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Editorial

Dear Readers,

with our new issue, the Goettingen Journal of International Law aims to contribute to current debates in international law.

A topic that promises to continue being highly debated is the interplay of International Humanitarian Law (IHL) and International Human Rights Law (IHRL). The latter is a set of rules stipulating fundamental rights every person has at all times and is established in international and regional treaties, customary rules as well as other so-called soft law instruments.¹ IHL on the other hand exclusively covers situations of armed conflict in order to mitigate the impact of war on the civilian population.² In contrast to some IHRL instruments and as stated in Article 5 of the Fourth Geneva Convention, IHL is non-derogatory, even if a person is suspected or active in hostile activities.³ The relationship between the two areas of law becomes tense where human rights are successfully asserted in times of armed conflict, where IHL is initially

¹ D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) 1.

² A. Quintin, *Permissions, Prohibitions and Prescriptions: The Nature of International Humanitarian Law* (2019) 11.

³ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 5.

applied. While some argue that solely IHL as *lex specialis* should apply,⁴ others recommend the systemic integration of IHRL during armed conflict.⁵

With his article ‘Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction With IHL’, *Severin Meier* is adding to the discourse. After illustrating the origins of both bodies of law, the author will then scrutinize how the extraterritorial application of the European Convention on Human Rights (ECHR) as an IHRL instrument can be justified during armed conflict. The extent to which both instruments are applicable side by side is subsequently analyzed, considering the case law of the International Court of Justice (ICJ), before concluding how the interplay of the ECHR and IHL can be reconciled.

The ICJ is not only of relevance for assessing the relationship between IHL and IHRL, but has been consulted on a wide spectrum of issues concerning international law since its establishment seventy years ago. As the principle judicial organ of the United Nations,⁶ the ICJ so far has dealt with 178 cases, compromising contentious cases and advisory opinions.⁷

Deepak Mawar examines the approach of the court’s decision-making in his article ‘The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice’. The author firstly explains and analyses why the court in its judgments leans toward a strict application of the sources of international law listed in Article 38 (1) ICJ Statute. This exhaustive enumeration of sources aims at standardizing the norms applied by the court,⁸ however, it is argued that a more active approach of reasoning can be desirable at times. For

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para 25; M. Sassòli and L. M. Olson, ‘The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’, 90 *International Review of the Red Cross* (2008) 871, 599, 613-616.

⁵ J. D’Aspremont & E. Tranchez, ‘The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the Lex Specialis Principle?’, in: R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (2013), 235-238.

⁶ *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Article 1.

⁷ Cf. <https://www.icj-cij.org/en/cases> (last visited 16 December 2019).

⁸ H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 67.

this purpose, *Deepak Mawar* highlights, *inter alia*, the potential Article 38 (2) ICJ Statute carries to advance jurisprudence, the courts approach to political questions underlying the judicial dispute as well as the ICJ's view of lacuna in the law.

The Goettingen Journal of International Law furthermore is delighted to include in this issue *Valentin Schatz*' article titled 'Access to Fisheries in the United Kingdom's Territorial Sea after its Withdrawal from the European Union: A European and International Law Perspective' which has been pre-published in October 2019. Given the fact that a "Brexit" has become even more likely with the Tories winning the majority in the House of Parliament in the latest election,⁹ thus reassuring the United Kingdom's undertaking to leave the European Union (EU), this article hits the pulse of time. One of the many serious impacts of a withdrawal from the EU is the inapplicability of the Common Fisheries policy which currently governs the access to territorial sea fisheries.¹⁰ After illustrating the *status quo* this contribution looks at the eligible Conventions and Agreements regulating access to fisheries in absence of a new treaty.

Another concern of the international law community continues to be how private corporations can be held accountable for human rights violations. Human rights were composed and are understood as defensive rights of individuals against States.¹¹ However, as businesses continue to expand their reach across the globe and some of them having a higher annual revenue than some State's GDP,¹² the demand for legal instruments holding businesses accountable has increased. Furthermore, for some human rights violations no remedy could be claimed because they cannot be attributed to a particular State, creating a loophole.¹³ As a result, the Zero Draft on a UN Treaty on Business and Human Rights was eagerly awaited.

⁹ 2019 United Kingdom General Election held on 12 December 2019; results available under <https://www.bbc.com/news/election/2019/results> (last visited 16 December 2019).

¹⁰ EP and Council Regulation 1380/2013 of 11 December 2013, OJ L 354/22 [CFP Framework Regulation].

¹¹ A. von Arnould, *Völkerrecht*, 3rd ed. (2016), 274.

¹² J. G. Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *The American Journal of International Law* (2007) 4, 819, 823.

¹³ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries, 2 *Yearbook of the International Law Commission* (2001) 2, 47-48.

In ‘Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?’ *Julia Bialek* first emphasizes the necessity for a binding instrument before she profoundly examines the Zero Draft and contrasts its content with existing soft-law instruments. The author concludes by giving a prognosis of the Zero Draft’s impact.

This issue concludes with a Focus Section on Economic and Social Rights which came about after the conference “Unpacking Economic and Social Rights: International and Comparative Dimensions” organized by Professor Andreas L. Paulus and Sebastian Ehrlich in cooperation with Professor Tomer Broude. The conference took place in Göttingen on 9 and 10 November 2018. The Goettingen Journal of International Law is proud to publish in this issue two articles of authors whose papers were presented and discussed at the conference.

In the article ‘CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations’, *Ioannis Kampouraki* addresses the issue of human rights obligations by businesses. In contrast to *Julia Bialek*’s contribution, the author discusses the two underlying positions of either strengthening corporate liability or maintaining the non-binding legal instruments already in place. To do this, the author reveals the origins, understanding of rights and corporations of both approaches, before juxtaposing them. In addition, the author embeds the approaches into existing frameworks, such as the UN Draft Treaty on Business and Human Rights and various soft law regulations, before drawing conclusions about the human rights obligations by corporations.

The article ‘Unpacking the Debate on Social Protection Floors’ by *Viljam Engström* discusses the background, content and effectiveness of social protection floors as a social security system. Although no uniform understanding exists about the scope of social protection, a strong support for the development of social security in areas such as health care and social minimum has been apparent, resulting in the ILO Recommendation of Social Protection Floors.¹⁴ The author examines in particular the social protection floors implemented by the International

¹⁴ ILO, R202 – Social Protection Floors Recommendation’ (2012).

Monetary Fund (IMF) and focuses on two key criticisms raised against the institution's policy-making in order to create space for a differentiated debate.

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

The Editors

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Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction With IHL

Severin Meier^{*}

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^{*} This article has been written during my employment as research assistant at the Chair of Prof. Dr. iur., h.c. Helen Keller, Professor of Constitutional and International Law at the University of Zurich and Justice at the European Court of Human Rights. Prof. Keller has provided guidance from the very beginning, throughout the drafting process, and has read and commented on the entire article in its final form. My special thanks thus goes to her. The arguments put forward, however, do not necessarily reflect Prof. Keller's views. Any errors that may remain are, of course, my sole responsibility.

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Abstract

This article examines the extraterritorial application of the European Convention on Human Rights (ECHR) during international armed conflict. After a brief discussion of the different historic origins of international human rights law and international humanitarian law (IHL), the article examines the test for establishing jurisdiction under Article 1 of the ECHR. A critical analysis of some contentious legal issues regarding derogations completes the picture of when jurisdiction is established. Subsequently, the article considers the interaction between the ECHR and IHL in international armed conflicts and concludes by arguing that a balance must be found between protecting human rights in international armed conflicts while not interfering unduly with IHL.

A. Introduction

I. Different Origins of IHL and IHRL

While historically international humanitarian law (IHL) and international human rights law (IHRL) have been developed in wholly different contexts, they are increasingly overlapping. This contribution focuses on an important international human rights treaty, the ECHR,¹ and its extraterritorial application in times of international armed conflict. In such situations, questions arise regarding whether the Convention can apply outside the territory of its member States and how the Convention and IHL interact. This paper does not consider the interplay between IHL and the ECHR in internal armed conflicts.²

To better understand the challenges that occur when both IHL and IHRL deal with the same factual situations, it is helpful to briefly look at their different origins. While the law of war belongs to the oldest areas of international law, IHRL has only been in existence since the end of the Second World War.³ Before the Second World War, IHL had developed in isolation. Its modern codification process commenced with the first Geneva Convention of 1864.⁴ While the sections of the 1907 Hague Regulations⁵ on prisoners of war and occupied territories covered – what would today be called – human rights issues, at the time nobody referred to such terminology or, more generally, to the dignity of human

¹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

² For an overview on how different types of armed conflicts are determined, see O. Hathaway *et al.*, ‘Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian and Human Rights Law’, 96 *Minnesota Law Review* (2012) 6.

³ H.-P. Gasser, ‘The Changing Relationship between International Criminal Law, Human Rights Law and International Humanitarian Law’, in J. Doria, H.-P. Gasser & M. Cherif Bassiouni (eds.), *The Legal Regime of the ICC: Essays in Honour of Professor I.P. Blishchenko* (2009), 1111, 1111-1112; T. D. Gill, ‘Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach’, in Y. Haek *et al.* (eds.), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (2014), 335.

⁴ *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, available at <https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument> (last visited 18 November 2019).

⁵ *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land*, 18 October 1907, 187 CTS 227; Gasser, *supra* note 3, 1112.

beings.⁶ Even in the years after the Second World War, when human rights were codified in various international and regional treaties,⁷ the two bodies of law continued to develop independently.⁸ None of the human rights treaties adopted after World War II directly dealt with questions concerning armed conflicts.⁹ At the same time, the 1949 Geneva Convention did not explicitly refer to human rights despite containing rules on the protection of civilians in the hand of the enemy,¹⁰ as well as basic rules for non-international armed conflicts¹¹ – domains that States usually consider to be internal affairs.¹²

Kolb noted that in the period after the Second World War

“[...] the United Nations, the guarantor of international human rights, wanted nothing to do with the law of war, while the [International Committee of the Red Cross], the guarantor of the law of war, did not want to move any closer to an essentially political organization or to human rights law which was supposed to be its expression.”¹³

⁶ Gasser, *supra* note 3, 1111-1112.

⁷ *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III); ECHR, *supra* note 1; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966; 993 UNTS 3.

⁸ R. Kolb, ‘The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions’, 324 *International Review of the Red Cross* (1998), 409; the separate development of the two bodies of law has, however, been relativized by a recent historical study. See B. van Dijk, ‘Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions’, 112 *American Journal of International Law* (2018), 553.

⁹ Gasser, *supra* note 3, 1112.

¹⁰ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

¹¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention), 12 August 1949, Art. 3, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention), 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Fourth Geneva Convention, *supra* note 10; for an overview on the differences between international armed conflicts and non-international armed conflicts, see F. Kalshoven & L. Zegveld, *Constraints on the Waging of War: Introduction to International Humanitarian Law* (2011).

¹² Gasser, *supra* note 3, 1113.

¹³ Kolb, *supra* note 8, 411.

The two bodies of law thus evolved separately. This started to change in 1968 at the United Nations Conference on Human Rights in Teheran, where delegates used the term *Human Rights in Armed Conflict* to refer to IHL.¹⁴ The Additional Protocols to the Geneva Convention that were adopted in 1977 contain several explicit references to human rights.¹⁵ As I will argue below, since the beginning of the 21st century, the case law of the European Court of Human Rights' (ECtHR) has brought IHL and IHRL even closer together.

This increasing interconnection,¹⁶ however, gives rise to complex legal challenges, due in part to the different regulative focus of the two bodies of law. Traditionally, IHL regulated warfare between States. The 1949 Geneva Conventions, with the exception of Common Article 3, apply to situations of "[...] declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties* [...]".¹⁷ This strict focus on international armed conflicts only changed in 1977, when Protocol II was adopted, which deals with non-international armed conflicts. However, Protocol II contains relatively few rules compared to those treaties that regulate inter-state conflicts. The main focus of IHL thus remains on armed conflicts between States.¹⁸ This

¹⁴ Gasser, *supra* note 3, 1114.

¹⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I), 8 June 1977, 1125 UNTS 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Additional Protocol II), 8 June 1977, 1125 UNTS 609; Art. 72 of Additional Protocol I mentions human rights as a subsidiary legal source in armed conflict; Art. 75 of Additional Protocol I codifies basic human rights for persons in armed conflict and holds that they have to be treated humanely in all circumstances. The preamble of Additional Protocol II recalls "[...] that international instruments relating to human rights offer a basic protection of the human person, [...]". The part on "Humane Treatment" in Additional Protocol II strongly resembles the fundamental guarantees regarding detention and penal prosecution of human rights law.

¹⁶ It has even been suggested that today the notion of *humanitarian* in IHL "[...] can be understood [...] only with reference to the idea, language, law and policy of human rights as the dominant moral and legal discourse of our times". However, while both branches of law have grown closer, the notion that the two bodies of law are indispensable to the understanding of each other seems exaggerated considering that IHL and IHRL are still separate legal regimes, see G. Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (2015), 340.

¹⁷ First Geneva Convention, *supra* note 11, Art. 2 (emphasis added).

¹⁸ This is still relevant even though the distinction between international armed conflicts and non-international armed conflicts has become increasingly blurred, see T. Meron, *The Making of International Criminal Justice: The View from the Bench: Selected Speeches* (2011), 220.

is where international human rights law differs. Its focus is on regulating the relationship between States and the individuals under their jurisdiction. This is the reason why international human rights treaties have their roots at the national level unlike IHL which has always been a predominantly international project.¹⁹ While IHRL originates from the democratic revolutions of the late 18th century, IHL is more conservative as it takes armed conflicts as a given and simply tries to make them less cruel.²⁰ The current debate on how these two bodies of law (should) interact is based on the worry that their differences might be irreconcilable.²¹ In this article, I shall argue that IHL and the ECHR can be reconciled to a certain degree.

II. Research Questions and Outline

The present contribution attempts to answer two main questions: 1) What is the test for establishing *jurisdiction* of the member States of the Council of Europe pursuant to Art. 1 of the ECHR? 2) Once jurisdiction is established, how do rights and freedoms of the Convention interact with norms of IHL in situations of international armed conflict? Part II shall give an overview of the recent case law on the extraterritorial application of the ECHR, on derogations and on the interaction between norms of the Convention and IHL. Additionally, some criticisms that have been voiced against these approaches will be presented. Section III will analyse the merits and shortcomings of these criticisms and will propose a way to reconcile the ECHR with IHL to a certain degree.

¹⁹ M. Happold, 'International Humanitarian Law and Human Rights Law', in C. Henderson & N. White (eds.), *Research Handbook on International Conflict and Security Law* (2013), 444, 446.

²⁰ B. Bowring, 'Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights', 14 *Journal of Conflict and Security Law* (2009) 3, 485, 489-490.

²¹ The concern that these two branches of law are irreconcilable might stem not only from their historical differences but also from a debate that has often been exaggerated on both sides. As Bethlehem notes: "The debate to this point, however, has too often been characterised by a high level of generality, a lack of judicial rigour, a failure by those in government to engage actively in public discussion, overly expansive claims on the part of non-governmental commentators, and anxiety on the part of the military that these developments are hampering the flexibility to act effectively to keep society safe", see D. Bethlehem, 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', 2 *Cambridge Journal of International and Comparative Law* (2013) 2, 180, 195.

B. Extraterritoriality, Derogations and the Interplay Between the ECHR and IHL

I. The Extraterritorial Application of the ECHR

Article 1 ECHR demarcates the Convention's scope. Its application *ratione loci* is controversial: does the Convention also apply outside the territory of its member States pursuant to Article 1? This section will give an overview of the ECtHR's case law on the Convention's extraterritorial application. The discussion will only be able to touch upon some of the most important cases and will put the emphasis on more recent case law.

During the negotiation of the Convention, an initial draft of Article 1 was phrased as follows: "Every State a party to this Convention shall guarantee to all persons within its territory the following rights: [...]".²² Although the final formulation used the terms "to everyone in their jurisdiction", this was done in order "[...] to expand [...] the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States".²³ The change from territory to jurisdiction should thus not be over-interpreted as the intention of the drafters to apply the Convention on a large scale to the territories of non-member States. However, the Court's case law over roughly the last two decades has expanded the meaning of Article 1 in such a way that it can also apply extraterritorially.

In the *Banković* decision, the Grand Chamber unanimously held that *jurisdiction* was primarily a territorial notion and that other bases of jurisdiction are exceptional.²⁴ The exceptions to this territorial notion of jurisdiction that were recognised in the *Banković* decision included the events taking place on board craft and vessels registered in, or flying the flag of, a member State.²⁵ Additionally, the activities of a State's diplomatic and consular agents abroad would trigger its jurisdiction.²⁶ Other exceptional grounds are situations in which a State

²² W. A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), 84.

²³ Happold, *supra* note 19, 446; *Banković and Others v. Belgium and Others*, ECtHR Application No. 52207/99, Judgment of 12 December 2001, para. 63.

²⁴ *Banković*, *supra* note 23, paras. 59, 61.

²⁵ *Ibid.*, para. 73; see also *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 23 February 2012.

²⁶ *Banković*, *supra* note 23, para. 73.

“[...] through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government [...]”.²⁷

Moreover, the Court held that once jurisdiction is established, the rights and freedoms of the Convention cannot be “[...] divided and tailored [...]” to the particular circumstances but apply as a whole.²⁸ Lastly, the *Banković* decision developed the concept of legal space (*espace juridique*), which was used to limit the Convention’s jurisdiction to an essentially regional, i.e. European, context.²⁹ In subsequent cases, however, the Court expanded this notion and has applied the Convention to alleged acts of Turkish agents in Iran³⁰ and Iraq.³¹ In the *Al-Skeini* case, the Court established UK jurisdiction under Art. 1 of the ECHR in the Iraq conflict.

Moreover, the *Al-Skeini* case clarified the principles of extraterritorial jurisdiction pursuant to Article 1 of the ECHR by underlining that what counts is not only the control over a certain *place*, but also the control over *individuals*: “The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.”³² However, the difference between spatial and personal control should not be exaggerated. *Ohlin* points out that: “[c]ontrol over territory can only mean the capacity to control the individuals who reside on that slice of territory”.³³ The shift from spatial to personal control nevertheless comes with an important advantage: in models of spatial control, the difficult question arises of how small a piece of

²⁷ *Ibid.*, para. 71; see also *Loizidou v. Turkey*, ECtHR Application No. 15318/89, Judgment of 18 December 1996; *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 10 May 2001.

²⁸ *Banković*, *supra* note 23, para. 75.

²⁹ *Ibid.*, para. 80.

³⁰ *Pad and Others v. Turkey*, ECtHR Application No. 60167/00, Judgment of 28 June 2007.

³¹ *Issa and Others v. Turkey*, ECtHR Application No. 31821/96, Judgment of 16 November 2004.

³² *Al-Skeini v. the United Kingdom*, ECtHR Application No. 55721/07, Judgment of 7 July 2011, para. 136; this analysis was followed by the High Court of Justice of England and Wales, *Al-Saadoon and Others v. Secretary of State for Defence* [2015] EWHC 715.

³³ J. D. Ohlin, ‘Acting as a Sovereign versus Acting as a Belligerent’, in J. D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights* (2016), 118, 139.

territory can be in order to give rise to jurisdiction. Is it, for example, enough to have spatial control over a neighbourhood or even a single room? Adopting a model of personal control avoids such difficulties.³⁴ It is important to note that the Court in *Al-Skeini* applied a personal conception of jurisdiction to the killing of the applicants' relatives only exceptionally, given that the UK exercised public powers at the relevant time in Iraq.³⁵ Had the UK not exercised such public powers, the personal conception of jurisdiction would have been inapplicable. This means that firing missiles from an aircraft or drone will not trigger jurisdiction if the State does not simultaneously exercise public powers. Isolated targeted killings by drones would thus not fall under the jurisdiction of the State Parties.³⁶

Just like the spatial model of jurisdiction, the personal conception also gives rise to complications. *Milanovic*, for instance, asks how to non-arbitrarily limit this model. Why, *Milanovic* wonders, can jurisdiction based on *physical power and control over a person* be established in cases of physical custody if it is not also triggered by the killing of a person through a gun or a drone?³⁷ After all, as noted by Mr Justice Leggatt of the High Court of Justice of England and Wales in *Al-Saadoon and Others*: "I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person."³⁸ These complications will be further discussed below.

³⁴ *Ibid.*

³⁵ *Al-Skeini*, *supra* note 32, para. 149 reads as follows: "It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."

³⁶ M. Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg', 23 *European Journal of International Law* (2012) 1, 121, 130; recall that the paper at hand only deals with international armed conflicts. For an analysis of targeted killings in other contexts, see A. Bodnar & I. Pachó, 'Targeted Killings (Drone Strikes) and the European Convention on Human Rights', 32 *Polish Yearbook of International Law* (2013), 189.

³⁷ Milanovic, *supra* note 36, 129.

³⁸ *Al-Saadoon*, *supra* note 32, para. 95; suffice it to say here that this challenge will be examined in the next main section as it has to be understood in the context of the interplay between the ECHR and IHL

A last point on *Al-Skeini* is necessary. The Court held:

“It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be *divided and tailored*”.

Once jurisdiction is established based on personal conception – *authority and control* over an individual – the Convention does not apply in its entirety. Instead, the rights and freedoms that are *relevant* to the situation of the individual apply. It has been suggested that this includes Articles 2, 3, 5 and in certain circumstances Article 8.³⁹ However, rights and freedoms can only be divided and tailored to the context if State agents exercise *authority and control* over individuals, i.e. when jurisdiction is established based on the personal conception. If jurisdiction is based on the spatial model – effective control over territory – the entire range of substantive rights of the Convention applies.⁴⁰ This is meaningful, given that certain rights and freedoms are less relevant when it comes to *authority and control* over a few individuals. For example, it would be doubtful whether the right to form trade unions, which is codified in Article 11 ECHR, is relevant to a handful of individuals at a checkpoint. In the case of effective control over a piece of territory, this right can, however, be relevant and it is thus the obligation of the member State in control to guarantee it.

