29-30 April 2008), available at http://responsibilitytoprotect.org/files/South%20Africa%20Draft%20Discussion.pdf (last visited 15 August 2014); WFM-IGP, 'Dialogue on the Responsibility to Protect: Latin Americas Perspectives' (31 March-1 April 2008) (copy on file with author); WFM-IPG, 'Prospects for an International Coalition on the Responsibility to Protect (R2P): Civil Society Consultation' (7 March 2008), available at http://worldfederalistscanada.org/programdocs/program4/R2PCoalCdnMtngRpt.pdf (last visited 15 August 2014).

4 See on this subject R. van Steenberghe, 'Non-state Actors', in G. Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (2013), 33.

5 GA, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, UN Doc A/59/565, 2 December 2004, 56-57, paras 201-203 [GA, Report of the High-Level Panel on Threats, Challenges and Change].

6 GA, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc A/59/2005, 21 March 2005, 34-35, para. 132.

the High Level Panel's report acknowledging the existence of an "emerging norm of a collective international responsibility to protect",[7] while the ICISS report only related to an "emerging guiding principle".[8] The most significant references, because they were evidence of a preliminary (political) agreement between States on the notion and giving a general definition to it (which clearly limits its scope to genocide, crimes against humanity, war crimes, and ethnic cleansing), are contained in the famous paragraphs 138 and 139 of the 2005 *World Summit Outcome*.[9] This document also recommends the UN GA "to continue consideration of" the R2P.[10] It is on such basis that (informal) debates are held before the UN GA[11] and that reports are delivered each year by the UN SG on the subject.[12] Finally, R2P is referred to in many resolutions adopted at

7 GA, *Report of the High-Level Panel on Threats, Challenges and Change*, *supra* note 5, 57, para. 202.

8 ICISS, *The Responsibility to Protect*, *supra* note 1, 15, para. 2.24.

9 *World Summit Outcome*, GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005.

10 *Ibid.*, 30, para. 139.

11 Six informal interactive dialogues have been held before the GA: the first one in 2009 on the 'Implementation of the Responsibility to Protect'; the second one in 2010, entitled 'Early Warning, Assessment, and the Responsibility to Protect'; the third one in 2011 on the 'Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect'; the fourth one in 2012 on 'the Responsibility to Protect: Timely and Decisive Response'; the fith one in 2013 on 'Responsibility to Protect: State Responsibility and Prevention'; and the sixth one in 2014 on 'Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect'.

12 Six reports have been delivered on the subject, in particular on the issues addressed at the six informal interactive dialogues before the UN GA (*supra* note 11). See GA, *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/63/677, 12 January 2009; GA, *Early Warning, Assessment and the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/64/864, 14 July 2010; GA & SC, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/65/877-S/2011/393, 28 June 2011; GA & SC, *Responsibility to Protect: Timely and Decisive Response: Report of the Secretary-General*, UN Doc A/66/874-S/2012/578, 25 July 2012 [GA & SC, Responsibility to Protect: Timely and Decisive Response]; GA & SC, *Responsibility to Protect: State Responsibility and Prevention: Report of the Secretary-General*, UN Doc A/67/929-S/2013/399, 9 July 2013; and GA & SC, *Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/68/947-S/2014/449, 11 July 2014, respectively.

the UN level,[13] in particular by the UN Security Council (UN SC),[14] on specific crises or general thematic issues such as the Protection of Civilians in Armed Conflict (POC), besides being frequently discussed by States in the UN SC debates on POC.[15]

As will be discussed later,[16] such practice actually evidences a clear trend towards associating R2P with POC. Quite unsurprisingly, the POC thematic issue is also the result of a Canadian initiative. When sitting as the UN SC President, every State may propose to the members of the Council a focus on a specific thematic topic. Canada took the occasion of its presidency in February 2009 to propose the issue of POC.[17] This proposal was largely welcomed by the other UN SC members. Therefore, since February 1999, the UN SC has generally met twice a year in order to discuss the protection of civilians in armed conflict. Several resolutions have been adopted by this body on that subject[18] and it has referred to POC in many resolutions dealing with specific crises. In May 2012, the UN SG delivered his ninth report on the subject which refers to five core challenges:

> "enhancing compliance by parties to conflict with international law; enhancing compliance by non-state armed groups; enhancing

13 See, e.g., in addition to UN SC resolutions (*infra* note 14), GA Res. 66/176, UN Doc A/RES/66/176, 23 February 2011, 2 (operative part 2) and GA Res. 66/253, UN Doc A/RES/66/253, 21 February 2012, 2 (operative part 3) as well as Human Rights Council (HRC) Res. S-16/1, UN Doc A/HRC/RES/S-16/1, 4 May 2011, 2 (operative part 1); HRC Res. S-18/1, UN Doc A/HRC/RES/S-18/1, 5 December 2011, 2 (operative part 3); and HRC Res. S-19/1, UN Doc A/HRC/RES/S-19/1, 4 June 2012, 2 (operative part 5) (on the situation in Syria). See also HRC Res. S-15/1, UN Doc A/HRC/RES/S-15/1, 3 March 2011, 2 (operative part 2) (on the situation in Libya).

14 See, e.g., in addition to resolutions mentioned below (*infra* section B.), SC Res. 2014, UN Doc S/RES/2014 (2011), 21 October 2011, 2 (Preamble, part 14) (on the situation in Yemen); SC Res. 2016, UN Doc S/RES/2016 (2011), 27 October 2011, 2 (operative part 3); and SC Res. 2040, UN Doc S/RES/2040 (2012), 12 March 2012, 3 (operative part 4) (on the situation in Libya); SC Res. 2085, UN Doc S/RES/2085 (2011), 20 December 2011, 4 (operative part 9 (d)) (on the situation in Mali).

15 See especially *infra* section B.

16 *Ibid.*

17 SC, *Verbatim Record of the 3977th Meeting*, UN Doc S/PV.3977, 12 February 1999, 33 (declaration of Cananda).

18 See, e.g., SC Res. 1265, UN Doc S/RES/1265 (1999), 17 September 1999; SC Res. 1296, UN Doc S/RES/1296 (2000), 19 April 2000; SC Res. 1674, UN Doc S/RES/1674 (2006), 28 April 2006; and SC Res. 1894, UN Doc S/RES/1894 (2009), 11 November 2009 (in addition to the numerous statements of the UN SC President).

> protection by United Nations peacekeeping and other relevant missions; improving humanitarian access; and enhancing accountability for violations".[19]

Even if the questions addressed under POC have slightly evolved since 1999,[20] international law, in particular international humanitarian law (IHL), remains the central pillar of this thematic issue.[21]

Although the association of R2P with POC is clearly apparent in recent practice, this phenomenon has only been studied by political scientists[22] but not by lawyers.[23] Much of the legal scholarship indeed focuses on two main issues regarding R2P: the normative nature of this concept[24] and the relationships

19 SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, 22 May 2012, 1, para. 3 [Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc S/2012/376].

20 See in this respect the issues addressed by the UN Secretary-General (SG) in its first report on the subject. SC, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc S/1999/957, 9 September 1999 [SC, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc S/1999/957].

21 See *infra* section D.

22 See, e.g., J.-F. Thibault, 'Protection des civils et responsabilité de protéger: Les enjeux humanitaires d'une séparation du jus in bello et du jus ad bellum', 94 *Bulletin du Maintien de la Paix* (2009), 1; B. Pouligny, 'La responsabilité de protéger (r2p): état des débats', *Humanitaire en mouvement* (2010) 5, 2. See also H. E. Breakey, 'Protection Norms and Human Rights: A Rights-Based Analysis of the Responsibility to Protect and the Protection of Civilians in Armed Conflict', 4 *Global Responsibility to Protect* (2012) 3, 309 [Breakey, Protection Norms and Human Rights]; H. E. Breakey & A. Francis, 'Points of Convergence and Divergence: Normative, Institutional and Operational Relationships Between R2P and PoC', 7 *Security Challenges* (2011) 4, 39; H. E. Breakey *et al.*, 'Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts', available at http://i.unu.edu/media/unu.edu/publication/31142/R2P_POC_Policy_Guide.pdf (last visited 15 August 2014).

23 See the only exception of L. Poli, 'The Responsibility to Protect Within the Security Council's Open Debates on the Protection of Civilians: A Growing Culture of Protection', in J. Hoffmann & A. Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (2012), 71. However, this study is brief and mainly concerned with the influence of R2P upon the POC discourse in the UN SC debates on POC.

24 See, e.g., L. Boisson de Chazournes & L. Condorelli, 'De la "Responsabilité de protéger", ou d'une nouvelle parure pour une notion déjà bien établie', 110 *Revue générale de droit international public* (2006) 1, 11, 14; D. Warner & G. Giacca, 'Responsibility to Protect', in V. Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (2009), 291; J. Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era?', 1 *Groningen Journal of International Law* (2012) 0, 11.

between R2P and humanitarian intervention.[25] Lawyers have quite neglected examining this recent trend to link R2P to POC, though this may have an impact not only on each of these notions but also on international law, in particular IHL as POC is mainly based on this law. This article intends to address those issues from a legal perspective. It will be first devoted to analyzing UN and State practice – mainly the UN SC resolutions and the State declarations made at the UN SC meetings on POC – which evidences this recent trend to associate R2P with POC (section B.). The following parts will emphasize the common (section C.) and distinct (section D.) features of the two concepts. Finally, the potential normative impacts of this association, mainly on IHL, will be analyzed (section E.).

The article, therefore, differentiates itself from the broad literature on the subject regarding two main aspects. Firstly, the recent trend to associate R2P with POC is studied from the viewpoint of a lawyer, following a legal approach which mainly focuses on UN and State practice and refers to the international instruments and customary law when relevant. Secondly, the article aims at analyzing the direct influence of this recent trend on international law. It emphasizes that this phenomenon may have the potential of not only influencing the nature of the responsibility to protect by enabling it to evolve from a political to a legal concept, but also and more probably to have an impact on IHL. It concludes in this respect that, although such evolution could have the advantage of both clarifying and putting the accent on the necessity of coercive intervention of the international community in case of violations of the IHL rules related to the protection of civilians, it is not without risk for this law, as it may affect its neutral nature or lead to conflate the primary and collective responsibility that it provides with the ones under the responsibility to protect.

B. Recent Trend to Associate R2P with POC

The first time that R2P was mentioned in a UN SC resolution was in a resolution devoted to POC, i.e. *Resolution 1674* (2006), which was adopted not long after the recognition of R2P in the 2005 UN *World Summit Outcome*. This link between the two notions again appeared some months later in

[25] See, e.g., O. Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* (2010), 769; E. Massingham, 'Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?', 91 *International Review of the Red Cross* (2009) 876, 831.

Resolution 1706 (2006), dealing with the situation in Darfur, in which the UN SC recalled, among its relevant previous resolutions, *Resolution 1674* (2006) "on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations *World Summit Outcome*."[26] The last substantial UN SC resolution adopted on POC after 2005, i.e. *Resolution 1894* (2005), is even more explicit on the link between R2P and POC. *Resolution 1894* (2005) expressly considers paragraphs 138 and 139 of the 2005 UN *World Summit Outcome* as being part of "the relevant provisions of [this document] regarding the protection of civilians in armed conflict".[27] Such a link is also noticeable in recent UN SC resolutions related to specific crises, namely the ones on the situation in Libya, *Resolution 1970* (2011) and *Resolution 1973* (2011), and the one on the situation in the Ivory Coast, *Resolution 1975* (2011). In each of these resolutions R2P is clearly associated with POC. Both notions are reaffirmed in the same paragraph of the preamble, which is formulated in a similar way.

This is actually in line with declarations made by States before the UN SC during the POC debates. Most States associate the two concepts. Some do it implicitly[28] while others do so explicitly. Among the latter, States like Sweden

[26] SC Res. 1706, UN Doc S/RES/1706 (2006), 31 August 2006, 1 (Preamble, part. 2) (emphasis added).

[27] SC Res. 1894, *supra* note 18, 1 (Preamble, part. 7).

[28] See, e.g., SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, 22 June 2007, 8 (declaration of Panama); *ibid.*, 17 (declaration of Congo); *ibid.*, 31 (declaration of Mexico); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, 20 November 2007, 7 (declaration of Belgium, on behalf of the European Union); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), 11 November 2009, 25-26 (declaration of Belgium); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), 14 January 2009, 17 (declaration of Australia); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), 20 November 2007, 14 (declaration of Australia); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066, 14 January 2009, 28 (declaration of Italy); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* this note, 14 (declaration of Finland, on behalf of Denmark, Iceland, Norway, Sweden); SC, *Verbatim Record of the 6151st Meeting*, UN Doc S/PV.6151, 26 June 2009, 23 (declaration of the United States); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, 11 November 2009, 15 (declaration of France); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427 (Resumption 1), 22 November 2009, 20 (declaration of Ghana); and SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, 25 June 2012, 23 (declaration of Germany). For declarations which evidence more clearly that R2P is considered as an element of the POC thematic issue, see, e.g., SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* this note, 8 (declaration of Peru); *ibid.*, 20 (declaration of Ghana);

and the United Kingdom expressly consider R2P as one of the key elements of the POC normative framework.[29] This position actually coincides with the one supported by the UN SG in his 2007 report on POC. The report indeed indicates, under a section entitled 'Advances in the normative framework [of POC]', that

> "[o]f particular significance was the acceptance by all Member States at the 2005 World Summit of a fundamental 'responsibility to protect' [as this] represents a critically important affirmation of the primary responsibility of each State to protect its citizens and persons within its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity".[30]

In fact, the report largely contributed to this recent trend in State declarations associating R2P with POC. Some States also expressly argue in favor of such association. Ireland, for example, stated before the UN SC in 2009 that it viewed R2P "as an extremely important vehicle for advancing the work on the protection of civilians in armed conflict".[31] Similarly, Rwanda asserted at the same meeting that it

> "view[ed] the responsibility to protect as being integral to the protection of civilians, and welcome[d] the reference to the responsibility to protect in [...] resolution [1894]".[32]

SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* this note, 10-11 (declaration of Panama); *ibid*., 14 (declaration of South Africa); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* this note, 16 (declaration of Liechtenstein); SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, 10 May 2011, 20 (declaration of Nigeria); and SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), 10 May 2011, 15 (declaration of Croatia).

29 SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, *supra* note 28, 30 (declaration of Sweden); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 12 (declaration of the United Kingdom).

30 SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2007/643, 28 October 2007, 4, para. 11.

31 SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), *supra* note 28, 19 (declaration of Ireland).

32 *Ibid*., 53 (declaration of Rwanda). See also SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* note 28, 6 (declaration of Belgium); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, *supra* note 28, 31 (declaration of Italy); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427, 22 November

Finally, some States clearly emphasize the common features of the two notions. The Netherlands' declaration at an UN SC meeting in May 2011 is particularly illustrative in that regard. This declaration is entirely devoted, according to the representative's words, to the "the relationship between the protection of civilians and the responsibility to protect, which is an important relationship that has been acknowledged in various resolutions on the protection of civilians in recent years".[33] After having underlined that "[c]onceptually, the responsibility to protect and the protection of civilians are indeed distinct", the representative nonetheless stated that "the two principles [were] also closely related", before concluding that

> "[t]he language of the recent resolutions on Libya acknowledge[d] the very close relationship between the protection of civilians and the responsibility to protect [...], [t]he Netherlands [being] very pleased about that".[34]

It is true that some States, like China[35] and Russia[36], argue for a very strict conception of R2P – conforming to the 2005 UN *World Summit Outcome* – when considering it in the framework of the POC debates and warned against any political use of this notion in relation to the protection of civilians in armed conflict.[37] However, R2P is still considered by those States as an element – although controversial – of the POC framework.

2009, 29 (declaration of Italy); and SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), 9 November 2011, 13 (declaration of Norway) (the latter stating that "protection of civilians cannot be seen in isolation from the principle of the responsibility to protect").

33 SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 23 (declaration of the Netherlands].

34 *Ibid.*, 24 (declaration of the Netherlands).

35 See SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 10 (declaration of China); SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 20 (declaration of China); and SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650, 9 November 2011, 24-25 (declaration of China).

36 See SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, *supra* note 28, 21-22 (declaration of Russia).

37 See also SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 11 (declaration of Qatar); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 18 (declaration of Qatar); SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* note 28, 34-35 (declaration of Sudan); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), *supra* note

That said, more recently, several States expressly opposed any association of R2P with POC. They argue for a clear distinction between the two notions. Brazil, for example, stated before the UN SC in May 2011 that

> "[t]he protection of civilians is a humanitarian imperative [and that it] is a distinct concept [which] must not be confused or conflated with threats to international peace and security, as described in the Charter, or with the responsibility to protect".[38]

Interestingly, contrary to his 2007 report on POC,[39] the UN SG strongly emphasized the necessity of distinguishing between R2P and POC in his 2012 report on the subject. In this report he asserted that he was "concerned about the continuing and inaccurate conflation of the concepts of the protection of civilians and the responsibility to protect", arguing that

> "[w]hile the two concepts share some common elements, particularly with regard to prevention and support to national authorities in discharging their responsibilities towards civilians, there are fundamental differences, [including the fact that] the protection of civilians is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept, set out in the 2005 *World Summit Outcome* [...]".[40]

28, 42 (declaration of Sudan); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427 (Resumption 1), *supra* note 28, 26 (declaration of Sudan); SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 24 (declaration of Sudan). See also SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, *supra* note 28, 10 (declaration of Guatemala).

38 SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 11 (declaration of Brazil). See also SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 24 (declaration of Colombia); SC, *Verbatim Record of the 6354th Meeting*, UN Doc S/PV.6354 (Resumption 1), 7 July 2010, 21 (declaration of Venezuela); SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 28-29 (declaration of Syria); SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 27 (declaration of Syria).

39 Cf. *supra* note 30.

40 SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, *supra* note 19, 5-6, para. 21 (emphasis added).

Such a change is certainly due to the vigorous criticisms by some States of the 2011 military intervention in Libya which was based, as indicated above, on a resolution associating the two concepts and interpreted by some States as an application of R2P[41] while by others as an application of POC.[42] It is therefore necessary to examine whether the recent trend of associating the two concepts is well-founded by analyzing the common and distinct features of those concepts.

C. Common Features

R2P and POC undoubtedly share several common features. Only the main ones will be discussed in the following paragraphs. The first and most evident common feature is that they both serve the protection of persons. They pursue the same final objective, to avoid civilian populations from being seriously harmed. Actually, they are both related to this trend of protecting individuals, historically rooted in IHL. This does not however mean that R2P is directly founded upon IHL (or *jus in bello*). As will be detailed below,[43] R2P is intrinsically linked to the notions of sovereignty and intervention and therefore belongs to *jus ad bellum*, which is classically separated from IHL, while the latter is both the ultimate and direct basis of POC. That said, in addition to the fact that those two branches of international law are somewhat interconnected, particularly regarding the protection of civilians,[44] and that R2P also includes other aspects than use of force, such as the prevention of armed conflicts, one must acknowledge, as rightly noted by an author, that

> "the very starting point of the meaning embodied in the formula 'responsibility to protect' is clearly to be found in international humanitarian law, the latter operating as a legal experimentation

41 For such interpretation see, e.g., SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 26 (declaration of Venezuela).

42 For such interpretation, see, e.g., SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650, *supra* note 35, 19-20 (declaration of France); *ibid.*, 20 (declaration of the United States of America), *ibid.*, 22 (declaration of South Africa); SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650 (Resumption 1), *supra* note 32, 7 (declaration of Canada) and *ibid.*, 16 (declaration of Chile).

43 See *infra* section D.

44 See, e.g., R. van Steenberghe, 'L'emploi de la force en Libye: Questions de droit international et de droit interne', 26 *Journal des tribunaux* (2011), 529, 535-536. See also V. Koutroulis, 'Jus ad/contra bellum', in R. van Steenberghe (ed.), *Droit international humanitaire: Un régime spécial de droit international?* (2013) [van Steenberghe, Droit international humanitaire], 157, 183-187.

> platform within which several new concepts of contemporary international law have been elaborated and have moved towards other fields of this law, like human rights law or, very recently, international criminal law".[45]

A second important common feature is that R2P and POC involve a similar continuum of actions. They both include prevention, reaction, and rebuilding aspects. This is manifest with respect to R2P, at least in the 2001 ICISS report. Although it is true that the 2005 UN *World Summit Outcome* and the UN SG reports on the subject no longer insist on the rebuilding aspects, State declarations evidence that those aspects are still considered as an important part of R2P. A similar distinction between prevention, reaction and rebuilding aspects is also a characteristic of POC. This is evidenced by UN SC resolutions[46] and State declarations[47] on the matter. As far as prevention is concerned, UN SC resolutions on POC insist on a global approach to the problem, taking into account both the immediate and remote causes of armed conflicts. This is clearly apparent in *Resolution 1674* (2005), adopted in the framework of the POC debates. In operative part 2, the UN SC

> "*[e]mphasizes* the importance of preventing armed conflict and its recurrence, and *stresses in this context* the need for a comprehensive approach through promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law, and respect for, and protection of, human rights [...]".[48]

The same approach seems to be followed by the ICISS in its 2001 report which emphasizes the need to address the root and direct causes of armed conflicts[49] and expressly refers in that regard to the 2001 UN SG report on the prevention of armed conflicts.[50] That prevention is actually one of the main common features of R2P and POC is also evidenced by the recent merger of the Special Advisor on the Prevention of Genocide, whose main activity is related

45 Boisson de Chazournes & Condorelli, *supra* note 24, 14 (translation by the author).
46 See, e.g., SC Res. 1674, *supra* note 18, 2 (operative part 2).
47 See, e.g., *infra* note 52.
48 SC Res. 1674, *supra* note 18, 2 (operative part 2).
49 ICISS, *The Responsibility to Protect*, *supra* note 1, 22-23, paras 3.18-3.24 & 23 *et seq.* & 3.25 *et seq*.
50 *Ibid*., 19, para. 3.5.

to the prevention of armed conflicts, with the Office of the Special Advisor on the Responsibility to Protect.[51] Finally, this common aspect is emphasized by States in their declarations at UN SC meetings on POC; the representative of the Netherlands, for example, stated in May 2011 that "prevention and early warning [were] key aspects of the protection of civilians and the responsibility to protect"[52] which constituted one of the four main common characteristics of the two notions.[53] However, the reaction and rebuilding aspects are not absent from the POC thematic issue. In each of the UN SC resolutions on this issue, the Council recalls that it may take any appropriate measure under the *UN Charter* when civilians are directly targeted in armed conflict and that such a situation may amount to a threat to international peace and security.[54] This aspect was already mentioned in the first UN SG report on POC[55] and discussed by States at the first UN SC meeting on POC.[56] Similarly, all the UN SC resolutions on that subject contain aspects pertaining to rebuilding. Although they do not establish a general framework regarding such aspects, contrary to what they do concerning the other ones, those resolutions mention several measures in that regard. They regularly insist on the necessity of including provisions regarding disarmament, demobilization, and reinsertion of ex-combatants in

51 See generally International Coalition for the Responsibility to Protect, 'Joint Office of the Special Advisor on the Prevention of Genocide and on the Responsibility to Protect', available at http://responsibilitytoprotect.org/index.php/component/content/article/3618 (last visited 15 August 2014).