The *Hassan v. the United Kingdom* Grand Chamber judgment mainly deals with the arrest and detention of Tarek Hassan, an Iraqi national, by British forces in a British-controlled section of the U.S. operated Camp Bucca in Iraq.⁴¹ *Hassan* is so far the most important case on the interaction between the Convention and IHL. Following Tarek Hassan’s capture by British troops, the Court held that he was “[...] within the physical power and control [...]” of the UK and thus under UK jurisdiction.⁴² Even though some operational aspects relating to Mr. Hassan’s detention were transferred to the United States forces,

³⁹ B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 2017, 94.

⁴⁰ *Banković*, *supra* note 23, para. 75; Rainey, Wicks & Ovey, *supra* note 39, 94 .

⁴¹ *Hassan v. the United Kingdom*, ECtHR Application No. 29750/09, Judgment of 16 September 2014, para. 14.

⁴² *Ibid.*, para. 76.

the UK “[...] retained authority and control over all aspects of the detention relevant to the applicant’s complaints under Article 5 [...]”.⁴³ In *Jaloud v. the Netherlands*, the Court continued to focus on the *authority and control* test to establish jurisdiction pursuant to Article 1.⁴⁴

II. Article 15 ECHR: Derogations

Before examining how the Convention and IHL interact, the focus will be put on Article 15 of the ECHR, which deals with derogations. The ECHR only applies extraterritorially in times of international armed conflict if, first, *jurisdiction* pursuant to Article 1 is triggered and, second, no valid derogation has been lodged. Article 15(1) reads: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.” Without going into any detail, it may be sufficient to state that what constitutes a “[...] war or other public emergency threatening the life of the nation [...]” raises interesting questions as to the margin of appreciation doctrine.⁴⁵

Even in such emergency situations, however, not all rights can be derogated from. Article 2, 3, 4 (paragraph 1) and 7, i.e. the right to life, the prohibition of torture, the prohibition of slavery and forced labour as well as the prohibition of punishment without law are non-derogable. An important exception is that Article 2, the right to life, can be derogated from “[...] in respect of deaths resulting from lawful acts of war [...]”.⁴⁶ How this exception is understood influences

⁴³ *Ibid.*, para. 78.

⁴⁴ *Jaloud v. the Netherlands*, ECtHR Application No. 47708/08, Judgment of 20 November 2014, para. 152.

⁴⁵ In the recent *Mehmet Hasan Altan v. Turkey* judgment, the Court reiterated that the Contracting State has a large margin of appreciation regarding the determination of such situations of emergency and of the measures they require, given that the national authorities are in more direct contact with the pressing needs of the moment. Nevertheless, the Court emphasized “[...] that States do not enjoy an unlimited discretion in this respect. The domestic margin of appreciation is accompanied by European supervision.” In that case, the Court held that the military coup attempt in Turkey in 2016 constituted a “[...] public emergency threatening the life of the nation [...]”, see *Mehmet Hasan Altan v. Turkey*, ECtHR Application No. 13237/17, Judgment of 20 March (10 September) 2018, paras. 91-93; see also *Şahin Alpay v. Turkey*, ECtHR Application No. 16538/17, Judgment of 20 March (20 June) 2018, paras. 75-77.

⁴⁶ Art. 15(2) ECHR *supra* note 1.

how the Convention interacts with IHL regarding situations of targeting. Unfortunately, the question raised by this provision, namely how lawful acts of war are to be distinguished from unlawful ones, has not been discussed in the Court's case law so far and nothing in the drafting history of the ECHR assists in its interpretation.⁴⁷ In the Commentary on the ECHR, Schabas states that it is possible to understand the provision as referring to the *ius in bello* (IHL) or the *ius ad bellum* (the completely distinct body of international law regulating the recourse to the use of force in international relations).⁴⁸ In my view, the words *in respect to lawful acts of war* should be understood as referring to the *ius in bello*, to IHL. If these words referred to the *ius ad bellum*, it would mean that a derogation from the right to life in the context of an armed conflict not in line with the UN Charter⁴⁹ and other instruments regulating the recourse to force would be invalid.⁵⁰ This would come close to mixing the question of when a State can go to war and what it can do once it finds itself in war. If human rights law has any application in armed conflicts, it operates at the level of what is allowed in and surrounding hostilities. In this sense, it operates on the same level as the *ius in bello*. Given that modern international law has moved away from just war theories and adopted a clear distinction between the *ius ad bellum* and the *ius in bello*, I argue that the exception to the non-derogability of Article 2 should be understood to refer to the *ius in bello*.⁵¹

⁴⁷ Schabas, *supra* note 22, 601; Rainey, Wicks & Ovey, *supra* note 39, 116; K. Oellers-Frahm, 'Menschenrechte und humanitäres Völkerrecht: Umfang und Grenzen der Zuständigkeit des Europäischen Gerichtshofs für Menschenrechte', in: G. Jochum, W. Frizenmeyer & M. Kau (eds.), *Grenzüberschreitendes Recht – Crossing Frontiers: Festschrift für Kay Hailbronner*, (2013), 491, 495 [Oellers-Frahm, Menschenrechte und humanitäres Völkerrecht].

⁴⁸ Schabas, *supra* note 22, 602; Bodnar and Pacho also argue that *lawful acts of war* pursuant to Article 15 § 2 ECHR have to be determined by reference to UN Security Council resolutions, i.e. the *ius ad bellum*, see Bodnar & Pacho, *supra* note 36, 206.

⁴⁹ Art. 2(4), Chapter VII of the Charter of the United Nations, 26 June 1945, 1 UNTS XVI.

⁵⁰ Schabas, *supra* note 22, 602.

⁵¹ This is also the approach taken by D. Bethlehem, 'The Right to Life under Article 2 of the European Convention on Human Rights: Twenty Years of Development since *McCann vs. the United Kingdom*', in L. Early & A. Austin (eds.), *The Right to Life under Article 2 of the European Convention on Human Rights: Essays in Honour of Michael O'Boyle* (2016), 237; the defended opinion is shared by C. Johann, 'Article 15', in U. Karpenstein & F. C. Mayer (eds.), *EMRK: Konvention zum Schutz der Menschenrechte und Grundfreiheiten – Kommentar* (2015), 488, 493; the opposite position is taken by R. Alleweldt, 'Recht auf Leben', in O. Dörr, R. Grote & T. Marauhn (eds.), *EMRK/GG Konkordanzkommentar*,

The *Hassan* case answered important questions regarding derogations in international armed conflicts. In its judgment, the Grand Chamber held that the “[...] lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case [...]”.⁵² The Strasbourg Court’s reasoning was that no derogations from international human rights treaties are made in practice by States that detain prisoners in international armed conflicts.⁵³ This State practice of not formally derogating was seen by the Court, pursuant to Article 31 § 3(b) of the Vienna Convention on the Law of Treaties (VCLT), to constitute a consistent practice establishing an agreement regarding the Convention’s interpretation.⁵⁴ The dissenting judges in *Hassan* argue that State practice can only modify the rights enshrined in the Convention “[...] towards a more *expansive or generous understanding of their scope than originally envisaged* [...]” but not towards a more limited or restricted interpretation.⁵⁵ It would indeed be preferable if States developed the Convention rights in a more expansive and generous way through subsequent State practice, but it seems doubtful why they should not be able to also limit these rights. First, nothing in the text of the VCLT suggests that State practice can only lead to an expansive development of a treaty text.⁵⁶ Second, if States have the power to change the treaty provisions in their written form in both directions, why should it be different for the subsequent development through State practice? The point is that the dissenting judges in *Hassan* present no convincing reasons as to why it should theoretically not be possible to modify the rights enshrined in the Convention in a non-generous way through State practice. Third, even if it were correct that subsequent practice can only establish a more *generous* way of interpreting the Convention rights, it is far from self-evident what such an interpretation would look like. Would, for instance, a shift in the Court’s case law towards greater freedom of expression in the context of religious matters be

para. 79; contrary to the position defended here, see also H. Krieger, ‘Notstand’, in: Dörr, Grote & Marauhn (eds.), *EMRK/GG Konkordanzkommentar*, para 36.

⁵² *Hassan*, *supra* note 41, para. 103.

⁵³ *Ibid.*, para. 101 .

⁵⁴ *Ibid.*

⁵⁵ Partly dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva, *Hassan*, *supra* note 41, para. 13.

⁵⁶ Art. 31 § 3(b) VCLT reads: “There shall be taken into account, together with the context: Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

a *generous* interpretation of Article 10 or would it be a restrictive interpretation of religious rights? Therefore, it seems difficult to claim that the ECtHR can only interpret the Convention in a *generous* way. It thus cannot be excluded on these grounds that subsequent State practice establishes an agreement of not formally derogating from human rights treaties in international armed conflicts. Therefore, the reasoning of the majority in *Hassan* on this matter seems to be defensible. By taking State practice into account, the *Hassan* judgment gives effect to the normative force of the factual, which is inherent in the methods of interpretation⁵⁷ in international law. *Hassan* recognized that Article 15 ECHR has been modified by State practice to not require a formal derogation in international armed conflicts anymore.⁵⁸ This does not mean, however, that subsequent State practice could not reverse this development. A step in this direction could be the derogation lodged by Ukraine in June 2015.⁵⁹

While the Court in *Hassan* held that it is not necessary that a formal derogation be lodged, Article 5 ECHR will only be interpreted in the context of IHL where this is specifically pleaded by the respondent State. The reason stated by the Court for this finding is that: “It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect.”⁶⁰ However, neither is it for the Court to assume that a State does not consider itself bound by IHL in situations of armed conflict. That a State is bound by all its international legal obligations should be self-evident and does not have to be stated explicitly in every single instance. Following the above-mentioned argumentation of the Court, it could be inverted: Only when the State clearly indicates that it is

⁵⁷ *Ibid.*

⁵⁸ Fachthaler even states that “[i]n fact, applied to scenarios like in *Hassan*, the novel approach of the Court would lead to Article 15 effectively becoming obsolete”, see T. Fachthaler, ‘*Hassan v. United Kingdom and the Interplay Between International Humanitarian Law and Human Rights Law in the Jurisprudence of the European Court of Human Rights*’, 16 *European Yearbook on Human Rights* (2016), 345, 356.

⁵⁹ ECtHR Fact Sheet, Derogation in Time of Emergency, available at https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf (last visited 18 November 2019).

⁶⁰ *Hassan*, *supra* note 41, 54, para. 107; Oellers-Frahm partly welcomes this new approach given that “the Court has at least acknowledged that it cannot consider whether acts of states are consistent with IHL without some sort of consent of the state concerned”. K. Oellers-Frahm, ‘A Regional Perspective on the Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations: The European Court of Human Rights’, in E. de Wet & J. Kleffner (eds.), *Convergence and Conflicts: Of Human Rights and International Humanitarian Law in Military Operations* (2014), 333, 356.

also bound by human rights law are its commitments which it has undertaken by ratifying the Geneva Convention modified. Both arguments have the same structure and are equally questionable.⁶¹ Instead, it should be assumed that a State considers itself bound by both IHL and the Convention whenever they apply.⁶² The question of applicability of either branch of law cannot be made dependent on the State's clear indication to that effect.

III. The Interaction Between IHRL and IHL

It seems clear that the ECHR applies extraterritorially to situations of armed conflict. But how does the Convention interact with IHL? To answer this question, a brief overview of the International Court of Justice's (ICJ) case law on how IHRL generally interacts with the law of armed conflict will be given to then shed light on the Strasbourg Court's recent judgments on the role of the Convention in international armed conflicts.

In the *Nuclear Weapons* advisory opinion, the ICJ held that IHRL – in this case the International Covenant on Civil and Political Rights – continues to apply in times of war, except for the provisions that have been derogated from. While human rights norms apply, their exact meaning is determined by

⁶¹ Fachthaler makes the point that “[b]y stressing the importance of the United Kingdom’s explicit referral to international humanitarian law in order to have it considered and, thus, have a less strict standard applied, it effectively invites all states involved in armed conflicts to switch human rights on and off, just as they please.” T. Fachthaler, *supra* note 58, 345, 356.

⁶² A further reason why the view should be rejected that Art. 5 ECHR will only be interpreted in the context of IHL where this is specifically pleaded is that the Court has emphasized that the Convention does not apply in a vacuum. In the *Al-Dulimi* judgment, the Grand Chamber held that “[...] the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. Thus the Court has never considered the provisions of the Convention to be the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (...).” *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR Application No. 5809/08, Judgment of 21 June 2016, 65, para. 134.

the applicable *lex specialis*, namely IHL.⁶³ In the *Construction of a Wall* advisory opinion the ICJ adopted the view that three possible solutions exist:

“[S]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”⁶⁴

This was confirmed in the ICJ’s *Armed Activities on the Territory of the Congo* judgment.⁶⁵ The two branches of international law, the ICJ held, must thus be considered in tandem.

That both branches should be considered together is also the approach taken by the ECtHR. On the merits in *Al-Skeini*, the Court had to decide whether the UK complied with the procedural obligation to investigate the killings pursuant to Article 2. While the Court held that this procedural obligation continues to apply in situations of armed conflict, it also acknowledged that in such situations constraints may lead to delays or compel the use of less effective measures of investigation.⁶⁶ Therefore, the Court held that the obligation to conduct an effective investigation is not an obligation of result but of means.⁶⁷ Through its holding in this case the Court showed awareness that in the difficult context of an armed conflict the procedural obligation under Article 2 cannot be applied in the same way as it would in peacetime in Europe.

In the 2014 Grand Chamber judgment of *Jaloud v. the Netherlands*, the Court made similar allowances for the challenging conditions under which the investigators had to work.⁶⁸ Despite the Court’s willingness in *Al-Skeini* to

⁶³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 240, para. 25; in this regard, Gill noted that: “The ICJ neither said that IHL will always take precedence in every situation and with regard to any issue, nor did it say that the entire relationship between IHL and IHRL is governed by it.” Gill, *supra* note 3, 257.

⁶⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 178, para. 106.

⁶⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment, ICJ Reports 2005, 168, 242, para. 216.

⁶⁶ *Al-Skeini*, *supra* note 32, 68-69, para. 164.

⁶⁷ *Al-Skeini*, *supra* note 32, 68-69, para. 164.

⁶⁸ *Jaloud*, *supra* note 44, para. 226.

take the difficult situations arising in armed conflicts into consideration, the finding that the ECHR did apply extraterritorially to the Iraq conflict was seen as a regrettable watershed.⁶⁹ It was argued that extending the applicability of the Convention destabilises the delicate balance between military necessity and humanitarian considerations inherent in IHL. There was a fear that simultaneously applying the ECHR and IHL would lead to absurd results and would threaten to undermine both branches of law.⁷⁰

In *Hassan v. the United Kingdom*, the Court further clarified how the Convention interacts with IHL. In deciding whether the right to liberty and security pursuant to Article 5 ECHR had been violated, it held that

“[b]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be ‘lawful’ to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness [...]”.⁷¹

Several points are noteworthy in this crucial text passage: first, the Convention and IHL do co-exist. Second, Article 5 § 1 ECHR *should be accommodated, as far as possible* with the norms of the Geneva Conventions. Lastly, the detention must (fully) comply with IHL while it suffices that it be in line with the *fundamental purpose* of Article 5 § 1, namely the protection of

⁶⁹ J. Morgan, R. Ekins & G. Verdirame, ‘Derogation from the European Convention on Human Rights in Armed Conflict: Submission to the Joint Committee on Human Rights’ (2017), available at <http://judicialpowerproject.org.uk/wp-content/uploads/2017/04/JPP-JCHR-submission-on-ECHR-derogation.pdf> (last visited 18 November 2019), paras. 8-9.

⁷⁰ *Ibid.*, paras. 5, 7; these criticisms will only be mentioned here in order to deal with them in greater detail in Section III.

⁷¹ *Hassan*, *supra* note 41, 53-54, paras. 104-105.

arbitrariness. The dissenting judges argued that there is no scope to *accommodate* Article 5 § 1 ECHR with the powers of internment under IHL, given that they clearly contradict each other.⁷² Instead of attempting to “[...] reconcile the irreconcilable [...]”,⁷³ they contended that the Strasbourg Court must give priority to the ECHR.⁷⁴

C. Reconciling the ECHR and IHL

I. Criticism Regarding *Jurisdiction* Pursuant to Article 1 ECHR

It has been argued that the application of the ECHR should not be extended to military action outside the territory of Member States.⁷⁵ The criticism has two components: First, the application of the Convention in times of armed conflict and, second, its extraterritoriality pursuant to Article 1. The ECHR clearly applies to international armed conflicts (at least to those taking place on the territory of member States) as it would otherwise be meaningless to allow for derogations to be lodged in such situations.⁷⁶ Moreover, the argument that a simultaneous application of the ECHR together with IHL would lead to unclear legal obligations cannot *per se* preclude the Convention from applying in international armed conflicts, given that at the time of the Convention’s negotiation in 1950 the four Geneva Conventions had already been agreed upon. It was thus clear from the beginning that the non-derogable rights and freedoms enshrined in the ECHR can apply, simultaneously with IHL, to armed conflicts in Europe. The core of the criticism thus has to be the extraterritorial application of the Convention, given that one cannot meaningfully argue that the non-derogable parts of the Convention do not apply to armed conflicts taking place on the territory of Council of Europe Member States. As has already been discussed above, it was not the intention of the drafters to apply the ECHR outside of the territory of its member States,⁷⁷ the Court’s jurisprudence over roughly the last two decades has developed the meaning of Article 1 to also cover certain extraterritorial situations.

⁷² *Hassan*, *supra* note 41, 64-65, paras. 16-17.

⁷³ *Hassan*, *supra* note 41, 66, para. 19.

⁷⁴ *Hassan*, *supra* note 41, 66, para. 19.

⁷⁵ Morgan, Ekins & Verdirame, *supra* note 69, para. 2.

⁷⁶ M. Sassòli, ‘Die EMRK in Krisenzeiten’, in: S. Breitenmoser & B. Ehrenzeller (eds.), *Wirkungen der Europäischen Menschenrechtskonvention (EMRK) – heute und morgen: Kolloquium zu Ehren des 80. Geburtstages von Luzius Wildhaber* (2018), 23, 33.

⁷⁷ Happold, *supra* note 19, 446-447; *Banković*, *supra* note 23, 17, para. 63.

It could be argued that this extension of jurisdiction has been done incorrectly. *Milanovic's* point raised above is that the personal conception of jurisdiction cannot be limited non-arbitrarily. Why should an isolated killing by a drone not trigger jurisdiction while physical custody does?⁷⁸ This distinction is, however, not arbitrary as it takes the interplay between the Convention and IHL into consideration. In the situation of a drone strike, the many detailed targeting rules of IHL are sufficient to determine whether a target can be attacked or not. In situations of physical custody, however, the level of control over an individual is higher than in the case of a drone strike. The detained individual cannot *only* be killed or wounded, as it is in the case of the drone strike, but can be forced to take certain actions – actions that could not be ordered by a drone flying over the house of an individual, for example. Because the control over an individual held in custody is greater than the control exercised by a drone, it indeed makes sense to establish jurisdiction in the former situation but not in the latter. Moreover, the rights of the Convention, interpreted by accounting for the context of an international armed conflict, can be applied to such situations without unduly interfering with IHL. The way the Strasbourg Court established jurisdiction is thus non-arbitrary as it is based on relevant differences in control and considerations regarding the interplay between the Convention and IHL. Therefore, the Court is well advised to stick to the strict criteria of jurisdiction. Establishing jurisdiction in situations other than those that have been mentioned above would not be beneficial to the ECHR nor for IHL. Applying the Convention to isolated targeted killings would, for instance, severely destabilise the balance between the two legal regimes.

If the criticism that the Convention should not apply to military action outside the territory of member States is justified, it is so not because Article 1 of the Convention cannot be interpreted in the way it has been by the Court but because the consequences of such an extension would be adverse. In other words, the criticism would need to focus on the unfavourable consequences of the interplay between the ECHR and IHL.

⁷⁸ Milanovic, *supra* note 36, 129.

II. Criticism Regarding the Interplay Between the ECHR and IHL

1. Absurd Results?

A central argument against the extraterritorial application of the Convention pursuant to Article 1 ECHR and its interaction with IHL is that the application of the Convention would produce absurd results when applied to armed conflicts. For example, the right to life codified in Article 2 ECHR could be interpreted to prohibit targeting enemy combatants with lethal force unless strictly necessary for the protection of life. The right to liberty and security enshrined in Article 5 ECHR could also be read as fully precluding taking prisoners of war, given that this is not listed as one of the exceptions within Article 5.⁷⁹ Such criticism has to be taken very seriously, given that unrealistic results stemming from the applicability of the ECHR in times of armed conflict would undermine the respect for the Convention and at the same time weaken IHL. However, it is also important that these criticisms are not exaggerated.

First, it should be recalled in what situations *jurisdiction* pursuant to Article 1 ECHR is established, namely when a State exercises effective control over a territory or its agents have authority and control over individuals.⁸⁰ In both scenarios, we are not dealing with chaotic circumstances of war where nobody really is in control of the situation. Instead, jurisdiction is established in cases of military occupation, at checkpoints, in prisons etc., where states clearly exercise control. For that reason, as has already been discussed, isolated targeted killings by drones or fighter jets would not trigger jurisdiction.⁸¹ The Convention thus only applies when a member State has a certain amount of control over the situation, i.e. either effective control over a piece of territory or authority and control over individuals. It can hardly be argued that the conditions in a military prison are so chaotic that it is absurd to ask from the State which controls the detention centre to at least respect the core human rights obligations.

Second, as to the right to life codified in Article 2 of the Convention, States can, subject to the conditions spelled out in Article 15, lodge derogations “[...] in respect of deaths resulting from lawful acts of war [...]”. As has been noted above, the lawfulness is determined by the *ius in bello*, i.e. IHL. If a derogation is lodged and is valid, an application of Article 2 ECHR to situations

⁷⁹ Morgan, Ekins & Verdirame, *supra* note 69, para. 5.

⁸⁰ See Section B. I above.