52 SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 24 (declaration of the Netherlands). See also SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 14 (declaration of Portugal) (stating that "[p]reventive measures are core elements of resolution 1894 (2009) and important pillars of the responsibility to protect").

53 SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 24 (declaration of the Netherlands).

54 See, e.g., SC Res. 1265, *supra* note 18, 3 (operative part 10); SC Res. 1296, *supra* note 18, 2 (operative parts 5 & 8); SC Res. 1674, *supra* note 18, 5 (operative part 26); and SC Res. 1894, *supra* note 18, 3 (operative parts 3 & 4).

55 SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/1999/957, *supra* note 20, 24, para. 72.

56 See, e.g., SC, *Verbatim Record of the 3977th Meeting*, UN Doc S/PV.3977, *supra* note 17, 15 (declaration of Russia).

peace agreements.[57] They always contain international criminal law provisions,[58] recalling in particular the duty to bring those responsible for international crimes to justice.[59]

Both POC and R2P also involve a similar continuum of responsibilities, which includes the primary responsibility of States to protect their population, the responsibility of the international community *sensu lato* (i.e. the United Nations and other actors) to assist States to protect their population, and, finally, the responsibility of the international community *sensu stricto* (i.e. mainly the UN SC) to react when States do not fulfill their primary responsibility and do not accept any help in that regard. These are the famous three R2P pillars. It is true that this continuum of responsibilities is not so apparent in the POC field. Yet, as discussed in detail below,[60] State declarations on that matter clearly show that, although the accent was originally put on the primary responsibility of States to protect civilians and the responsibility of the United Nations to assist those States in fulfilling this primary responsibility, the responsibility to react (mainly borne by the UN SC) was asserted later, precisely under the influence of R2P.

Finally, the last common feature concerns the scope of application of the two notions which partially overlap: *ratione personae* firstly, since both notions deal with protection of civilians by the States and the international community; *ratione materiae* secondly, as they protect those persons against violations of IHL and human rights law; and *ratione contextus* thirdly, because they both apply to armed conflicts, R2P being indeed applicable, not only in case of genocide, crimes against humanity, and ethnic cleansing, i.e. crimes which are not legally required to be committed in armed conflict, but also in case of war crimes, which consist of serious violations of the law of armed conflict by individuals.[61]

57 See, e.g., SC Res. 1265, *supra* note 18, 3-4 (operative part 12); SC Res. 1296, *supra* note 18, 3 (operative part 16); SC Res. 1674, *supra* note 18, 4 (operative part 18); and SC Res. 1894, *supra* note 18, 7 (operative part 29).

58 See, e.g., SC Res. 1265, *supra* note 18, 3 (operative part 6); SC Res. 1296, *supra* note 18, 3 (operative part 17); SC Res. 1674, 3, *supra* note 18 (operative part 8); and SC Res. 1894, *supra* note 18, 4 (operative part 10).

59 This is actually common to all the notions dealing with rebuilding aspects, such as the notions of transitional justice (see on this subject A.-M. La Rosa & X. Philippe, 'Transitional Justice', in Chetail (ed.), *supra* note 24, 373) or *jus post bellum* (see on this subject C. Stahn, 'Jus post Bellum: Mapping the Discipline(s)', 23 *American University International Law Review* (2008) 2, 311, 336 *et seq.*).

60 Cf. *infra* section D.

61 The UN SC or UN GA resolutions referring to R2P often emphasizes the existence of grave violations of IHL and human rights. See generally *supra* note 13 and, for a clear

D. Main Differences

Although R2P and POC share similar features, a closer look reveals significant differences between the two notions. Firstly, the logic that they follow for achieving their common objective, i.e. the protection of persons, is not the same given their different starting point and nature. It is well-known that the objective of the creation of the R2P concept – clearly acknowledged by the ICISS[62] – was to find a more acceptable notion than humanitarian intervention by not opposing, as the latter does, intervention to sovereignty. This was done by inverting the relation between these apparently conflicting notions and by rooting the notion of intervention in sovereignty: R2P is considered as primarily borne by States as a corollary of their sovereignty, which makes it possible to support that if a State is unwilling or unable to fulfill this primary responsibility and, therefore, to fully exercise its sovereignty over its territory, the international community can (and even must) legitimately intervene. By doing so, it intends to provide a right (and even impose an obligation) to take action and, if needed, to use force. The international community is moreover led to be one-sided with respect to the situation of violence in which it intervenes as it acts against the actor that it considers as being responsible for the mass atrocities in this situation. Therefore, as intrinsically linked to sovereignty and to the notion of intervention (*jus ad bellum*), as well as requiring to be one-sided in relation to the situation of violence at stake, R2P logically has a more political nature and is subject to controversies.

It is not the case of POC, which is directly founded upon IHL (*jus in bello*) and human rights law. This is clearly evidenced by all the UN SG reports and UN SC resolutions on POC. Many States have also underlined this fundamental link between POC and international law by asserting for example that "[t]he numerous topics of direct relevance to the protection of civilians have one thing in common [,] the central role of international law and its application"[63] or that "[w]hen we talk about the protection of civilians, we generally speak about an attachment to legality and respect for international law, in particular international humanitarian law and human rights"[64] or again

example of the application of R2P in relation to war crimes, GA Res. 67/262, UN Doc. A/RES/67/262, 4 June 2013, 4 (operative part 4) (concerning the situation in Syria).

62 See the ICISS, *The Reponsibility to Protect*, *supra* note 1, 16-17, paras 2.28 & 2.29.

63 SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 16 (declaration of Liechtenstein).

64 SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066, *supra* note 28, 7 (declaration of Costa Rica).

that "[t]he concept of the protection of civilians is founded on the universally accepted rules of humanitarian and human rights law, which are set down in a range of international legal instruments".[65]

As firmly founded upon law, mainly legal obligations to abstain from doing something, whose implementation must conform to a principle of neutrality in relation to the situation of violence to which this law applies, POC appears as an objective and neutral notion, or even as being itself a legal concept as expressly asserted by the UN SG in his 2012 report on the subject.[66]

A second significant distinct feature is concerned with the continuum of actions characterizing the two notions. It is undisputed, as already mentioned, that both notions involve prevention, reaction, and rebuilding aspects and similarly focus on prevention while containing fewer developments on rebuilding activities. There is, however, a significant difference between the two notions regarding the reaction aspects. While R2P reaction includes, in accordance with the ICISS report,[67] any 'coercive' military intervention, POC reaction aspects are mainly concerned with peacekeeping operations, originally construed and presented as neutral and impartial operations. In fact, peacekeeping operations are one of the main components of the POC thematic issue. Indeed, since the creation of UNAMSIL (United Nations Mission in Sierra Leone) in 1999, a UN peacekeeping operation which was for the first time mandated to protect civilians under imminent threat of physical violence,[68] many UN operations have now been given this kind of mandate. UN SC *Resolution 1296* (2000) is the first text to insist in general terms on the necessity to include such a protective mission in the UN operations' mandates.[69] This practice therefore clearly existed before the emergence of the R2P concept and, as a result, was not originally related to that concept. Nowadays, UN institutions and States generally take care not to link R2P to the field of peacekeeping operations or at

65 SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427, *supra* note 32, 22-23 (declaration of Armenia).

66 SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, *supra* note 19, 5-6, para. 21.

67 See ICISS, *The Responsibility to Protect*, *supra* note 1, 31-32.

68 SC Res. 1270, S/RES/1270, 22 October 1999 (1999), 3 (operative part 14).

69 See, e.g., P. d'Argent, 'Opérations de protection et opérations de maintien de la paix', in Société Française pour le Droit International (ed.), *La responsabilité de protéger* (2008), 137. See also the numerous resolutions quoted by the author.

least remain particularly cautious in that regard.[70] The 2012 UN SG report on R2P indicates in this way that

> "[w]hile the work of peacekeepers may contribute to the achievement of R2P goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives".[71]

Yet it is true that some UN documents evidence an embryonic evolution in that respect, particularly regarding peacekeeping operations authorized by the UN SC to use force under Chapter VII and in having a protective mandate. One of the main documents in that regard is the 'UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo', which was drafted in order to take "into account the need to reconcile and integrate MONUC's mandate to protect civilians with its mandate to support the operations of the [DRC armies]".[72]

70 See for a similar observation H. E. Breakey, 'The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast', in A. Francis, V. Popovski & Charles Sampford (eds), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (2012), 62, 74 [Breakey, The Responsibility to Protect].

71 GA & SC, *Responsibility to Protect: Timely and Decisive Response*, *supra* note 12, 5, para. 16. See also the famous 2009 independent study on the protection of civilians in the context of the UN peacekeeping operations, jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (V. Holt & G. Taylor, 'Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges', available at http://peacekeepingbestpractices.unlb.org/pbps/Library/Protecting%20Civilians%20in%20the%20Context%20of%20UN%20PKO.pdf (last visited 15 August 2014)). This study indicates that "[it] does not aim to define or discuss the related but yet separated concept of a 'responsibility to protect' [...]" (*Ibid.*, 21). As emphasized by B. Pouligny (*supra* note 22, 5), "the study takes care of not putting the responsibility to protect as a central point, since most of the actors engaged in the discussions on the field of peacekeeping operations fear that the responsibility to protect brings confusion and calls into question the progress made in that field" (translation by the author).

72 United Nations Organization Mission in the Democratic Republic of Congo (MONUC) & UN Office of the High Commissioner for Human Rights, 'UN System-Wide Strategy for the Protection of Civilians in the Democratic Republic of the Congo' (January 2010), available at http://globalprotectioncluster.org/_assets/files/field_protection_clusters/Democratic_Republic_Congo/files/UN_Wide_Protection_Strategy_Final_150110_EN.pdf (last visited 15 August 2014), 1, para. 2.

This document expressly refers to R2P and discusses it in three paragraphs under a section entitled 'Rationale and the Responsibility to Protect'.[73] Yet, this is the only document to explicitly and elaborately refer to R2P in relation to peacekeeping operations.

It is certainly with respect to the continuum of responsibilities, which characterizes both R2P and POC, that the difference between the two notions appears as the most fundamental. As already indicated, both notions involve similar types of responsibility. However, the interconnection between them was at the origin very different. As far as R2P is concerned, the assertion of a primary responsibility to protect upon States, which constitutes the R2P first pillar, appears as a means to support in an easier and more acceptable way, the existence of a responsibility borne by the international community to intervene on the territory of a State if the latter does not fulfill its primary responsibility, which constitutes the R2P third pillar. In other words, the R2P first pillar, which infers from the sovereignty of States their primary responsibility to protect their population, serves as a judicious means for the assertion of potential collective reactions on their territory in case of massive persecutions.[74]

Contrary to R2P, only two general types of responsibility were originally asserted under POC: the States' primary responsibility and the UN SC responsibility to protect civilians. Unlike the R2P logic, the primary responsibility was generally asserted as coexisting with – and could not be superseded by – the responsibility of the UN SC, and, especially, as not excluding such collective responsibility. The only aim of insisting on a UN SC responsibility was to show that it was relevant to consider the protection of civilians in armed conflict as a thematic issue before the Security Council although such protection primarily fell on States (and any other party to the armed conflict). The declaration of Germany before the UN SC in February 1999 is particularly relevant in that regard. Indeed, the German representative stated:

73 *Ibid*., 1-2, paras 4-6.

74 Actually, making military interventions on the territory of a State dependent upon the failure of this State to act adequately to face the situation urging the intervention is conform to the general and well-known condition in the *jus ad bellum* field, according to which a military action can only be conducted on a foreign territory if it is necessary or, in other words, if it is undertaken as a last resort. This at least implies that the State was unable or unwilling to meet the problematic situation, that is, in the case at stake, to protect its population. See, e.g., with respect to the right of self-defense, R. van Steenberghe, *La légitime défense en droit international public* (2012), 188-190 & 354-355 [van Steenberghe, La légitime défense].

> "The EU believes that the issue of the protection of civilians in armed conflict deserves to figure high on the international political agenda. While we recognize that the primary responsibility to protect civilians under all circumstances rests with States and parties to a conflict, we must also reinvigorate international efforts to protect civilians in armed conflict. The Security Council has an important responsibility in this context. It is important that it properly coordinate its actions with other relevant bodies."[75]

Similarly, the Russian representative asserted the next year:

> "The primary responsibility for protecting civilians in all circumstances is vested in the States and parties to an armed conflict. However, international efforts undertaken, including those undertaken by the Security Council, can have a powerful, positive impact on the performance of this task."[76]

It is precisely after the emergence of the R2P concept that things have evolved. The R2P specific logic has been exported to the POC field. The primary responsibility has no longer been conceived as coexisting with the UN responsibility but as the starting point of the assertion of a responsibility borne by the UN SC to intervene in case of failure of the national authorities to protect civilians in armed conflict. This change appeared in the first declaration in which R2P was associated with POC. Unsurprisingly, this association was made by Canada – which is at the origin of both R2P and POC. Indeed, the Canadian representative stated in 2004 at an UN SC meeting on POC:

> "Ultimately of course, Member States themselves must take primary responsibility for ensuring the protection of their own people. Indeed, as argued in the recent report of the International Commission on Intervention and State Sovereignty, entitled *The Responsibility to Protect*, this is a responsibility implicit in the very concept of State sovereignty. Much more can and should be done by Member States. But when they fail to assume their responsibility,

[75] SC, *Verbatim Record of the 3980th Meeting*, UN Doc S/PV.3980, 22 February 1999, 3 (declaration of Germany, on behalf of the European Union).

[76] SC, *Verbatim Record of the 4130th Meeting*, UN Doc S/PV.4130, 19 April 2000, 12 (declaration of Russia).

> the Security Council must act. It is evident that the Council can and must do more."[77]

Similarly, the Belgian representative asserted in 2007:

> "Belgium would also like to emphasize that it is above all States themselves that must assume the responsibility to protect civilians in situations of armed conflict. If they do not have the capacity or the will to guarantee adequate protection, then the international community has the responsibility — and even the duty — to respond."[78]

The declaration made by Ghana in the same year is even more explicit, the representative of Ghana stating:

> "While it is recognized that the primary responsibility for the protection of civilians falls on States and Governments, the present situation clearly indicates that in most conflicts, States and Governments are either unable or unwilling to provide that protection. The international community, therefore, has a moral and legal duty to extend this protection as affirmed in paragraphs 138 and 139 of the 2005 *World Summit Outcome* (General Assembly *Resolution 60/1*), and as stressed in Council *Resolution 1674* (2006)."[79]

Such a change also seems perceptible in the field of peacekeeping operations, mainly in the UN document entitled 'Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operation'.[80]

77 SC, *Verbatim Record of the 4990th Meeting*, UN Doc S/PV.4990 (Resumption 1), 14 June 2004, 16 (declaration of Canada).

78 SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 28 (declaration of Belgium).

79 SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 17 (declaration of Ghana) (emphasis added).

80 UN Office for the Coordination of Humanitarian Affairs (OCHA), 'Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operation' (2011), available at http://globalprotectioncluster.org/_assets/files/tools_and_guidance/protection_of_civilians/Framework_Comprehensive_PoC_Strategies_EN.pdf (last visited 15 August 2014).

Although this document does not explicitly refer to R2P (contrary to the abovementioned document related to MONUC),[81] it evidences an evolution endorsing a logic close to the R2P one. It is well-known that, since 1999, UN SC resolutions on peacekeeping operations have stipulated that missions to protect civilians must be conducted 'without prejudice of the responsibility of the government' in that matter. In other words, UN operations cannot act as a substitute for the government without its consent. By using another formula, founded upon a rationale resembling the R2P one, the 'Framework for Drafting Comprehensive Protection of Civilians (POC) Strategies in UN Peacekeeping Operation' brings a significant change. Paragraph five of this document states, under a section entitled 'Key Considerations Prior to Drafting the Strategy':

> "[The Operational] Concept [on the protection of Civilians in United Nations Peacekeeping Operations] also recognizes that the protection of civilians is primarily the responsibility of the host government and that the mission is deployed to assist and build the capacity of the government in the fulfillment of this responsibility. However, in cases where the government is unable or unwilling to fulfill its responsibility, Security Council mandates give missions the authority to act independently to protect civilians [meaning that] *missions are authorized to use force against any party, including elements of government forces* [...]."[82]

Such a change concerning the mandate of the UN peacekeeping operations also seems noticeable in the UN SC *Resolution 1856* (2008)[83] on the situation in the DRC. Previous resolutions defining the MONUC's mandate generally attributed to this mission the task to protect civilians 'without prejudice to the responsibility of the government of the DRC'. By contrast, *Resolution 1856* (2008) does not use such wording and indicates that the MONUC must "[e] nsure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence, in particular violence emanating *from any of the parties engaged in the conflict*".[84]

Those last words therefore enable measures to be taken even against the Congolese governmental forces. Some States, including Belgium which was at the

81 Cf. *supra* note 72.
82 OCHA, *supra* note 80, 2-3 (para. 5) (emphasis added).
83 SC Res. 1856, UN Doc S/RES/1856 (2008), 22 December 2008.
84 *Ibid.*, 4 (operative part 3 (a)) (emphasis added).

origin of the resolution, expressly considered that such modification with respect to the MONUC mandate "fully [integrated] the notion of the responsibility to protect".[85]

Finally, a last significant difference between R2P and POC is related to the scope of application of these notions. While they partially overlap, they also partially diverge. *Ratione personae* firstly, as the primary responsibility to protect under R2P only falls on States while the responsibility under POC rests with not only States but also any party to the armed conflict in general, including armed groups. *Ratione materiae* secondly, since R2P is only concerned, regarding armed conflicts, with serious IHL violations amounting to war crimes whereas POC deals with any IHL violation in relation to the protection of civilians. *Ratione contextus* thirdly, as R2P also applies in situations which do not amount to armed conflicts since its aim is to protect populations not only from war crimes but also from genocide, crimes against humanity, and ethnic cleansing which do not technically require being committed in an armed conflict to exist. Yet this last apparent difference – the only one which would make the R2P scope of application larger than the POC scope – has to be nuanced. It must be first noted that some UN SC resolutions on POC provide for mechanisms which apply outside of armed conflict situations. According to these resolutions, such mechanisms indeed apply in case of threat not only of war crimes but also of "genocide [and] crimes against humanity [...] against the civilian population".[86] Moreover, many States expressly consider that POC concerns any situation of violence, even if such a situation does not amount to an armed conflict. For example, Lichtenstein stated in May 2011 before the UN SC that there was "a collective responsibility to ensure the protection of civilians outside situations of armed conflicts, and the Council acted accordingly in adopting *Resolution 1973* (2011) [on Libya]".[87]

85 SC, *Verbatim Record of the 6066th Meeting*, UN Doc S/PV.6066 (Resumption 1), *supra* note 28, 6 (declaration of Belgium). See also N. Hajjami, *La Responsabilité de protéger* (2013), 360.

86 See, e.g., SC Res. 1296, *supra* note 18, 3 (operative part 15) in which the Council "[*i*]*ndicates* its willingness to consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population".

87 SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531, *supra* note 28, 33 (declaration of Liechtenstein). See also SC, *Verbatim Record of the 6650th Meeting*, UN Doc S/PV.6650, *supra* note 35, 14 (declaration of Colombia); *ibid*., 25 (declaration of Gabon).

E. Normative Impacts on International Law?

Does the association of R2P with POC have normative impacts on international law? One of the most significant impacts that such association could have on R2P relates to the normative nature of such notion. As already emphasized, R2P is generally viewed as a controversial and political notion. By contrast, POC is firmly rooted in international law and even seen as being itself a legal concept.[88] As a result, linking R2P to POC may facilitate the evolution of R2P from a controversial and political concept towards a legal one. Such link at least enables R2P to appear in UN SC resolutions and to be discussed by States before the UN SC, which may be seen as a form of State practice contributing, as wished by many NGOs, to the formation of a customary rule on the matter. This is particularly true with respect to references in UN SC resolutions dealing with specific situations, such as the UN SC resolutions concerning Libya[89] and the Ivory Coast,[90] since those general references materialized into physical acts. Those references could potentially be seen as expressing the *opinio juris* of the States having voted in favor of the resolutions and the actions concretely undertaken on the basis of those resolutions as the *State practice* element of the customary rule, as this element is classically construed – that is, as involving material conduct. In other words, the two main elements of customary law could be identified in this case. Yet a customary R2P rule could also be derived from references to R2P in international instruments unrelated to specific situations, such as the general UN SC resolutions on POC, or in State declarations preceding the adoption of such instruments even if no material act may support those declarations. Indeed, in accordance with a modern conception of the formation process of customary law,[91] which is particularly defended in the fields of human rights and humanitarian law because of the lack of State material conduct in those domains,[92] such abstract references to R2P could be considered as a form

88 Cf. *supra* note 40 and accompanying text.

89 SC Res. 1970, UN Doc S/RES/1970 (2011), 26 February 2011; SC Res. 1973, UN Doc S/RES/1973 (2011), 17 March 2011.

90 SC Res. 1975, UN Doc S/RES/1975 (2011), 30 March 2011.

91 See generally A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* (2001) 4, 757. For the application of such modern conception by the International Court of Justice, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 254-255, paras 70-73.

92 See generally B. Simma & P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1988-1989), 82.

of State practice and, if sufficiently repeated over time by the majority of States, as expressing the *opinio juris* of those States.[93]

Admittedly, it is clear that no customary R2P rule can claim to have emerged on the basis of all those references to R2P, since an important requirement, the widespread acceptance and repetition of the relevant State practice, must still be met. More fundamentally, it does not seem that the notion of R2P has gained an autonomous and normative content yet and it is far from being established that the above-mentioned references to R2P evidence the *opinio juris* of States – that is the belief to act in accordance with law – rather than a mere political endorsement of this concept. Yet these references significantly open the door for potential normative developments of R2P. While raising concerns regarding the non-binding nature of the 2005 UN *World Summit Outcome*, some NGOs have pushed for additional references to R2P in international instruments, mainly UN SC resolutions on POC, with the explicit hope of transforming R2P from an emerging norm into established customary international law.[94]

The association of R2P with POC may also have legal normative impacts in relation to POC, to the extent that it may affect what constitutes the (legal) foundation of it, i.e. IHL. Those impacts may *a priori* be seen as positive ones. It is well-known that mechanisms for controlling the IHL application are limited. It is true that many international criminal jurisdictions, viewed as constituting such mechanisms,[95] have been established and are now operating. Yet their role is only to sanction individuals. It is also true that the UN SC has adopted sanctions against States in case of IHL violations,[96] but those sanctions remain limited.[97] They are far from being automatically adopted, the UN SC role being not to sanction violations of international law but primarily to maintain or restore international peace and security, which is not the same thing. It is

93 See van Steenberghe, *La légitime défense*, *supra* note 74, 147-150; R. van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature', 9 *Journal of International Criminal Justice* (2011) 4, 1089, 1093-1094 for further developments on this position.

94 See, e.g., World Federalist Movement, 'Global Consultative Roundtables on the Responsibility to Protect: Civil Society Perspectives and Recommendations for Action' (January 2008), available at http://responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=653 (last visited 15 August 2014), 11.

95 See generally D. Scalia, 'Droit international pénal', in van Steenberghe (ed.), *Droit international humanitaire*, *supra* note 44, 195, 199.

96 See P. d'Argent *et al.*, 'Article 39', in J.-P. Cot, A. Pellet & M. Forteau, *La Charte des Nations Unies: Commentaire article par article*, 3rd ed. (2005), 1131, 1155.

97 See, e.g., SC Res. 787, UN Doc S/RES/787 (1992), 30 November 1992 concerning the situation in Bosnia and Herzegovina (see *ibid.*, 3 (operative parts 7 & 8) for a reference to serious IHL violations and *ibid.*, 3-4 (operative parts 9-12) regarding sanctions).

precisely this gap that the association of R2P with POC may possibly fulfill. By exporting its specific logic in the POC field, R2P has made the primary responsibility of States in that matter the starting point for legitimizing a coercive action by the international community in case of failure of the State to protect civilians on its territory. This association may therefore both clarify and put the accent on the possibility and necessity of coercive intervention of the international community in case of violations of IHL rules related to the protection of civilians. This conclusion is in line with the position asserted by political scientists who, questioning the complementarity of the two notions, contend that "[f]inally, RtoP as a whole can be seen as a specification and concretization of the amorphous and aspirational *Security Council POC*",[98] those last terms referring to the POC reaction aspects.

Similarly, the association of R2P with POC may contribute, as suggested by some UN documents,[99] to modifying the 'traditional' conception of the UN peacekeeping operations mandated to protect civilians, in a way which would reinforce the mandate of those operations in order to give them the possibility to act *in lieu* of, or even against, the host State if the latter is unable or unwilling to protect civilians on its territory itself. Such a modification implies not only increasing the military, human, and logistical support of the UN operations but also adapting the rules of engagement (ROE) which indicate the specific instances in which UN soldiers can make use of force in accordance with IHL. At the origin, these ROE only enabled members of the UN operations to act in self-defense in order to protect themselves. While these rules necessarily evolved after the creation of the UN operations mandated to protect civilians under imminent threat of attack and incorporated the right to use force "up to, and including deadly force, to defend any civilian person who is in need of protection against a hostile act or hostile intent",[100] this right now is even provided, in cases like the one concerning MONUC, without the 'traditional' limitation according to which force can only be exercised 'without the prejudice of the responsibility of the host government'.

That said, the exportation of the R2P specific logic in the POC field is not without risk for IHL. The first and most evident one is the politicization

98 Breakey, 'Protection Norms and Human Rights', *supra* note 22, 332.

99 Cf. *supra* note 80.

100 UN Department of Peacekeeping Operations (DPKO), *United Nations Master List of Numbered Rules of Engagement*, UN Doc MD/FGS/0220.001 annex 1, May 2002, Rule 1.18. The source is reprinted in T. Findlay, *The Use of Force in UN Peace Operations* (2002), 425-427.

of a field characterized by neutrality and impartiality. IHL belongs to law and therefore presents itself as a neutral language. In addition, the matter that it regulates is itself founded upon impartiality, as IHL provides for the protection of persons independently of the party of the conflict to which those persons belong. The association of POC with R2P, still a controversial political concept, could jeopardize those elements of neutrality and impartiality. Some States indirectly referred to that risk in their declaration, by stating:

> "[W]e align ourselves with paragraph 21 of the Secretary-General's report, which basically proposes that we [should] not politicize the noble task of humanitarian assistance. We have made no secret of our support for the norm of the responsibility to protect, which overlaps and has some aspects in common with the issue of the protection of civilians. However, we believe that the continuing debate surrounding the so-called third pillar of the responsibility to protect should not affect the integrity of the broader concept of the protection of civilians, which is rooted in humanitarian law."[101]

Such 'politicization' phenomenon could not only directly affect IHL but also the activities of those working to implement it. The latter certainly include the International Committee of the Red Cross (ICRC), whose mandate under the IHL treaties can only be accomplished if the Committee is not viewed as favoring one party against the other, the principles of impartiality and neutrality being the main pillars of the ICRC's activities.[102] One may also mention the UN peacekeeping operations mandated to protect civilians in armed conflicts. As already noted, UN institutions are reluctant to associate R2P with such operations because they fear not only that the UN soldiers would not have enough material means to accomplish their mandate, which would supposedly involve stronger military operations,[103] but also that those operations would no

[101] SC, *Verbatim Record of the 6790th Meeting*, UN Doc S/PV.6790, *supra* 28, 10 (declaration of Guatemala).

[102] *Statutes of the International Committee of the Red Cross* (2013), Art. 4 (1) (a), available at http://icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm (last visited 15 August 2014).

[103] See, for a similar observation, the declarations of some members of the DPKO, quoted in Breakey, 'The Responsibility to Protect', *supra* note 70, 74: "[...] A number of DPKO officials effectively divorced R2P cases from the POC concerns of peacekeepers. One argued that the DPKO 'should not get into a position where we are meant to respond to R2P situations. We do not have the resources or the capacity'. A second interviewee

longer be seen as impartial and neutral since they would be carried out under (the controversial and political concept of) R2P.

Another major risk is to conflate the *ratione materiae* scopes of application of R2P and POC. Legal literature has wondered whether the specific R2P third pillar, implying a collective responsibility in case of failure of the national authorities to protect their civilian population, added something to the already existing IHL mechanisms. Many scholars consider that it is not the case, mainly because common Article 1 to the four 1949 *Geneva Conventions* and the 1977 *Additional Protocol I* to those conventions obliges States not only to respect but also to ensure respect of those legal texts and, therefore, provides a collective responsibility in case of IHL violations.[104] The existence of such a collective responsibility was confirmed by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[105] It may also be asserted on the basis of the special nature of IHL obligations, at least of those related to the protection of civilians. It is well-known that, in the above-mentioned ICJ Advisory Opinion, the Court inferred from the *erga omnes* nature of some IHL obligations that the violation of those obligations involved specific consequences for any State, including the obligation to cooperate to bring the violation to an end.[106] Several elements, like common Article 1 to the four *Geneva Conventions* and *Additional Protocol I* to those conventions[107] as well as the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY),[108] strongly suggest that most of the IHL obligations are of *erga omnes* nature. At least the ICJ qualified the rules being "so fundamental to the respect of the human person and 'elementary

asserted that [...] '[t]o date personnel involved in peacekeeping missions are not trained to respond to genocide and there is no support for the idea that they should be'."

104 See Boisson de Chazournes & Condorelli, *supra* note 24, 16; I. Moulier, 'L'obligation de "faire respecter" le droit international humanitaire', in M. J. Matheson & D. Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (2010), 697, 755. See also H. Brollowski, 'The Responsibility to Protect and Common Article 1 of the 1949 Geneva Conventions and Obligations of Third States', in Hoffmann & Nollkaemper (eds), *supra* note 23, 93.

105 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisoy Opinion, ICJ Reports 2004, 136, 199-200, paras 158 & 159.

106 *Ibid.*, 199 & 200, paras 157 & 159.

107 See, e.g., in this sense, J. d'Aspremont & J. de Hemptinne, *Droit international humanitaire: Themès chosis* (2012), 41.

108 *Prosecutor v. Zoran Kupreškić et al.*, Judgment, IT-95-16-T, 14 January 2000, 202-203, para. 518.

considerations of humanity'",[109] which undoubtedly include those related to the protection of civilians. Finally, still in the same Advisory Opinion, the ICJ stated, after its considerations on the obligation to ensure respect of IHL and the consequences stemming from the violation of *erga omnes* obligations, that

> "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion".[110]

In other words, a collective responsibility may arguably be seen as imposed not only on States but also on the United Nations. This is in line with the obligation under Article 89 of *Additional Protocol I*, which expressly imposes on State parties to "undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the *United Nations Charter*" in case of serious IHL violations.[111] As a result, the collective responsibilities under R2P and IHL do not look so different from each other. One may be tempted to confuse them entirely. However, one must not forget that the application of R2P collective responsibility is limited to war crimes whereas under IHL it extends beyond the IHL rules, whose violation amounts to such crimes. Therefore, the association of R2P with POC should not affect the scope of this particular collective responsibility under IHL and lead third States, or even the United Nations, to consider undertaking actions only in case of the most serious IHL violations. One can be satisfied in that regard that the UN SG expressly emphasized this risk of confusion and stated in his 2012 report on POC:

> "The protection of civilians relates to violations of international humanitarian and human rights law in situations of armed conflict. The responsibility to protect is limited to violations that constitute war crimes or crimes against humanity or that would be considered

109 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 105, 199, para. 157.

110 *Ibid.*, 200, para. 160.

111 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, 43.

> acts of genocide or ethnic cleansing. [...] I urge the Security Council and Member States to be mindful of these distinctions."[112]

Another risk is to conflate the bearers of the primary responsibility under both R2P and POC. As far as the latter is concerned, the primary responsibility does not only fall on States. It is borne by any party to the armed conflict, including armed groups. The applicability of IHL, in particular the rules related to the protection of civilians, on armed groups is now generally admitted, although the mechanisms through which those groups are bound by IHL remain controversial.[113] By contrast, the primary responsibility to protect under R2P can only be borne by States, since this notion is fundamentally based upon sovereignty. What made its success, being more acceptable than the concept of humanitarian intervention, actually prevents it from applying to armed groups. Yet one may question why such groups, especially when they are controlling large parts of a State territory, could not be vested with a primary responsibility to protect civilian populations, in particular on the territory that they would control. However, no State has ever suggested extending the

[112] SC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2012/376, *supra* note 19, 5-6, para. 21.

[113] See J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary,* Vol. I (1952), 51; J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. II (1960), 34; A. Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflict', 30 *International Comparative Law Quarterly* (1981) 2, 416; G. Abi-Saab, 'Non-international Armed Conflict', in UNESCO (ed.), *International Dimensions of Humanitarian Law* (1988), 217; S.-S. Junod, 'Protocol II: Part I – Scope of This Protocol', in Y. Sandoz, C. Swinarski & B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1342, 1345, para. 4444; L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), 14-26; E. David, *Principes de droit des conflits armés*, 5th ed. (2012), 245 *et seq*., para. 1.216; E. David, 'Le droit international humanitaire et les acteurs non étatiques', *Collegium* (2003) 27, 27, 29-30; J.-M. Henckaerts, 'Binding Armed Opposition Groups Through Humanitarian Treaty Law and Customary Law', *Collegium* (2003) 27, 123, 126-129; S. Sivakumaran, 'Binding Armed Opposition Groups', 55 *International Comparative Law Quarterly* (2006) 2, 369; A. Clapham, 'Human Rights Obligations of Non-state Actors in Conflict Situations', 88 *International Review of the Red Cross* (2006) 863, 491, 497-499 & 511; C. Ryngaert, 'Human Rights Obligations of Armed Groups', 41 *Revue belge de droit international* (2008) 1-2, 355, 357-358; R. Kolb, *Ius in bello: Le droit international des conflits armés*, 2nd ed. (2009), 208-209; R. van Steenberghe, 'Non-state Actors From the Perspective of the International Committee of the Red Cross', in J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law* (2011), 204, 217-223.

ratione personae scope of the primary responsibility to protect under R2P to armed groups. In fact, many State declarations evidence an opposite evolution resulting from the association of R2P with POC, namely the assimilation of the bearers of the primary responsibility under POC to those considered under R2P, that is, only States. This evolution is clear: while States often took care to mention that the POC primary responsibility was borne not only by States but also and more generally by any party to the armed conflict,[114] such a care has curiously disappeared in many State declarations since the emergence of the R2P concept.[115] Several States now emphasize that the responsibility to protect civilians in armed conflict primarily fall on States in accordance with what has been said in relation to R2P.[116] Some States go even further and entirely confuse the *ratione personae* scopes of application of R2P and POC. For example, the Netherlands stated before the UN SC:

> "[The two notions] are also closely related, as they share a similar normative foundation that consists of four elements. The first is that the protection of individuals is a primary responsibility of each State."[117]

Such an evolution is also latent in the statements of the UN SC President on POC, one of its last statements curiously indicating that "[t]he Security

114 See, e.g., *supra* notes 75-76 and accompanying text.

115 See, e.g. SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 20 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 17 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 17-18 (declaration of Nepal); SC, *Verbatim Record of the 6151st Meeting*, UN Doc S/PV.6151, *supra* note 28, 16 (declaration of France); SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216 (Resumption 1), *supra* note 28, 42 (declaration of Sudan); SC, *Verbatim Record of the 6427th Meeting*, UN Doc S/PV.6427 (Resumption 1), *supra* note 28, 26 (declaration of Sudan); *ibid*., 8-9 (declaration of Portugal); and SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 26 (declaration of Bangladesh).

116 See, e.g., SC, *Verbatim Record of the 5703rd Meeting*, UN Doc S/PV.5703, *supra* note 28, 20 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781, *supra* note 28, 17 (declaration of Ghana); SC, *Verbatim Record of the 5781st Meeting*, UN Doc S/PV.5781 (Resumption 1), *supra* note 28, 2 (declaration of Portugal, on behalf of the EU); and SC, *Verbatim Record of the 6216th Meeting*, UN Doc S/PV.6216, *supra* note 28, 29 (declaration of Austria).

117 SC, *Verbatim Record of the 6531st Meeting*, UN Doc S/PV.6531 (Resumption 1), *supra* note 28, 24 (declaration of the Netherlands).

Council recognises that States bear the primary responsibility to protect civilians [...] as provided for by relevant international law".[118]

Finally, in case no 'politicization' or 'regression' of IHL happens due to the (potential) lack of any influence from R2P through its association with POC, another risk is the emergence of parallel and concurrent legal regimes applicable to the protection of civilians in armed conflict. On the one hand, the 'classical' regime, based on IHL, whose scope of application related to the protection of civilians as well as the collective responsibility in case of its violations is well established in international conventional and customary law; and, on the other hand, a 'modern' regime, based on R2P, whose scope, more limited with respect to the protection of civilians in armed conflict, would essentially stem from the UN practice and whose main feature would be to put the accent on the necessity of a 'coercive' intervention in case of failure of the national authorities to ensure such protection. This phenomenon would be similar to the one evidenced in recent UN practice, consisting in the creation by the United Nations of security zones in armed conflicts, whose regime was different from the one under IHL regarding the protected zones,[119] as well as in the assertion by UN institutions of a duty to humanitarian intervention, whose regime was not the same as the one provided under IHL with respect to humanitarian assistance.[120] One could therefore observe a phenomenon of fragmentation and differentiated application of the regulation of the protection of civilians in armed conflict.

F. Conclusion

The R2P added value should definitely not be underestimated. Although R2P is based on already existing legal mechanisms, it has the advantage of re-ordering all those mechanisms under the same heading. It is indeed a concept which is now automatically referred to in situations when civilian populations are massively persecuted. However, R2P remains a political concept whose content is still controversial and must be discussed before the UN GA. Therefore, it does not come as a surprise that R2P supporters, in particular NGOs, sought to associate it to POC, a well-established and neutral notion, having some common features with it and firmly rooted in international law. Numerous letters have

118 SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2013/2, 12 February 2013, 1 (para. 4).

119 On this subject see, e.g., M. Torrelli, 'Les zones de sécurité', 4 *Revue générale de droit international public* (1995), 787.

120 On this subject see, e.g., M. Torrelli, 'De l'assistance à l'ingérence humanitaire', 74 *Revue internationale de la Croix-Rouge* (1994) 795, 238.

been sent by NGOs to States, before UN SC meetings on POC, in order to push those States to refer to R2P in their declarations during the meeting and in the resolution adopted at this occasion.

Those efforts have been successful. The UN and State practice evidences a clear trend to associate R2P with POC. This association does not seem unreasonable at first glance. The two notions share some important characteristics, including that they both serve the protection of civilian populations against massive persecutions. In addition, their scopes of application partially overlap and they both involve a similar continuum of actions and responsibilities. Similarities nonetheless stop here. One must not forget that the two notions not only have a distinct scope of application in several respects but also and most importantly have very dissimilar bases. The whole R2P mechanism is founded upon the notion of sovereignty and originally seeks to justify in a more acceptable manner the intervention of the international community in case of failure of the national authorities, while the POC thematic issue is characterized by an idea of impartiality and neutrality ultimately based on IHL.

One may therefore call into question this recent trend, if not to conflate the two notions, to export the R2P specific logic into the POC field. It is true that by putting the accent on the necessity of a reaction by the international community on the territory of a State when this State is unable or unwilling to put an end to IHL violations concerning the protection of civilians, this may have advantage of reinforcing the – still too limited – mechanims for controlling the IHL application. Yet this may also be hazardous for IHL. Conflating R2P and POC could affect the IHL legal nature by 'politicizing' it and therefore, could also put at risk the actors charged with implementing it. The other risks stem from the possibility of conflation of the respective scopes of application of the two notions. The *ratione materiae* risk is that the collective responsibility under IHL would be seen as applying only with respect to the IHL violations triggering the collective responsibility under R2P, that is, war crimes. The *ratione personae* risk is that, under the influence of the logic of sovereignty underlying R2P, only States would be considered as the bearers of the primary responsibility under POC, although it is clearly established that IHL, and in particular the rules related to the protection of civilians, must be respected by any party to the armed conflict, including armed groups.

These risks of IHL 'regression' require that States be more cautious and precise when discussing R2P and POC. This is particularly recommended as their declarations before the UN SC and UN GA may be seen as a form of State practice or *opinio juris*, likely to contribute to the interpretation of the existing rules or to the formation of customary law. The distinction between the

two notions must therefore be claimed and repeated, without, however, such a distinction leading to the existence of two parallel and concurrent regimes on the regulation of the protection of civilians in armed conflict.

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The Least-Developed Countries Services Waiver: Any Alternative Under the GATS?

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Abstract

Despite the fact that least-developed countries (LDCs) constitute approximately 12 percent of the world's population, they account for 0.5 percent of the world's trade in commercial services.[1] LDCs have important disadvantages that prevent them from acquiring an adequate share of benefits from liberalization of trade in services.

In this context, the suitability of the special and differential treatment provisions of the *General Agreement on Trade in Services* (GATS) for the LDCs' needs and of the flexibility of GATS architecture has been questioned. Article IV:3 of the GATS gives a mandate to negotiate mechanisms that could increase the participation of LDCs in the multilateral trade system. After more than ten years of negotiations, finally in December 2011, the Ministerial Conference of the World Trade Organization (WTO) approved a services waiver decision that allows developed and developing countries to depart from the most favored nation principle in order to grant preferential treatment for LDCs' services and service suppliers.

Therefore, this article first examines the legal scope of the LDCs services waiver, including the background of the waiver, the preferences covered, and the main conditions applying to these preferences. Then, the viability of the waiver's implementation as a useful tool to boost LDCs' participation in trade in services and engagement within the GATS is analyzed. The authors also examine whether the waiver has failed to fulfill its mains objectives, whether other alternatives exist.

In this contribution the authors argue that the waiver might not have a strong incidence, because of the following regulatory concerns: Firstly, neither a binding obligation is imposed on developed and developing countries to grant preferential treatment in market access, nor any right to perceive preferential treatment is assured to LDCs. As the services waiver is primarily focused on voluntary market access preferences, LDCs' services suppliers may not find enough legal

[1] See, with reference to 2011, United Nations Conference on Trade and Development (UNCTAD), *The Least Developed Countries Report 2013: Growth With Employment for Inclusive and Sustainable Development* (2013), 28; WTO, *Market Access for Products and Services of Export Interest to Least-Developed Countries: Note by the Secretariat*, WTO Doc WT/COMTD/LDC/W/56/Rev.1, 31 October 2012, 23 & 40, paras 58 & 86. In 2012, the share of LDCs in world exports of commercial services increased insignificantly to 0.6 percent. See WTO, *Market Access for Products and Services of Export Interest to Least-Developed Countries: Note by the Secretariat*, WTO Doc WT/COMTD/LDC/W/58, 10 September 2013, 22, para. 2.48.

certainty regarding a preferential treatment, as it might be withdrawn at any time. Secondly, the discipline which allows other discriminatory measures in favor of LDCs is even weaker as it needs approval by the Council on Trade in Services. It therefore should be reinforced and clarified. Thirdly, the difficulty of interpreting 'rules of origin' and the consequences of its ambiguous definition need to be overcome. Finally, it is also relevant to consider the differences between the preferential treatment process of concessions to LDCs and the general multilateral negotiation process for trade in services in the WTO that should be considered by members to grant preferences.