⁸¹ Milanovic, *supra* note 36, 121, 130.

of international armed conflict would not produce the manifestly absurd results that the above-mentioned critics fear. Third, other than Articles 2 and 5 of the Convention, the obligations under the ECHR and the rules of IHL can be interpreted to lead to the same results. This is, for example, the case regarding the prohibition of torture and degrading treatment, as well as for the right to a fair trial.⁸² *Sassòli* argues that the right to respect for private and family life can also be interpreted as not interfering with the provisions of IHL. Other freedoms, such as the freedom of expression and the freedom of assembly and association are not contained in IHL and hence no direct tensions can occur.⁸³ Article 2 (right to life) and Article 5 (right to liberty and security) are thus clearly the most important fields of potential conflicts.⁸⁴

Even though the above-mentioned criticisms should be relativized, certain problematic issues remain. What if no valid derogation from Article 2 “[...] in respect of deaths resulting from lawful acts of war [...]” has been lodged? How can Article 5, which does not list taking prisoners of war as an exception to the deprivation of liberty, be brought in line with IHL? A strict interpretation of Articles 2 and 5 would be at odds with the realities of war, as well as with the rules of IHL. It would be impossible to engage in an international armed conflict without constantly violating these two ECHR provisions if they were not interpreted less strictly than in peacetime. Such an outcome would, of course, weaken the Convention. The aim of alleviating the suffering of people in situations of armed conflict would thus be missed by adopting a strict interpretation of Articles 2 and 5. Hence the core question is how these two ECHR provisions should be interpreted in times of international armed conflict once jurisdiction is established.

The procedural obligations to independently and effectively investigate the deprivation of life must also be assessed along with the substantive side of Article 2. The substantive component of Article 2 shall be discussed first. As stated above, the ICJ in the *Nuclear Weapons* advisory opinion has decided that the IHL rules referring to lethal uses of force in international armed conflicts constitute the *lex specialis* to the right to life.⁸⁵ Moreover, the ICJ held that while human rights norms apply, their exact meaning is determined by the applicable *lex specialis*, namely IHL.⁸⁶ Article 15 § 2 ECHR, which allows derogations from

⁸² *Sassòli*, *supra* note 76, 35-36.

⁸³ *Sassòli*, *supra* note 76, 36.

⁸⁴ *Sassòli*, *supra* note 76, 35.

⁸⁵ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 63, 240, para. 25.

⁸⁶ *Ibid.*

the right to life only “[...] in respect of deaths resulting from lawful acts of war [...]”, strongly suggests that the drafters of the Convention would have agreed with the ICJ’s *Nuclear Weapons* advisory opinion on the relation between IHL and the right to life in international armed conflicts. As noted in *Hassan*, the Strasbourg Court does not require a formal derogation under Article 15 ECHR to be lodged.⁸⁷ In light of these cases, it seems that the substantive component of Article 2, while it still applies to international armed conflicts, is interpreted through the lens of IHL even when no valid derogation has been lodged.⁸⁸ Leaving the conceptual differences between the *lex specialis* and the *Hassan* approach aside, the point is that the ECHR continues to apply to situations of international armed conflict but is interpreted by taking IHL into account.

The procedural component of Article 2, namely the obligation to independently and effectively investigate deprivations of life, is another potential area of tension between the ECHR and IHL. The Strasbourg Court has on several occasions demanded an investigation in situations of armed conflict where a person has been killed intentionally.⁸⁹ IHL only demands an investigation in cases in which a prisoner of war⁹⁰ or an internee⁹¹ has been killed and when someone is accused of a grave breach of IHL.⁹² Given that IHL only requires investigations in these cases and does not prescribe any further details, the procedural component of Article 2 ECHR has been described as *lex specialis*.⁹³ If

⁸⁷ *Hassan*, *supra* note 41, 53, para. 103.

⁸⁸ Recall that the Court required in *Hassan* that Article 5 ECHR only be interpreted in the context of IHL where this is specifically pleaded by the respondent State. As mentioned above, however, I argue that compliance by the State with all its applicable international legal obligations should be presumed.

⁸⁹ *Güleç v. Turkey*, ECtHR Application No. 21593/93, Judgment of 27 July 1998, 37, para. 81; *Kaya v. Turkey*, ECtHR Application No. 22729/93, Judgment of 19 February 1998, unreported, 25, 26, para. 86; *Ergi v. Turkey*, ECtHR Application No. 23818/94, Judgment of 28 July 1998, unreported, 27, para. 85; *Isayeva and Others. v. Russia*, Applications Nos. 57947/00-57949/00, Judgment of 24 February 2005, unreported, 43 - 45, paras. 209-213; *Al-Skeini*, *supra* note 32, 63 - 70, paras. 151-167; *Jaloud*, *supra* note 44, 65-76, paras. 157-228.

⁹⁰ Art. 121 of the Third Geneva Convention, *supra* note 11.

⁹¹ Art. 131 of the Fourth Geneva Convention, *supra* note 10.

⁹² Common Article 49, 50, 129 respectively 146 of the four Geneva Conventions, *supra* notes 10, 11.

⁹³ G. Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie* (2013), 474-514; Sicilianos has pointed out that due to the ambiguity of the *lex specialis* approach, the Court has so far not referred to it but preferred to apply IHL and the ECHR simultaneously. L.-A. Sicilianos, 'L'Articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la

such an approach were taken, however, the ECtHR would need to refrain from requiring an investigation in cases of lethal force used against combatants, given that IHL – which is *lex specialis* on the matter of killing combatants – clearly does not prohibit such conduct.⁹⁴ Even though the death of civilians can be legal under IHL, it could be argued that an investigation is necessary in order to shed light on whether the conditions of lawfully killing civilians have been fulfilled in the specific case.⁹⁵ The Strasbourg Court does not require the same standards of investigation in situations of armed conflict as it would in a peaceful context.⁹⁶ This ensures that the obligation to investigate under Article 2 does not lead to an unrealistic burden for the parties to the conflict.

Regarding Article 5 of the Convention, the Strasbourg Court's approach concerning the interplay between the ECHR and IHL adopted in *Hassan* appears to be a workable route. As has been seen, the Grand Chamber held that the ground of permitted deprivation of liberty set out in Article 5 § 1 ECHR should be “[...] accommodated, as far as possible [...]” with the provision regarding detention under IHL.⁹⁷ While the rules of IHL have to be fully complied with, it suffices that the fundamental purpose of Article 5 § 1, which is the protection from arbitrary detention, be respected. This interpretation of Article 5 does not interfere unduly with the delicate balance between humanitarian considerations and military necessity that is at the heart of IHL.⁹⁸ One might even argue that merely requiring respect for the fundamental purpose of Article 5 adds very little, if anything at all, to the provisions of IHL, given that the detention of enemy combatants and civilians is regulated by the Geneva Conventions and can thus hardly be described as arbitrary. However, the main advantage of the

Court européenne des droits de l’homme’, *Swiss Review of International and European Law* (2017) 1, 3, 16.

⁹⁴ Sassòli, *supra* note 76, 44.

⁹⁵ *Ibid.*

⁹⁶ *Al-Skeini*, *supra* note 32, 68-69, para. 164; *Jaloud*, *supra* note 44, 75, para. 226.

⁹⁷ *Hassan*, *supra* note 41, 53, para. 104.

⁹⁸ Hampson mentions that: “Lawyers with certain armed forces shy away from anything to do with human rights law and, by extension, with human rights more generally, perhaps at least in part owing to fear of the unknown.” At the same time, she highlights that “[o]n condition that human rights law is interpreted in the light of relevant rules of the law of armed conflict, armed forces should not fear the extraterritorial applicability of the former.” F. J. Hampson, ‘Is Human Rights Law of Any Relevant to Military Operations in Afghanistan?’, 85 *International Law Studies* (2009), 485, 486, 511[Hampson, Military Operations in Afghanistan]; it is hoped that the *Hassan* judgment contributes to establishing a considerate balance between IHL and the ECHR and that therefore military lawyers will less often shy away from human rights law.

Hassan approach is that it allows the Strasbourg Court, whose competence is limited to applying the Convention, to pronounce itself on situations where an individual is detained in the context of an international armed conflict. Due to the weak enforcement mechanisms of IHL, this advantage of the *Hassan* approach is not to be underestimated.⁹⁹

2. Policy and Procedural Concerns

There are several policy and procedural concerns regarding the application of the Convention to times of armed conflict. For one, the ECtHR is already overburdened by its current workload, which is quite substantial. Regarding this criticism, it is indeed true that the Strasbourg Court is tasked with deciding too many cases when compared with its few resources. However, this is a problem of a lack of resources, not of too many cases. It would be a wrong reaction to turn a blind eye on those situations where the gravest human rights violations often occur, namely armed conflicts, simply because of a lack of resources. Rather, this problem needs to be solved by acquiring more funds. A further concern is that it would be difficult to properly decide cases without being able to get reliable factual evidence from the ground. The ECtHR cannot engage in fact finding on the spot and is thus dependent on the, often scarce, information at its disposal. This is especially a challenge in situations of armed conflicts where it is even more difficult for the Court to get accurate documentation. Insufficient factual evidence forces the Court to leave certain legal questions unanswered. This,

⁹⁹ Due to IHL's weak enforcement mechanisms, Oellers-Frahm welcomes that human rights courts take IHL into consideration. At the same time, she cautions against an undue extension of the ECtHR's competence *ratione materiae* in order not to weaken its own implementation and excessively interfere with IHL. Oellers-Frahm, *Menschenrechte und humanitäres Völkerrecht*, *supra* note 47, 504. I argue that the *Hassan* case achieves exactly this balance; it is to be noted that the relationship between IHL and IHRL needs to be clarified in any case, whether this is done by a human rights court or by a body mainly applying IHL. As remarked by Hampson, in the case of the establishment of a new IHL court "[a] new problem would (...) emerge, namely the extent to which the new IHL body could take account of human rights law in determining whether there had been a breach of IHL. Rather than creating new problems, it might be preferable to attempt to solve the difficulties that arise for existing institutions." F. J. Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', 90 *International Review of the Red Cross* (2008) 871, 549, 572 [Hampson, The Relationship Between International Humanitarian Law and Human Rights Law].

however, does not mean that it cannot pronounce itself on situations where the facts are sufficiently established.

Another question relating to the factual basis of the ECtHR's decisions concerns the *prima facie* evidence required for the establishment of an administrative practice in inter-state cases. To substantiate an application by providing evidence has to be distinguished from the burden of persuading the Court. The substantiation of an application requires the concerned State to adduce evidence which is sufficient to allow a reasonable person to decide in favour of that party.¹⁰⁰ In contrast, the party that bears the *persuasive* burden of proof will lose on the relevant point if its factual contentions are not in the end proved to the appropriate standard.¹⁰¹ For present purposes, I only refer to the substantiation of an application by adducing evidence. Providing substantial evidence to prove an administrative practice is usually treated in the admissibility phase while the *persuasive* burden of proof is dealt with on the merits. However, in the *Georgia v. Russia (II)* admissibility decision, the Chamber decided to join the question of providing substantial evidence to prove an administrative practice to the merits.¹⁰² In terms of procedural economy, it would be advisable not to blur the distinction between these two steps.¹⁰³ The requirement of the exhaustion of domestic remedies applies to individual as well as inter-state cases. This requirement, however, may differ in inter-state proceedings. To the extent that “[...] the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice” the requirement of the exhaustion of domestic remedies not does apply.¹⁰⁴ Such

¹⁰⁰ T. Thienel, ‘The Burden and Standard of Proof in the ECtHR’, 50 *German Yearbook of International Law* (2007) 543, 545; usually the term *burden of producing evidence* is distinguished from the *persuasive burden of proof*. The ECtHR, however, refers to *substantiating an application* by providing evidence instead of using the term *burden of producing evidence*.

¹⁰¹ *Ibid.*, 548; J. Auburn, ‘Burden and Standard of Proof’, in H. M. Malek & M. N. Howard & S. L. Phipson (eds.), *Phipson on Evidence* (2005), para. 6-01, para. 6-02.

¹⁰² *Georgia v. Russia II*, ECtHR Application No. 38263/08, Decision of 13 December 2011, unreported, 33, para. 93-94.

¹⁰³ In the Grand Chamber case of *Cyprus v. Turkey* the Court confirmed the Commission's view of limiting the scope of admissibility, which was in the interest of procedural economy. *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 10 May 2001, 81, para. 335.

¹⁰⁴ *Ireland v. the United Kingdom*, ECtHR Application No. 5310/71, Judgment of 18 January 1978, 56-57, para. 159; *Georgia v. Russia II*, *supra* note 102, 31, para. 85; W. A. Schabas, *supra* note 22, 728.

an administrative practice consists of the repetition of acts and their official tolerance.¹⁰⁵ An applicant State trying to prove an administrative practice must provide substantial evidence. However, this should not be understood to mean that the applicant State has to fully prove the existence of an administrative practice, given that:

“[...] whether the existence of an administrative practice is established or not can only be determined after an examination of the merits. At the stage of admissibility prima facie evidence, while required, must also be considered as sufficient... There is prima facie evidence of an alleged administrative practice where the allegations concerning individual cases are sufficiently substantiated, *considered as a whole and in the light of the submissions of both the applicant and the respondent Party*. It is in this sense that the term ‘substantial evidence’ is to be understood.”¹⁰⁶

The ECtHR will thus “[...] study all the material before it, from whatever source it originates [...]”.¹⁰⁷

In practice this flexible approach may lead to uncertainty. Firstly, the States involved in inter-state proceedings currently have no clear guidance on which Party is under the obligation to adduce the required evidence. While it is understandable why the Court considers the evidence “[...] as a whole and in light of the submissions of both the applicant and the respondent Party [...]”¹⁰⁸ further clarifications would be welcomed. If the applicant government knew more precisely which party has to adduce what kind of evidence, it could better foresee the likelihood of succeeding in Court. This is particularly important regarding sensitive information, such as military intelligence. Better

¹⁰⁵ *Georgia v. Russia II*, *supra* note 102, 31, para. 85; *France, Norway, Denmark, Sweden, and the Netherlands v. Turkey*, ECtHR Application Nos. 9940/82-9944/82, Commission decision of 6 December 1983, unreported, 163, para. 19.

¹⁰⁶ *Georgia v. Russia II*, *supra* note 102, 31, para. 86; *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, *supra* note 105, 164, paras. 21-22; emphasis added; international humanitarian law is not only relevant for the inter-state case as such but also for the numerous individual applications that can be examined as evidence of an administrative practice. *Georgia v. Russia I*, ECtHR Application No. 13255/07, Judgment of 3 July 2014, 37, para. 128; see also *Ireland v. the United Kingdom*, *supra* note 104, 55, para. 157.

¹⁰⁷ *Georgia v. Russia I*, *supra* note 106, 28, para. 95; see also *Cyprus v. Turkey*, *supra* note 103, 31, para. 113; *Ireland v. the United Kingdom*, *supra* note 104, 57, para. 160.

¹⁰⁸ *Georgia v. Russia II*, *supra* note 102, 31, para. 86. *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, *supra* note 105, 164-165, paras. 22.

foreseeability of the rules of evidence would enable the applicant State Party to assess the trade-off between successfully making its case at the ECtHR and revealing sensitive information. As inter-state cases are often based on heavily contested facts, clearer evidentiary rules would prevent the ECtHR from being slowed down by numerous such cases. This, in turn, would free resources to be allocated to individual cases. Lastly, elucidating the evidentiary procedures of the establishment of an administrative practice would enable the Strasbourg judges to ensure a coherent case-law regarding this crucial matter in inter-state proceedings. Hence clarifying the rules regarding the substantiation of a *prima facie* case would be to the benefit of State-Parties, the Court and the many individual applicants that are waiting for a judgment in their case.

Moreover, it has been argued that the staff of the ECtHR will either have to be further trained in IHL or rely on IHL specialists.¹⁰⁹ While this is true, it should be noted that the Court has to deal with many different legal branches and it is thus necessary that its staff consists of generalists with the support of a few experts. The same could be argued regarding the ICJ's expertise in IHL. Therefore, while it would be appreciated if member States further supported the ECtHR, e.g. by seconding IHL lawyers, a Court with such a wide material scope like the ECtHR relies on jurists that have a wide knowledge of different aspects of international and domestic law without being overly specialised.

Critique against the majority's findings in *Hassan* has been voiced by four partly dissenting judges. Referring to the clash between the provisions on detention contained in the ECHR and in the Geneva Conventions, the judges argue that

“[t]he Court does not have any legitimate tools at its disposal, as a court of law, to remedy this clash of norms. It must therefore give priority to the Convention, as its role is limited under Article 19 to ‘[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.’”¹¹⁰

Is the Strasbourg Court indeed not legitimized to remedy the clash between the ECHR and IHL? Yes, it is true that the Court is tasked to apply

¹⁰⁹ Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law*, *supra* note 99, 571.

¹¹⁰ *Hassan*, *supra* note 41, 66, para. 19.

solely the ECHR.¹¹¹ However, this does not bar it from interpreting the rights enshrined in the Convention in their context, even if these contextual factors are also governed by another branch of international law. In the *Hassan* judgment, the Grand Chamber pronounced itself on the scope of Article 5 of the ECHR, not on norms of IHL.¹¹² If the Court were unable to take other fields of law into consideration when interpreting the Convention, the outcome would often be disconnected and unrealistic.¹¹³ Had the majority in *Hassan* blindly given “[...] priority to the Convention [...]” without taking IHL into consideration, its application would have given rise to the unrealistic result that, during an international armed conflict, prisoners of war cannot be lawfully detained.¹¹⁴ The argument made here is, however, not mainly a consequentialist one. The point is that the ECtHR did not exceed its competence as a court of law by referring to another branch of law when interpreting the Convention. To the contrary, it is the task of the Strasbourg Court to apply the rights and freedoms enshrined in the Convention in light of their context – a context that includes both domestic law and other branches of international law.¹¹⁵

¹¹¹ Oellers-Frahm points out that pursuant to Article 15 § 2 ECHR, the Court’s competence *ratione materiae* is extended to also include an examination of whether deaths resulted from *lawful acts of war* – i.e. an examination of IHL. Oellers-Frahm, *Menschenrechte und humanitäres Völkerrecht*, *supra* note 47, 494.

¹¹² Lippold noted that „[...] the European Court did not engage in a mere balancing which could have blurred both regimes and raised legitimacy concerns, and instead adopted a restrained interpretation of the Convention which the court is mandated to interpret.”, M. Lippold, ‘Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights’, 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016), 53, 88.

¹¹³ The Court often takes other areas of law into consideration, e.g. the Hague Convention (*Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 UNTS 89). See, for instance, *X v. Latvia*, ECtHR Application No. 27853/09, Judgment of 26 November 2013.

¹¹⁴ Lippold furthermore argued that if the Court in the *Hassan* case had applied Art. 5 ECHR without any qualification it would have risked the non-implementation by member States. Moreover, he commends “[...] that the judgment does not emphasize one [branch of international law] at the expense of the other. The UK won the *Hassan* case, and the European Court applied the Convention, but not to the detriment of international humanitarian law.” Lippold, *supra* note 112, 88.

¹¹⁵ The Court held in the *Al-Dulimi* case that the Convention cannot be applied in a vacuum, *supra* note 62.

D. Concluding Remarks

The tests for establishing jurisdiction extraterritorially pursuant to Article 1 are meaningful and the ECHR and IHL can be reconciled. The Court would be well advised to stick to the strict criteria of jurisdiction. Extending the application of the Convention to situations of isolated drone strikes would, for example, unnecessarily interfere with the sole domain of IHL. While numerous challenges arise from the interplay between the ECHR and IHL, it would be exaggerated to conclude that either only IHL applies or that the Strasbourg Court should blindly give priority to the Convention when applying it to extraterritorial situations of international armed conflict. Instead, a middle way must be found. It is crucial that the rights and freedoms of the Convention do not interfere unduly with the delicate balance between humanitarian considerations and military necessity which is inherent in IHL. This is especially true for the two provisions that might give rise to the greatest tensions, namely Article 2 (the right to life) and Article 5 (the right to liberty and security) of the Convention. The argument was made that there are ways to apply the ECHR without imposing unrealistic obligations on the parties to the conflict. Such a considerate application of the Convention leads, however, to a lower standard of protection in international armed conflicts as compared to normal peacetime situations. Given that the application of human rights never takes place in a contextual vacuum, it is legitimate to account for the difficult context in international armed conflicts. Were the Convention applied in exactly the same way as during peacetime, unrealistic and harmful consequences would result.

Going forward, it is hoped that the Strasbourg Court continues to develop a prudential balance between not unduly interfering with IHL while continuing to protect individuals in international armed conflict from human rights violations.¹¹⁶ No doubt this is a difficult task since the two branches of international law have different historical origins and ways of functioning.

¹¹⁶ Gioia also calls for a prudential balance between the two branches of law: “[...] some commentators already interpret the Court’s case-law relating to the right to life as being ‘at odds’ with IHL and, indeed, hail this as the beginning of a ‘new approach’ whereby combat operations will be treated in the same way as law-enforcement operations. This attitude is often based on the perception that the protection provided to individuals by IHL is less than that afforded under IHRL. In my opinion, however, this perception is largely mistaken, much as the view that IHRL should apply in times of armed conflict in exactly the same way as it applies in times of peace and without any adaptations is unrealistic and thus, ultimately, dangerous: IHRL extremists tend to forget that international law is the product of a society where sovereign states still play the leading role.” A. Gioia, “The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian

However, both IHL and IHRL share a common goal, namely alleviating human suffering. To come closer to this purpose, they should be reconciled, even though this might appear at first to be attempting to *reconcile the irreconcilable*.

The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice

Deepak Mawar^{*}

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Abstract

The article analyzes the International Court of Justice and its approach to judicial decision-making. By investigating the Court's jurisprudence over its seventy years of activity, the article seeks to outline, that if given the choice, the ICJ tends to prioritize judicial restraint over judicial activism. In fact, the Court maintains a strict adherence to judicial restraint, which stems from a fear of losing its legitimacy when facing the issue of consent-based jurisdiction. The article purports that although judicial restraint is an important facet of sound judicial decision-making, the ICJ should not be so reluctant to adopt judicial activism when it is suitable to utilize such an approach. Such a position is strengthened when analyzing the criticisms made of judgments delivered by the Court, which fail to serve the international community beneficially.