Nevertheless, alternatives to enhance LDCs' integration within the GATS could exist, although lack of political willingness may affect the outcome. Two options have been identified. Firstly, market access negotiations in modes of supply of export interest to LDCs should be linked with those attractive to non-LDCs. Secondly, good regulation and regulatory cooperation are essential to overcome non-market access barriers, while disciplines on domestic regulation and extension of mutual recognition agreements to LDCs should be reinforced, essentially building solid institutional mechanisms. Consequently, the 'aid for trade' shall be driven to implement LDCs' domestic regulatory reforms.

A. Background: Special and Differential Treatment Within the *General Agreement on Trade in Services*

The World Trade Organization (WTO) has introduced several provisions within its agreements that take into account the special situation of developing countries in general and least-developed countries (LDCs) in particular. The provisions are aimed to achieve one of the following goals: to increase trade opportunities of developing members; safeguard the interests of developing members; to allow them flexibility of commitments, action and use of policy tools; to use transitional time periods; to receive technical assistance; and finally there are provisions aimed only at LDCs which fall into the above categories.[2]

[2] WTO, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc TN/CTD/W/33, 8 June 2010, 59-63, paras 41-42 [WTO, Special and Differential Treatment Provisions in WTO Agreements and Decisions]; WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc WT/COMTD/W/77/Rev.1, 21 September 2001, 41-55. See generally M. Matsushita, T. J. Schoenbaum & P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (2006), 601-696.

Most of the WTO agreements provide a special and differential treatment (S&D) regime with some of the provisions mentioned above. For instance, under the *General Agreement on Trade and Tariffs* (GATT), the 1979 *Framework Agreement*, nowadays Part IV of the GATT, together with the 'Enabling Clause',[3] sets this regime.[4] They constitute the legal basis for the 'General System of Preferences' (GSP) scheme and in particular for deeper preferences for LDCs.

However, there is a growing literature that points out the deficiencies of S&D to effectively serve the commercial and development interests of developing countries and LDCs in particular. Some commentators request more flexibility in implementing WTO rules,[5] others demand a rebalance in the agreements to reflect developing countries' interests and recommend the use of S&D as a broader principle to assist in interpreting WTO provisions.[6] Recently Pauwelyn, for example, proposed to develop new criteria to distinguish between countries.[7] In this context, it is clear that the early statement that Hudec made in 1987 against preferential and non-reciprocal treatment for developing countries is currently a strong argument and cause of debate.[8]

In the framework of the *General Agreement on Trade in Services* (GATS)[9], the S&D has a particular scheme. It does not follow the structure of GATT and other WTO agreements, where all developing countries have the same degree of special consideration. Instead of establishing a more specific and specialized regime, it is mainly the flexible architecture of GATS that gives room for

3 GATT, *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries: Decision of 28 November 1979*, Doc L/4903, 3 December 1979.

4 See, e.g., J. Whalley, 'Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries', 100 *The Economic Journal* (1990) 403, 1318, 1320.

5 S. W. Chang, 'WTO for Trade and Development Post-Doha', 10 *Journal of International Economic Law* (2007) 3, 553, 569 (especially).

6 A. D. Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes', 5 *World Trade Review* (2006) 3, 445, 469 (especially); B. Hoekman, C. Michalopoulos & L. A. Winter, 'Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún', 27 *The World Economy* (2004) 4, 481, 503-504 (especially).

7 J. Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons From the Trade and Climate Change Regimes', 22 *Review of European Community & International Environmental Law* (2013) 1, 29, 41 (especially).

8 R. E. Hudec, *Developing Countries in the GATT Legal System* (1987). See, e.g, C. Thomas & J. P. Trachtman (eds), *Developing Countries in the WTO Legal System* (2009); J. M. Finger, 'Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round', 31 *World Economy* (2008) 7, 887.

9 *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183 [GATS].

LDCs' interests.[10] GATS liberalization is done through a 'hybrid approach',[11] as countries use a positive list to schedule their commitments and they also inscribe limitations and conditions (trade-restrictive measures) which they consider appropriate.[12] For this reason, it is argued that the flexible provisions of the GATS already give room for each country to liberalize considering its own needs.[13]

GATS also includes references to development and preferential treatment in some of its provisions which are of particular relevance to developing countries' trade in services.[14] There is a lax S&D framework, aiming at the increasing participation of developing countries in trade in services according to Articles IV:1 and IV:2, and the priority in attending the needs of LCDs established in Article IV:3. The S&D provisions in GATS are however non-binding, as

[10] See, e.g., WTO, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, *supra* note 2, 59, para. 41.

[11] The authors who defend the 'hybrid approach' argue that the GATS schedules of commitment have both elements of positive and negative list approaches. See M. Molinuevo, 'Article XX GATS', in R. Wolfrum, P.-T. Stoll & C. Feinäugle (eds), *WTO – Trade in Services* (2008), 445, 455, para. 26; C. Fink & M. Molinuevo, 'East Asian Free Trade Agreements in Services: Key Architectural Elements', 11 *Journal of International Economic Law* (2008) 2, 263, 267-279 (especially) [Fink & Molinuevo, East Asian Free Trade Agreements in Services]; P. Delimatsis, 'Don't Gamble With GATS – The Interaction Between Articles VI, XVI, XVII and XVIII GATS in the Light of the US–Gambling Case', 40 *Journal of World Trade* (2006) 6, 1059, 1062 (note 17) [Delimatisis, The Interaction Between Articles VI, XVI, XVII and XVIII GATS]. More conservative authors consider the GATS liberalization process as a 'positive list' approach, focused on the roof of further liberalization. See M. E. Footer & C. George 'The General Agreement on Trade in Services', in P. F. J. Macrory & A. E. Appleton & M. G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. I (2005), 799, 821; WTO, *A Handbook on the GATS Agreement* (2005), 16. Positive list system or bottom-up means that no services sector is open unless listed in the specific commitments.

[12] It refers to Part III of the GATS where countries can open services sectors and indicate limitations on market access (Art. XVI), national treatment (Art. XVII) and additional commitments (Art. XVIII).

[13] R. Adlung & A. Mattoo, 'The GATS', in A. Mattoo, R. Stern & G. Zanini (eds), *A Handbook of International Trade in Services* (2008), 48. About GATS flexibility as a bottom-up agreement see Organisation for Economic Co-operation and Development (OECD), *Special and Differential Treatment Under the GATS*, OECD Doc D/TC/WP(2005)24/FINAL, 21 January 2006, 7-12, paras 9-36.

[14] The main provisions related to S&D under the GATS for developing countries are the Preamble, Art. III:4 about transparency requirements, Art. XIX:1 and 2 about progressive liberalization, and Art. XIX:3 on LDCs. Moreover, Art. V:3 on regional agreements, Art. XV:1 referring to subsidies, and the Annex on Telecommunications.

they are mainly best endeavor clauses which lack an operative mechanism.[15] This mechanism could resemble the 'Enabling Clause' of GATT, which allows exemptions from the most-favored nation (MFN) treatment to developing countries.

Specific S&D for LDCs under the GATS is provided mainly by Article IV:3 and Article XIX:3. The former allows other members to take certain measures in order to enhance the integration of LDCs in trade in services and the latter refers to special treatment related to progressive liberalization that LDCs are entitled to have. Both are stated by the WTO as mandatory provisions, but Article IV:3 is considered only an obligation of conduct and not an obligation of result.[16]

In this context, Article IV:3 requires the members to assume conducts with particular priority for LDCs. This special treatment to LDC shall be implemented according to the rules established by Articles IV:1 and IV:2 for developing countries in general.[17] The article also states, in reference to Article IV:1(c), that members shall negotiate specific commitments to liberalize "[...] market access in sectors and modes of supply of export interest to them" [LDCs]. This provision needed indeed to be operationalized. In 2002, the LDCs asked for the establishment of additional measures ensuring the increasing participation of the LDCs, and in this sense an additional paragraph of Article VI:3 was also proposed.[18]

15 P. Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (2007), 32 [Delimatsis, International Trade in Services and Domestic Regulations].

16 See, e.g., WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – A Review of Mandatory Special and Differential Treatment Provisions: Note by the Secretariat*, WTO Doc WT/COMTD/W/77/Rev.1/Add.2, 21 December 2001, 30. See also WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Mandatory and Non-Mandatory Special and Differential Treatment Provisions: Note by the Secretariat*, WTO Doc WT/COMTD/W/77/Rev.1/Add.1, 21 December 2001, 4; WTO, *Special and Differential Treatment for Least-Developed Countries: Note by the Secretariat*, WT/COMTD/W/135, 5 October 2004, 15-16 (in which paragraph 6 (d) of the Annex on Telecommunications is added apart from the other two articles already mentioned).

17 In this sense, member shall negotiate specific commitments which strengthen domestic services capacity, efficiency, and competitiveness of LDCs; the commitment shall improve the LDCs access to distribution channels and information networks, and liberalize sectors/modes of supply of LDCs interests. And the obligation of transparence to establish contact points in developed countries for information on LDC related to services market.

18 See WTO, *Special and Differential Treatment Provisions: Joint Least-developed Countries Proposal on Special and Differential Treatment*, 1 July 2002, WTO Doc TN/CTD/W/4/

Article XIX:3 prescribes that negotiating guidelines and modalities must be established for the special treatment of LDCs; this is considered an obligation of result.[19] Following this mandate, the *Modalities for the Special Treatment for Least-Developed Country Members* (LDC Modalities) and the *Guidelines and Procedures for the Negotiation on Trade in Services* were devised in 2003[20] and have since then provided more guidance for the development of the waiver. The *LDC Modalities* are based on preferential coverage of services sectors and modes of supply of interest to LDCs, technical assistance, and non-reciprocity.[21] The non-reciprocity principle[22] releases LDCs from the pressure to make market access offers in services negotiations. Preferential coverage[23] is mainly focused on increasing openness of WTO members to LDCs suppliers, essentially in mode 4 market access. Modalities also urged members to develop mechanisms to implement Article IV:3 and facilitate "effective access of LDCs' services and service suppliers to foreign markets".[24]

In addition, the 2005 *Hong Kong Ministerial Declaration* called members to implement the *LDC Modalities* in a full and effective manner; and in particular required again to develop, *inter alia*, methods for according special priority for LDCs' market access.[25] The Declaration reaffirmed moreover the

Add.1, 9, paras 50-51: "In sectors of their export interest multilaterally agreed criteria for giving priority to the least developed country Members shall be established, and when developing further disciplines and general obligations under the agreement[.]"

19 WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Mandatory and Non-Mandatory Special and Differential Treatment Provisions*, *supra* note 16, 4.

20 WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, WTO Doc TN/S/13, 5 September 2003 [WTO, Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services]; WTO, *Doha Work Programme: Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC, 22 December 2005, 5, para. 26 [WTO, Doha Work Programme: Ministerial Declaration].

21 A. Melchior, 'Services and Development: The Scope for Special and Differential Treatment in the GATS' (2010), available at http://nupi.no/content/download/13215/126242/version/5/file/NUPI+Report+Melchior+et+al.pdf (last visited 15 August 2014), 15.

22 WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, *supra* note 20, 1 & 2, paras 4 & 11.

23 *Ibid*., 2, para. 6, 7 & 9.

24 *Ibid*., 2, para. 7.

25 WTO, *Doha Work Programme: Ministerial Declaration*, Annex C, *supra* note 20, C-2 & C-3, paras 3 & 9 (a). See also *ibid*., 8-9, para. 47.

non-reciprocity principle in negotiations with LDCs[26]; an aspect which may have influenced LDCs' negotiation approach for the services waiver.

Based on these antecedents, in 2008 the general support of the members for a MFN exemption for LDCs was evident, as it appeared to be the most satisfactory mechanism to give special priority to LDCs in trade in services.[27] In this sense, the waiver has been oriented to give S&D to the LDCs in order to increase their up to now minimal participation in the international market of services as exporters. During the debates after the *Hong Kong Ministerial Declaration* it was noticed that LDCs did not primarily focus on export interests as it had been stated in the *LDC Modalities,*[28] but they promoted a more general perspective in order to obtain non-reciprocity special provisions in sectors and modes of supply of interest to them. This proposal would have led to a wider scope than the one adopted in the waiver.[29] Zambia and other LDCs wanted a mechanism with binding provisions for developed countries to allow preferential market access to LDCs, thereby waiving the obligations of Article II:1. Moreover they proposed these S&D to be granted on a permanent basis and referred to a 'non-reciprocity' special priority to LDCs.

Finally, according to the options identified in a note by the Secretariat of 2008,[30] members agreed on that "a waiver, available to all Members, from the obligations of Article II:1 of the GATS in respect of preferential treatment benefiting all LDC Members offers the most satisfactory outcome of this negotiation".[31] The ensuing negotiations focused on the content of the waiver and

26 *Ibid*., 5, para. 26 states: "We recognize the particular economic situation of LDCs, including the difficulties they face, and acknowledge that they are not expected to undertake new commitments."

27 WTO, *Elements Required for the Completion of the Services Negotiations: Report by the Chairman*, WTO Doc TN/S/34, 28 July 2008, Annex, 3, para 9 [WTO, Elements Required for the Completion of the Services Negotiations].

28 WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, *supra* note 20, 2, para. 6.

29 WTO, *Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS*, WTO Doc TN/S/W/59, 28 March 2006, 1, para. 1 [WTO, Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS].

30 WTO, *Options to Implement the LDC Modalities: Note by the Sectetariat*, WTO Doc JOB(08)/8), 21 February 2008.

31 WTO, *Elements Required for the Completion of the Services Negotiations*, Annex, *supra* note 27, 3, para. 9.

were based on the 2010 proposal of the LDC Group.[32] This proposal essentially requested a waiver from the GATS MFN treatment clause, providing effective market access in sectors and modes of supply of export interest to LDCs through negotiated specific commitments.

B. No Obligation to Provide Preferential Treatment: May It Diminish the Effectiveness of the Waiver?

The mechanism that was adopted at the 8th WTO Ministerial Conference of December 2011 to implement the *LDCs Modalities* and therefore enhance the participation of LDCs within the multilateral trade in services is a waiver[33] that acts similar to a traditional enabling clause,[34] providing the possibility to depart from the MFN principle.[35] It states that "[...] Members may provide preferential treatment to services and service suppliers of least-developed countries […]".[36] This is a voluntary and non-binding provision, by its nature of exception. In this sense, the concession of preferential treatment in services to LDCs is not enforceable. As a reference, the tariff preferences in the GSP do not constitute a binding commitment either.[37]

As some scholars have pointed out, one of the main problems of S&D provisions is their inefficiency[38] which is due to the fact that they are not binding

32 WTO, *Communication From Zambia on Behalf of LDCs: Draft Text for a Waiver Decision*, WTO Doc JOB/SERV/18, 30 June 2010 (copy on file with author) [WTO, Communication From Zambia on Behalf of LDCs: Draft Text for a Waiver Decision].

33 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, WTO Doc WT/L/847, 19 December 2001 [WTO, Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011].

34 It is, for instance, mentioned by H. Schloemann, 'The LDC Service Waiver: Making it Work', 1 *Bridges Africa* (2012) 4, available at http://ictsd.org/bridges-news/bridges-africa/news/the-ldc-services-waiver-making-it-work (last visited 15 August 2014).

35 As the waiver covers the entire scope of MFN obligation in GATS, the preferences covered include any services and services suppliers, whether or not any commitment is inscribed.

36 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 1).

37 See GATT, *Generalized System of Preferences: Decision of 25 June 1971*, Doc L/3545, 28 June 1971, 1 (Preamble, para. 5) and the WTO Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, 7 April 2004, 36-37 & 44-45, paras 92 & 111. They stated that WTO members are 'encouraged' to grant tariff preferences under the Enabling Clause; not that they are obliged to do so.

38 F. Mangeni, 'Strengthening Special and Differential Treatment in the WTO Agreements: Some Reflections on the Stakes for African Countries', *ICTSD Resource Paper* (2003)

or enforceable as initially demanded by the LDCs.[39] On the one hand, lack of mandatory provisions in the waiver has been outlined as a main concern since LDCs will have to rely on other WTO members' willingness to provide S&D through this instrument.[40] For this reason, not only in this particular case but also in S&D provisions in general, LDCs usually support a reading of S&D provisions as legally enforceable clauses,[41] in the sense that it could be possible to submit a dispute under the WTO adjudicatory system.

On the other hand, even if S&D provisions and market access preferences for trade in services in particular were considered legally enforceable clauses and could consequently establish the main argument to start a WTO dispute, it appears that it would not be enough to implement the Panel or Appellate Body report. This is particularly true as LDCs do not have an important retaliation power,[42] which may be the reason why some LDCs have proposed to strengthen

4, 13; L. Bartel & C. Häberli, 'Binding Tariff Preferences for Developing Countries Under Article II GATT', 13 *Journal of International Economic Law* (2010) 4, 969, 974-976 (for example); M. Irish, 'Special and Differential Treatment, Trade and Sustainable Development', 4 *Law and Development Review* (2011) 2, 72, 72 (for example). It is also said that most S&D are a type of soft law. See, e.g., G. Olivares, 'The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs', 35 *Journal of World Trade* (2001) 3, 545, 548-550.

39 See also the proposal of the LDCs group of 2006 regarding the binding character of S&D provisions: "1. [...] non-reciprocal special priority shall be accorded only to least developed countries in sectors and modes of supply of interest to them. 2. Developed country Members shall, and developing country Members declaring themselves in a position to do so should, accord non-reciprocal special priority to least developed countries." WTO, *Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS*, *supra* note 29, 3.

40 See, for instance, M. R. Islam & A. Bhattacharya, 'WTO's Services Waiver for LDCs: Between Hope and Doubt', *The Daily Star* (9 January 2012), available at http://thedailystar.net/newDesign/news-details.php?nid=217560 (last visited 15 August 2014).

41 Enforceability of S&D provisions within WTO law is a controversial issue as the drafting language is imprecise. See, for instance, E. Kessie, 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment Under the WTO Agreements', 3 *Journal of World Intellectual Property* (2000) 6, 955.

42 Dispute Settlement Body rulings in WTO law allow retaliation in cases where the condemned country does not modify the sanctioned behavior. Nonetheless, retaliation is not a major power in the hands of LDCs as they are generally small economies. This view is implicit, for instance, in H. Nottage, 'Developing Countries in the WTO Dispute Settlement System', *GEG Working Paper* (2009) 47, B. 1.

the developing countries' enforcement power in the Dispute Settlement Body (DSB).[43]

In the second paragraph of the services waiver members are required to specify, among other issues, "[...] the period of time during which the Member is intending to maintain those preferences [...]".[44] Even though there is, at least, a requirement to approximately establish the duration of any preferential treatment provided, which is in line with the best-endeavor nature of the waiver, it is also true that it is merely mandatory to set the 'intended' duration. WTO members are free to withdraw any preferential measure at any time, which introduces an element of unpredictability that could affect the decision of LDCs' potential businesses and investors.[45] As in the case of tariff preferences, it appears that preferences in trade in services will be authorized on dubious grounds and without due process. In terms of Bartel and Häberli, it "reduces [...] [the] potential value" of the preferences.[46]

In the end, what may reduce the effectiveness of the mechanism are both the fact that the waiver acts as an 'Enabling Clause' and that even provisions

43 The LDC Group together with the African Group proposed an obligation for the DSB to recommend monetary or other compensation, taking into account any injury suffered, with retroactive effect from the date of adoption of the measure found to be inconsistent with the covered agreement. See WTO, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication From Haiti*, WTO Doc TN/DS/W/37, 17 January 2003, 2-3, para. VII [WTO, Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication From Haiti]; WTO, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication From Kenya*, WTO Doc TN/DS/W/42, 24 January 2003, 3, para. VIII. The LDCs also asked for the possibility to allow a 'collective' suspension. See WTO, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication From Haiti, supra* this note, 3, para. VIII. In a more recent communication, the African Group asks, related with the effective implementation of recommendations and rulings: "the DSB, upon request, shall grant authorization to the developing or least-developed country Member and any other Members to suspend concessions or other obligations within 30 days." WTO, *Text for the African Group Proposals on Dispute Settlement: Understanding Negotiations: Communication from Côte d'Ivoire*, WTO Doc TN/DS/W/92, 5 March 2008, 2, para. III (c). See also G. Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies', *ICTSD Resource Paper* (2003) 5, 38 *et seq.*

44 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part, para. 2).

45 UNCTAD, *Ways and Means of Enhancing the Utilization of Trade Preferences by Developing Countries, in particular LDCs, as well as Further Ways of Expanding Preferences: Report by the UNCTAD Secretariat*, Doc TD/B/COM.1/20, 21 July 1998, 16, para. 68.

46 Bartel & Häberli, *supra* note 38, 969.

as important as those related to the duration of any preferential treatment are non-binding.

Other issues related with the non-binding character of the mechanism and its effectiveness are the connection with the negotiations on trade in services and the LDCs' participation in the process. Negotiations to liberalize services within the GATS are done mainly through a request-offer approach[47] and LDCs have been given more flexibility to commit or not according to their development situation. In particular, the *Modalities for Special Treatment* for LDCs establish: "Members [...] shall exercise restraint in seeking commitments from LDCs" and "not seek the removal of conditions which LDCs may attach when making access to their markets",[48] which in a sense may push them out of negotiations.[49]

It appears that LDCs are going from 'request offer' to a 'request only' approach of negotiation, as they are released from taking part in the normal process of negotiations due to their special circumstances, and with the waiver the LDCs should first submit a request to developed countries according to their particular sectors and subsectors of interest. However, at the same time the new mechanism does not impose any obligation on other WTO members to offer preferential treatment. In this sense, the effectiveness of the waiver is depending not only on the political willingness of developed countries, but on the active negotiation role of LDCs as well.

However, the effectiveness of the entire mechanism may be even lower if it is taken into account, as in previous documents such as the *LDCs Modalities* and the *Hong Kong Ministerial Declaration*, that LDCs have been released of any pressure to negotiate.

In other words, non-reciprocity could work more successfully if it is accompanied by a binding obligation of developed and developing countries to provide preferences to LDCs.[50] In the current form, LDCs only have the

47 WTO, *Guidelines and Procedures for the Negotiations on Trade in Services*, WTO Doc S/L/93, 29 March 2001, 2, paras 11-12 [WTO, Guidelines and Procedures for the Negotiations on Trade in Services].

48 WTO, *Modalities for the Special Treatment for Least-Developed Country Members*, *supra* note 20, 1, para. 4. WTO, *Doha Work Programme: Ministerial Declaration*, *supra* note 20, 5, para. 26 provided that in recognition of the particular circumstances of LDCs, "they are not expected to undertake new commitments".

49 WTO, *Guidelines and Procedures for the Negotiations on Trade in Services*, *supra* note 47, 2, paras 11-12.

50 This view is implicit in P. Macrory & S. Stephenson, 'Making Trade in Services Supportive of Development in Commonwealth Small and Low-income Countries', *Commonwealth Economic Paper Series* (2011) 93, 5.

possibility of S&D being granted if they enter into particular negotiations out of the general process having strong, technical, and specific arguments in their request. In this particular negotiation for preferential treatment, it is important for LDCs to identify their individual preferences needs.[51]

C. Beyond Market Access Preferences?

The LDC services waiver is based on two types of measures that developed and developing countries can adopt to provide preferential treatment to LDCs departing from the MFN principle. First, members can provide voluntary preferential treatment related to the application of market access measures, with the sole requirement of notification to the Council for Trade in Services (CTS) as a fast procedure. Second, members can also provide preferential treatment in any other measure if it is approved by the CTS.[52] For this reason, it can be argued that the services waiver is primarily focused on market access preferences.

Market access provisions in the reading of Article XVI of the GATS call for members not to adopt certain limitations when specific commitments were undertaken, in order to allow progressive openness in services sectors.[53]

The measures regarding which WTO members may automatically provide preferential treatment to LDCs are restricted to those listed in Article XVI:2, which essentially deal with quantitative restrictions to services suppliers.[54] These include quotas and other limitations related with the type of legal entity or economic needs tests. For example, the member could grant

51 Recently as response to a request by LDC Group, the Secretariat of WTO has developed some elements to be considered in identifying possible preferences to LDCs. WTO, *LDC Services Waiver: Background Note by the Secretariat*, WTO Doc JOB/SERV/135, 22 February 2013, 4-7, paras 2.1-2.19.

52 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 1).

53 Note here that the typology of trade barriers in services is not clear and generally there are some overlaps between Art. XVI and Art. XVII. See Delimatsis, *International Trade in Services and Domestic Regulations*, *supra* note 15, 76-83.

54 Except for Art. XVI:2(e) GATS which states a qualitative limitation (forms of establishment), the others are quantitative. See generally P. Delimatsis & M. Molinuevo, 'Article XVI GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 367. The limitations on Art. XVI:2 are limitations on the number of services suppliers, limitations on the total value of services transactions, limitations on the total number of services operations, limitations on the total number of natural persons that might be employed in a particular service sector, limitations that restrict or require specific types of legal entities, and limitations on the participation of foreign capital.

additional immigration quotas for midwifes from LDCs, extend the number of construction staff for contractors from LDCs, or release geographic economic needs tests for hotel licenses.[55] As in most cases these market access preferences are clearly identified, the waiver only includes this type of measures under its fast procedure.

In contrast to what is now stated in the waiver, another option would have been to establish a general provision to provide preferential treatment to all measures included in the GATS, in modes and sectors of interest to LDCs,[56] instead of subediting potential preferences to other measures than those of Article XVI to a CTS consultation. In the current wording of the waiver, the possibility of preferences concerning national treatment, domestic regulatory preferences as the ones defined in Article VI:4, and other preferences like tax exemptions in fact not only depend on developed countries' willingness, but are also limited by the CTS' authorization.

For instance, Schloemann provides some examples of regulatory preferences such as recognition of qualifications based on practical experience for LDC professionals or facilitated licensing procedures for LDC providers among others.[57] Others options can be to administrate regulations with shorter periods to resolve applications for licenses in construction services for LDCs, or lower application fees for LDCs.

The WTO has stated that preferential market access will help to enhance the participation of LDCs in multilateral trade in services,[58] and the type of preferences covered by the waiver need to go beyond market access; a limitation of the coverage to market access only is contrary to the spirit of the *LDC Modalities*.[59] Indeed, when LDCs submitted the 2006 proposal for the waiver, they aimed at a wide scope and therefore did not mention any differentiation of

55 For similar and other examples see, e.g., Melchior, *supra* note 21, 17.

56 See the similar proposal of 2006 stating that non-reciprocal special priority shall be accorded only to least developed countries in sectors and modes of supply of interest to them. As long as it responds to promote exports of LDCs and responds to development needs and concerns of LDCs, provided on a permanent basis. WTO, *Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS*, *supra* note 29, 1 (para. 1).

57 Schloemann, *supra* note 34.

58 See WTO, *Market Access for Products and Services of Export Interest to Least-Developed Countries: Note by the WTO Secretariat*, WTO Doc WT/COMTD/LDC/W/51, 10 October 2011, 33, para. 58.

59 South Centre, *LDC Package: State of Play and Proposed Language for WTO's MC8*, Doc SC/TDP/AN/MC8/1, November 2011, 8 (para. 3) [South Centre, LDC Package: State of Play and Proposed Language for WTO's MC8]; WTO (Council for Trade in Services,

treatment between market access limitations falling within Article XVI and any other type of measures.[60] This view seems to be supported by other institutions, which believe that other liberalization measures regarding qualitative restrictions shall be taken to extend the scope of the waiver beyond market access. This would help to ensure that domestic regulations do not act as barriers to LDCs services exports.[61]

During the negotiations, some members in favor of a narrower scope agreed on the application of the waiver to measures described in Article XVI and also showed some degree of flexibility indicating "a willingness to be flexible by considering an extension of coverage to Article XVII measures as well".[62] One important problem for LCDs was to explain and name the types and specific examples of preferential treatment beyond the quantitative limitations on market access of Article XVI they were interested in. This made it difficult to determine the implications of such potential preferential treatment related to national treatment or other rules and domestic regulations.[63] On the other hand, all the while developed countries held that increasing the scope of the waiver beyond market access preferences would sink the entire process.[64] The United States of America (U.S.) were concerned about creating an instrument that would apply too broadly and might result in unintended consequences.[65]

Other non-LDC members commented that preferential treatment related to other measures not related to limitations of Article XVI could be particularly

Special Session), *Report of the Meeting Held on 15 April 2011: Note by the Secretariat*, WTO Doc TN/S/M/42, 21 June 2011, 13, para. 69.

60 WTO, *Communication From Zambia on Behalf of LDCs: Draft Text for a Waiver Decision*, *supra* note 32, para. 1.

61 South Centre, *Analysis of Draft Waiver Decision on Services and Services Suppliers of LDCs*, Doc SC/TDP/AN/SV/14, December 2011, 9, para. 42 [South Centre, Analysis of Draft Waiver Decision on Services and Services Suppliers of LDCs].

62 WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 25 November 2010: Note by the Secretariat*, WTO Doc TN/S/M/39, 13 January 2011, 1, para. 5 [WTO (Council for Trade in Services, Special Session), Report of the Meeting Held on 25 November 2010].

63 WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 18th March 2011: Note by the Secretariat*, WTO Doc TN/S/M/41, 7 April 2011, 1-2, para. 4 [WTO (Council for Trade in Services, Special Session), Report of the Meeting Held on 18th March 2011].

64 WTO (Council for Trade in Services, Special Session), *Report on the Meeting Held on 2 July 2010*, WTO Doc TN/S/M/37, 24 September 2010, 2-3, para. 13 [WTO (Council for Trade in Services, Special Session), Report on the Meeting Held on 2 July 2010].

65 WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 25 November 2010*, *supra* note 62, 5, para. 22.

important in trade in services of LDCs. Giving a broader approach to the waiver could provide the opportunity to the members to determine the measures on which preferential treatment would be granted with more flexibility. In any case, the parameters of preferential treatment would be decided on discretionally by each granting member.[66]

It is, however, important to consider that, despite regulations being used to be the main barriers in trade for services, preferences in domestic regulation could sometimes be impossible or illogical to implement. This would be due to the many regulations based on a particular domestic public policy interest, and due to preferential treatment affecting the content of a regulatory requirement that may generate undesirable effects.[67] For instance, requirements of education or training for licenses and qualifications play an important role in the protection of the consumers and in public policy in general. As well, many countries will not allow lower capital requirements to LDC's banks as it would firstly be hazardous for the quality of the financial system in the country that granted such preferential treatment, and secondly be contrary to their preference to use financial prudential regulations.[68]

The waiver may be useful to address formal regulatory barriers or administrative limitations. For example, it may be possible to set a fast-track for LDCs providing them less burdensome procedures than like services and service-suppliers of non-LDCs. Such mechanism could be done through a guarantee of origin that would certify that the preference operates only when the service is supplied by a LDC exporter. In this sense, the *Agreement on Technical Barriers to Trade* and the *Agreement on the Application of Sanitary*

66 In this sense, Mexico mentioned that "Members should have the courage to go beyond Article XVI, since it was up to each granting Member to decide or not to grant the preference". *Ibid.*, 4-5, para. 21. The Chinese representative said that "Members offering preferential treatment to LDCs had full autonomy in determining the specific parameters of the preferential treatments and defining their scope. The delegation did not think, therefore, that Members should limit the scope of the waiver." See WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 18th March 2011*, *supra* note 63, 2, para. 7.

67 Melchior, *supra* note 21, 17 & 31.

68 The GATS allows prudential regulation related to financial services which grants enough regulatory autonomy for members to decide whether they liberalize or not. The authorization to use prudential regulation under the GATS is based on the *Annex on Financial Services*. See *Annex on Financial Services* of the GATS, para. 2 (a) (*supra* note 9, 209, 209). See also M. Yokai-Arai, 'GATS' Prudential Carve Out in Financial Services and Its Relation With Prudential Regulation', 57 *International and Comparative Law Quarterly* (2008) 3, 613, 623-625.

and Phytosanitary Measures already include general disciplines to provide that no measure becomes an unnecessary barrier to trade.[69] In services, the factual negotiations on domestic regulation involve the possibility to implement a necessity test to ensure that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services.[70]

Although a fast-track for LDCs might be legally feasible, it seems that a broader approach of S&D within the waiver would be unlikely to happen as it might require political willingness and a clear identification of the export priorities for the LDCs in the granting country. It also appears to be difficult to demonstrate how and under which form regulatory preferences could lead to a broader market access for LDCs, reducing or eliminating disguised restrictions. This could be seen as an intrusion into the regulatory autonomy of the granting country.

Furthermore, a systemic problem related to the unclear distinctions and connection between the disciplines of the GATS would remain[71] which could influence the decisions of developed countries to grant S&D under the waiver

69 M. Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003), 131 [Krajewski, National Regulation and Trade Liberalization in Services]. See *Agreement on Technical Barriers to Trade*, 15 April 1994, Art. 2 (2) & Art. 2 (3), 1868 UNTS 120, 121 and *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Art. 5 (6), 1867 UNTS 493, 496.

70 Art. VI:4 GATS establishes the mandate to negotiate future disciplines on domestic regulations; in paragraph (b) it states that the disciplines would be "not more burdensome than necessary to ensure the quality of the service". GATS, Art. VI:4(b), *supra* note 9, 190. As Delimatsis points out, the necessity test is central to this mandate. See P. Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come', 19 *European Journal of International Law* (2008) 2, 365, 365 [Delimatsis, Determining the Necessity of Domestic Regulations in Services]. The implementation of a necessity test in domestic regulation is an important controversial issue in the Working Party on Domestic Regulation negotiations. See generally WTO (Working Party on Domestic Regulation), *Report of the Meeting Held on 1 April 2009: Note by the Secretariat*, WTO Doc S/WPDR/M/40, 12 May 2009.

71 Note that there is a doctrine debate about the distinction between the Art. XVI on market access and Art. VI related to domestic regulation. See for this J. Pauwelyn, 'Rien ne Va Plus? Distinguishing Domestic Regulation From Market Access in GATT and GATS', 4 *World Trade Review* (2005) 2, 131; P. Delimatsis, 'The Interaction Between Articles VI, XVI, XVII and XVIII GATS', *supra* note 11, 1059-1080; M. Krajewski, 'Article VI GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 165, 195-196, paras 73-74 [Krajwski, Article VI GATS]. In the *United States – Gambling* dispute the panel found that Arts VI:4 & VI:5 v. Art. XVI are mutually exclusive, however, this conclusion was

It seems that market access preferences, related to Article XVII will have a low impact in LDCs' trade in services, therefore addressing other regulatory barriers might help to enhance the effectiveness of this mechanism. Despite the importance of these non-market access preferences, according to the waiver, if a member wants to provide preferential treatment in measures other than the related to Article XVI, it will need to obtain the previous authorization of the CTS to be implemented.[72] This decision appears to be related to the position of several developed countries that want to analyze in detail and case by case this type of preferences. In this case, the implementation will also depend on how demanding and specific LDCs demand of preferences could be.

Thus, an agreement for a 'Fast Track', providing LDCs preferences related to regulatory concerns, such as less burdensome administrative procedures and requirements, might be difficult to achieve. The negotiations on new disciplines on domestic regulation of Article VI, which are still at an impasse and ongoing due to the divergent opinions of the members regarding their content, can be considered a similar development.[73]

Furthermore, the services waiver is focused on market access for LDCs services suppliers; however, it is also known that in general LDCs have supply side and regulatory constraints on their own, which makes it difficult for them to benefit from market access preferences.[74] Other options to address internal concerns of LDCs shall be examined below.

questioned. Panel Report, *United States – Gambling*, WT/DS285/R, 10 November 2004, 206, para. 6.305.

72 The waiver sets two types of procedures for the different measures that can be adopted: preferences that fall in the scope of Art. XVI GATS and a longer procedure for any other type of preference that do not fall within the scope of Art. XVI. As qualitative measures fall within the latter category, they need the approval of the CTS. See WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 1).

73 See C. Manrique, 'El potencial del acuerdo general sobre el comercio de servicios (AGCS) en la agenda del desarrollo humano', in J. Escribano Úbeda-Portugués (coord.), *Comercio, Economía, Desarrollo y Derecho Internacional: Nuevos retos en la agenda global del siglo XXI* (2013), 76, 91 with further references.

74 Melchior, *supra* note 21, 31 (para. 41). As an example, Cambodia has not yet approved basic laws regarding services trade. See WTO, *Trade Policy Review: Cambodia: Report by the Secretariat*, WTO Doc WT/TPR/S/253, 27 September 2011, 19-20 (Table II.1).

D. Rules of Origin: Could They Help to Enhance the Mechanism's Efficiency?

Rules of origin are the criteria needed to determine the national source of a product or service.[75] The extent to which products with non-parties' inputs which are imported intermediately entitle for trade preferences is set by rules of origin.[76] (i.e. it is necessary to determine the level of transformations of the imported good). This seeks to prevent the transshipment of goods exports to a Preferential Trade Agreement (PTA) party only to obtain the preferential tariff treatment.

The restrictiveness of agreed rules of origin in services will determine the extent to which non-members can benefit from trade or investment preferences. These rules are generally used in a PTA. Here, the general rule is to adopt the most liberal rule of origin – the substantial business operations test, whereby any third country investor carrying out substantial business activities in the territory of a party to a PTA must be treated like an investor from any PTA party.[77]

Nevertheless, rules of origin in services are different from those in goods. As goods are tangible, it is possible to determine the percentage that has been produced in a given country, which is not the case in services, where the outcome is normally intangible and it is therefore not easy to determine the level of service transformation or the percentage that has been produced in each country.[78] Moreover, most services require the movement of either the consumer

75 On rules of origin in trade in services see B. Hoekmann, 'Rules of Origin for Goods and Services: Conceptual Issues and Economic Considerations', 27 *Journal of World Trade* (1993) 4, 81; A. Beviglia Zampetti & P. Sauvé, 'Rules of Origin for Services: Economic and Legal Considerations', in O. Cadot *et al.* (eds), *The Origin of Goods: Rules of Origin in Regional Trade Agreements* (2006), 114. Rules of origins are defined as " [...] those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods [...]". *Agreement on Rules of Origin*, 15 April 1994, Art. 1:1, 1868 UNTS 397, 397.

76 Fink & Molinuevo, 'East Asian Free Trade Agreements in Services', *supra* note 11, 291.

77 According to Art. V:5 of the GATS, but ambiguously Art. V:3(b) GATS affords Parties to South-South PTAs the right to adopt a more restrictive rule of origin and deny the benefits of integration to third country investors that are not owned or controlled by juridical persons of a PTA Party.

78 The issue of domestic added value in services or intermediate inputs in services has not been developed. Currently UNCTAD is involved in a project related to the Global Value Chain (GVC), analyzing the value added in global trade to map the distribution of valued added and participation of a country in GVCs and in several sectors. They calculate that the share of services value-added exports in global value-added exports has increased at a faster rate than in manufactured products. See, e.g., R. Banga, 'Regional Value Chains

or the supplier.[79] Therefore, rules of origin in services PTAs are usually focused on identifying the origin of services suppliers.[80]

The rules of origin of trade in services in PTAs usually take into account three different contexts: the origin of services, the origin of service suppliers in the form of juridical persons, and the origin of service suppliers in the form of natural persons.[81]

The services waiver is opted for identifying and defining the norm of origin of a 'service supplier of a least-developed country' in the form of natural and juridical person in more detail, and describes the specific requirements in the case of supply of a service through commercial presence. Depending on the agreed criteria to determine the origin of services suppliers, potential suppliers benefiting from the services waiver may vary. Consequently, the importance of rules of origin lies in whether they are more liberal or more restrictive.[82]

Rules of origin in the LDCs services waiver identifying the service suppliers which can benefit from preferential treatment appear to be 'liberal rules' as it will be explained. On the one hand, developed countries are concerned to tackle free-riding.[83] Indeed, highly liberal rules might let non-LDC suppliers benefit from the application of the waiver. On the other hand, it is also noticed that, to some extent, liberal rules could help LDCs to enhance the benefits from any market access preference granted in pursuance of this waiver because, as it was mentioned before, one of LDCs' problems is their own supply side capacity[84] which could improve with the investment from a non-LDC country. In fact,

– Background Paper: Measuring Value in Global Value Chains' (May 2013), available at http://unctad.org/en/PublicationsLibrary/ecidc2013misc1_bp8.pdf (last visited 31 August 2014).

79 C. Fink & D. Nikomborirak, 'Rules of Origin in Services: A Case Study of Five ASEAN Countries', in M. Panizzon, N. Pohl & P. Sauvé (eds), *GATS and the Regulation of International Trade in Services* (2008), 111, 114-115 [Fink & Nikomborirak, Rules of Origin in Services].

80 South Centre, *Analysis of Draft Waiver Decision on Services and Services Suppliers of LDCs*, *supra* note 61, 6, para. 30. According to Fink and Nikomborirak rules of origin in services have opted to identify the service supplier instead of the services itself because most services require proximity and therefore usually cannot be supplied cross-border. See Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 115.

81 Fink & Molinuevo, 'East Asian Free Trade Agreements in Services', *supra* note 11, 291.

82 South Centre, *LDC Package: State of Play and Proposed Language for WTO's MC8*, *supra* note 59, 8 (para. 7).

83 Schloemann, *supra* note 34.

84 South Centre, *LDC Package: State of Play and Proposed Language for WTO's MC8*, *supra* note 59, 8 (para. 7).

this effect is clearer in the case of liberal rules of origin applied to juridical persons as they could help to attract more foreign direct investment (FDI), but it is not so clear in the case of individuals, whose relocation to a country that is covered under the waiver may not play an important role in attracting FDI.[85]

Related to the definition of the norm of origin of 'services of a least developed country', the waiver does not contain any specification; it therefore appears necessary to consider the GATS definitions under Article XXVIII for its interpretation.[86]

Regarding the rules of origin for services suppliers the waiver distinguishes the case of natural and juridical persons to define under which circumstances LDCs can benefit from the discriminatory preferential treatment.[87] In the following, the authors will focus on the ambiguities of these rules.

Some of the criteria usually employed to determine the origin of service suppliers in the case of a natural person are nationality, residence (permanent or temporary), and the center of economic interests.[88] The waiver states that a natural person is considered a supplier eligible for a preference, if he or she is "a natural person of a least-developed country".[89] While the waiver does not specify any details about the definition applicable to 'a person of a least- developed country', the GATS does not have any specific disciples related to rules of origin of natural persons in PTAs. However, the GATS provides some guidance within its definitions. Indeed, Article XXVIII:(k) establishes two cumulative pre-conditions to define the meaning of a natural person from another member country: first, the requirement of residence in that other member country and, second, to have the nationality of that other member. Moreover, the latter could be substituted by the right of permanent residence if this member has no nationals[90] or if it "accords substantially the same treatment to its permanent

85 Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 118.

86 The rule of origin related to 'services of a LDC', in the PTAs is normally based on the definition of 'services of another party'. This definition is established by Art. XXVIII:(f) GATS. It refers to the services which are supplied 'from a territory of another Member" (related to mode 1 and 2) and 'by a service supplier of that other Member' (related to mode 3 and 4). See GATS, Art. XXVIII:(f)(i) & (ii), *supra* note 9, 203.

87 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2-3 (operative part 5).

88 See Beviglia Zampetti & Sauvé, *supra* note 75, 114-145; Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 122.

89 See WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 5 (a)).

90 GATS, Art. XVIII:(k)(i), *supra* note 9, 203. This is the case of a member which is not a State under international law, e.g. the European Union (EU).

residents as it does to its nationals".[91] Consequently, it seems that under the services waiver both nationals and permanent residents in LDCs, depending on national law,[92] could benefit from the measures adopted in pursuance of the services waiver.