A. Introduction

When Sir Gerald Fitzmaurice published an article in memory of Hersch Lauterpacht in 1961, following the latter's recent passing, the former Senior Judge of the International Court of Justice suggested two possible approaches a judge may take when dealing with cases:

“There is the approach which conceives it to be the primary, if not the sole duty of the judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop.”¹

The two approaches discussed here are judicial restraint and judicial activism. Judicial restraint would be considered the formalist approach that is positivist in tradition, which tends to follow the precedent already established. On the other hand, judicial activism embraces a Dworkinian approach, which is open to further development of the law if required with non-legal dimensions included in the judicial decision-making process.

It is worth noting that these two approaches are not mutually exclusive, however a decision tends to be made to prioritize one or the other. This article begins the exploration of the ICJ from this standpoint, for it is the Court's decision to prioritize judicial restraint over judicial activism that is concerning for an international community seeking to tackle threats to international peace and security upholding universal values in a rapidly changing environment. Thus, the key point of exploration for this article is to highlight that the ICJ is characterized by restraint and to understand why it is that the Court has prioritized such an approach over judicial activism. This exploration of the Court's judicial restraint is best exhibited by analyzing the jurisprudence it has developed over its seventy years of activity. In turn this delineates the issues of

¹ G. Fitzmaurice, 'Hersch Lauterpacht- The Scholar as Judge', 37 *The British Yearbook of International Law* (1961) 1, 14, 15.

the ICJ's strict adherence to judicial restraint, and why the inclusion of judicial activism is such a vital factor for sound judicial decision-making.

B. The ICJ and Judicial Restraint

When analyzing the ICJ and its seventy years of practice, it becomes apparent that the court tends to “[...] lean towards a conservative or restrictive jurisprudence”.² This embodies some of the central features of judicial restraint, which is often considered the process through which “[...] judges render decisions that conform to what an experienced lawyer, familiar with the facts of the case and the relevant legal authorities, would counsel a client would be the most likely outcome”.³ Extending this point further, it follows the spirit of a judge being highly predictable in their judicial decision-making, relying on the legal principles established either by prior case law or legislation.⁴

There are two outcomes in particular that make judicial restraint such an enticing approach for the ICJ to adopt. Firstly, it creates a level of predictability as mentioned already. Judicial restraint “[...] in this sense simply requires that the judge adhere to whatever method produces the most easily-predicted results”.⁵ Subjects to any legal system where judicial restraint is a central tenet of the judges in power will therefore know the outcome of the case in question. It creates a level of reliability and foreseeability that strengthens the legal system. Moreover, Thomas Merrill argues that it is not the role of the judge to develop the law. “In a democracy, innovation in law and policy is supposed to come from officials selected by the People, not from unelected judges.”⁶ Through this paradigm, the role of the judge is to apply the law that has already been established, and leave the development of law to those democratically elected to do so.

The secondary outcome of adopting judicial restraint is what makes such an approach distinct from judicial activism; namely that it excludes non-legal elements from the judicial decision-making process. Oreste Pollicino deduces that judicial restraint resists a perceived *degeneration* of the judicial function, which involves “[...] a judge's arbitrary intrusion into the political arena by

² R. Kolb, *The Elgar Companion to the International Court of Justice* (2014), 404.

³ T.W. Merrill, ‘Originalism, Stare Decisis and the Promotion of Judicial Restraint’, 22 *Constitutional Commentary* (2005) 271, 274, 275.

⁴ *Ibid.*, 275.

⁵ *Ibid.*, 275.

⁶ *Ibid.*, 275.

giving priority to values other than legal ones [...]”.⁷ Such an approach rejects the role of politics or non-legal approaches to the judicial decision-making process, confirming “[...] the idea that by purely deductive logic the judge could ascertain the law without personal responsibility or creative means”.⁸

Establishing a significant level of predictability and excluding politics or other non-legal approaches are apparent goals of the Court. Identifying the importance of article 38(1)(a)-(c) of the ICJ Statute to the Court’s work illustrates the ICJ’s desire to reach the aforementioned outcomes that result from adopting judicial restraint. The purpose of listing the sources in Article 38 is to remove the possibility of judicial indeterminacy.⁹ “By presenting a ‘closed’ enumeration of sources to which the Court’s judges would be allowed to turn, the hope is to unify and standardize the norms which could validly be applied by the Court.”¹⁰ This cements the notion that the primary role of the judge in the ICJ is to settle the legal dispute or question put before them. Thus “[...] the Court’s judgements cannot be seen to make international law, but its decisions may be viewed as material evidence of the existence of legal rules”.¹¹ The desired outcomes are somewhat met when judges are restricted to rely on the list of legal sources enumerated in Article 38 when making a judicial decision.

In fact, the ICJ’s reliance upon article 38(1)(a)-(c) to make judicial decisions is the preliminary indication of the Court’s desire to maintain a significant level of foreseeability and to pursue a strictly legal approach. Exploring the key characteristics and jurisprudence of the ICJ’s work demonstrates that the Court is dedicated to the judicial restraint approach. This becomes all the more apparent when assessing the Court’s adherence to *stare decisis* and its approach to the political dimensions of a legal question or when it is faced with issues of *non-liquet*. Analysing these facets of the ICJ with greater detail is therefore a necessary exercise. This exercise further strengthens the argument that the Court takes a restrictive approach in its decision-making process in order to

⁷ O. Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint’, 5 *German Law Journal* (2004) 3, 283, 285.

⁸ *Ibid.*, 286.

⁹ G. Hernandez, *The International Court of Justice and the Judicial Function* (2014), 180. See also, H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 67, 68.

¹⁰ *Ibid.*, See also C.J.R. Dugard, *International Law: A South African Perspective* (2006), 27.

¹¹ *Ibid.*, See also R.Y. Jennings & A. Watts (eds), *Oppenheim’s International Law*, Vol I., 9th edn. (1992), 41, para. 13 and J. Crawford, *Brownlie’s Principles of Public International Law*, 9th edn. (2012), 19-20.

achieve two outcomes: foreseeability and the exclusion of politics. Therefore, the forthcoming analysis develops a general image of the Court and gives some understanding as to why it is so averse to adopting judicial activism.

C. Stare Decisis

Beginning with the principle of *stare decisis* and the loyalty to such a principle, the ICJ displays its affinity with judicial restraint. *Stare decisis* applies precedent to judicial decision-making already established in prior judgments. Herman Oliphant's support for *stare decisis* is based on the notion that "[...] it makes the law applicable to future transactions certain and the future decisions of judges predictable; and again, how it gives us justice according to law and not according to the whims of men".¹² As following this principle this principle brings a level of predictability, it comes to no surprise that *stare decisis* is an established feature of the Court's work. The ICJ has always strictly adhered to precedent, thus resisting the temptation to expand or move beyond its established jurisprudence. This is indicative of the ICJ's adherence to a positivist model of international adjudication, promoting a tradition of continuity and persistence with historical practices.

This tradition of adopting the principle of *stare decisis* dates as far back the ICJ's predecessor, the PCIJ. In the 1927 *Mavrommatis Jerusalem Concessions* case, judges saw no reason to depart from previous decisions, which were still regarded as sound judgments.¹³ In the case of the ICJ, though the likes of Hernandez supports the argument that *stare decisis* is a feature of the Court's work,¹⁴ there are dissenting voices to such a proposition. Former ICJ Judge Mohamed Shahabuddeen contends that:

"Article 38, paragraph 1(d), was mandatory in requiring the Court to apply judicial decisions, including those of the Court itself; but nothing in the requirement, or in what he said, suggests that such decisions are to apply with the force of binding precedent."¹⁵

¹² H. Oliphant, 'A Return to Stare Decisis', 14 *American Bar Association Journal* (1928) 2, 71, 72.

¹³ *The Mavrommatis Jerusalem Concessions* (Greece v. Great Britain), PCIJ Rep, Series A, No. 5 (1925).

¹⁴ Hernandez, *The Judicial Function*, *supra* note 9, Chapter 6.

¹⁵ M. Shahabuddeen, *Precedent in the World Court* (1996), 98.

On the basis that the Court has the choice to apply previously established precedent, Shahabuddeen asserts that *stare decisis* does not apply. However, the implicit application of *stare decisis* is a prevalent feature in the Court's work. The ICJ refers back to its own decisions regularly to ensure consistency of jurisprudence.¹⁶ Regardless of whether the Statute explicitly states the use of *stare decisis*, the Court is more inclined to follow "[...] the *rationes decidendi* of past cases".¹⁷

It is worth noting Hart's emphasis on the meaningfulness of law is based on the uniform agreement of the law-abiding criteria. If uniform agreement is lost, so too is the meaningfulness of the legal system. For the ICJ, this is one of the principal reasons as to why the Court commits to *stare decisis* in such a stringent manner. It is an attempt to validate the international legal system and to overcome the criticisms directed towards the system as not really being a system of law; a criticism Hart has consistently made against public international law.¹⁸ By following precedent, the Court is attempting to establish rules that are regarded, by both the subjects and objects of the system, as rules of international law, asserting meaningfulness to the legal system and establishing its normative authority. Moreover, it creates continuity and foreseeability. For "[...] respect for decisions given in the past makes for stability, which are of the essence of orderly administration of justice, and because judges do not like, if they can help it, to admit that they were previously wrong".¹⁹ Especially in respect of international law where there is no written constitution identifying the law-abiding criteria, the Court's adoption of *stare decisis* can thus be seen as filling a void in the absence of a constitution. The Court's work is a reference point for both subjects and objects of international law to confirm the established rules.

Hence the Court's favorability towards *stare decisis* in its work relates to its reliance upon the list of sources enumerated in article 38(1)(a)-(c) of the Statute. Establishing precedent that is based on such a list of sources, seeks to achieve the anchoring of judicial decisions. This provides the necessary justification, not only for the legal order itself as Hernandez would claim,²⁰ but for the Court and its decisions. Thus, judicial decisions do not fall privy to "[...] idiosyncratic interests and preferences [...]", but rather follow the continuity and historical

¹⁶ See the joint declaration of seven judges in the case of Kosovo, *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Judgment, ICJ Reports 2004, 1160, 1208.

¹⁷ R. Cross & J.W. Harris, *Precedent in English Law*, (1991), 100.

¹⁸ H.L.A Hart, *The Concept of Law*, 2nd ed. (1994), 214.

¹⁹ H. Lauterpacht, *The Development of International Law by the International Court*, (1958) 14.

²⁰ Hernandez, *The Judicial Function*, *supra* note 9, 159.

practices of international law.²¹ Therefore, establishing precedent on the legal sources of international law accepted as such by States, strengthens not only the legality of the sources of international law in question, but the very precedent itself. Moreover, by adopting such an approach to its judicial decision-making process, the Court seeks not only to retain its own authority, but to also establish stability in the international legal system by validating the legitimacy of the accepted sources of international law.

In this regard the Court's adherence to precedent can be seen as a necessity for ensuring the validity of the international legal system. This also goes some way to denounce the criticisms that it is not in fact a fully-fledged system of law. The benefits for a strict adoption of *stare decisis* are apparent when addressing the validation of such a system of law and forming a historical tradition and a degree of continuity. However, for the likes of Dworkin such an approach is flawed. Dworkin considered this to be “[...] a fruitless exercise to seek unanimity among law-applying authorities of a legal system as to the criteria for identifying law”.²² He considered judges to be an essential part of the developmental process legal systems undergo naturally and flexibility is required when reform of precedent is necessary:

“Judges think about law, moreover, within society, not apart from it; the general intellectual environment, as well as the common language that reflects and protects that environment, exercises practical constraints on idiosyncrasy and conceptual constraints on imagination.”²³

Dworkin has focused on one of the central flaws of positivism, and consequently the Court's approach to international adjudication. If the application of precedent in specific cases does not deliver a suitable judgment, then it is the Court's responsibility to develop the law accordingly. In light of Dworkin's arguments against Hart's necessity of establishing law-abiding criteria, the Court's adoption of *stare decisis* can thus be seen as an act of judicial restraint when the development of the law is required. This is a criticism that

²¹ M. Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1996) 2, 455, 478; see also M. Koskenniemi, *The Gentle Civilizer of Nations* (2005), 494, 596.

²² J. D'Aspremont, 'Herbert Hart in Today's International Legal Scholarship', in J. D'Aspremont & J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (2014), 126.

²³ R. Dworkin, *Law's Empire* (2003), 88 [Law's Empire].

has been directed at the Court on several occasions when restraining themselves from veering away from the principle of *stare decisis* has led to unsatisfactory judgments. Dworkin recounts that, “[...] consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one”.²⁴

The 2015 *Applications of the Convention on the Prevention and Punishment of Crime of Genocide* case is indicative of the frailties of stringently adopting *stare decisis*. The case concerned Croatia and Serbia, with Croatia claiming that Serbia, as the successor of the Soviet Federal Republic of Yugoslavia, had committed an act of genocide, consequently violating the Genocide Convention 1948. Serbia submitted the counter-claim that Croatia had similarly violated the Genocide Convention in the Krajina region. Much of the case mirrored the *Bosnian Genocide* case (2007), hence there was little surprise that the Court continued to refer back to this specific case when dealing with Croatia and Serbia’s claims:

“In this connection, the Court recalls that, in its Judgment of 26 February 2007 in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, it considered certain issues similar to those before it in the present case. It will take into account that Judgment to the extent necessary for its legal reasoning here. This will not, however, preclude it, where necessary, from elaborating upon this jurisprudence, in light of the arguments of the Parties in the present case.”²⁵

The Court did not fail to follow through with this statement as the judgment followed the precedent of the *Bosnian Genocide* case.

Both claims were considered to fall short of a violation of the Genocide Convention. This was in light of the fact that they had failed the *mens rea* test, as there was no *dolus specialis* to commit the act of genocide, even though the *actus reus* had been confirmed. It is in the dissenting opinion of Judge Cancado Trindade that the issues with such a precedent become apparent:

²⁴ *Ibid.*, 151.

²⁵ *Applications of the Convention on the Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Jurisdiction and Admissibility, Judgement, ICJ Reports 2015, 9, 61, para. 125.

“The Court cannot simply say, as is done in the present Judgment, that there has been no intent to destroy, in the atrocities perpetrated, just because it says so. This is a *diktat*, not a proper handling of evidence. This *diktat* goes against the voluminous evidence of the material element of *actus reus* under the Convention against Genocide (Article II), wherefrom the intent to destroy can be inferred. This *diktat* is unsustainable; it is nothing but a *petitio principii* militating against the proper exercise of the international judicial function. *Summum jus, summa injuria*. *Mens rea*, the *dolus specialis*, can only be *inferred*, from a number of factors. In my understanding, evidential assessments cannot prescind from axiological concerns. Human values are always present, as acknowledged by the historical emergence of the principle, in process, of the *conviction intime* (*livre convencimentollibre convencimientollibero convincimento*) of the judge. Facts and values come together, in evidential assessments. The inference of *mens realdolus specialis*, for the determination of responsibility for genocide, is undertaken as from the *conviction intime* of each judge, as from human conscience [...]. The evidence produced before the ICJ pertains to the *overall conduct* of the State concerned, and not to the conduct only of individuals, in each crime examined in an isolated way.”²⁶

Although Judge Trindade is somewhat extreme in considering the Court’s judgment a *Diktat*, the questioning of the high threshold for proving the *dolus specialis* for committing genocide is worth some analysis. Such a precedent makes it difficult for States to violate the Genocide Convention, raising questions as to the purpose of the convention. When the issue was brought up in the *Bosnian Genocide* case, the Court argued that although genocide had been committed in Srebrenica, Serbia was unaware of such genocidal intentions. Therefore, the Court did not address the *mens rea* elements of the crime in question. Consequently, the Court held that Serbia was not responsible for the genocide in Srebrenica.²⁷

²⁶ Dissenting Opinion of Judge Cancado Trindade, *Applications of the Convention on the Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Jurisdiction and Admissibility, Judgement, ICJ Reports 2015, 9, para. 468-470.

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, 43, 179 [Bosnian Genocide].

Such a precedent established a standard of intent that is too difficult to reach, allowing States to evade the responsibility of such acts too easily. The Court's position on genocide is untenable because the high threshold established by the ICJ seemingly facilitates States evading responsibility for the crime of genocide. Such a high threshold required reworking and development in the law remains necessary. However, the Court avoided such measures and continues to apply pre-existing precedent. The Court referred back to the *Bosnian Genocide* case to establish that in order for the *dolus specialis* to be established:

“The Court recalls that, in the passage in question in its 2007 Judgment, it accepted the possibility of genocidal intent being established indirectly by inference. The notion of ‘reasonableness’ must necessarily be regarded as implicit in the reasoning of the Court. Thus, to state that, ‘for a pattern of conduct to be accepted as evidence of [...] existence [of genocidal intent], it [must] be such that it could only point to the existence of such intent’ amounts to saying that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question. To interpret paragraph 373 of the 2007 Judgment in any other way would make it impossible to reach conclusions by way of inference.”²⁸

What becomes apparent from analyzing the Court's stringent adoption of *stare decisis* is the pitfalls that beseeches such an approach. Analyzing the approach the Court has taken to the application of the Genocide Convention seems to validate Dworkin's argument that to always follow pre-existing precedent does not necessarily contribute to the international community in a positive manner to ensure justice or virtue.²⁹ Instances will arise where the law needs development, where simple application of pre-existing precedent may not be as compatible to the contextual situation of the case at hand. Moreover, the application of precedents by the Court may be to the detriment of the international community.

²⁸ *Applications of the Convention on the Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2015, 5, para. 148.

²⁹ Dworkin, *Law's Empire*, *supra* note 23, 151.

The concerns arising from the Court's adoption of *stare decisis* in regard to the high threshold for a State's culpability for genocide are further justified by Dworkin's advancements for law as integrity. For Dworkin, "[...] propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice".³⁰ Moreover, jurisprudence must be reconcilable with political theory and political obligation, for political ideals are the moral base which influence the legislation of laws.³¹ It is this urge to reconcile judicial decision-making with the political, ethical and moral facets of society, that rejects the judicial decision-making process as an exercise of pure legal science. Law "[...] as integrity does not require consistency in principle over all historical stages of a community's law [...]",³² nor does it "[...] require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or generation".³³ Instead, the law should be interpreted in order to accommodate the political ideals of the community, ensuring it follows principles of justice, fairness and procedural due process. The argument can be made that judicial activism is required for an interpretation of the Genocide Convention that advances law as integrity, for the Court's high-threshold for genocide does little to represent the dominant political ideals of an international community ever more concerned with protecting the fundamental freedoms and human rights of the individual. Thus, Dworkin and his law as integrity concept advocates that a different standard for genocide would be preferable, rejecting the reapplication of a previous generation's jurisprudence.

Exploring *stare decisis* and the ICJ's strict application of such a principle, begins to paint a vivid picture of the Court's approach to judicial decision-making. It starts to outline the Court's tendency to choose judicial restraint over judicial activism. Moreover, it gives some reasoning as to why the Court has opted for judicial restraint. "The international community is [...] peculiarly dependent on its international tribunals for the [...] clarification of the law [...]",³⁴ and adopting *stare decisis* ensures that international legal rules are strengthened by its constant and consistent application.

³⁰ *Ibid.*, 225.

³¹ *Ibid.*, 191.

³² *Ibid.*, 227.

³³ *Ibid.*, 227.

³⁴ Fitzmaurice, 'Hersch Lauterpacht- The Scholar as Judge', *supra* note 1, 19.

D. Ex Aequo et Bono

Article 38 of the ICJ statute covers the sources of international law that the Court may apply to settle disputes brought before them. The Court has the tendency to utilize the sources prescribed in Article 38.1 when adjudicating on international legal disputes, staying true to its positivist roots.³⁵ Subsequently, the Court has veered away from applying the provisions set in Article 38.2 of *ex aequo et bono* given the lack of restraint such a provision administers. *Ex aequo et bono* allows the Court to utilize an equitable approach to decide cases based on “[...] which is ‘fair’ and ‘good’, acts ‘outside of law’ or more pejoratively ‘acts notwithstanding the law’”.³⁶ Therefore, rather than reaching decisions on the basis of the applicable law, the Court would deliberate upon non-legal elements to reach a decision that is fair and good.³⁷ This could see the Court use a deontological approach for example, or simply consider the political and sociological factors incumbent within the case at hand in order to reach the most equitable decision.

However, an integral pre-requisite of utilizing article 38.2, is the consent of both parties in advance. So far in the Court’s relatively short history, no party has invoked the application of Article 38.2, which has been to the relief of the Court. Considering its strict adherence to *stare decisis*, it would seem that the Court would show a sense of reluctance to apply a non-legal approach. First of all, the adoption of such a principle would incur uncertainty in regard to the parties’ acceptance of a judgment. The Court is constantly attempting to ensure its legitimacy. The use of *ex aequo et bono* could give rise to parties challenging the Court’s jurisdiction, as the US did in the *Nicaragua* case.³⁸ Although it must be stressed that in this particular incident, the lack of US compliance was not due to the utilization of Article 38.2. Secondly, it would be a profound turn

³⁵ Hernandez, ‘The Judicial Function’, *supra* note 9, 29-30.

³⁶ L. Trakman, ‘Ex Aequo et Bono: Demystifying an Ancient Concept’, 8 *Chicago Journal of International Law* (2007) 2, 621, 622.

³⁷ *Ibid.*, 623.

³⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14. United States withdrew from the compulsory jurisdiction of the Court following their judgement. See J. I. Charney, ‘Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non Participation, and Non-Performance’, in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 288 [Charney, Disputes Implicating the Institutional Credibility of the Court] and C. Paulson, ‘Compliance with the Final Judgements of the International Court of Justice since 1987’, 98 *The American Journal of International Law* (2004) 3, 434.

from Hart's law-abiding criteria, and the continuity that it strives to achieve when adjudicating upon cases of international law. In the eyes of the Court it would betray much of the ICJ's work to create a system with established rules that both subject and objects of international law have agreed to. Consequently, the Court can seek to apply such established rules without the fear of parties rejecting their judgments and no longer agreeing to the Court's jurisdiction.³⁹

Yet for Lauterpacht, such a provision was purposefully drafted so that it gives the Court a legislative function, and the ability to develop the law if necessary. Such a legislative function was administered, "[...] not only in regard to a particular dispute, but also, within the purview of a general arbitration treaty, in regard to future disputes".⁴⁰ Thus the Statute has left room for the Court to develop the law if required. The Court instead has confirmed its reluctance for the use of Article 38.2, repeatedly insisting that it would make judgments purely on the basis of international law, and never *ex aequo et bono*:

"On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves—that is to say, rules binding upon States for all delimitations; in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field."⁴¹

Given the choice to develop the law or to fall back on existing laws, the Court has fallen back on the latter, generating further support towards the argument that the ICJ is characterized by judicial restraint. It must be stressed however, that the Court would utilize Article 38.2 if parties direct it to do so,

³⁹ Charney, *Disputes Implicating the Institutional Credibility of the Court*, *supra* note 38, 297. Charney explored the ICJ's problems with compliance and suggested that the Court 'establish a record of success in cases where the parties would probably live up to their obligations.'

⁴⁰ H. Lauterpacht, *The Function of Law in the International Community*, (1933), 313.

⁴¹ *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark)*, Judgement, ICJ Reports 1969, 3, 47, para. 85.

where it is “[...] freed from the strict application of legal rules in order to bring about an appropriate settlement”.⁴²

E. The ICJ’s Relationship With Legal and Political Questions

During the first and second Hague Conference, Friedrich Von Martens was a prevalent figure that “[...] was emphatic that matters suitable for arbitration must be capable of judicial analysis”.⁴³ However “[...] in all international disputes in which the political element predominates, settlement by arbitration is impossible”.⁴⁴ Martens espoused the notion that it was not within the remit of international arbitration to deal with matters that maintained a greater political dimension. Moreover, the likes of Gennady Danilenko argued against the need to tend to the political dimension, for he considered non-legal phenomena as “[...] too broad for a close legal analysis of technical aspects of law-making”.⁴⁵ This aligned with Hartesian propositions regarding the manner in which a purely legal system of law should be structured. For these scholars, pulling away from the political, sociological and ethical dimensions of an international dispute and thus adopting a more scientific approach to arbitration, would nurture a more efficient system of law.⁴⁶ Considering the deep tradition of positivism entrenched in the work of the Court, it is no surprise that the ICJ have followed such a position.

Since 1946 the position of the ICJ has been that “[...] whilst recognizing the distinction between legal and political aspects of a dispute, it has consistently rejected the claim that the immixture of legal and political issues was a sufficient ground to refuse to consider the legal issues in themselves”.⁴⁷ This in itself follows the tradition of the PCIJ, who often decided to exclude non-legal matters in their judicial decision-making process. The *Austro-German Customs Union* case

⁴² *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgement, ICJ Reports 1982, 18, 60, para. 71.

⁴³ Lauterpacht, *Development of International Law*, *supra* note 19, 148.

⁴⁴ *Ibid.*, 148.

⁴⁵ G.M. Danilenko, *Law-Making in the International Community* (1993), 5.

⁴⁶ See also F. Rigaux, ‘Hans Kelsen on International Law’, 9 *European Journal of International Law* (1998), 325, 340. “[Politics does not] enter into a ‘pure’ theory of law [...] [it] is excluded because legal thinking must center on positive rules which rely on the hypothetical Grundnorm, a purely formal premise without any reliance on philosophical or moral considerations, without any engagement with political or social values.”

⁴⁷ Hernandez, *The Judicial Function*, *supra* note 9, 70.

is a prime example where the PCIJ faced a legal matter that contained a highly politicized agenda, and as a consequence, forced the Court to only partially answer the question brought before it.⁴⁸ The dispute concerned the compatibility of the customs regime with the Treaty of Saint-Germain and also Protocol 1 signed at Geneva in 1922, however, the Court only responded to the part of the question relating to Protocol 1. The application of article 88 of the Treaty of Saint-Germain required Austria to refrain from directly or indirectly compromising its independence, preventing a political or economic union with Germany. The joint dissenting opinions of Judges Adatci, Kellogg, Rolin-Jaequemyns, Jonkheer Von Eysinga and Wang thus agreed with the Court's opinion that such a matter became too political an agenda for the Court to address:

“The undersigned regard it as necessary first of all to indicate what they believe to be the task assigned to the Court in this case. The Court is not concerned with political considerations nor with political consequences. These lie outside its competence.”⁴⁹

In light of the Court's firm exclusion of political matters in contentious cases, the ICJ has tended to use advisory opinions as *testing ground* for addressing legal issues entwined with political elements. Advisory opinions are non-binding and consequently afford the Court flexibility in exploring contentious issues within the international legal system. Absent from the concern of voluntary jurisdiction, the Court has the opportunity to move away from judicial restraint to potentially develop international law. This position has been advocated by ICJ Presidents Schwebel and Guillaume. In fact, they have encouraged international courts and tribunals outside of the UN to follow the Security Council and General Assembly in referring issues that are of importance for the unity of international law⁵⁰ to the ICJ.

With such room for flexibility the Court has attempted to answer questions pertaining to international law regardless of the political dimensions to the issue

⁴⁸ *Customs Regime between Germany and Austria*, Advisory Opinion, PCIJ Series A/B, No. 41 (1931), 37.

⁴⁹ Dissenting Opinion of the Judges Adatci, Kellogg, Baron Rolin-Jaequemyns, Sir Hurst, Schücking, Van Eysinga and Wang, *Customs Regime between Germany and Austria*, Advisory Opinion, PCIJ Series A/B, No. 41 (1931), 153.

⁵⁰ See Judge S. Schwebel's speech in 'Work of the Court in 1999-2000', 54 *Yearbook of the International Court of Justice* (1999-2000), 186, 282-288; and President G. Guillaume speech in 'Publications of the Court', 55 *Yearbook of the International Court of Justice* (2000-2001), 336, 347-357.

at hand. In the Court's first advisory opinion, *Conditions for Admission of a State*, the matter had arisen:

“The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives, which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances.”⁵¹

The Court continued to stress this point in advisory opinions following *Conditions for Admission of a State*. In the *Namibia* advisory opinion, South West Africa claimed that the Security Council's question “[...] was intertwined with political issues and has a political background in which the Court itself has become embroiled to an extent rendering it impossible for the Court to exercise its judicial function properly [...]”.⁵² The Court dismissed such claims maintaining that political pressure did not prevent it from making a decision on the matter. The ICJ reasserted this principle in the *Nuclear Weapons* advisory opinion stressing that regardless of the political nature of a question brought before the Court, it could not refuse the “[...] legal character of a question which it invites it to discharge an essentially judicial task [...]”.⁵³

It is important to establish that the lack of concern in regard to jurisdiction plays an important role in allowing the ICJ to utilize advisory opinions in such a manner. This factor is evident in the 2004 *Palestinian Wall* advisory opinion where the Court had “[...] indicated that Israel should forthwith cease construction of the wall, dismantle what had been so far constructed and make reparations to

⁵¹ *Conditions for Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57, 61.

⁵² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, ICJ Pleadings 1, 425, 427.

⁵³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 234, para. 13.

the Palestinians for all damages caused by the project”,⁵⁴ Fourteen of the fifteen participating judges supported the Court’s position, with the single dissenting voice being American Judge Thomas Buergenthal, “[...] who based his entire position on the failure of the ICJ to have before its sufficient evidence relating to Israel’s claims of defensive necessity and security from suicide bombings [...]”.⁵⁵ The Court persisted with such a judgment irrespective of the political situation and the fact that the General Assembly had acted *ultra vires* by referring this issue to the Court, even though the Security Council was in active engagement with the issue.⁵⁶ This issue surfaced again in the *Kosovo* advisory opinion. Several States proposed that the matter of a declaration of independence is a question of domestic law, as opposed to international law. These States thus asserted that the Court did not have the competence to evaluate such a question.⁵⁷ However the Court thwarted such claims re-establishing its responsibility as a judicial organ of international law:

“Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have.”⁵⁸

As much as the Court’s willingness to pursue the legal questions referred to it is commendable, the issue remains that it will continue to ignore the political dimensions of a dispute. For this reason, criticisms can still be directed towards its judgments for unsatisfactorily failing to grasp all the factors that are pertinent to such legal questions. A primary reason for the Court’s abstinence of political

⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 197, para. 150.

⁵⁵ R. A. Falk, ‘Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall’, 99 *American Journal of International Law* (2005) 1, 42, 43.

⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 148, para. 24.

⁵⁷ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, 415, para. 26.

⁵⁸ *Ibid.*, 415, para. 27.

factors is based on a principle of objectivity. Matters that devolve in to ethical or political discourse have the danger of being subjective, giving rise to claims of a lack of neutrality in decision-making. The principle of neutrality has been something the Court has adopted as one of its primary characteristics and the focus of ensuring objectivity is a pivotal manner in which to achieve this.⁵⁹ The Court used the *South West Africa* case to expound the principle of neutrality. It stated that it must act in a manner that is independent “[...] of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute”.⁶⁰ The aim of such a position is to establish a system of law that is both “[...] ‘technical’ and ‘scientific’, [and] a truly neutral and objective solution to political problems”.⁶¹ The repercussions of a subjective Court can be a dangerous proposition for the principle of neutrality and international law in general. It severely endangers the scientific model of international law that is being advanced by the ICJ, inevitably moving away from the characteristic of restraint that it often displays. The Court would be forced to move away from its reliance upon the strict application of Article 38.1, betraying its positivist roots. This would not only broaden the palette of the Court and system of law in general, but it would also bring into question whether or not parties would accept the jurisdiction of the Court. Judgments would have the potential to become less predictable as the ICJ could not adopt merely the sources of international law in order to attend to matters of a political nature. For the ICJ’s own livelihood, dismissing political questions would be advised.⁶²

However, the likes of Koskeniemi would be sceptical of the Court’s omission of political questions. Koskeniemi’s view is that the legal matters of an international dispute cannot be separated from its political dimensions for “[p]olitics is focal and law secondary. Even where the latter exists, its content cannot be ascertained independently from political analyses”.⁶³ Legal and political matters merge into one another seamlessly for the constant recourse to balance out the humanist criteria blurs the line between the two areas. The

⁵⁹ S. Schwebel, ‘Remarks on the International Court of Justice’, 102 *Annual Meeting of the American Society of International Law* (2008), 282, 282.

⁶⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 23, para. 29.

⁶¹ J. D’Aspremont, ‘Introduction: The Future of International Legal Positivism’, in J. D’Aspremont & J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (2014), 6.

⁶² Schwebel, ‘Remarks on the International Court of Justice’, *supra* note 59, 282.

⁶³ M. Koskeniemi, *From Apology to Utopia* (2005), 198.

political elements give explanation to the legal dispute and the legal matters have repercussions for the political climate in which the dispute occurs. To pull one away from the other precludes a comprehensive understanding of the dispute and may potentially result in judgments that are deemed inadequate for its resolution. A prime example would be the Court's judgment on the *Bosnian Genocide* case. The Court's finding that Serbia was not directly involved in the Srebrenica genocide, as it had not directly authorized the acts, was heavily criticized for omitting political factors that were relevant to the legal dispute. The Vice-President of the International Court of Justice, Judge Al-Khasawneh, outlined the failings of such an approach for:

“The ‘effective control’ test for attribution established in the Nicaragua case is not suitable to questions of State responsibility for international crimes committed with a common purpose. The ‘overall control’ test for attribution established in the Tadić case is more appropriate when the commission of international crimes is the common objective of the controlling State and the non-State actors. The Court’s refusal to infer genocidal intent from a consistent pattern of conduct in Bosnia and Herzegovina is inconsistent with the established jurisprudence of the ICTY. The FRY’s knowledge of the genocide set to unfold in Srebrenica is clearly established. The Court should have treated the Scorpions as a *de jure* organ of the FRY. The statement by the Serbian Council of Ministers in response to the massacre of Muslim men by the Scorpions amounted to an admission of responsibility. The Court failed to appreciate the definitional complexity of the crime of genocide and to assess the facts before it accordingly.”⁶⁴

The Court's rigid tradition of positivism is responsible for the criticism laid before such a judgment, for the political elements prevalent indicated a need to develop the law. However, the Court's stance on political matters remains the same, regardless of the flaws that such a position draws out. As the Court stated in the *South West Africa* advisory opinion, “[i]t would not be proper for the Court to entertain these [political] observations, bearing as they do on the

⁶⁴ Dissenting opinion of Vice-President Al-Khasawneh, *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, 241.

very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, *acts only on the basis of the law* [...].⁶⁵

F. Non Liquet

Another feature highlighting the ICJ's strict adherence to judicial restraint is *non liquet*, which has been a prominent criticism directed towards the ICJ. When faced with a gap or lacuna in the law, the Court has tended to gloss over such problems.⁶⁶ "The view prevailing among writers is that there is no room for *non liquet* in international law because there are no lacunae in international law."⁶⁷ Gaps in international law are considered to be logically impossible because the system is rigorously structured in a manner to prevent the opportunity for such a phenomenon to unravel. Prosper Weil suggests that the starting point of such a position on international law is founded on the basis that the sovereignty of States is the most fundamental factor within the system:

"International law exists only to limit the states' inherent freedom of action. States, thus, are obliged to act only insofar as there exists a prescriptive rule, and they are obliged not to act only if there exists a prohibitive rule. Without any prescriptive or prohibitive rule, states may act as they want, unfettered by law."⁶⁸

Ultimately this followed the precedent established in the PCIJ *Lotus* case, where the court held that, "[t]he rules of law binding upon States [...] emanate from their own free will [...]. Restrictions upon the independence of States cannot therefore be presumed".⁶⁹ Subsequently, if there is no explicit prohibition by the international legal system, such conduct is thus permitted. This realist projection of international law prescribes to the notion that States are bound

⁶⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 23.

⁶⁶ "[...] in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited [...]", *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 135, para. 269.

⁶⁷ P. Weil, "The Court Cannot Conclude Definitively... Non Liquet Revisited", 36 *Columbia Journal of Transnational Law* (1998) 1&2, 109, 110.

⁶⁸ *Ibid.*, 112.

⁶⁹ The Case of the *SS Lotus*, PCIJ Series A, No. 10 (1927), 18.

by a rule of law only because, and to the extent that they had consented to it.⁷⁰ The freedom for States to act continues to exist as a basic principle under such an approach to international law. The denial of the issue of *non liquet* is another mechanism to ensure that States remain the primary object and subject of international law.⁷¹

Accepting the existence of lacunae in international law creates an issue for the ICJ. If gaps are discovered, the remedy to such problem is the development of law, which would go against the principle of *stare decisis*. Thus, accepting instances of *non liquet* would consequently force the Court to consider moving away from a strict application of Article 38.1, and its positivist traditions. *Non liquet* would force parties away from the accepted norms of international law and into the territory of the unknown. The decision to develop the law may impact States that have not accepted the Court's jurisdiction, violating the basic principle of State sovereignty.

Thus, it is due to the protection of the Lotus principle; that *non liquet* has been disregarded by the ICJ. When the ICJ has faced instances where there is no law for the matter in question, the attitude of the Court has been to look over the problem and provide weak judgments. This is apparent in the *Nuclear Weapons* advisory opinion:

“any specific authorization. [...] [nor] any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. [...] [T]he threat or use of nuclear weapons would generally be contrary to the rules of international law [...] and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”⁷²

The Court provided an advisory opinion with a less than satisfactory conclusion which discards *non liquet* and the requirement to develop international

⁷⁰ M.J Aznar-Gomez, ‘The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law’, 48 *International Comparative Law Quarterly* (1999) 1, 3, 8.

⁷¹ *Ibid.*

⁷² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 266, para. 105.

law. As much as the Court seeks to adhere to its positivist principles, a relatively young system that is regulating an arena that is constantly changing and revealing new and distinctive problems, will have instances where there are no legal rules to cover unique events.

However, the Court has indicated its intention to commit to judicial restraint by predicating that there is no issue of *non liquet*. This is because “[...] the State as sovereign is free to do, providing for those issues which are not within the exclusive competence of the State [...]”.⁷³ In this way, the Court has steered itself clear of the responsibilities it may have of developing the law.

G. The ICJ and The Issue of Jurisdiction

By providing a lucid account of the ICJ’s adherence to judicial restraint, the objective is to move a step further and to understand why it is the Court has opted to adopt such an approach. Assessing the Court’s decision at critical points in the various cases over its seventy years of activity, it seems the ICJ has been ushered into such norms of behavior due to the position of States in international law; as the primary object and subject of the international legal system. Even if the Court does wish to develop international law, and move beyond judicial restraint, it is chained by its own fear of losing legitimacy within the international community. This fear is rooted in the Court’s jurisdiction based on consent. Judge Higgins stated that the Court requires State consent in order to establish jurisdiction, “[...] even if one might regret this state of affairs as we approach the twenty-first century [...]”.⁷⁴ Judge Kooijmans stated that the provisions outlined in Article 36.2 of the ICJ Statute could be considered a “[...] serious setback [...]” for the functioning of the Court. If the ICJ is compared to courts such as the European Court of Human Rights or the European Court of Justice that maintain automatic jurisdiction, the ICJ is somewhat lacking in judicial activism. This difference it has with the likes of the ECHR and ECJ means “[...] that before dealing with the merits, the Court always has to analyze in a meticulous way whether the heads of jurisdiction invoked provide the Court with jurisdiction in all those cases which are brought unilaterally

⁷³ Aznar-Gomez, ‘The 1996 Nuclear Weapons Advisory Opinion and Non Liqueet in International Law’, *supra* note 70, 8. See also Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, PCIJ Series B, No.4 (1923), 24.

⁷⁴ Separate Opinion of Judge Higgins, *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, Provisional Measures Order, ICJ Reports 1999, 124, 161, 168, para 26. See also Separate Opinion of Judge Higgins, *Legality of the Use of Force (Yugoslavia v. Spain)*, Provisional Measures Order, ICJ Reports 1999 761, 798, 805 para 26.

[...].⁷⁵ Furthermore the ICJ is concerned that if the Court is too ambitious in its judgment it may “[...] endanger its position [...]” for States may show reluctance to comply with such a judgment and subsequently revoke its consent.⁷⁶

From this perspective it becomes clearer as to why the ICJ maintain such a strict adherence to *stare decisis*. Following precedent ensures predictability. States will be more willing to accept the Court’s jurisdiction knowing more or less the direction the ICJ will take with its judgment. Similarly, the Court’s hesitance to apply Article 38.2 and decide cases *ex aequo et bono* is grounded in the same desire to ensure predictability. This is because States may revoke consent if the Court goes beyond and develops the law away from what the primary objects have established as rules of international law. Furthermore, this same fear of losing jurisdiction and legitimacy has made the Court reluctant to delve into non-legal matters pertaining to a case or remedy instances of *non liquet*. The ICJ is constantly walking a tightrope when carrying out its judicial functions, for it is wary of the negative consequences it would have upon its judicial function, and more importantly the international legal system as a whole, if States persistently revoked their consent to the Court’s jurisdiction. It is attempting to stay relevant as well as legitimate. This highlights the Court’s focus on appeasing States in an effort to maintain relevancy, justifying claims that the Court may have a judicial function but no judicial power. Such a capacity derives from the ability to decide disputes irrespective of whether the parties accept its authority.⁷⁷

The *Armed Activities in the Congo* case, between the Democratic Republic of Congo (DRC) and Rwanda, illustrates the Court’s preoccupation with consent deftly. Although Rwanda had established a reservation to Article IX of the Genocide Convention,⁷⁸ the DRC contended that such a reservation was incompatible with the purposes and uses of the convention, rendering it “null and void.” However, the Court held that “[...] the fact that a norm having such character may be at issue in a dispute cannot in itself provide a basis for the

⁷⁵ P. Kooijmans, ‘The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy’, 56 *International Comparative Law Quarterly* (2007) 4, 741, 743.

⁷⁶ *Ibid.*

⁷⁷ A. Orakhelashvili, ‘The Concept of International Judicial Jurisdiction: A Reappraisal’, 2 *The Law and Practice of International Court and Tribunals* (2003) 3, 501, 504-505.

⁷⁸ Article IX of the Genocide Convention (1948) stipulates that: “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

Court's jurisdiction to entertain that dispute — Court's jurisdiction always based on consent of the parties".⁷⁹ Several judges such as Kooijmans, Higgins, Simma and Owada criticized the Court's formalist position, posing the argument in their Joint Separate Opinion that:

"It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide, [...] one of the greatest crimes known."⁸⁰

They concluded the Joint Separate Opinion by stating that "[...] it is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration".⁸¹ Nevertheless the Court stuck to its initial judgment and displayed the problems such a formalist approach can have upon the legal system.

In the 2011 *Application of the CERD Convention* case, between Georgia and Russia, the Court reiterated the approach to consent, for it declined jurisdiction on the basis of a restrictive interpretation of the precondition to negotiate embodied in the compromissory clause of CERD. Georgia claimed that Russia had violated Articles 2, 3, 4, 5 and 6 of the Convention on the Elimination of All Forms of Racial Discrimination, however the Court held that it lacked jurisdiction under Article 22 of the CERD thus upholding Russia's preliminary objections. The ICJ had determined that Georgia had not exhausted the procedural preconditions required to activate the Court's jurisdiction on the matter. The Court stipulated that Georgia "[...] did not attempt to negotiate CERD-related matters with the Russian Federation [...]"⁸² and that Georgia had not "[...] used or attempted to use the other mode of dispute resolution contained

⁷⁹ *Armed Activities on the Territory of the Congo (New Application: 2002)(Democratic Republic of Congo v. Rwanda)*, Judgment, ICJ Reports 2006, 6, 7, para 5.

⁸⁰ Joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, *Armed Activities on the Territory of the Congo (New Application: 2002)(Democratic Republic of Congo v. Rwanda)*, Judgment, ICJ Reports 2006, 6, 65, 71, para 25.

⁸¹ *Ibid.*, 72, para 29.

⁸² *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment, ICJ Reports 2011, 70, 73.

at Article 22, namely the procedures expressly provided for in CERD”.⁸³ The Court linked the applicant’s duty to negotiate with the limits of consent given by States, referring back to the *Armed Activities in the Congo*. The Court were stressing that any conditions that affect State consent “[...] must be regarded as constituting limits thereon”.⁸⁴

An earlier case that delineates the problems incumbent within establishing jurisdiction based on consent was the *East Timor* case of 1995. Portugal had instigated proceedings against Australia over the administering power capacity it had over East Timor. In 1989, Australia had concluded a treaty with Indonesia, who had occupied East Timor since 1975, on the delimitation and exploitation of part of the continental shelf between Australia and East Timor.⁸⁵ Portugal contended that such a treaty had led to Australia infringing the rights of the people of East Timor, in particular the right to self-determination. Portugal affirmed itself as the administering power of East Timor, therefore establishing the argument that such a right was exclusively entitled to be exercised by them.

Though the Court’s jurisdiction had been activated by the declarations of both Parties, the fact that the conduct in question was centered around whether Australia had lawfully entered into an agreement with Indonesia, made the matter of jurisdiction problematic for the Court. As the Court sought to also analyze the lawful conduct of Indonesia, they expressed the fact that such an undertaking could only be done with the consent of Indonesia. “The Court applied the so-called Monetary Gold doctrine according to which the Court cannot exercise jurisdiction if the rights and obligations of a third State constitute the very subject-matter of the case before it, in the absence of that third State’s consent.”⁸⁶ There were several problems with such a restrictive judgment. Firstly, East Timor was a non-self governing territory that was entitled to the right of self-determination. Secondly, the General Assembly had continued to refer to Portugal as the administering power of East Timor after rejecting Indonesia’s claim that East Timor had been incorporated into its territory.⁸⁷ For these reasons of which the Court had expressly touched upon, it could “[...] perfectly well have ruled on that issue without having to pass a

⁸³ *Ibid.*, 140, para 183.

⁸⁴ Hernandez, *The International Court of Justice and the Judicial Function*, *supra* note 9, 49.

⁸⁵ *Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (with annexes)*. Signed over the zone of cooperation, above the Timor Sea, 11 December 1989, Australia and Indonesia, 1654 UNTS 105.

⁸⁶ Kooijman, ‘The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy’, *supra* note 75, 744.

⁸⁷ *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, 96-97.

verdict on the legality of Indonesia's conduct. Portugal was claiming that its own right as administering power, acting on behalf of a non-self-governing people, had been violated by Australia".⁸⁸ The Court had unnecessarily refrained from investigating the contentious case in fear of the repercussions it may have upon its own legitimacy to settle the dispute. The greater concern was that "[...] basic principles and values of the international community were an issue, namely the rights of non-self-governing people and their right to self-determination".⁸⁹ The issue of compulsory jurisdiction has created obstacles for the Court to address matters that require assessment for the sake of the international community.

This outlines the fundamental flaw in the composition of the Court. The ICJ's work is dictated by the primary position States enjoy in the international legal system. If the Court did desire to develop international law, it is unable to do so for it is not within its remit to extend beyond what is consented for by States. Although the Court receives much criticism for its judicial restraint, it is apparent that there is pressure to adopt such an approach, for if the Court were to lose its legitimacy; the repercussions for the international legal system of law would be greater. However, it can also be argued that the Court's judicial restraint undermines its legitimacy. Such a characteristic is concerning for an international community seeking to uphold universal values and dealing with threats to international peace and security accordingly.

H. A Cry for Judicial Activism

It must be made clear that the intention here is not to dismiss the need for judicial restraint. Judicial restraint is a necessary tool for strengthening the international legal system by affirming the weight of the international laws already established. To solely decide the case at hand by applying pre-existing laws that are functioning effectively is an imperative component for a strong legal system. Continuity and foreseeability are essential proponents of a legal system for they define acceptable behavior in which the community is regulating.⁹⁰

However, continuity and foreseeability should not overshadow the importance of making sound judicial decisions that would impact the community in a positive manner. Judicial proactivity is vital for this very reason, so that mere application of pre-existing laws do not result in unsatisfactory judgments

⁸⁸ Kooijman, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', *supra* note 75, 744.

⁸⁹ *Ibid.*

⁹⁰ Hart, *The Concept of Law*, *supra* note 18, 51.

that would have negative implications upon the community. It is why Dworkin urges the judge to be part of the legal process, articulating how important it is that the judge continues to develop the law:

“The practice of precedent, which no judge’s interpretation can wholly ignore, presses towards agreement; each judge’s theories of what judging really is will incorporate by reference, through whatever account and restructuring of precedent he settles on, aspects of other popular interpretations of the day.”⁹¹

Citing such an approach as legal pragmatism, he contended that it “[...] offers a very different interpretation of legal practice: one where judges do and should make whatever decisions seem to them best for the community’s future, not counting any form of consistency with the past as valuable for its own sake”.⁹² It entrenches the role of the judge to be that of serving the community that it works within in a manner that nurtures its environment positively.⁹³ Therefore, if the case at hand requires judicial restraint for the sake of impacting international community in a positive manner, then such an approach should be encouraged. Likewise, if judicial activism is the suitable approach, it should not be discouraged. Thus, the ICJ should not shy away from moving beyond the pre-existing laws, particularly if the overall implications of such an approach ensure international peace and security or uphold universal values.

Revisiting *Nicaragua* in light of this argument is ideal for outlining that when judicial restraint falls short of ensuring sound judgments, it gives ground for applying judicial activism. The Court contended that the reapplication of the effective control test in the Bosnian Genocide case, which was established in *Nicaragua*, “[...] substantially coincided with the standards required by the International Law Commission (ILC) in Article 8 of the ILC Articles on State Responsibility which, according to the Court [...] reflects customary international law”.⁹⁴ However, Cassese raised concerns on whether the effective control test was based on “[...] either customary law [...] or, absent any specific rule of customary law, on general principles on state responsibility or even general

⁹¹ Dworkin, *Law’s Empire*, *supra* note 23, 88.

⁹² *Ibid.*, 95.

⁹³ *Ibid.*, 88.

⁹⁴ A. Cassese, ‘The Nicaragua and Tadić Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia’, 18 *European Journal of International Law* (2007) 4, 649, 650.

principles of international law”.⁹⁵ Cassese outlines a void of legal provisions in regards to this area of international law, thus supporting the suitability of adopting legal activism. However, the Court referred back to the ILC articles, instead of seeking to develop the law in a manner where the necessary political and ethical considerations are incorporated within the assessment of the issue at hand. It is important to consider that although the US most likely did not order Nicaraguan rebels to assassinate, rape or torture, “[...] such operations had been carried out by individuals acting under the authority and with the (financial, logistical, operational, etc.) support of US organs”.⁹⁶ Therefore, for the ICJ to establish such a high threshold for State responsibility for international crimes committed with a common purpose, the argument can be made that such a decision can incur a negative implication for the international community going forward.

This supports Dworkin’s argumentation that “[...] sometimes lawyers must deal with problems that are not technical...and there is no general agreement on how to proceed. One example is the ethical problem that is presented when a lawyer asks, not whether a particular law is effective, but whether it is fair”.⁹⁷ Occasions arise where a move beyond technical considerations is required and what is beneficial for the international community, both on a legal and political basis. Thus, judicial activism is a pivotal tool for judges to move beyond the law if necessary, in order to focus on establishing rules that will positively impact the international community by tackling threats to international peace and security effectively and upholding universal values.

In fact, though some would scorn the use of judicial activism,⁹⁸ and the criticism that the term’s meaning has become unclear is somewhat persuasive,⁹⁹ what cannot be denied is that judicial activism can play an important role in ensuring justiciability in judicial decisions.¹⁰⁰ Oreste Pollicino contends that judicial creativity has the potential to transform the role of law in the modern

⁹⁵ *Ibid.*, 653.

⁹⁶ *Ibid.*, 655.

⁹⁷ R. Dworkin, *Taking Rights Seriously* (1978), 1.

⁹⁸ F. H. Easterbrook, ‘Do Liberals and Conservatives Differ in Judicial Activism?’, 73 *University of Colorado Law Review* (2002) 4, 1401, 1401. Speaking in a symposium, Judge Frank Easterbrook stated that: “Everyone scorns judicial activism, that notoriously slippery term.” See also K.D. Kmiec, ‘The Origin and Current Meanings of “Judicial Activism”’, 92 *California Law Review* (2004) 5, 1441, 1442.

⁹⁹ K.D. Kmiec, ‘The Origin and Current Meanings of “Judicial Activism”’, 92 *California Law Review* (2004) 5, 1441, 1443.

¹⁰⁰ *Ibid.*, 1442.

“[...] welfare [...]” of societies.¹⁰¹ Therefore, the use of judicial activism, and by extension judicial creativity, can ensure the judicial decision not only maintains relevancy to the contemporary environment of society, but the relevance and legitimacy of the legal system itself.

“The interpretation of the rule should, therefore, not only be guided by textual and historical arguments: elements of the system and of purpose will have to come into play. These elements can be found by consulting tradition, case law and literature, and by rethinking the cohesion of the different chapters of the legal system.”¹⁰²

Incidentally, judicial activism inspires the judicial decision-making process to be better attuned to the aims and purpose of legal sources, then to merely apply the strict letter of the law without understanding its teleology.

It is in this sense that international law could learn from the work of the European Court of Justice and how it adopts a teleological approach to remain “[...] perfectly consistent with the dynamic and evolving nature of the European Community”.¹⁰³ Thus, the ECJ “[...] reinterpret[s] and adapt[s] the original meaning of the Treaty dispositions in accordance with the new values and aims that are becoming part of the European dimension”.¹⁰⁴ This teleological approach is apparent in the *CILFIT* case, where it held that “[...] every provision of Community law must be placed in its context and interpreted in the light of the provisions of E.C. law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.¹⁰⁵ This approach is precisely what is required for in the work of the ICJ, which would permit judicial activism to be adopted when appropriate. Currently, a strict use of judicial restraint does little to modify law in order to meet the changing circumstances of the international law community¹⁰⁶ or

¹⁰¹ Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint’, *supra* note 7, 286.

¹⁰² T. Koopmans, ‘The Theory of Interpretation and The Court of Justice’, in D. O’Keeffe & A. Bavasso (eds), *Judicial review in European Union law: Liber Amicorum in Honour of Lord Slynn of Hadley* Vol. I (2000), 45, 48.

¹⁰³ Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint’, *supra* note 7, 289.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Cilfit v. Italian Ministry of Health*, Case No. 283/81, Judgment of 6 October 1982, [1982] ECR 3415, 3430.

¹⁰⁶ Kolb, *The Elgar Companion to the International Court of Justice*, *supra* note 2, 404.

meet the “[...] objective need to chart new lands”.¹⁰⁷ Furthermore, the teleological approach qualifies and justifies when judicial activism should be utilised in the ICJ’s work. Indeed, a teleological approach supports the argument that both judicial restraint and judicial activism should both be used as and when necessary. For often the sources of law utilized to make a judicial decision correlates with its aims and purposes justifying the use of judicial restraint. However, it is in those situations when these two factors do not correlate that the use of judicial activism is required. Hence, “[...] being unsatisfied with existing law [...]” and subsequently then “indulg[ing] in something close to open law-creation in order to base [their] decision,”¹⁰⁸ is justified, as it is the aims and the purposes of international law that are of prime focus. This paper has contended that the aims and purposes of international law is both to maintain international peace and security and to uphold universal values. Though a significant level of discretion can be considered of how such aims and purposes can be interpreted and achieved, what can be surmised here is when and what qualifies the legitimate use of judicial activism in the ICJ’s judicial decision-making process. Indeed, understanding fully the teleology of international law requires a complete research study of its own. However, what can be advanced in this paper is that the aims and purpose of international law justify the selective use of judicial activism, for it can be a powerful tool in preserving the welfare of international society.

I. Conclusion

International lawyers purport a firmly positivist view of the international legal system when “[t]hey assume that a sovereign state is subject to international law but, on the standard account, only so far as it has consented to be bound by that law [...]”.¹⁰⁹ Therefore, international law is “[...] grounded in what nations – or at least the vast bulk of those that others count as ‘civilized’ [...] have consented to its provisions being law for them just by their signatures”.¹¹⁰ The ICJ seeks to carry on such a firmly positivist tradition given its strict adherence to judicial restraint. Certainly, the aim of this article was not to dispel such an approach to judicial decision making as judicial restraint strengthens the

¹⁰⁷ *Ibid.*

¹⁰⁸ H. Thirlway, ‘Judicial Activism and the International Court of Justice’, in N. Ando, E. McWhinney & R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, (2002), 75, 76.

¹⁰⁹ R. Dworkin, ‘A New Philosophy for International Law’, 41 *Philosophy of Public Affairs* (2013) 1, 2, 5.

¹¹⁰ *Ibid.*, 6.

international legal system and furnishes the boundaries of acceptable conduct within the international community.

However, the international community is an ever-changing environment that has new and unseen matters that require dealing with in a manner that has not been dealt with before. For example, was environmental law an urgent matter that the international community was prepared to deal with in 1945? Or take the matter of modern warfare, with technologically advanced weaponry and the issue of Non-State actors; was the international legal system established in 1945 taking into account such matters? It seems unlikely that this was the case, and such a predicament supports the argument that judicial activism is an approach that the ICJ should adopt when a suitable situation arises. On one hand there are gaps in the law that need filling, and on the other there are pre-existing laws that require fine-tuning. It seems fitting that the judges of the ICJ attend to such responsibilities. If judges can move away from a stringent use of judicial restraint, the further development of international law through the application of judicial activism can benefit the international community considerably.

Access to Fisheries in the United Kingdom's Territorial Sea after its Withdrawal from the European Union: A European and International Law Perspective

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Abstract

This article approaches the question of post-Brexit access of European Union (EU) Member States to the United Kingdom's (UK) territorial sea fisheries by first discussing the pre-Brexit legal *status quo* under the *Common Fisheries Policy* (CFP) of the EU. Second, this article discusses the international legal framework for access to territorial sea fisheries that would apply if the UK withdraws from the EU in the absence of a future agreement. As Part II of the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) does not contain provisions on fisheries access, this analysis focuses on the role of the 1964 *London Fisheries Convention* (LFC), bilateral voisinage agreements between the UK and EU Member States, potential acquired historic fishing rights of EU Member States in the UK's territorial sea, and potential access rights derived from royal privileges. Next, this article addresses the relevance of the transitional arrangements contained in the latest draft withdrawal agreement of 2018, which was not, however, adopted by the UK. Finally, this article offers some conclusions as to the applicable legal framework for access of EU Member States to the UK's territorial sea fisheries absent a new fisheries agreement between the EU and the UK, and potential ways to proceed in the future regulation of this issue.

A. Introduction¹

An early monograph on the *Common Fisheries Policy* (CFP) of the European Economic Community (EEC) begins with the following statement made by Edward Heath, a former British politician, in 1964: “Her Majesty’s Government made clear their interest in the settlement of common fisheries problems on a European basis.”² The same year, the conclusion of the 1964 *London Fisheries Convention* (LFC)³ marked an important step in European cooperation on the regulation of international fisheries access. The conclusion of the LFC laid vital foundations for the initiation of the CFP within the EEC in 1970. Less than a decade after Heath’s statement, on 1 January 1973, the United Kingdom (UK) became an EEC Member State – and at the same time subject to the CFP.⁴ As of June 2019, it is the unequivocal intention of Her Majesty’s Government that the UK should withdraw from the EU, and from the CFP in particular.⁵ The UK’s government notified its intention to initiate the procedure to withdraw from the EU on 29 March 2017, which means that the original withdrawal date on which the UK’s EU membership would have ceased was 29 March 2019 at 00:00 CET.⁶ However, after the UK’s parliament had voted against an adoption of the latest draft withdrawal agreement between the UK and the EU on 15 January 2019,⁷ on 5 April 2019 the UK formally asked for an extension of

¹ This article discusses the legal situation as of, and related developments until June 2019.

² M. Wise, *The Common Fisheries Policy of the European Community* (1984), 1.

³ *Fisheries Convention*, 9 March 1964, 581 UNTS 57.

⁴ This date marks the entry into force of the *Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom to the EEC and the EAEC*, 22 January 1972, L73 OJ [1972 Accession Treaty].

⁵ See generally Department for Environment, Farming and Rural Affairs, ‘Sustainable Fisheries for Future Generations’ (2018), available at <http://www.gov.uk/government/consultations/fisheries-white-paper-sustainable-fisheries-for-future-generations> (last visited 17 October 2019) [UK White Paper].

⁶ *Treaty on European Union*, 13 December 2007, Art. 5 (3), OJ 2012/C 326/01 [TEU].

⁷ H. Stewart, ‘May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era’, *The Guardian* (15 January 2019), available at <https://www.theguardian.com/politics/2019/jan/15/theresa-may-loses-brexite-deal-vote-by-majority-of-230> (last visited 17 October 2019). This means that a withdrawal from the EU without a withdrawal agreement establishing a transition period regulated with transitional arrangements has become significantly less likely. J. Elgot, ‘No Second Vote on Brexit Deal Likely Before February, Says No 10’, *The Guardian* (21 January 2019), available at <https://www.theguardian.com/politics/2019/jan/21/no-second-vote-on-brexite-deal-likely-before->

the withdrawal period.⁸ On 10 April 2019, the European Council extended the withdrawal period until 31 October 2019.⁹ In addition, a unilateral revocation of the UK's withdrawal from the EU remains legally possible.¹⁰

A key objective of the UK government's post-Brexit fisheries policy is “[t]o enable the UK to take back control of access to our fishing waters (territorial sea extending up to 12 nautical miles and our EEZ extending up to 200 nautical miles offshore) by allowing the UK to decide which countries' vessels may fish in these areas.”¹¹ For this purpose, the UK government has prepared its 2018 UK Fisheries Bill, which contains clauses on access to fisheries in UK waters.¹² So far, access to fisheries in the exclusive economic zone (EEZ) of up to 200 nm has received more public attention than access to fisheries in the territorial sea of up

february-says-no-10 (last visited 17 October 2019). For discussion of the content of the latest draft withdrawal agreement, see Section D.

⁸ Letter from Theresa May to Donald Tusk (5 April 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793058/PM_letter_to_His_Excellency_Mr_Donald_Tusk__1_.pdf (last visited 17 October 2019).

⁹ European Council Decision Taken in Agreement with the United Kingdom, Extending the Period under Article 50 TEU (10 April 2019), available at <https://www.consilium.europa.eu/en/press/press-releases/2019/04/10/20190410-european-council-decision-on-extension/> (last visited 17 October 2019). This also required an updated of the latest draft withdrawal agreement. See Council Decision XT 21027/19 of 11 April 2019, available at <https://data.consilium.europa.eu/doc/document/XT-21027-2019-INIT/en/pdf> (last visited 17 October 2019).

¹⁰ The Court of Justice of the European Union ruled on 10 December 2018 that the UK could in principle unilaterally revoke its notification of withdrawal before the withdrawal period has lapsed. See *Wightman v. Secretary of State for Exiting the European Union*, Case C-621/18, Judgment of 10 December 2018, para. 75, available at <http://curia.europa.eu/juris/documents.jsf?num=C-621/18> (last visited 17 October 2019). For discussion, see, e.g., O. Garner, ‘Case C-621/18, Wightman v. Secretary of State for Exiting the European Union: The European Court of Justice Confirms that Article 50 Notification Can be Unilaterally Revoked’, *European Law Blog* (11 December 2018), available at <https://europeanlawblog.eu/2018/12/11/case-c-621-18-wightman-v-secretary-of-state-for-exiting-the-european-union-the-european-court-of-justice-confirms-that-article-50-notification-can-be-unilaterally-revoked/> (last visited 17 October 2019).

¹¹ ‘UK White Paper’, *supra* note 5, 16.

¹² Clauses 7 and 8 of the Fisheries Bill 2017–19, 25 October 2018, available at <https://services.parliament.uk/Bills/2017-19/fisheries/documents.html> (last visited 17 October 2019). See further Department for Environment, Farming and Rural Affairs, ‘Explanatory Notes to UK Fisheries Bill’, 25 October 2018, 18, available at <https://services.parliament.uk/Bills/2017-19/fisheries/documents.html> (last visited 17 October 2019).

to 12 nm.¹³ However, this article is exclusively devoted to territorial sea fisheries access as it remains important particularly for artisanal fishing by smaller vessels, and as the relevant legal questions have not been subject to in-depth scholarly discussion. Under Article 2(1) of the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS),¹⁴ coastal States enjoy sovereignty in their territorial sea, which also entails exclusive jurisdiction over, and exclusive rights to, marine living resources. These rights include the right to grant other States or those States' nationals access to fisheries in their territorial sea. Where they have done so through the conclusion of bilateral or multilateral fisheries access agreements, or where historic fishing rights of other States exist, coastal States are under an obligation to respect these access rights.

This article approaches the question of post-Brexit access of EU Member States to the UK's territorial sea fisheries by first discussing the pre-Brexit legal *status quo* under the CFP. This analysis provides insights on which access arrangements would be terminated by the UK's withdrawal from the EU in the absence of a future agreement that provides otherwise. Second, this article discusses the international legal framework for access to territorial sea fisheries that would apply in such a "no-deal" Brexit scenario. As Part II of UNCLOS does not contain provisions on fisheries access, this analysis focuses on the role of the LFC, bilateral voisinage agreements between the UK and EU Member States, potential historic fishing rights of EU Member States in the UK's territorial sea, and potential historic rights of these States derived from royal privileges. Given that all of these potential legal sources of fisheries access are best understood in light of their historical context, which in some cases dates back as far as the 1600s, this part of the article devotes significant attention to tracing their historical origins. Next, this article discusses the relevance of the transitional arrangements contained in the latest draft withdrawal agreement of 2018, which was not, however, adopted by the UK. Nonetheless, the agreement sheds some light on potential transitional solutions which, at the time of writing, cannot be excluded entirely. Finally, this article offers some conclusions as to the applicable legal framework for access of EU Member States to the UK's

¹³ For a detailed analysis of post-Brexit access to EEZ fisheries between the UK and the EU, see V. J. Schatz, 'The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union', *International Journal of Marine and Coastal Law* (2019, pre-published), available at <https://doi.org/10.1163/15718085-23343067> (last visited 16 October 2019) [Post-Brexit EEZ Fisheries Access].