Finally, the waiver could include more liberal rules of origin for natural persons using the 'center of economic interests' criterion. On the one hand, this may widen the scope of the waiver to individual foreign suppliers that have no nationality or residence from a LDC. On the other hand, this would add legal uncertainty to the scope of the waiver, as this clause is difficult to interpret. Some elements that could be useful for this interpretation are the minimum numbers of years of residency, the payment of local income taxes, or the owning or renting of a dwelling.[93]

The liberality/restrictiveness dichotomy of rules of origin is more important when referred to juridical persons, in the sense that supply side problems for LDCs are more related to this type of suppliers. The services waiver states that those juridical persons which are "constituted or otherwise organized under the law of a least-developed country", but which are owned or controlled[94] by a natural or juridical person of a non-LDC, must be "engaged in substantive business operations in the territory of any least-developed country" to be considered a services supplier of a LCD and to benefit from the waiver.[95]

91 GATS, Art. XVIII:(k)(ii), *supra* note 9, 204. See also C. Feinäugle, 'Article XXVIII GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 540, 558-560, paras 35-41 [Feinäugle, Article XXVIII GATS].

92 Nevertheless, it is important to note that even though nationality and permanent residency attribution falls in the domain of Private Law, there may arise ambiguous situations like double nationality, that in case of conflict may be limited by rules of International Public Law such as the 'genuine link'. See W. Zdouc, *Legal Problems Arising Under the General Agreement on Trade in Services: Comparative Analysis of GATS and GATT* (2002), 139-140.

93 The different types of suppliers that are included in a preferential treatment depending on whether rules of origin are more liberal or restrictive and the types of rules of origin applicable to individuals are identified in Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 118 *et seq*.

94 Arts XXVIII:(n)(i) & (ii) GATS (*supra* note 9, 204) define 'owned by persons of a Member' "[...] if more than 50 percent of the equity interest in it is beneficially owned by persons of that Member" and 'controlled by persons of a Member' " [...] if such persons have the power to name a majority of its directors or otherwise to legally direct its actions". See also Feinäugle, 'Article XXVIII GATS', *supra* note 91, 563-564, paras 49-51.

95 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2-3 (oparative part 5 (b)) states that: "[...] a juridical person which is either: (i) constituted or otherwise organized under the law of a

This criterion is relatively liberal, as it gives the possibility to services suppliers owned or controlled by a natural or juridical person of a non-LDC to be granted with the preferential treatment of the waiver, with the condition to carry out substantive business operations in the LDC.[96]

This contrasts with Article V:6 of the GATS which just refers to the requirement to be a "juridical person constituted under the laws of a party".[97] This could be interpreted more restrictively as it does not include 'otherwise organized' that can be for example a branch or representative office.

Schloemann pointed out that the criterion of substantive business operations is a good balance between liberal rules and avoiding free-riding.[98] It has also been mentioned that, in fact, rules of origin that focus on a location requirement like substantive business operations instead of the criteria of ownership are more liberal.[99] The waiver does not require that the juridical person has also to be the owned or controlled by a LDC person, it only requires to be 'engaged in substantive business operations in the territory of any least-developed country'. Moreover, the real extent of preferential treatment will also depend on the meaning of 'substantive business operation'; in this respect, the waiver does not provide further guidance so we turn to the definition of 'juridical person of another Member' provided by Article XXVIII:(m) GATS.[100] However, the GATS does not provide any further detail regarding the meaning of 'substantive business operation' and therefore this concept will have to be

least-developed country and, if it is owned or controlled by natural persons of a non-least-developed country Member or juridical persons constituted or otherwise organized under the law of a non-least-developed country Member, is engaged in substantive business operations in the territory of any least-developed country; or (ii) in the case of the supply of a service through commercial presence, owned or controlled by: 1. natural persons of least-developed countries; or 2. juridical persons of least-developed countries identified under subparagraph (i)."

96 Fink & Molinuevo, 'East Asian Free Trade Agreements in Services', *supra* note 11, 293.

97 GATS, Art. V:6, *supra* note 9, 189.

98 Schloemann, *supra* note 34.

99 Melchior, *supra* note 21, 26-27.

100 According to Art. XXVIII:(m) GATS (*supra* note 9, 204) the term 'juridical person of another Member' is defined as "a juridical person which is either: (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or (ii) in the case of the supply of a service through commercial presence, owned or controlled by: 1. natural persons of that Member; or 2. juridical persons of that other Member identified under subparagraph (i)".

clarified.[101] Nonetheless, it has also been affirmed that the concept of 'business operations' covers the production, distribution, marketing, and delivery of a service as provided for in Art. XXVIII,[102] and that other GATS provisions like Article V:6 have a different understanding of 'substantive business operations', referring to "a service supplier engaged in regular commercial activity"[103] as one that engages in substantive business operations in the territory of the parties to such agreement. Nevertheless, Feinäugle then points out that the word 'regular' must be examined on a case-by-case basis.[104] Existing rules of origin for other regional or preferential trade agreements can give different definitions. For example, the *Mainland and Macau Closer Economic Partnership Arrangement*, although focused on rules of origin for goods, sets as a criterion for 'substantive business operations' that a service supplier shall be engaged for 3 years or more.[105] Other criteria are used in the case of the *Mainland and Hong Kong Closer Economic Partnership Arrangement*, where, for instance, the company must employ 50 percent of its total employees in Hong Kong.[106]

Consequently, even if including the criteria of 'substantive business operations' implicitly tends towards more liberal than restrictive rules of origin, it might be necessary to establish more guidance on the scope of this legal formula, firstly to see whether they are truly quite liberal, and secondly to provide legal certainty to non-LDC members issuing any preferential treatment in pursuance of the services waiver.

101 See WTO (Council for Trade in Services, Special Session), *Report on the Meeting Held on 2 July 2010*, *supra* note 64, para. 14, in which the EU argues that Art. XVIII GATS does not offer appropriate mechanisms to clarify in that case the previous LDC proposal. The lack of clear criteria to identify the 'scope of substantive business operations' is implicit in H. Wang, 'WTO Origin Rules for Services and the Defects: Substantial Input Test as One Way Out?', 44 *Journal of World Trade* (2010) 5, 1083.

102 WTO, *Compendium of Issues Related to Regional Trade Agreements: Background Note by the Secretariat*, WTO Doc TN/RL/W/8/Rev.1, 1 August 2002, 27, para. 112.

103 T. Cottier & M. Molinuevo, 'Article V GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 125, 148, para. 63.

104 Feinäugle, 'Article XXVIII GATS', *supra* note 91, 561-562, para. 45.

105 *Mainland and Macao Closer Economic Partnership Arrangement*, 17 October 2003, Annex 5, para. 3.1.2. (2). Exercpts of this arrangement are reprinted in UNCTAD, *International Investments Instruments: A Compendium*, Vol. XIII (2005), 67. Annex 5, para. 3.1.2. (2) can be found on page 80 [UNCTAD, International Investments Instruments].

106 *Mainland and Hong Kong Closer Economic Partnership Arrangement*, 29 June 2003, Annex 5, para. 3.1.2. (5). Exercpts of this arrangement are reprinted in UNCTAD, *International Investments Instruments*, *supra* note 105, 31. Annex 5, para. 3.1.2. (2) can be found on page 46.

E. Any Alternatives to the Service Waiver?

As it has been seen through the previous analysis, the waiver seems to require improvements and an important political willingness to meaningfully enhance LDCs' participation in the multilateral trade system in services. In this sense, the 2013 WTO Ministerial Conference in Bali has emphasized the need of a LDC collective request indicating those service sectors of export interest for LDCs, in order to operationalize the waiver.[107] This may indicate that despite its approval in 2011 the implementation of the waiver is at an early stage. This might also be one of the reasons why in Bali the WTO members have insisted on the importance of technical assistance, capacity building, and on the optimal use of aid for trade to reinforce the benefit from the operationalization of the waiver.[108]

For this reason, it seems important to comment some alternatives that may help to increase the share of LDCs in multilateral trade in services.

Section B. of this article discussed the difficulties to obtain meaningful preferences granted by WTO members to LDC members under the waiver, as there is no obligation imposed on them, and the demands of preferences from LDCs will not be easy to formulate. One possibility could be to return to the general request-offer approach, focused on the LDCs and development priorities. Indeed some commentators have already mentioned the use of modal exchange of market access to overcome the exclusion of developing countries in general and of LDCs in particular.[109] This type of negotiations might link, for instance, mode 3 (commercial presence) openness, which is of interest to most developed countries, to mode 4 openness (temporary movement of natural persons, especially of low and medium skilled workers), which is essential for LDCs.[110] Nevertheless, this issue presents some concerns such as the low bargaining power of LDCs as they usually are small countries, or the fact that

107 WTO, *Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-developed Countries: Draft Ministerial Decision*, WTO Doc WT/MIN(13)/W/15, 5 December 2013, 1 (operative part 1.1).

108 *Ibid.*, 2 (operative part 1.4).

109 See B. Hoekman, A. Mattoo & A. Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?', 23 *Oxford Review of Economic Policy* (2007) 3, 367, 381 [Hoekman, Mattoo & Sapir, The Political Economy of Services Trade Liberalization].

110 As stated for instance in WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, *supra* note 20, 2, para. 9.

mode 4 is actually non-tradable for most developed countries,[111] essentially due to migrational and political concerns. It has also been proposed to link mode 4 market access negotiations with non-agricultural market access negotiations,[112] but it may be the case that this linkage may not be applicable, as some developed countries like the U.S. would not accept it.[113]

As it has been seen in section C. of this article, most trade barriers are not market access restrictions (in the sense of quantitative barriers given in Article XVI GATS), but are qualitative barriers such as domestic regulations, which present most impediments to trade. For example, it has been mentioned that burdensome procedures for LDCs could be overcome through the services waiver. Nonetheless, considering that GATS negotiations about disciplines on domestic regulation at a multilateral level are being difficult, it seems plausible that the same difficulties might arise to LDCs trying to apply the service waiver on market access preferences. Another possibility could take into account additional commitments (Article XVIII) as a way to reduce qualitative barriers without providing preferential treatment.

It is necessary to deepen the debate about Article VI GATS related to procedural obligations in general and implementation of Article VI:4 which sets a mandate to establish disciplines on domestic regulation aimed at ensuring that measures related to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services.[114]

In this sense, Munin pointed out that

> "[s]ome commentators believe that one of the future potential developments from which developing countries could profit is the development of strengthened multilateral disciplines on domestic regulation, for two reason: first, it can play a significant role in promoting and consolidating domestic regulatory reform in these countries. Second, such disciplines can help exporters in developing

111 See Hoekman, Mattoo & Sapir, 'The Political Economy of Services Trade Liberalization', *supra* note 109, 381; B. Hoekman, 'The GATS and Developing Countries: Why Such Limited Traction?', in Thomas & Trachtman (eds), *supra* note 8, 437, 444.

112 R. Adlung, 'Service Liberalisation From a WTO/GATS Perspective: In Search for Volunteers', *WTO Staff Working Paper* (2009) ERSD-2009-05, 10.

113 F. Ismail, 'Is the Doha Round Dead? What Is the Way Forward?", *BWPI Working Paper* (2012) 167, 15-16.

114 For a detailed analysis of the provision see, e.g, Krajewski, 'Article VI GATS', *supra* note 71, 168-196, paras 1-74.

countries address potential regulatory barriers to their exports in foreign markets".[115]

Nevertheless, it has also been mentioned that a main downside could be the restriction of the regulatory autonomy of the members, as the new necessity test could limit their domestic policy and development goals[116] and "imply a greater burden of costs in order to comply with these disciplines".[117]

Indeed, to overcome the difficulties that LDCs could face with the application of general disciplines, it has been proposed to adopt horizontal disciplines on a necessity test and to allow at the same time a transitional period for LDCs according to their development needs.[118] However, this view might paradoxically bring us back to more flexibility within the GATS as it is already the case within the waiver. Moreover, it is important to take into account that in the last draft of the disciplines the necessity test was withdrawn.[119]

Furthermore, another commentator suggests that the horizontal approach of the necessity tests is not effective and therefore approaches should be from a sectorial perspective.[120] Nevertheless, Article VI:5, which sets the provisional criteria, might be reinforced. It has been criticized that this regime only applies, first, to international standards that are already applied by the member in question, second, to sectors that are already listed, third, to cases of measures that nullify or impair what presents conceptual downsides, and finally, the scope of 'reasonable expectation' must be understood from the perspective of the schedules.[121]

115 N. Munin, *Legal Guide to GATS* (2010), 334 (footnote omitted). About the importance of a strong disciplines on domestic regulation see P. Delimatsis, 'Concluding the WTO Services Negotiations on Domestic Regulation – Hopes and Fears', 9 *World Trade Review* (2010) 4, 643.

116 This effect is explained as a consequence of the necessity test in Krajewski, *National Regulation and Trade Liberalization in Services*, *supra* note 69, 141-145.

117 Munin, *supra* note 115, 334.

118 It is argued in Delimatsis, 'Determining the Necessity of Domestic Regulations in Services', *supra* note 70, 365-408.

119 See WTO, *Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4*: *Informal Note by the Chairman*, 20 March 2009 (room document) (copy on file with author).

120 A. Mattoo, 'Shaping Future GATS Rules for Trade in Services', *World Bank Policy Research Working Paper* (2001) 2596, 12-13.

121 See Krajewski, 'Article VI GATS', *supra* note 71, 192-194, paras 65-69; Krajewski, *National Regulation and Trade Liberalization in Services*, *supra* note 69, 152.

Standardization (Article VII GATS[122]) may also be a tool to enhance the participation of LDCs in multilateral trade in services. Nevertheless, mutual recognition agreements (MRAs), although being allowed, are negotiated bilaterally which actually has excluded LDCs from them.[123] In fact, India has proposed to standardize a GATS-visa,[124] but it has never been approved involving LDCs' interests in medium and low skilled suppliers' qualifications to be recognized. Therefore, it seems that any meaningful standardization might come from the creation of an autonomous mechanism that certifies the fulfillment of requirements which would be a high improvement.[125]

However, in line with what has been stated, LDCs may need to address their own regulatory issues if they want to benefit from trade in services liberalization and standardization processes.[126] Despite the creation of the *Enhanced Integrated Framework* by the *Hong Kong Ministerial Declaration*, in which a comprehensive Aid for Trade (AfT) framework was established, up to now it has been essentially directed towards supply-side and infrastructure-related trade constraints.[127] Although it is possible to add policy reforms among

122 No definition of recognition has either been done in Art. VII GATS or agreed on among academics. Nevertheless Krajewski states that in broad terms it is defined as "the acceptance of regulatory conditions for goods and services required in one country (exporting origin/home country) as equivalent to the conditions necessary in another country (importing country/host country)". See M. Krajewski, 'Article VII GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 197, 198, para. 1.

123 M. Panizzon, 'International Law of Economic Migration: A Ménage à Trois? GATS Mode 4, EPAs and Bilateral Migration Agreements', 44 *Journal of World Trade* (2010) 6, 1207, 1222.

124 WTO, *Communication From India: Proposed Liberalisation of Movement of Professionals Under General Agreement on Trade in Services (GATS)*, WTO Doc S/CSS/W/12, 24 November 2000, 5-6, para. 18.

125 It has been, for instance, proposed by B. Hoekman, 'The GATS and Developing Countries', *supra* note 111, 451-452. It could also be the case that WTO members use GATS flexibility through additional requirements (Art. XVIII) to list qualitative pre-conditions in mode 4 access of interest to LDCs, in which the burden of ensuring temporariness of natural persons in the host country would be shared with LDCs as it is pointed out in B. Hoekman & A. Mattoo, 'Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation', *World Bank Policy Research Working Papers* (2011) 5517, 16 [Hoekman & Mattoo, Services Trade Liberalization and Regulatory Reform].

126 See, for instance, Hoekman & Mattoo, 'Services Trade Liberalization and Regulatory Reform', *supra* note 125, 11; S. Sáez, 'Trato especial y diferenciado y comercio de servicios', *Serie comercio internacional* (2008) 90, 30.

127 Precisely, the priorities for AfT are "[the] lack of access to financing for export or business development [...][,] [the] lack of access to reliable and inexpensive infrastructure [...][,]

its priorities, most AfT has been directed towards other issues.[128] Consequently, it is basic for LDCs to improve their national legislation and regulations in order to benefit from any standardization or reduction of quantitative and qualitative barriers for trade in services.

F. Concluding Remarks

GATS architectural flexibility gives room for the approved LDCs service waiver, whose impact may be reduced if the mechanism is not strengthened as follows: First, the waiver should impose obligations on non-LDC members instead of being an 'Enabling Clause'. Second, the fast procedure to grant preferences should be extended to other measures such as qualitative limitations, apart from quantitative ones, like the measures related with national treatment or the good governance of domestic regulation, as the former are the most important barriers to trade in services.

Third, liberal rules of origin may enhance the effectiveness of provisions granted by the waiver, but the legal formula 'substantive business operations' needs further clarification to provide legal certainty and avoid free-riding.

Due to the difficulties to modify the waiver provisions, other options have been explored to enhance LDCs participation by strengthening the GATS framework. First, market access negotiation linkages may not be effective due to the low bargaining power of LDCs and developed countries' reluctance to commit in mode 4. However, the modal exchange mechanism could have a positive effect for LDCs if political willingness is reinforced. Second, strong new disciplines on domestic regulations should be adopted, which take into account the priorities of LDCs. Meanwhile, Article VI:5 might be clarified and reinforced. Third, international regulatory cooperation could tackle technical standards, formal regulation barriers, transparency, and other regulation concerns through MRA or institutionalization mechanisms. Finally, concentrating AfT on addressing LDCs' policy reforms may help them to reach international standards.

[the] lack of access to a range of formal and informal networks and institutional facilities necessary for trade [...][,] [and to address] limited availability of trained staff and vocational training." WTO, *Workshop on Aid for Trade: Background Note by the Secretariat*, WTO Doc WT/COMTD/AFT/W/34, 12 July 2012, 9, paras 30-32.

128 This view can be seen in Hoekman & Mattoo, 'Services Trade Liberalization and Regulatory Reform', *supra* note 125, 17.

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The Interaction Between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments

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Abstract

The proposal of carbon-related border tax adjustments (BTAs) has raised a strong objection among the targeted States, mostly developing countries. The BTAs are claimed not only to violate the law of the World Trade Organization (WTO), but also to conflict with the principle of 'common but differentiated responsibilities' (CDR principle) enshrined in the *United Nations Framework Convention on Climate Change*. This study attempts to determine the extent to which the CDR principle could color WTO legal disputes concerning the climate-related BTAs. Here, WTO law is analyzed as a multi-objective legal system, pursuing to promote, *inter alia*, free trade and environmental protection while respecting the special concerns of less developed countries via the Special and Differential treatment (S&D). In this context, relevant WTO provisions to the climate-related BTAs are interpreted. This article concludes that the S&D bears no legal obligation and the non-discrimination principle tenaciously reigns within the WTO legal system. The CDR principle could therefore have a very limited impact on WTO law, even in the *chapeau* of Article XX of the *General Agreement on Tariffs and Trade* leaving the fairness of international climate change law vulnerable within the WTO legal system.

A. Introduction

Climate-related border tax adjustments (BTAs) are a fiscal measure introduced by the European Union in 2008 to cope with the additional production costs resulting from internal climate measures. Their aim is to offset those additional costs on imported products originating from countries without comparably stringent climate measures. Seemingly targeting at developing countries, the proposal of carbon-related BTAs has been opposed by the targeted States, claiming that the BTAs would violate the law of the World Trade Organization (WTO), as well as contradict the principle of 'common but differentiated responsibilities' (CDR principle) of the climate change regime, which imposes differentiated obligations to States in response to the climate change.

The legality of climate-related BTAs under WTO law has been widely debated.[1] Nevertheless, much less attention has been paid to how the CDR

[1] See, e.g., J. Pauwelyn, 'U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law', *NI Working Paper 2007/07-02* (April 2007), available at http://carbontax.org/wp-content/uploads/2007/09/pauwelyn-_-duke

principle can play a role when assessing the WTO's conformity to the measure in question. Recent literature presents divergent views. On the one hand, it has been argued that by interpreting the *chapeau* of Article XX of the *General Agreement on Tariffs and Trade* (GATT) in light of the CDR principle, unilateral application of climate-related trade measures would constitute discrimination and could not be justified.[2] On the other hand, it has been suggested that the non-discrimination principle of WTO law could probably conflict with the CDR principle,[3] making the effect of the CDR principle on the *chapeau* of Article XX GATT far from certain.[4]

In contrast to previous works, this contribution aims to study interaction between WTO law and the CDR principle in the case of climate-related BTAs by examining WTO law as a legal system seeking to promote not only free trade, but also environmental protection, while taking into account the special needs of less developed countries. Its rules and exceptions, including the Special and Differential treatment (S&D) and general exceptions, are collectively analyzed. Against this backdrop, relevant GATT provisions and jurisprudence are carefully interpreted in order to understand the perspective of the WTO legal system on the CDR principle and the extent to which the CDR principle can play a role in this realm.

This article is constructed as follows: Section B. defines the content and the legal status of the CDR principle in international law and determines whether the principle is recognized by or reflected in principles enshrined in WTO law. Section C. then provides definitions and functions of climate-related BTAs and

-univ-_-working-paper-on-climate-and-competitiveness-_-2007.pdf (last visited 15 August 2014) [Pauwelyn, Climate Policy]; T. Epps & A. Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change* (2010), 122-141; J. Hilbert & H. Berg, 'Border Tax Adjustments for Additional Costs Endangered by Internal and EU Environmental Protection Measures: Implementation Options and WTO Admissibility' (2009) available at http://umweltbundesamt.de/sites/default/files/medien/publikation/long/3819.pdf (last visited 15 August 2014), 9 *et seq.*

2 M. Hertel, 'Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities', 45 *Journal of World Trade* (2011) 3, 653, 667. See also F. Morosini, 'Trade and Climate Change: Unveiling the Principle of Common but Differentiated Responsibilities From the WTO Agreements', 42 *George Washington International Law Review* (2010) 4, 713, 723 *et seq.*

3 S. Davidson Ladly, 'Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities', 12 *International Environmental Agreements* (2012) 1, 63, 65.