¹⁴ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3.

territorial sea fisheries absent a new fisheries agreement between the EU and the UK, and potential ways to proceed in the future regulation of this issue.

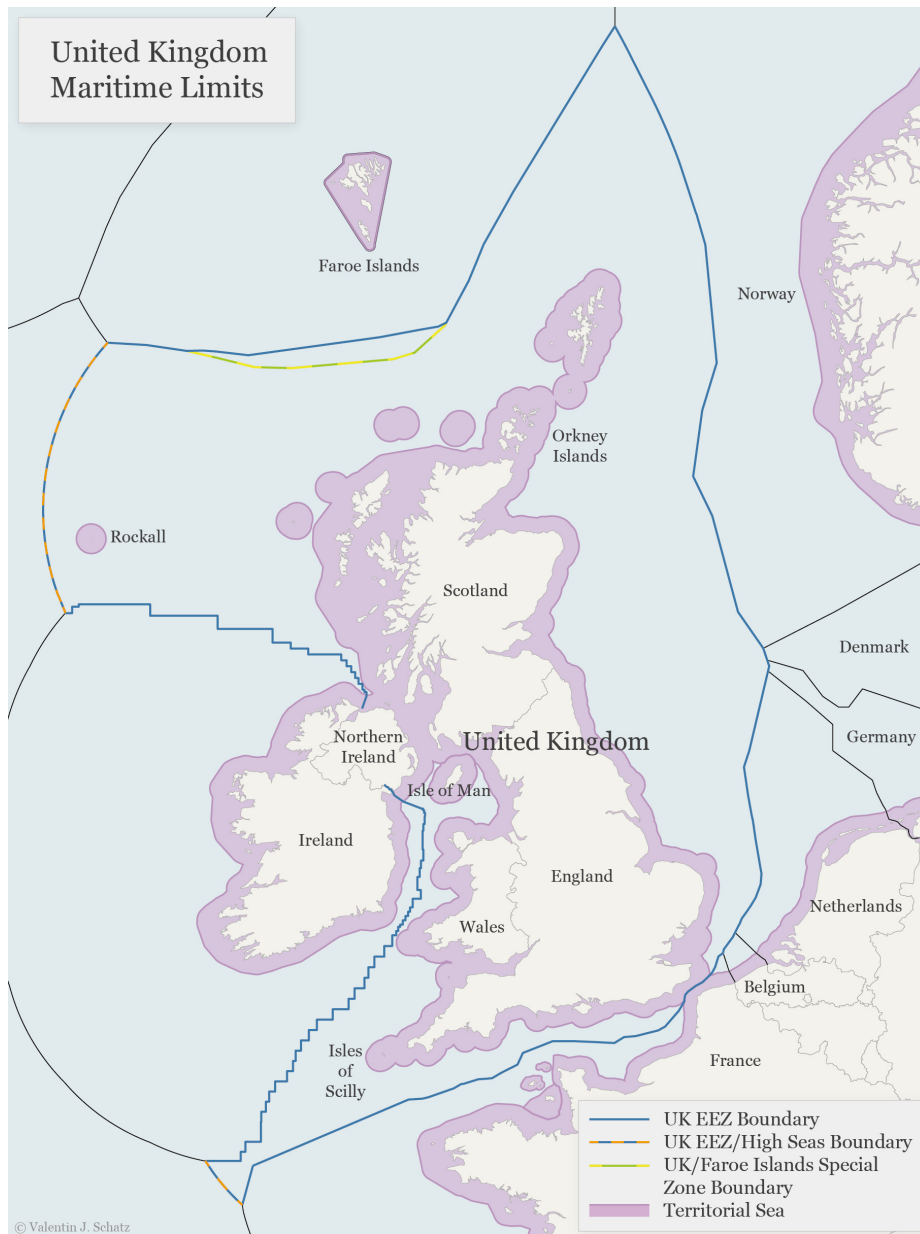


Figure 1: United Kingdom Maritime Limits in the North Sea (for purposes of illustration only)

B. Access to Fisheries Within 12 nm Under the CFP

As mentioned, the coastal State's sovereignty in the territorial sea naturally includes the right to grant other States access to the fisheries located therein. Usually, such access is granted on a consensual basis by way of fisheries access agreements, which provide for detailed rules on the extent of access granted and any applicable conditions. As shown below, consensual access arrangements applicable in the territorial sea have been incorporated into EU law on the basis of the CFP.¹⁵ The UK has been subject to these access arrangements since its accession to the EU on 1 January 1973. The following section first introduces the most fundamental rule concerning intra-EU fisheries access under the CFP, namely the principle of equal access, before discussing the rules for access within 12 nm, which are excluded from the application of the principle of equal access.

I. The Principle of Equal Access and the Allocation of Fishing Opportunities

Article 5 and Annex I of the Basic CFP Framework Regulation¹⁶ provide the legal framework for intra-EU fisheries access under the CFP. Pursuant to Article 5(1) of the Basic CFP Framework Regulation "Union fishing vessels shall have equal access to waters and resources in all Union waters".¹⁷ This rule is commonly referred to as the principle of equal access. Article 5(1) of the Basic

¹⁵ The legal basis for the CFP may be found in Art. 3(1)(d) of the *Treaty on the Functioning of the European Union*, 2012, OJ C 326/47 [26.10. 2012 TFEU], which provides for an exclusive competence of the EU in the area of "the conservation of marine biological resources under the common fisheries policy". The legal basis and procedures for the realization of the CFP on the basis of this exclusive competence are laid down in Arts. 38(1), 43(2) and 43(3) TFEU.

¹⁶ EP and Council Regulation 1380/2013 of 11 December 2013, OJ L 354/22 [CFP Framework Regulation].

¹⁷ Art. 4(1) of the Basic CFP Framework Regulation defines "Union waters" as "the waters under the sovereignty or jurisdiction of the Member States, with the exception of the waters adjacent to the territories listed in Annex II to the [TFEU]". In accordance with Art. 355(2) TFEU, Annex II of the TFEU lists overseas countries and territories to which the special provisions of Part IV of the TFEU on "association of the overseas countries and territories" apply. With respect to the UK, these are Anguilla, Cayman Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda. Art. 355(2) TFEU also states that the TEU and TFEU do "not apply to those overseas countries and territories having special relations with the [UK] which are not included in [Annex II]".

CFP Framework Regulation further provides that equal access is “subject to the measures adopted under Part III”, which include “measures on the fixing and allocation of fishing opportunities”.¹⁸ Article 16(1) of the Basic CFP Framework Regulation provides that the allocation of fishing opportunities is conducted on the basis of either the principle of relative stability for existing fisheries or on EU Member State interests for new fisheries.¹⁹ The detailed rules concerning the allocation of fishing opportunities are not discussed here because some parts of the Union waters, in particular those within 12 nm, are exempt from the application of the principle of equal access. The rules applicable in these waters are addressed in the next section.

II. Exception to the Principle of Equal Access for Waters Within 12 nm

Certain parts of EU waters can be excluded from the application of the principle of equal access. For the present purposes, the only relevant exception is that of Article 5(2) of the Basic CFP Framework Regulation, under which EU Member States may restrict access to fisheries located in their waters within 12 nm to fishing vessels “that traditionally fish in those waters from ports on the adjacent coast”.²⁰ Such restrictions require notification of, but not authorization by, the EU Commission.²¹ Under the current Basic CFP Framework Regulation, the right of EU Member States to restrict fisheries access to their waters of up to 12 nm will expire by 31 December 2022. However, nothing would prevent EU Member States from agreeing on an extension of this right for another period of ten years, as has been the case for the past decades.²²

With regard to Akrotiri and Dhekelia in Cyprus and with regard to the Channel Islands and the Isle of Man, see Art. 355(5)(b) TFEU.

¹⁸ Art. 7(1)(e) of the Basic CFP Framework Regulation.

¹⁹ Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13, with further references.

²⁰ Another exception is laid down in Art. 5(3) of the Basic CFP Framework Regulation. This exception addresses coastal waters up to 100 nm of “Union outermost regions” of EU Member States expressly listed in Art. 349(1) TFEU. None of these Union outermost regions belong to the UK.

²¹ Art. 5(2) of the CFP Framework Regulation.

²² See Art. 6 and Annex I of Council Regulation (EEC) 3760/92 of 20 December 1992, OJ L389/1, establishing a Community system for fisheries and aquaculture; Art. 17(2) and Annex I of Council Regulation (EC) 2371/2002 of 20 December 2002, OJ L358/59 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

Parts of the structure and logic of Article 5(2) of the Basic CFP Framework Regulation reflect provisions of the LFC.²³ In particular, the scope of Article 5(2) of the Basic CFP Framework Regulation is defined in spatial terms and not by reference to the classification of the relevant waters under the international law of the sea. The wording “waters [...] under their sovereignty *or jurisdiction*”²⁴ in Article 5(2) of the Basic CFP Framework Regulation clarifies that the principle of equal access would also apply if an EU Member State claimed a territorial sea of less than 12 nm, but still claimed an EEZ or a similar maritime zone such as an exclusive fisheries zone (EFZ) that involves exclusive fisheries jurisdiction. The original conception of the 12 nm fisheries limit was borrowed from the LFC, not from the limit of the territorial sea at the time.²⁵ Nowadays, most waters within 12 nm of EU Member States have been claimed as territorial sea. However, since a territorial sea of 12 nm does not exist *ipso iure* and *ab initio*, but rather has to be actively claimed by the coastal State,²⁶ full coverage of waters within 12 nm by territorial seas is not guaranteed. Indeed, until 2019, the UK had not claimed a full territorial sea for some of its territories, including some of the Channel Islands belonging to the Bailiwick of Guernsey. The UK extended the territorial sea of the islands belonging to the Bailiwick of Guernsey from 3 to 12 nm with effect on 23 July 2019.²⁷ Thus, the wording of Article 5(2) of the Basic CFP Framework Regulation ensures consistent application of the exception to the principle of equal access.

EU Member States may only restrict fishing in their waters within 12 nm under Article 5(2) of the Basic CFP Framework Regulation to fishing vessels “that traditionally fish in those waters from ports on the adjacent coast”.²⁸ Thus,

²³ See Section C. I.

²⁴ Emphasis added.

²⁵ K. van den Bossche, ‘EU Enlargements and Fisheries: A Legal Analysis: Steps Towards the Re-Nationalisation of EU Maritime Waters’, 64 *Jurisprudencija* (2005) 72, 124, 128. See also Section C. I.

²⁶ UNCLOS, Art. 3 . See also R. Barnes, ‘Article 2’, in A. Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS) – A Commentary* (2017), para. 15.

²⁷ Government of the States of Guernsey, ‘Bailiwick of Guernsey’s Territorial Seas Will be Extended on 23 July 2019’, available at <https://www.gov.gg/article/172632/Bailiwick-of-Guernseys-territorial-seas-will-be-extended-on-23-July-2019>. See Figure 2 below.

²⁸ This is similar, but not identical, to Art. 4(1) of the first Basic CFP Framework Regulation of 1970, which allowed an identical restriction of fishing “to the local population of the coastal regions concerned if that population depends primarily on inshore fishing”. In fact, the blueprint for this formulation may be found in Art. 100(1) of the 1972 Accession Treaty, which allowed restrictions of fishing “to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area”. But see A. Proelß,

the provision lacks a reference to “nationals” of the coastal State and at least in theory also includes fishers of other EU Member States.²⁹ In order to be a beneficiary of this provision, fishing vessels must fulfil two requirements. First, they must have fished traditionally in those waters – whatever that may mean.³⁰ Second, they must have done so from ports on the adjacent coast, which – again – is rather ambiguous wording.³¹

It has been suggested that this wording covers historic fishing rights of other EU Member States.³² However, Article 5(2) of the Basic CFP Framework Regulation contains an independent source of fisheries access under EU law for fishing vessels of other EU Member States if both requirements are fulfilled. The threshold is below that of historic fishing rights *sensu stricto* as it only requires traditional fishing activity, but not that historic fishing rights under public international law have accrued as a result of this traditional fishing activity.³³ On the other hand, the geographical requirement of Article 5(2) of the Basic CFP Framework Regulation is narrower in that the provision does not apply to traditional fishing activity from ports not located adjacent to the relevant waters regardless of whether this traditional fishing activity has given rise to historic fishing rights *sensu stricto*. In any event, it would be difficult to establish the existence of any historic fishing rights among EU Member States nowadays.³⁴ In practice, historic fishing interests of nationals of other EU Member States are protected through the “exceptions from the exception” to the principle of equal access addressed subsequently.

Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks (2004), 377, who appears to attribute the background of the provision to Art. 100(2)-(3) of the 1972 Accession Treaty. However, these provisions of the 1972 Accession Treaty constitute the blueprint for the exceptions to Art. 5(2) of the Basic CFP Framework Regulation discussed below. For an overview of the negotiation history of this provision, see Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 108–141.

²⁹ Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 132: “non-national principle”; R. R. Churchill, *EEC Fisheries Law* (1987), 125 [EEC Fisheries Law]; van den Bossche, ‘EU Enlargements and Fisheries: A Legal Analysis: Steps Towards the Re-Nationalisation of EU Maritime Waters’, *supra* note 25, 128.

³⁰ For an attempt of an interpretation, see Churchill, *EEC Fisheries Law*, *supra* note 29, 135.

³¹ *Ibid.*, 135–136, who comes to the conclusion that the original wording of this provision (“that geographical coastal area”) in Art. 100(1) of the 1972 Accession Treaty may in certain circumstances also include nationals of other EU Member States.

³² Proelß, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks*, *supra* note 28, 377–378.

³³ For a discussion of historic fishing rights in the present context, see Section C. III.

³⁴ Proelß, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks*, *supra* note 28, 377–378.

III. Exceptions to the Exception for Fisheries Within 12 nm

The exception for waters within 12 nm under Article 5(2) of the Basic CFP Framework Regulation is not absolute. There are two “exceptions from the exception”.³⁵ First, an exclusion of waters up to 12 nm from the application of the principle of equal access is “without prejudice to [...] the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned” (hereinafter the “Annex I exception”).³⁶ This exception reflects access arrangements contained in Article 3 LFC and, therefore, applies to the belt between 6-12 nm.³⁷ Second, an exclusion of waters within 12 nm from the application of the principle of equal access is “without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States” (hereinafter the “voisinage exception”).³⁸ This exception is inspired by Article 9(2) LFC³⁹ and applies to the belt between 0-6 nm from the coast. The following two sections address the relevance of each of these exceptions with respect to access to fisheries in the UK’s territorial sea.

1. Arrangements Under Article 5(2) and Annex I of the Basic CFP Framework Regulation

Many of the fisheries access arrangements under Article 5(2) in conjunction with Annex I of the Basic CFP Framework Regulation, which apply to the belt between 6-12 nm,⁴⁰ have their origin in access previously accorded under Article 3 LFC.⁴¹ Due to the incorporation of these arrangements into Annex I of the Basic CFP Framework Regulation, their legal source is currently EU law rather than the LFC.⁴² This has not always been the case. Pursuant to

³⁵ These exceptions have their source in Art. 100(2)-(3) of the 1972 Accession Treaty.

³⁶ Art. 5(2) Basic CFP Framework Regulation.

³⁷ On this, see R. Steiling, *Das Seefischereirecht der Europäischen Gemeinschaften* (1989), 91; Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 135 and 165–166. See also Section C. I.

³⁸ Art. 5(2) Basic CFP Framework Regulation.

³⁹ See also Section C. I.

⁴⁰ Churchill, *EEC Fisheries Law*, *supra* note 29, 137.

⁴¹ See also Section C. I.

⁴² R. R. Churchill, ‘Possible EU Fishery Rights in UK Waters and Possible UK Fishery Rights in EU Waters Post-Brexit, An Opinion Prepared for the Scottish Fishermen’s

Art. 100(2)-(3) of the 1972 *Accession Treaty*, the access provisions of the CFP did not prejudice pre-existing special fishing rights within 12 nm. Therefore, at this point in time, the LFC was still the actual source of the access rights in question.⁴³

There are also arrangements under Annex I of the Basic CFP Framework Regulation which have origins other than the LFC.⁴⁴ However, this last category of access arrangements is not relevant in the present context. The UK has granted five EU Member States fisheries access to certain areas of the UK's waters within 6-12 nm under Article 5(2) in conjunction with Annex I of the Basic CFP Framework Regulation: Belgium, France, Germany, Ireland, and the Netherlands.⁴⁵ Four of these States have in turn granted the UK fisheries access to certain parts of their waters within the 6-12 nm belt: France, Germany, Ireland, and the Netherlands.⁴⁶

Federation' (2016), 5, available at <http://www.sff.co.uk/wp-content/uploads/2017/03/Opinion-for-SFF-2016.pdf> (last visited 17 October 2019) [Possible Fishery Rights in EU Waters Post Brexit]; V. J. Schatz, 'Brexit and Fisheries Access: Some Reflections on the UK's Denunciation of the 1964 London Fisheries Convention', *EJIL: Talk! – Blog of the European Journal of International Law* (18 July 2017), available at <http://www.ejiltalk.org/brexit-and-fisheries-access-some-reflections-on-the-uks-denunciation-of-the-1964-london-fisheries-convention/> (last visited 17 October 2019) [Brexit and Fisheries Access]; Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13. But see T. Appleby & J. Harrison, 'Brexit and the Future of Scottish Fisheries: Key Legal Issues in a Changing Regulatory Landscape', *25 Journal of Water Law* (2017) 3, 124, 126; J. Phillipson & D. Symes, 'A Sea of Troubles: Brexit and the Fisheries Question', *90 Marine Policy* (2018), 168, 170.

⁴³ Cf. Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 136-137.

⁴⁴ Churchill, *EEC Fisheries Law*, *supra* note 29, 137 gives the example of access to Germany's coastal waters, which had not declared a 12 nm EFZ under the LFC. A modern day example would be the reciprocal access arrangement between Croatia and Slovenia, which "shall apply from the full implementation of the arbitration award resulting from the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed in Stockholm on 4 November 2009". This arrangement was incorporated into Annex I as a result of the EU's role in brokering said arbitration agreement in light of Croatia's accession to the EU. It aims to ensure that any maritime delimitation undertaken by the arbitral tribunal in that case does not result in any significant displacement and disturbance of existing fisheries in the area.

⁴⁵ Table 1. See also 'Explanatory Notes to UK Fisheries Bill', *supra* note 12, 6-7.

⁴⁶ Table 2.

Table 1: Access to the waters of the United Kingdom within 6-12 nm

State	Description
Belgium	unlimited access to five coastal areas in which demersal species and/or herring may be fished
France	unlimited access to a variety of (and in some cases all) species in fifteen coastal areas
Germany	unlimited access to herring (and in one case mackerel) in six coastal areas
Ireland	unlimited access to demersal species and nephrops in two coastal areas in the Irish Sea and off the west coast of Scotland
The Netherlands	unlimited access to herring in three coastal areas

Table 2: Access of the United Kingdom to EU Member State waters within 6-12 nm

State	Description
France	unlimited access to herring in a coastal area adjacent to the Belgian/French border
Germany	unlimited access to cod and plaice in the waters around Heligoland
Ireland	unlimited access to demersal species, herring and mackerel in one coastal area in the South of Ireland and unlimited access to these species as well as nephrops and scallops along the entire east coast of Ireland
The Netherlands	unlimited access to demersal species in a coastal area west to the Netherlands/German border

2. The “Voisinage Exception” Under Article 5(2) of the Basic CFP Framework Regulation

As for the “voisinage exception”, Article 5(2) of the Basic CFP Framework Regulation does not provide a definition of the term “existing neighbourhood relations between Member States”. Nonetheless, the wording of the exception points towards so-called “voisinage agreements” between EU Member States,⁴⁷

⁴⁷ With respect to Art. 100(2)-(3) of the 1972 Accession Treaty, which is the source of this exception, Churchill, *EEC Fisheries Law*, *supra* note 29, 133 and Steiling, *Das*

which are commonly described as “reciprocity agreements, in that [they involve] an exchange of benefits of the same type between the two contracting States which each grant each other fishing rights in the zones subject to their respective jurisdictions.”⁴⁸ As the Basic CFP Framework Regulation neither prohibits nor incorporates “existing neighbourhood relations”, voisinage agreements between EU Member States arguably have continued to serve as the legal source of these fisheries access rights in their own right, with the “blessing” of the Basic CFP Framework Regulation. This distinguishes them from the access arrangements stemming from the LFC, which were incorporated into Annex I of the Basic CFP Framework Regulation. As the EU Commission does not maintain an official list of such voisinage agreements and has to rely on EU Member States to notify existing agreements,⁴⁹ it is difficult to identify all agreements in force. In the present context, commentators have indicated that no voisinage agreements currently serve as a basis for fisheries access between the UK and EU Member States.⁵⁰ Upon closer inspection, however, there exist two voisinage agreements of the UK with France and Ireland, respectively.⁵¹

Seefischereirecht der Europäischen Gemeinschaften, *supra* note 37, 91 correctly note that it covers not only access arrangements under the LFC but also other agreements between EU Member States. See also W. Graf Vitzthum & S. Talmon, *Alles Fließt: Kulturgüterschutz und Innere Gewässer im Neuen Seerecht* (1998), 110 who mention rights arising from community law or treaty law. See also van den Bossche, ‘EU Enlargements and Fisheries: A Legal Analysis: Steps Towards the Re-Nationalisation of EU Maritime Waters’, *supra* note 25, 130 who expressly mentions existing neighbourhood relations. The exception for “existing neighbourhood relations” does not, however, include historic fishing rights as argued by Proelß, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks*, *supra* note 28, 377–378 with respect to the *Accession Treaty*, 1972, Art. 100(2)-(3). Neither its wording nor its drafting history reflect an intention to include historic fishing rights and there are no examples from EU Member State practice that would support such a view.