4 *Ibid.*, 79.

reasons why the CDR principle is of particular relevance when determining the legality of such a measure within the ambit of the WTO system. Next, section D. examines the jurisdiction of the Dispute Settlement Body (DSB) and applicable law to disputes, to explore the way in which the CDR principle can affect a WTO dispute regarding the climate-related BTAs. Finally, section E. analyzes how the findings from the previous sections influence the test of WTO legality of the measure. Given that the climate-related BTAs will be subjected primarily to the GATT rules, *inter alia* Articles I and III GATT, and – in case justification is necessary – Article XX GATT, this article examines the impact of the CDR principle in these two cases separately.

B. CDR Principle

I. Content

The CDR principle has developed from the principle of equity in general international law.[5] It recognizes that climate change is of common concern and that each State has a common responsibility to protect the climate. However, in attributing roles and responsibilities, the CDR principle is aware of the historically larger contributions to the climate change problem by developed countries and also their higher technical and financial capabilities to cut down emissions.[6] Such recognized facts result in differentiated responsibilities; developed countries "should take the lead in combating climate change", including their effects,[7] as well as assist developing countries with funds, technologies, and knowledge in addressing the problem of climate change.[8]

II. Legal Status

The legal status of the CDR principle is still open to question. As for now, it is unlikely to be classified as a customary rule.[9] Customary rule requires evidence of a general practice accepted as law,[10] whereas the content and scope of

5 P. Sands, *Principles of International Environmental Law*, 3rd ed. (2012), 233.

6 F. Yamin & J. Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (2004), 70.

7 *United Nations Framework Convention on Climate Change*, 21 March 1994, Art. 3 (1), 1771 UNTS 107, 169 [UNFCC].

8 *Ibid.*, Art. 4 (3), (4) & (5), 173.

9 E. Hey, 'Common but Differentiated Responsibilities', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. II, 444, 447, para. 18.

10 *Statute of the International Court of Justice*, 26 June 1945, Art. 38 (1) (b) [ICJ Statute].

the CDR principle are difficult to define.[11] Its consequences are unclear, without treaty provisions giving it meaning.[12] States, thus, divergently interpret the CDR principle,[13] making it "[very] difficult to show that it has the necessary *opinio juris* for the establishment of international customary law".[14]

Although written under the title 'Principles' under Article 3 of the UNFCCC, it is difficult to determine whether the CDR principle is legally binding. The CDR principle was not expressed under Article 3 in legally obligatory terms,[15] but instead crafted in vague terms and using the wording 'should'.[16] The principle is, hence, most likely to be qualified as soft law.[17]

Despite its soft character, the CDR principle should not be regarded as legally irrelevant.[18] It is most importantly a core principle of the climate change regime as evidenced in Article 4 of the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol*, where only developed countries have specific obligations to reduce greenhouse gases (GHGs) emission.[19] And undoubtedly, the CDR principle serves as a guide to interpret existing climate change obligations[20] and provides the basis for the elaboration of future ones.[21]

III. The CDR Principle and WTO Law

The CDR principle has been argued to be an inherent part of the WTO rules.[22] Indeed, the Preamble to the *WTO Agreement* affirming its environmental objective and the S&D appear to share some similarities with the CDR principle of international environmental law. Since climate-related BTAs deal with trade

11 T. Honkonen, *The Common but Differentiated Responsibilities Principle in Multilateral Environmental Agreements* (2009), 89.

12 Hertel, *supra* note 2, 665.

13 *Ibid.*

14 Honkonen, *supra* note 11, 302.

15 *Ibid.*, 317.

16 UNFCCC, Art. 3, *supra* note 7, 169-170.

17 Hey, *supra* note 9, 447, para. 18; Honkonen, *supra* note 11, 297.

18 Honkonen, *supra* note 11, 307.

19 UNFCCC, Art. 4, *supra* note 7, 170-174 and *Kyoto Protocol*, Art. 3, UN Doc FCCC/CP/1997/7/Add. 1, 10 December 1997, 37 ILM 22, 33-34.

20 R. Wolfrum, 'General International Law (Principles, Rules and Standards)', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. IV, 344, 353, para. 57.

21 L. Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime', 9 *Review of European Community and International Environmental Law* (2000) 2, 120, 124.

22 Morosini, *supra* note 2, 721 *et seq.*

in goods, the analysis of the S&D provisions is thereupon confined to GATT, specifically Part IV, and the 'Enabling Clause'.

1. Environmental Objective of the WTO

The Preamble to the WTO Agreement acknowledges the protection and the preservation of the environment as one objective of the WTO. And in doing so, it should be "in a manner consistent with [Members'] respective needs and concerns at different levels of economic development".[23] This clause reflects the concept of differentiated responsibilities according to differences in financial and technical capacities of States found in the CDR principle.[24] Notably, unlike the CDR principle, such a clause does not mention historical contribution to environmental problems by developed countries as a reason for differentiated responsibilities.

2. Special and Differential Treatment in WTO Agreements

Apart from the Preamble to the *WTO Agreement*, several of the WTO-covered agreements contain S&D provisions[25] in an attempt "to facilitate the integration of developing countries into the multilateral trading system".[26] Particularly relevant to the case of climate-related BTAs are Part IV of the GATT and the 'Enabling Clause'.

Added in 1966, Part IV of the GATT "formalised acceptance by developed countries of the non-reciprocity principle[27] under which developed countries gave up their right to ask developing countries to offer concessions during trade negotiations to reduce or remove tariffs and other barriers to

23 *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Preamble, para. 1, 1867 UNTS 3, 154.

24 See Morosini, *supra* note 2, 723.

25 See WTO, 'Trade and Development', available at http://wto.org/english/tratop_e/devel_e/devel_e.htm (last visited 15 August 2014).

26 E. Kessie, 'The Legal Status of Special and Differential Treatment Provisions Under the WTO Agreements', in G. A. Bermann & P. C. Mavroidis (eds), *WTO Law and Developing Countries* (2007), 12, 13.

27 *General Agreement on Tariffs and Trade 1994*, 15 April 1994, Art. XXXVI:8, 1867 UNTS 187 [GATT 1994]. GATT 1994 contains, *inter alia*, the rectified, amended or modified provisions of GATT 1947 (55 UNTS 187). See GATT 1994, *supra* this note, 190. Part IV of GATT 1947, which includes Art. XXXVI:8, was added on 26 November 1964. A consolidated version of GATT 1947 is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *The Text of the General Agreement on Tariffs and Trade* (1986). Art. XXXVI:8 can be found on page 54.

trade".[28] Article XXXVII in Part IV also prescribes a list of commitments of developed Contracting Parties to secure a share of developing countries in the growth of international trade. Nevertheless, they appear to be mere best effort provisions and were criticized because their language could be understood as "cast in hortatory, rather than contractual, terms and led to very little concrete action".[29] Despite several attempts to give Part IV operational effect in a number of disputes, developing countries have never succeeded.[30]

The Panel in *EEC – Dessert Apples* made clear that the commitments under Article XXXVII were additional to their obligations under Parts I to III of the GATT and that these commitments thus applied to measures which were permitted under Parts I to III.[31] Such reasoning of the Panel hinders "the possibility that measures taken under Part IV could be recognized as valid exceptions to obligations under Parts I to III",[32] especially Article I, the most-favored-nation principle (MFN). And despite suggested alternatives to interpret Part IV so as to legally validate deviation from the MFN,[33] it cannot be ignored that, unlike the 'Enabling Clause',[34] nowhere does Article XXXVII explicitly exempt itself from Article I. Nor does it mention any 'more favorable' treatments to developing countries in a comparative sense to treatments to other Contracting Parties. Moreover, the wording 'legal reasons' of Article XXXVII:1[35] is indeterminate, making it possible to include the obligation under Article I GATT as a compelling legal reason that bars developed countries from according preferential treatments to developing countries. Indeed, the wording 'more favorable' does occur once in Part IV, but it is crafted in vague language

28 Kessie, *supra* note 26, 17-18.

29 M. Hart & B. Dymond, 'Special and Differential Treatment and the Doha 'Development' Round', 37 *Journal of World Trade* (2003) 2, 395, 401.

30 Panel Report, *EC – Sugar Exports*, L/5011, BISD 27S/69, 10 November 1980; Panel Report, *EEC* – Apples I, L/5047, BISD 27S/98, 10 November 1980; Panel Report, *EEC – Dessert Apples*, L/6491, BISD 36S/93, 22 June 1989 [Panel Report, EEC – Dessert Apples]; Panel Report, *United States – Sugar Quota*, L/5607, BISD 31S/67, 13 March 1984.

31 Panel Report, *EEC – Dessert Apples*, *supra* note 30, para. 12.31.

32 S. E. Rolland, *Development at the World Trade Organization* (2012), 150.

33 *Ibid.*

34 See *infra.*

35 GATT 1994, Art. XXXVII:1, *supra* note 27: "The developed contracting parties shall to the fullest extent possible [–] that is, except when compelling reasons, which may include legal reasons, make it impossible [–] give effect to the following provisions [...]." The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 55 (emphasis added).

under Article XXXVI GATT,[36] which makes it hard to distill any concrete legal effect. It would thus be very difficult to argue that Part IV allows or obligates a member to make an exception to the MFN to differentiate between developing and developed members.

Another relevant provision to climate-related BTAs is the so-called 'Enabling Clause',[37] adopted to "[...] secure [a] legal basis for [...] granting preferences to, and among developing countries [...]".[38] Commencing the first paragraph with the wording 'notwithstanding the provisions of Article I of the General Agreement', the 'Enabling Clause' is clearly regarded as an exception to Article I GATT.[39] The 'Enabling Clause' allows developed countries to grant developing countries preferential treatments under prescribed conditions. However, it does not impose an obligation to do so. So far, it can therefore be concluded that within the WTO substantive provisions there exists no legal duty of developed countries to treat developing countries with more favorable treatment.

The S&D provisions and the CDR principle share some similarities but also retain differences.[40] Both have the objective of accounting for the different circumstances of different countries. Nevertheless, while the CDR principle aims at promoting environmental protection, the S&D under the WTO intends first and foremost to promote international trade.[41] Another difference

> "[...] is that, [unlike the CDR principle,] the differential treatment under the international trade [system] is not so clearly based on reasons of historical contribution of industrial countries [...], but

36 GATT 1994, Art. XXXVI:4, *supra* note 27: "Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, [...]." The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 54 (emphasis added).

37 GATT, *Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903, 28 November 1979.

38 Kessie, *supra* note 26, 18.

39 See WTO, 'WTO Analytical Index: GATT 1994' available at http://wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1C (last visited 15 August 2014).

40 Honkonen, *supra* note 11, 66.

41 *Ibid.*

more generally on the perceived [inequalities] in the international trading system".[42]

Finally, despite the existence of S&D in the WTO system, this international trade system is predominantly governed by the principle of non-discrimination in Article I GATT, which precludes differential treatment among exporting countries.[43] Observance of Article I:1 could contradict the CDR principle which requires developed countries to take the lead in combating climate change.[44] As a result, a conflict between the CDR principle and the MFN of the GATT is very likely[45] and will be demonstrated later in this article.[46]

C. What Are Climate-Related BTAs?

Now this article turns to explore climate-related BTAs as the setting of the study of the interaction between the CDR principle and WTO law.

I. Definitions of BTAs

BTAs are not a new trade instrument, but have long been applied according to the destination principle,[47] which means that goods will be taxed only in a country where they are consumed.[48] Without BTAs, goods could be

42 *Ibid.*, 67.

43 GATT 1994, Art. I:1, *supra* note 27: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 2.

44 Davidson Ladly, *supra* note 3, 78.

45 *Ibid.*, 81.

46 See *infra* section E.

47 M. Matsushita, T. J. Schoenbaum & P. C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2006), 825.

48 D. Ruddigkeit, *Border Tax Adjustment an der Schnittstelle von Welthandelsrecht und Klimaschutz vor dem Hintergrund des Europäischen Emissionszertifikatehandels* (2009), 6.

double taxed or escape taxation.[49] In 1968, the Working Party on Border Tax Adjustments has defined that BTAs are

> "any fiscal measures, which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to customers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products)".[50]

II. Functions of Climate-Related BTAs

1. Competitiveness

The idea of applying BTAs with regard to climate measures comes from the fact that industries in some developed countries are burdened by the costs from more stringent domestic climate measures such as carbon tax or energy tax, whereas industries in developing countries are not. This situation raises concerns among firms in developed countries that they may lose their competitiveness in the world market when competing with their counterparts in developing countries.[51] BTAs have thus been purposed to relieve these concerns by charging imported goods from the countries with less stringent climate measures, the equivalent of what they would have had to pay if they had been produced domestically. This is to create a level playing field between domestic and imported products.[52]

2. Prevention of Carbon Leakage

Besides competitiveness concerns, carbon leakage is raised as the most crucial reason to support climate-related BTAs. Carbon leakage would occur

[49] H. P. Hestermeyer, 'Art. III GATT', in R. Wolfrum, P.-T. Stoll & H. P. Hestermeyer (eds), *Max Planck Commentaries on World Trade Law* (2011), Vol. 5, 116, 136, para. 45.

[50] GATT, *Report of the Working Party on Border Tax Adjustments*, L/3464, BISD/18S/97, 2 December 1970, 1, para. 4 [GATT, Report of the Working Party on Border Tax Adjustments].

[51] Epps & Green, *supra* note 1, 122; A. Cosby & R. Tarasofsky, 'Climate Change, Competitiveness and Trade' (May 2007), available at http://iisd.org/pdf/2007/climate_trade_competitive.pdf (last visited 15 August 2014), 1.

[52] Cosby & Tarasofsky, *supra* note 51, 19.

when climate measures lead to the increase of production costs and could therefore result in relocation of industries from countries with stricter climate measures to countries with less strict or with no such measures in order to sink production costs. This would hence undermine the efforts of developed countries to combat climate change.[53] It is worthy to note that some studies suggested that internal climate policies, which could affect some industrial sectors, might not be sufficient to induce carbon leakage.[54]

In addition to carbon leakage concerns, BTAs are also claimed to be an incentive for developing countries to take more actions to combat climate change.[55]

3. Response by Developing Countries

As illustrated above, the primary objective behind the implementation of climate-related BTAs by developed countries is to shift costs resulting from domestic environmental measures to developing countries.[56] This raises strong objections among developing countries, arguing that such allocation of costs contradicts the CDR principle.[57] Considering the ineffectiveness of UNFCCC dispute settlement mechanisms and the probability that affected developing countries would challenge climate-related BTAs under the WTO dispute settlement mechanism, it is important to analyze whether, how and to what extent this principle can play a role in the WTO legal system.

D. Jurisdiction and Applicable Law in WTO Dispute Settlement

In order to study the degree to which the CDR principle is welcomed by WTO law, it is first necessary to understand the jurisdiction of the DSB as well as the limit of applicable law to WTO disputes.

53 B. Volmert, *Border Tax Adjustments: Konfliktpotential zwischen Umweltschutz und Welthandelsrecht?* (2011), 28.

54 Cosbey & Tarasofky, *supra* note 51, 8.

55 Hilbert & Berg, *supra* note 1, 3.

56 See Davidson Ladly, *supra* note 3, 65.

57 R. Eckersley, 'The Politics of Carbon Leakage and the Fairness of Border Measures', 24 *Ethics and International Affairs* (2010) 4, 363, 382.

I. Jurisdiction

Despite the absence of a provision explicitly delineating the jurisdiction of the DSB, such rules can nevertheless be deducted from Articles 1 (1) and 3 (2) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Article 1 (1) deals with the 'Coverage and Application' of the DSU. It provides that the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the *agreements listed in Appendix I to this Understanding*",[58] which mean the WTO covers agreements. Article 3 (2) also affirms the duty of the DSB, which is "[...] to preserve the rights and obligations of Members *under the covered agreements*".[59] It can thus be concluded that the jurisdiction of the DSB is limited to only claims under WTO-covered agreements[60] and that the DSB cannot decide a claim based on the CDR principle under the UNFCCC.

II. Applicable Law

Unlike the ICJ Statute and UNCLOS,[61] the DSU lacks a provision specifically ruling on sources of applicable law. Surely, the WTO-covered agreements are the prime source of law in WTO dispute settlement. Highly controversial is whether and to what extent international norms other than WTO law can find application in the WTO system. The debates center on Article 3 (2) DSU, providing that "[r]ecommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements*".[62] This provision is subject to diverse interpretation[63] and is far from settled.

58 *Understanding on Rules and Procedures Governing the Settlment of Disputes*, 15 April 1994, Art. 1 (1), 1869 UNTS 401, 401 (emphasis added) [DSU].

59 *Ibid.*, Art. 3 (2), 402 (emphasis added).

60 J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 443 [Pauwelyn, Conflict of Norms]; L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35 *Journal of World Trade* (2001) 3, 499, 503; J. Trachtman, 'Jurisdiction in WTO Dispute Settlement', in R. Yerxa & B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005), 134; A. Lindroos & M. Mehling, 'Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO', 16 *European Journal of International Law* (2005) 5, 857, 860.

61 *ICJ Statute*, Art. 38, *supra* note 10; *United Nations Convention on the Law of the Sea*, 10 December 1982, Art. 291, 1833 UNTS 3, 511.

62 DSU, Art. 3 (2), *supra* note 58, 402 (emphasis added).

63 See Lindroos & Mehling, *supra* note 60, 863 *et seq.* (for example).

To the author's understanding, the explicit wording of Article 3 (2) seems to prevent the DSB from applying other international rules that contradict with WTO norms. The WTO is indeed part of the international law system[64] and the DSB has always needed to fall back on other international law, as can be witnessed in a number of cases. Nevertheless, it is important to note that the DSB restricted its application of other norms to only help fill gaps in WTO law,[65] especially in case of the law of treaties (such as the principle of non-retroactivity[66] of treaties and error in treaty formation)[67] and procedural rules (such as the authority to accept *amicus curiae* briefs),[68] or to help interpret WTO provisions within the limits of the words used (such as to interpret the term 'exhaustible natural resources' of Article XX (g) GATT by referring to other international environmental instruments).[69] No case law implies that the DSB is willing to apply other rules of international law that are not in compliance with WTO law.[70]

III. Customary Rules of Treaty Interpretation

Article 3 (2) DSU also explicitly refers to other rules of international law. It provides that the provisions of the covered agreements must be clarified "[...] in accordance with customary international rules of interpretation of public international law".[71] Those customary rules can be found in Articles 31 and 32 of the VCLT. Among those rules, Article 31 (3) (c) serves as a bridge connecting other norms to WTO law providing that (when interpreting a treaty) "[there]

64 See Pauwelyn, *Conflict of Norms*, *supra* note 60, 25.

65 Bartels, *supra* note 60, 515.

66 See, e.g., Appellate Body Report, *Brazil – Coconut*, WT/DS22/AB/R, 21 February 1997, 15.

67 Panel Report, *Korea – Government Procurement*, WT/DS163/R, 1 May 2000, 190-191, paras 7.123-7.126 [Panel Report, Korea – Government Procurement].

68 Appellate Body Report, *United States – Shrimp*, WT/DS58/AB/R, 12 October 1998, 38, para. 108 [Appellate Body Report, United States – Shrimp]. See, for other examples, Appellate Body Report, *United States – Imposition of Counterveiling Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, 10 May 2000, 14, para. 39; Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses From India*, WT/DS33/AB/R, 25 April 1997, 12-17; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, 57, para. 202.

69 Appellate Body Report, *United States – Shrimp*, *supra* note 68, 48, para. 129 *et seq.*

70 Panel Report, *Korea – Government Procurement*, *supra* note 67, 183-184, para. 7.96. See Bartels, *supra* note 60, 506 *et seq.*

71 DSU, Art. 3 (2), *supra* note 58, 402.

shall be taken into account [...] any relevant rules of international law applicable in the relations between the parties".[72]

The UNFCCC satisfies all requirements of Article 31 (3) (c). The wording '[...] any relevant rules [...]' is to be taken to refer to all recognized sources of international law,[73] which includes the UNFCCC as a treaty. Certainly, it is relevant to the case of the climate-related BTAs. Finally, since all WTO members are parties to the UNFCCC, it is indisputably applicable to the relations to all WTO members. As a result, the rules and principles of the UNFCCC, especially the CDR principle, must be taken into account when interpreting WTO provisions in a dispute concerning climate-related BTAs.[74]

In addition, the CDR principle is also to be taken into consideration when interpreting WTO-covered agreements since it is also reflected in the Preamble to the *WTO Agreement*, which constitutes a "context"[75] as well as reflects "object and purpose"[76] of the GATT.

E. Climate-Related BTAs and the CDR Principle

Having the results from the analysis above, this article now turns to analyze an influence the CDR principle may have on the WTO compliance test for climate-related BTAs.

Climate-related BTAs would most probably be challenged by the test under Articles III, II (2) (a) and I of the GATT. In case it fails, it would need justification by Article XX. Given existing widespread discussions as to the WTO compliance with the measure,[77] this article hence analyzes this subject only briefly and then examines the role of the CDR principle in the BTAs dispute separately in two levels; first, at the level of GATT substantive rules, and second, at the exception level.

72 *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31 (3) (c), 1155 UNTS 331, 340 [VCLT].

73 O. Dörr, 'Article 31', in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012), 521, 561-568, paras 92-104.

74 See Hertel, *supra* note 2, 661.

75 VCLT, Art. 31 (2), *supra* note 72, 340.

76 *Ibid.*, Art. 31 (1), 340. Appellate Body Report, *United States – Shrimp*, *supra* note 68, 58, para. 153.

77 See *supra* note 1.

I. GATT Substantive Rules

1. Adjustability of the Additional Costs

The additional costs to be adjusted in our case concern the production process of the product, which does not affect the physical characteristics of the product itself.[78] It thus gives rise to our foremost question of whether such additional costs are adjustable at all.

It is disputable whether Article III or Article II: 2 (a) is decisive for this issue.[79] On the one hand, carbon tax collected domestically is internal tax. Whether such tax is also collected from imported products by means of the BTAs, whether at the border or within the internal market, it would still be considered as internal tax and primarily subject to Article III: 2.[80] Article III: 2 mentions taxes applied "[...] directly or indirectly, to like domestic products".[81] A tax levied 'indirectly' seems to refer to a tax on the processing of the product[82] and does not require that such processing be incorporated in the final product.[83]

On the other hand, the wording 'an article from which the imported product has been manufactured in whole or in part' of Article II:2 (a) GATT[84] might forbid climate-related BTAs. The wording 'from which' seem to suggest "that the charge equivalent to the indirect tax shall be construed as being restricted to products [or raw material] physically incorporated into

78 Pauwelyn, 'Climate Policy', *supra* note 1, 19.

79 D. H. Regan, 'How to Think About PPMs (and Climate Change)', in T. Cottier, O. Nartova & S. Z. Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (2009), 97, 122.

80 GATT 1994, Ad Art. III, *supra* note 27: "Any internal tax or other internal charge, [...] which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, [...] and is accordingly subject to the provisions of Article III." The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 63.

81 GATT 1994, Art. III: 2, *supra* note 27. The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 6.

82 Hestermeyer, *supra* note 49, 134, para. 39.

83 Volmert, *supra* note 53, 38.

84 GATT 1994, Art. II:2, *supra* note 27: "Nothing [...] shall prevent any contracting party from imposing at any time on the importation of any product: (a) a charge equivalent to an internal tax imposed consistently with the provision of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured in whole or in part [...]. The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 4.

the final product".[85] Still, this interpretation is not obligatory as the wording is ambiguous.[86] However, the equally valid French text uses the wording '*une marchandise qui a été incorporée dans l'article importé* [...]'[87], which would most probably establish a physical incorporation requirement and thus would exclude non-product-related measures.

Nevertheless, Article 33 (3) of the VCLT provides that the terms of a treaty are presumed to have the same meaning in each version of the authentic text. This would allow an interpretation based on the broader meaning to include non-product-related measures. Moreover, the BTAs could also be argued to fall within the wording "[...] in respect of the like domestic product [...]" of Article II: 2 (a).[88]

The author believes that Article II: 2 (a) only reaffirms what Ad Article III provides; that internal taxes can also be imposed on imports at the border.[89] It is therefore Article III: 2, not Article II: 2 (a), which would be conclusive as to the adjustability of climate-related BTAs.[90] In addition, when we resort to the *travaux préparatoire*,[91] it suggests that States Parties, in order to conclude the agreement, deliberately left this unsettled matter open to the DSB to decide in the future.[92] It can thus be concluded that when nowhere in Article III: 2 prohibits the adjustment of taxes of this kind and Article II: (2) (a) is also ambiguous, additional costs resulting from climate measures should be seen as adjustable.

2. National Treatment

Next, Article III: 2 GATT, the 'National Treatment on Internal Taxation and Regulation', prohibits State Parties from imposing taxes on imported like

85 F. Bierman & R. Brohm, 'Implementing the Kyoto Protocol Without the USA: The Strategic Role of Energy Tax Adjustments at the Border', 4 *Climate Policy* (2005) 3, 289, 293.

86 *Ibid.*

87 The French text is available at http://wto.org/french/docs_f/legal_f/gatt47.pdf (last visited 15 August 2014). The article can be found on page 5 (emphasis added).

88 Epps & Green, *supra* note 1, 133.

89 See *supra* section C..

90 See also GATT, *Report of the Working Party on Border Tax Adjustments*, *supra* note 50, 2-3, para. 14; Pauwelyn, 'Climate Policy', *supra* note 1, 20.

91 VCLT, Art. 32, *supra* note 72, 340.

92 See GATT, *Analytical Index: Guide to GATT Law and Practice*, Vol. I, 6th ed. (1995), 145 citing *Review Working Party II on Tariffs, Schedules and Customs Administration: Report to the Contracting Parties*, L/329, 24 February 1955, 5, para. 10.

products in excess of those applied to like domestic products.[93] The author argues that products which are similar in their physical characteristics, whether produced in a climate-friendly manner or not, are like.[94] Thus, the like imported products must not be treated less favorably than the like domestic products. When calculating the monetary amounts of taxes to be adjusted, it is therefore necessary to establish equivalence between indirect domestic taxes and BTAs for imported products in order to pass the test of Article III: 2 GATT.

3. Most-Favored-Nation

The climate-related BTAs would then be tested by Article I GATT, the MFN. Targeting only countries without climate regulations and exempting ones with climate regulations would probably violate this standard. In order for the BTAs to be compatible, they would need to be implemented on all foreign products regardless of the climate policies of the countries of origin.

4. The Role of the CDR Principle at the Level of the GATT Substantive Rules

Next, this section examines the influence of the CDR principle in WTO law in cases where climate-related BTAs are found to comply with all abovementioned rules. To recall, Article I GATT strictly obliges WTO members to treat all exporting countries the same, regardless of different conditions prevailing in different countries. It is true that there exist Part IV concerning trade and development and the 'Enabling Clause'. However, they turn out to bear no obligation for developed countries to treat developed countries with preferential treatment.[95] Although the CDR principle is to be taken into account when interpreting WTO provisions, it cannot alter the clear meaning of Article I GATT[96] and oblige developed countries to differentiate between exporting

93 GATT 1994, Art. III:2, *supra* note 27: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products." The article is reprinted in Secretariat of the General Agreement on Tariffs and Trade, *supra* note 27, 6.

94 P. Low, G. Marceau & J. Reinaud, 'The Interface Between the Trade and Climate Change Regimes: Scoping the Issues', 46 *Journal of World Trade* (2012) 3, 485, 496; Pauwelyn, 'Climate Policy', *supra* note 1, 28 *et seq*.

95 See *supra* section section B. III.

96 R. Gardiner, *Treaty Interpretation* (2008), 547; Pauwelyn, *Conflict of Norms*, *supra* note 60, 573.

countries. Consequently, in this case, the CDR principle cannot override the MFN and prevent the implementation of the BTAs upon developing countries.

II. Article XX GATT

In case climate-related BTAs are found to be not adjustable or violate Article I or Article III GATT, the climate-related measure will need justification under Article XX GATT, the 'General Exceptions'. In order to be justified, it has to pass the two-tier test: first, the measure must fall under one of the exceptions set forth in items (a) through (j), and if so, it must have been applied in a manner consistent with the *chapeau* of Article XX.[97]

1. Article XX (g)

Through the list of exceptions provided, Article XX(g) is found to be most relevant to the objective of climate protection.[98] Article XX(g) contains three requirements. First, the climate needs to fall within the meaning of 'exhaustible natural resources'. The Appellate Body in *United States – Gasoline* considered clean air as an exhaustible resource.[99] Taken into account the importance of the problem of climate change nowadays, the climate should also fall into the same category.[100]

Furthermore, the measure must 'relate to' the conservation of exhaustible natural resources. This requires that "a close and genuine relationship" between the measure and the conservation of natural resources must be established.[101] Since climate-related BTAs are argued to aim at preventing carbon leakage, they would therefore meet this criterion.

The last requirement is that the measure must be made 'in conjunction with restrictions on domestic production or consumption'. This means that the regulating country must also impose a similar restriction domestically, as a requirement of even-handedness.[102] However, there is no requirement that the trade measure be "'primarily aimed' [at] [...] making effective certain restrictions

97 Appellate Body Report, *United States – Gasoline*, WT/DS2/AB/R, 20 May 1996, 22 [Appellate Body Report, United States – Gasoline].

98 See Hertel, *supra* note 2, 669; Hilbert & Berg, *supra* note 1, 20; Epps & Green, *supra* note 1, 142.

99 Appellate Body Report, *United States – Gasoline*, *supra* note 97, 14.

100 Pauwelyn, 'Climate Policy', *supra* note 1, 79.

101 Appellate Body Report, *United States – Shrimp*, *supra* note 68, 51-52, para. 136.

102 Appellate Body Report, *United States – Gasoline*, *supra* note 97, 21.

on domestic production or consumption".[103] Proposed to offset additional costs endangered by internal climate measures, it is also likely that climate-related BTAs would fulfill this requirement.

2. Chapeau

Should a trade measure fall under Article XX(g), the next step is to examine whether it also satisfies the requirements of the *chapeau* of Article XX. At this level, the object of examination is no longer the policy objective, but how the measure is actually applied.[104] The purpose of the *chapeau* is to prevent the abuse of exceptions under Article XX.[105] For a trade measure to be consistent with the *chapeau*, it should not (a) amount to arbitrary or unjustified discrimination and (b) be a disguised restriction on international trade.[106]

a. Arbitrary or Unjustifiable Discrimination

Not much clarity exists as to this *chapeau*'s requirement.[107] The Article XX jurisprudence has nevertheless suggested some criteria a trade measure has to reach. First, the measure in question must provide sufficient flexibility,[108] so that different exporting countries would have "sufficient latitude [...] with respect to the [measures they] [...] may adopt to achieve the level of effectiveness required" by the measure in question.[109] Second, the administration of measures must comply with other WTO standards, such as transparency and due process. Third, *serious, good faith efforts to negotiate* bilateral or multilateral agreements should be made on a non-discriminatory basis, especially when the measure addresses a universal environmental problem.[110] The past climate negotiations prove that governments are still unwilling to bind themselves to protect the

103 Appellate Body Report, *China – Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R & WT/DS398/AB/R, 30 January 2012, 141-142, para. 357.

104 Appellate Body Report, *United States – Shrimp*, *supra* note 68, 62-63, para. 160.

105 Appellate Body Report, *United States – Gasoline*, *supra* note 97, 22; Appellate Body Report, *United States – Shrimp*, *supra* note 68, 61-62, paras 158-159.

106 Appellate Body Report, *United States – Shrimp*, *supra* note 68, 44, para. 120.

107 See W. J. Davey, 'Non-Discrimination in the World Trade Organization: The Rules and Exceptions', 354 *Recueil des Cours de l' Académie de Droit International* (2011), 193, 411.

108 Appellate Body Report, *United States – Shrimp*, *supra* note 68, 64-65 & & 72-73, paras 164-165 & 177.

109 Appellate Body Report, *United States – Shrimp (Article 21.5 - Malaysia)*, WT/DS58/AB/RW, 22 October 2001, 46, para. 144 [Appellate Body Report, United States – Shrimp (Article 21.5 - Malaysia)].

110 Appellate Body Report, *United States – Shrimp*, *supra* note 68, 65 *et seq.*, paras 166 *et seq.*

climate. This has been argued to increase the legitimacy degree of climate-related BTAs.[111]

b. Disguised Restriction on International Trade

The definition of a disguised restriction on international trade is still unclear.[112] The Panel in *EC – Asbestos* suggested that a protectionist intent "can [...] be discerned from its design, architecture and revealing structure".[113] As to climate-related BTAs, the occurrence of carbon leakage is as yet hypothetical.[114] Furthermore, while BTAs also have been argued to create an incentive for developing countries to adopt more stringent climate policies, this role of BTAs is broadly questioned[115] and even found to be vain.[116] The obvious main result seems to be the level playing field between developed and developing countries. It is quite doubtful whether climate-related BTAs would actually be beneficial for conservation of the world's atmosphere, rather than trade protectionism. In this case, the BTAs could then be considered to constitute a "[disguised] restriction on international trade".[117]

3. The Role of the CDR Principle at the Level of Article XX GATT

This section analyzes the influence of the CDR principle on the Article XX GATT-test regarding climate-related BTAs. Since the *chapeau*'s prohibition of '[...] arbitrary or unjustifiable discrimination [...]' is where the CDR principle would possibly play an important role,[118] the analysis confines itself only to the *chapeau*'s non-discrimination requirement.

111 Hilbert & Berg, *supra* note 1, 26.
112 S. Puth, *WTO und Umwelt: Die Produkt-Prozess-Doktrin* (2003), 354.
113 Panel Report, *EC – Asbestos*, WT/DS135/R, 18 September 2000, 449, para. 8.236.
114 See *supra* section section C. II. 2.
115 R. Leal-Arcas, *Climate Change and International Trade* (2013), 136; N. Meyer-Ohlendorf & M. Mehling, 'Questions From the Devil's Advocate: Is a BTA Only the Third-Best Option (Out of Three)?' (2008), available at http://ecologic.eu/download/vortrag/2008/meyer-ohlendorf_grenzsteuerausgleichsmassnahmen.pdf (last visited 15 August 2014).
116 N. Tarui, M. Yomogida & Y. Yao, 'Trade Restrictions and Incentives to Tax Pollution Emissions' (2011) available at http://manoa.hawaii.edu/reis/wp-content/files_mf/trade_pollution_tax_july2011.pdf (last visited 15 August 2014), 18-19 (especially).
117 See Hertel, *supra* note 2, 674; Davidson Ladly, *supra* note 3, 78.
118 See Hertel, *supra* note 2, 675 *et seq.*; Morosini, *supra* note 2, 724.

a. Interpreting 'Discrimination' in Consideration of the CDR Principle

Under the *chapeau* of Article XX GATT, discrimination has been claimed to occur, not only when countries with the same conditions are treated differently, but also when countries with different conditions are treated the same. The proponents for this stretched meaning of discrimination argue that the DSB "[...] ought to draw upon the meaning of discrimination under UNFCCC [Article 3 (5)[119]] [...] to interpret the non-discrimination requirements [of the *chapeau*] of Article XX GATT".[120] In light of the CDR principle, discrimination under the UNFCCC would occur if countries in which different conditions prevail are treated the same. In this reasoning, when deciding a WTO dispute and taking into account the CDR principle, climate-related BTAs which require developing countries to adopt climate measures comparable in effectiveness to those in developed countries would constitute 'discrimination' under the *chapeau* of Article XX and hence, could not be justified.[121]

Although the CDR principle must be taken into account, it is questionable whether the abovementioned result would not exceed the reach of the term 'discrimination' interpreted in light of its context.[122] The Preambles both of the *WTO Agreement*[123] and the GATT 1994[124] emphasize that the core objective of the WTO (and the GATT) is to eliminate 'discriminatory treatment' in international trade relations in order to achieve a level playing field between private producers.[125] The MFN, enshrined in Article I GATT, requires the members to treat all other members the same, regardless of different conditions in different exporting countries. Among others, Article XVII:1(a) GATT affirms this definition of the term 'discrimination' by mentioning the "general principles of nondiscriminatory treatment" which directly refers to the MFN treatment.[126] Systematically, the word 'discrimination' prescribed in the WTO-covered

119 *UNFCCC*, Art. 3 (5), *supra* note 7, 170.
120 Hertel, *supra* note 2, 654 (emphasis added). See also Morosini, *supra* note 2, 723.
121 Hertel, *supra* note 2, 676 *et seq.* See also Low, Marceau & Reinaud, *supra* note 94, 510; Ruddigkeit, *supra* note 48, 28.
122 *VCLT*, Art. 31 (1), *supra* note 72, 340.
123 *Ibid.*, Art. 31 (3), 340.
124 *Ibid.*, Art. 31 (2), 340.
125 Davidson Ladly, *supra* note 3, 80-81.
126 WTO, 'WTO Analytical Index: GATT 1994', available at http://wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_06_e.htm#article17 (last visited 15 August 2014), para. 725.

agreements, including the one in the *chapeau* of Article XX GATT, should mean different treatments between trading countries, regardless of different conditions prevailing across countries.

Furthermore, the addition of the phrase 'between countries where the same condition prevails' indicates the intention of the WTO parties to condemn only discrimination that results from different treatment to countries with the same circumstances. Interpreting the term 'discrimination' according to the CDR requirement would indeed be inconsistent with this phrase, rendering it futile. The non-existence of legal obligation in the WTO system to treat developing countries with differential and preferential treatment despite S&D provisions[127] also prohibits such interpretation.

b. Revisiting *United States – Shrimp*

Many authors also hold an opinion that the Appellate Body's decision in *United States – Shrimp* may support the CDR principle's requirement.[128] The ruling wording

> "it is not acceptable [...] for one WTO Member [...] to require other Members to adopt essentially the same comprehensive program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members [...]"[129]

has been read to recognize a duty to consider various states of development of exporting countries. However, the terms 'different condition' within the meaning of *United States – Shrimp* and the CDR requirement seem incomparable.

In *United States – Shrimp*, the wording 'different condition' is likely to concern the *different levels of risk* of harm to conserved sea turtles in different countries, which depend upon, as the Appellate Body listed in the same paragraph, the actual incidence of sea turtles in those waters, the species of those sea turtles, etc.[130] What was unacceptable was the fact that the United States (U.S.) required exporting countries to use exactly the same measure as that used by the U.S. and must also be certified by the U.S. Although other countries

127 See *supra* section section B. III. 2.

128 Hertel, *supra* note 2, 677; Morosini, *supra* note 2, 722 & 724; Pauwelyn, 'Climate Policy', *supra* note 1, 39; Low, Marceau & Reinaud, *supra* note 94, 515.

129 Appellate Body Report, *United States – Shrimp*, *supra* note 68, 64-65, para. 164.

130 *Ibid.*

might have adopted some measures which were comparable in effectiveness in protection of sea turtles or even used the identical measure as the U.S. but were not certified, their shrimp exports were banned.[131] Nevertheless, after the U.S. revised its guidelines to allow certification of exporting countries having measures comparable in effectiveness to that of the U.S., the trade measure passed the test of the *chapeau*.[132]

On the other hand, the CDR principle leaves the GHGs limitations of developing countries voluntary. Accordingly, developing countries should not be forced to adopt domestic climate measures by a unilateral trade measure of developed counterparts. Unlike in *United States – Shrimp*, the U.S. was entitled to require exporting countries to adopt measures to conserve sea turtles to achieve the objective prescribed in Article XX(g). No exporting country must be exempted by reason of their development conditions. *United States – Shrimp* thus does not seem to support the CDR requisite.

c. The Relationship Between the CDR Principle and the Accomplishment of Climate Conservation

The influence of the CDR principle on Article XX GATT would face another obstacle: its relationship to the accomplishment of the climate objective of the regulating country. The jurisprudence of Article XX GATT suggests that once the objective pursued falls into one paragraph, the Appellate Body regards the achievability of the justified goal as important and one which must be secured.

In *United States – Shrimp*, as already mentioned, the U.S. could in the end apply import bans to require exporting countries to conserve sea turtles as the U.S. intended, as long as sufficient flexibility was provided. Manifestly in *Brazil – Retreaded Tyres*, the Appellate Body held that an alternative measure within the ambit of the necessity test of Article XX(b) should also "preserve for the responding [country] its right to achieve its desired level of protection with respect to the object pursued."[133] Besides, the Appellate Body also found it unacceptable "[...] when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to

131 *Ibid.*, 65, para. 165.

132 Appellate Body Report, *United States – Shrimp (Article 21.5 - Malaysia)*, *supra* note 109, 46, para. 144.

133 Appellate Body Report, *United States – Gambling*, WT/DS285/AB/R, 7 April 2005, 102, para. 308. See also Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, 63-64, para. 156 [Appellate Body Report, Brazil – Retreaded Tyres].

the accomplishment of the objective that falls within the purview of one [of the objective], or goes against this objective".[134] Therefore, it seems doubtful that the DSB would set aside the environmental objective and interpret the *chapeau* in light of the CDR principle to oblige the regulating State to lift the climate-related BTAs from developing countries.

The CDR principle must indeed be taken into consideration when interpreting the *chapeau* of Article XX GATT, but not without limits. It could not go beyond the ordinary meaning of the term 'discrimination' read in its context. The term could only mean *different treatments* and rejects the notion that discrimination would also occur when countries with different conditions are treated the same. The *contra legem* interpretation and Article 3 (2) of the DSU[135] also preclude the addition to the *chapeau* of a new obligation to differentiate between exporting countries. Furthermore, the Article XX GATT case law does not seem to support the influence of the CDR principle or even hamper it. After all, it would be difficult for the CDR principle to pierce through the armor of WTO law in order to effectively secure environmental fairness in this domain.

F. Conclusion

National climate measures have put industries in developed countries in fear that their products will lose the capacity to compete with those of their developing counterparts in the world market, and that this might lead to carbon leakage. Unilateral trade measures have thus been introduced as a solution to those concerns. Among those measures are climate-related BTAs. Its proposal has caused debates about its compliance with both the CDR principle and WTO law. This article focuses on the impact that the CDR principle might have when deciding WTO disputes regarding climate-related BTAs.

Within WTO law, there is a trace of concepts similar to the CDR principle: the environmental objective enshrined in the Preamble to the *WTO Agreement* and the S&D system. Both concepts recognize the special needs of developing countries. Unfortunately, they bear no legal obligation to provide developing countries with preferential treatment. Nevertheless, the Preamble could still at least add color to the interpretation of the WTO-covered agreements. Also as a relevant international rule applicable to all WTO members, the CDR principle of the UNFCCC must be taken into account when interpreting WTO provisions.

[134] Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 133, 97, para. 246.
[135] See also Pauwelyn, *Conflict of Norms*, *supra* note 60, 573.

The test of WTO legality of the climate-related BTAs would begin with the GATT rules: Articles I, II:2(a) and III. There is a possibility that, if carefully designed, the measure could pass all tests. Given the predominance of the MFN and lack of legal duty to differentiate between exporting countries, the CDR principle could obviously not bar the application of the BTAs if all GATT requirements are already fulfilled.

The hope for the CDR principle seems to depend on Article XX GATT in case the BTAs need justification. Attempts have been made to interpret the term 'discrimination' in the *chapeau* of Article XX GATT in light of the CDR principle to also condemn the same treatment to countries with different conditions. However, interpreted in accordance with the MFN-dominated WTO law system as its context, the term "discrimination" under the *chapeau* could only mean different treatments between exporting countries, regardless of different states of development of exporting countries. Taken together, the result of the analysis demonstrates that WTO law, as a guardian of free trade, would hardly let the CDR principle bend itself to prescribe a duty to differentiate between exporting countries according to their different states of development; hence, leaves environmental fairness insecure within the ambit of the WTO system.

Notwithstanding the paralysis of the CDR principle in international trade law, this work suggests that WTO members should indeed refrain from a unilateral application of climate-related BTAs which could not guarantee climate benefits. On the contrary, this action would convey ignorance of developed countries regarding the special needs of developing countries, suggesting that the S&D system and the CDR are purely illusive. This will threaten the cooperative efforts under the UNFCCC and might discourage future collaborations, which is the best means to address global warming. In order to achieve this goal, all parties should indeed put sincere efforts into bringing about a mutual agreement within the UNFCCC framework for the balance between trade, climate, and fairness.