⁴⁸ *Filleting within the Gulf of St. Lawrence between Canada and France*, Award of the Arbitral Tribunal, 17 July 1986, XIX RIAA 225, para. 29. See further Section C. R. Symmons, ‘Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments’, 49 *Ocean Development & International Law* (2018) 79, 79–80.

⁴⁹ Personal communication of the author with an official of the EU Commission (DG Mare).

⁵⁰ Churchill, ‘Possible Fishery Rights in EU Waters Post Brexit’, *supra* note 42, 3.

⁵¹ See also ‘Explanatory Notes to UK Fisheries Bill’, *supra* note 12, 6.

a. The UK/France Voisinage Agreement

The current voisinage agreement between the UK and France was concluded in 2000 (hereinafter “*Granville Bay Agreement*”).⁵² The *Granville Bay Agreement* is unquestionably a treaty under public international law. It regulates access to fisheries off the coast of the British Channel Islands, specifically the Bailiwick of Guernsey (consisting of the islands of Guernsey, Alderney, and Sark) and the Bailiwick of Jersey (consisting of the island of Jersey and some smaller uninhabited islands), which enjoy a degree of autonomy under UK constitutional law.⁵³ The *Granville Bay Agreement* and its annexes establish a legally binding fisheries regime for the waters around the Channel Islands and set up a Joint Management Committee and a Joint Advisory Committee to facilitate implementation and further cooperation. It also provides for reciprocal fisheries access between the UK and France in its area of application, which includes the territorial sea of the Channel Islands (part of which constituted EFZs before July 2019).⁵⁴

The UK could perhaps terminate the *Granville Bay Agreement* to exclude French fishers from its territorial sea in the Channel.⁵⁵ However, such a move should be carefully considered for political reasons. In order to fully understand the political sensitivity and legal complexity of UK-France fisheries relations in the waters of the Channel Islands, it is useful to take a look at the historical origins of the *Granville Bay Agreement*. The Channel Islands have for a long time been subject to sovereignty, delimitation, and fisheries disputes between the UK and France.⁵⁶ The two States concluded various bilateral agreements regulating

⁵² *Agreement Between the United Kingdom of Great Britain and Northern Ireland and the French Republic Concerning Fishing in the Bay of Granville*, 4 July 2000, 2269 UNTS 87.

⁵³ D. H. Anderson & R. N. Carlton, ‘France-United Kingdom (Guernsey) (1992), Report Number 9-3(5)’, in C. Lathrop (ed.), *International Maritime Boundaries* (2016) 2471, 2472. See also ‘UK White Paper’, *supra* note 5, 22.

⁵⁴ Figure 2.

⁵⁵ Although Art. 10 *Granville Bay Agreement* does not expressly provide for procedures of termination, it also does not exclude a termination – and it might fall within one of the two categories of Art. 56(1) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT].

⁵⁶ For an account of early fisheries disputes between the UK and France in the Channel, see, e.g., T. W. Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters: With Special Reference to the Rights of the Fishing and the Naval Salute* (1911), 607-620 [The Sovereignty of the Sea].

fisheries and the limits of fisheries jurisdiction between 1839 and 1965.⁵⁷ The concrete reasons for the conclusion of the current voisinage agreement can be traced back to 1 September 1992, when the government of the UK authorized the authorities of the Bailiwick of Guernsey to exercise fisheries jurisdiction up to a limit of 12 nm from the baselines (compared to 3 nm prior to that date).⁵⁸ As the territorial sea of Guernsey remained at 3 nm at the time (it was extended to 12 nm in 2019), the extension to 12 nm concerned fisheries jurisdiction only (see Figure 2). As this affected local French fishers, existing fishing practices were formalized through a voisinage agreement between the UK and France concerning access to fisheries within a 12 nm limit in the waters in the vicinity of the Channel Islands, the French Coast of the Cotentin Peninsula, and the Schole Bank in 1992.⁵⁹ The preamble of the exchange of notes expressly adopts the language of the Basic CFP Framework Regulation and refers to “existing

⁵⁷ These include the following: *Convention Between Great Britain and France, for Defining and Regulating the Limits of the Exclusive Right of the Oyster and Other Fishery on the Coasts of Great Britain and of France*, 2 August 1839, 27 *British and Foreign State Papers* 983 (This treaty set up a special fisheries regime for the area. On its background and content, see Fulton, *The Sovereignty of the Sea*, *supra* note 56, 611–615.); *Declaration Between Great Britain and France, Approving the Fishery Regulations, 24 May 1843 for the Guidance of the Fishermen of Great Britain and of France in the Seas Lying Between the Coasts of the two Countries*, 23 June 1843, 31 *British and Foreign State Papers* 165 (establishing regulations for the special fisheries regime); *Agreement Regarding the Limits of French Fisheries in Granville Bay*, 20 December 1928, LXXXVI LNTS 429 (modification of details of the delimitation of the area to which the special regime applied); *Agreement Regarding Rights of Fishery in Areas of the Ecrehos and Minquiers*, 30 January 1951, 121 UNTS 98 (establishing a special fisheries regime for the Minquiers and Ecrehos Islands); *Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning the Status of Previous Fisheries Agreements in Relation to the Fisheries Convention Opened for Signature in London from March 9 to April 10 1964*, 10 April 1964, 54 *UK Treaty Series* (This agreement provided for a continued application of the previous instruments despite the adoption of the LFC and expressly made use of the exception of Art. 10(d) LFC.); *Exchange of Notes Concerning the Question of the Habitual Rights of French Fishing Vessels Within British Fishery Limits*, 24 February 1965 (mentioned in the agreement of 2000, source unknown) (regulating details of French fishing rights under the special regime).

⁵⁸ Anderson & Carlton, ‘France-United Kingdom (Guernsey) (1992), Report Number 9-3(5)’, *supra* note 53, 2472.

⁵⁹ *Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning the Activities of Fishermen in the Vicinity of the Channel Islands and the French Coast of the Cotentin Peninsula and, in Particular, on the Schole Bank*, 10 July 1992, 66 *UK Treaty Series* [Exchange of Notes].

neighbourhood relations regarding activities by local coastal fishermen”.⁶⁰ Although French fisheries access to Schole Bank expired on 1 January 2010,⁶¹ reciprocal access to fisheries in the waters in the vicinity of the Channel Islands and the French coast of the Cotentin Peninsula remained in place.⁶² The new fishery limits were not, however, received well by French fishers. After the 1993 Cherbourg incident, which, *inter alia*, involved the abduction of UK enforcement officers by French fishers, the voisinage agreement of 1992 was modified.⁶³ In an additional 1994 exchange of notes, a *modus vivendi* without prejudice to legal positions was established in order “to ensure harmonious cohabitation between fishermen”.⁶⁴ In particular, fishing rights of French fishers were extended, or rather restored, in some areas not originally covered by the 1992 Exchange of Notes. These arrangements were subject to tacit renewal. Finally, France and the UK concluded the *Granville Bay Agreement* in 2000 in order “to review and modernise” the fisheries regime in the Bay of Granville established by the previous instruments adopted since 1839.⁶⁵ For that purpose, Article 9 *Granville Bay Agreement* terminated all previous instruments to the extent that they were still in force. It may be concluded that a unilateral termination of the *Granville Bay Agreement* by the UK would be lawful but might trigger significant protest by French fishers.⁶⁶

⁶⁰ Emphasis added.

⁶¹ *Exchange of Notes*, *supra* note 59, para. 2.

⁶² *Ibid.*, para. 3.

⁶³ S. Ward, O. Gillie & A. Gliniecki, ‘French Fishermen Strike Peace Deal With Guernsey: ‘Men in Suits and Ties’ Repudiate Agreement Made After Flotilla From Normandy Sails to Island Harbour for Talks’, *The Independent* (30 March 1993), available at www.independent.co.uk/news/french-fishermen-strike-peace-deal-with-guernsey-men-in-suits-and-ties-repudiate-agreement-made-1500747.html (last visited 17 October 2019).

⁶⁴ *Exchange of Notes Constituting an Agreement Regarding Activities by the Local Coastal Fishermen in the Vicinity of Guernsey and the French Coasts of the Cotentin Peninsula and of Brittany*, 16 August 1994, 1892 UNTS 343.

⁶⁵ *Agreement Between the United Kingdom of Great Britain and Northern Ireland and the French Republic Concerning Fishing in the Bay of Granville*, 4 July 2000, 2269 UNTS 87.

⁶⁶ This conclusion is supported by recent clashes between French and UK fishers in the Channel. See F. Harvey, ‘British Fishermen Attacked by French Boats in the Channel’, *The Guardian* (10 October 2012), available at www.theguardian.com/environment/2012/oct/10/british-fishermen-attacked-french-channel (last visited 17 October 2019).

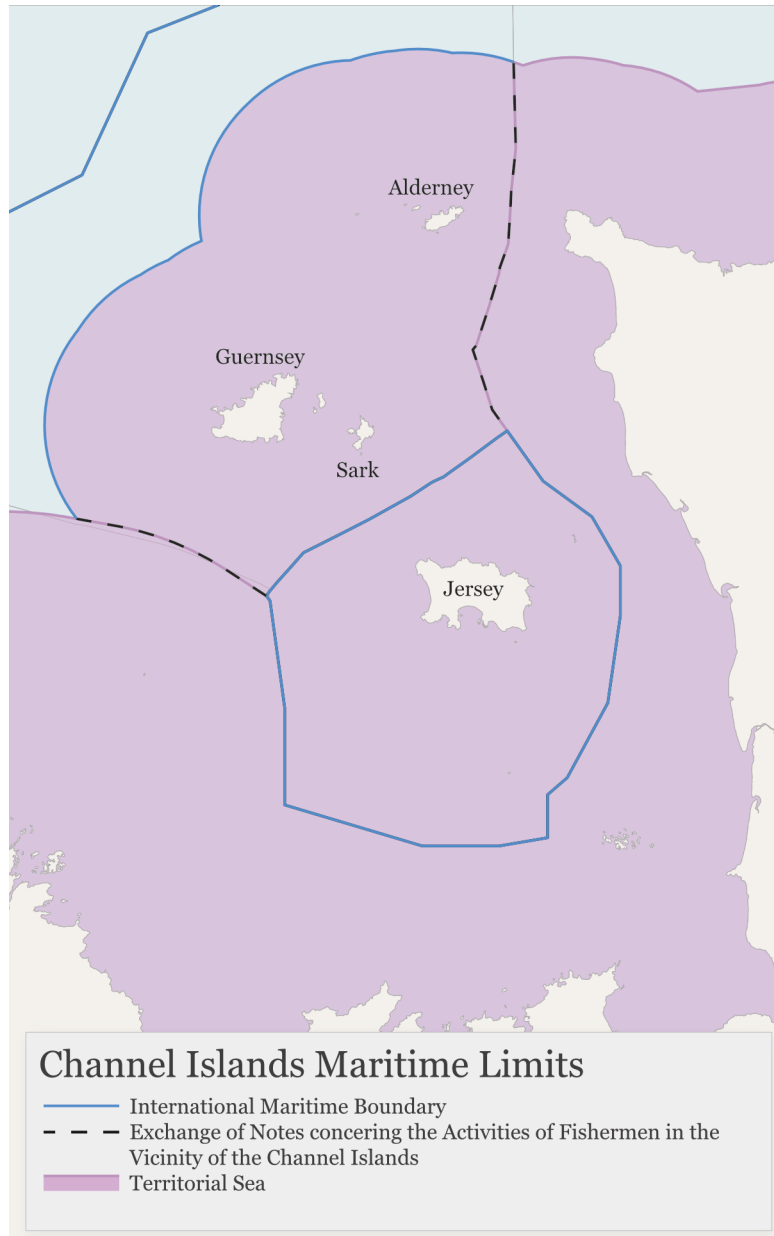


Figure 2: Channel Islands Maritime Limits (for purposes of illustration only)

b. The UK/Ireland Voisinage Agreement

The voisinage agreement between the UK and Ireland relates to fishing by Northern Irish and Irish fishers in the waters off the Irish and Northern Irish

coast. The voisinage agreement has not yet been incorporated into a formal treaty text and the text of the original agreement appears to be unavailable.⁶⁷ However, a vague exchange of letters from 1965 between the governments of the UK and Ireland regarding the continued implementation of the voisinage agreement after the conclusion of the LFC in 1964 is documented.⁶⁸ The voisinage agreement accords reciprocal fisheries access to the 0-6 nm belts (originally the 0-3 nm belts) of the waters of Northern Ireland and Ireland under a specific exception for voisinage agreements contained in Article 9(2) LFC.⁶⁹ The exchange of letters conveys that fisheries access for the UK is limited to “boats owned and operated by fishermen permanently resident in [Northern Ireland]”.⁷⁰ Furthermore, the exchange of letters conveys that the voisinage agreement allows for restrictions on vessel sizes at least insofar as such restrictions are applied on a non-discriminatory basis.⁷¹

Doubts have been expressed with respect to the voisinage agreement’s bindingness as a treaty under public international law rather than a mere “gentlemen’s agreement”.⁷² However, it would seem that “the right to fish [accorded under the voisinage agreement] to other Contracting Parties”, to use the words of Article 9(2) LFC, is not an undertaking without legal effect, and is opposable to the coastal State to some extent. For example, enforcement measures taken against vessels of the other party for fishing without license, despite the legality of fishing activities under the voisinage agreement, would arguably result in a breach of the voisinage agreement.

For some time, the future of the voisinage agreement was unclear. Four Irish fishers had challenged the legality under the Irish constitution of mussel

⁶⁷ C. R. Symmons, ‘The Sea Fishery Regime of the Irish Sea’, 4 *International Journal of Estuarine and Coastal Law* (1989) 192, 197 [Irish Sea Fishery Regime]; Symmons, ‘Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments’, *supra* note 48, 80.

⁶⁸ The text of the exchange of letters is reproduced in Supreme Court of Ireland, *Barlow & Ors v. Minister for Agriculture, Food and the Marine & Ors* (2016), IESC, para. 12 [Barlow & Ors].

⁶⁹ *Ibid.*, paras. 11 and 40. See also Section C. I.

⁷⁰ *Ibid.*, para. 12. See also House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’ (2018), Fourth Report of Session 2017–19, 36, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmniaf/878/878.pdf> (last visited 17 October 2019).

⁷¹ *Barlow & Ors*, *supra* note 68, para. 12.

⁷² *Ibid.*, para. 40; Symmons, ‘Irish Sea Fishery Regime’, *supra* note 67, 197. Compare also House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 36: “informal agreement”.

fishing by vessels from Northern Ireland under the voisinage agreement. As a result of this litigation, the Supreme Court of Ireland in its judgment of 2016 in the *Barlow Case* described the operation of the voisinage agreement in the following terms:

“For the last 50 years and, it seems likely, since the foundation of the State, fishermen resident in Northern Ireland have fished waters which, from time to time, have been designated as the territorial waters of the State. This fishing has been carried out with the knowledge and approval of the authorities here and, it appears in circumstances where reciprocal facilities were afforded to Irish fishermen in the waters adjoining the coastal area of Northern Ireland. This case raises the question of the legality of the practice of what may be described in general terms at this stage, as Northern Ireland fishermen, fishing in Irish territorial waters.”⁷³

In particular, fishers resident in Northern Ireland carried out bottom mussel fishing, which “involve[d] the collection of mussel seed at sea, and its transport to sheltered areas which have proved to be productive mussel beds, where the mussels can grow and where they can in due course be harvested.”⁷⁴ The Supreme Court found that “mussel harvesting is not, as yet controlled by the complex EU fishing regime” and that, therefore, the “dispute is to be determined by the provisions of domestic law”.⁷⁵ This finding was correct insofar as the mussel fishery within 12 nm is indeed not regulated by the fisheries access regime of the CFP. The Supreme Court found that the practice of mussel fishing under the voisinage agreement was unlawful, because Article 10 of the Irish Constitution required a law enacted by the Oireachtas for the exploitation of a natural resource such as the common mussel, and that no such law existed at present.⁷⁶

Of course, such a finding by a national court does not invalidate the voisinage agreement on the level of public international law. Nonetheless, vessels from Northern Ireland were no longer permitted under Irish law to fish in the

⁷³ *Barlow & Ors, supra* note 68, para. 2.

⁷⁴ *Ibid.*, para. 4.

⁷⁵ *Ibid.*, para. 3.

⁷⁶ *Ibid.*, paras. 67 and 73.

0-6 nm belt of the Irish territorial sea as a result of the judgment.⁷⁷ Irish vessels, on the other hand, continued to have access to Northern Irish waters. Thereafter, the Irish government attempted to pass legislation, namely the *Sea-Fisheries (Amendment) Bill 2017*,⁷⁸ to reinstate the terms of the voisinage agreement under Irish law.⁷⁹ However, the new legislation initially did not pass the committee stage at the Oireachtas due to strong political opposition.⁸⁰ Pending resolution of this asymmetric situation, the UK government emphasized that the UK “will not accept unequal application of the agreement indefinitely”.⁸¹ In a report published on 11 September 2018, Northern Ireland Affairs Committee of the House of Commons issued the following recommendation:

“If the Irish Government does not give a clear commitment to pass, within 6 months of publication of this report, legislation which restores reciprocal access, the Government must discontinue access to UK waters for Irish vessels from 30 March 2019. If the Irish Government does pass legislation to reinstate the Voisinage Arrangement, then the UK Government should consider whether the arrangement should also be put on statutory footing in UK law.”⁸²

The continuing situation of imbalance eventually led to considerable tensions between the UK and Ireland. In February 2019, the Irish navy impounded two fishing vessels from Northern Ireland for fishing illegally in the 0-6 nm belt of the Irish territorial sea, causing a diplomatic row.⁸³ The incident

⁷⁷ House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 36.

⁷⁸ Sea-Fisheries (Amendment) Bill (2017), available <https://www.oireachtas.ie/en/bills/bill/2017/19/> (last visited 17 October 2019).

⁷⁹ Symmons, ‘Recent Developments in Ireland: The Voisinage Doctrine and Irish Waters: Recent Judicial and Legislative Developments’, *supra* note 48, 81–82; House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 36–37.

⁸⁰ House of Commons, Northern Ireland Affairs Committee, ‘Brexit and Northern Ireland: Fisheries’, *supra* note 70, 37; G. Ní Aodha, ‘Bill to Allow Northern Irish Boats to Fish off Ireland’s Coasts Approved by Dáil’, (28 March 2019), available at <https://www.thejournal.ie/sea-fisheries-bill-northern-ireland-4566007-Mar2019/> (last visited 17 October 2019).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ G. Moriarty, *et al.*, ‘DUP Calls for Answers as NI Fishing Boats Detained by Irish Navy’, *The Irish Times* (28 February 2019), available at <https://www.irishtimes.com/>

increased pressure on the Irish government, which eventually managed to pass the *Sea-Fisheries (Amendment) Bill* 2017 in April 2019.⁸⁴ In relevant part, the *Sea-Fisheries (Amendment) Act* 2019 reads:

“A person who is on board a sea-fishing boat owned and operated in Northern Ireland may fish or attempt to fish while the boat is within the area between 0 and 6 nautical miles as measured from the baseline [...] if, at that time, both the person and the boat comply with any obligation specified in subsection (3) which would apply in the same circumstances if the boat were an Irish sea-fishing boat.”⁸⁵

In principle, Ireland or the UK could terminate the voisinage agreement in order to close their fisheries within 0-6 nm off the Irish coast. However, like the *Granville Bay Agreement* with France, the voisinage agreement between the UK and Ireland should probably not be terminated without due consideration for the sensitive political context. Indeed, the judgment of the Supreme Court expressed concerns that

“[...] at this stage of North-South relations, and indeed the relations between Ireland and the UK more generally, that the Court could find itself adjudicating upon a claim with an avowed object of invalidating an important area of cooperation between the jurisdictions.”⁸⁶

news/ireland/irish-news/dup-calls-for-answers-as-ni-fishing-boats-detained-by-irish-navy-1.3810224 (last visited 17 October 2019); D. Young, ‘Government Seizure of Fishing Boats ‘Heavy Handed’’, *The Times* (1 March 2019), available at <https://www.thetimes.co.uk/article/government-seizure-of-fishing-boats-heavy-handed-l699jdw9k> (last visited 17 October 2019); C. Macauley, ‘Fishermen ‘do not deserve conviction’ for Irish waters breach’, *BBC News* (1 March 2019), available at <https://www.bbc.com/news/world-europe-47413901> (last visited 17 October 2019).

⁸⁴ G. Ní Aodha, ‘Government Finally Wins Battle to Allow NI Boats to Fish Along Ireland’s Coasts - So What Does it Mean?’, (7 April 2019), available at <https://www.thejournal.ie/northern-irish-boats-voisinage-explainer-4579094-Apr2019/> (last visited 17 October 2019).

⁸⁵ Sec. 10(2) of the *Sea-Fisheries (Amendment) Act* 2019, available at <https://data.oireachtas.ie/ie/oireachtas/act/2019/9/eng/enacted/a0919.pdf> (last visited 17 October 2019).

⁸⁶ See *Barlow & Ors*, *supra* note 68, para. 28.

IV. Relevance of the Freedom of Establishment for Access to Fisheries in the Territorial Sea

Under EU law, access to the UK's territorial sea fisheries is also indirectly affected by rules that do not form part of the CFP in the strict sense. Under Article 49 TFEU, nationals of EU Member States enjoy freedom of establishment in other EU Member States. This freedom also applies to the establishment of fishing companies in the UK that are owned and operated by nationals or corporations of another EU Member State, and the acquisition of UK fishing vessels by such companies.⁸⁷ Therefore, the freedom of establishment in principle makes it possible for nationals of other EU Member States to access fishing opportunities reserved for, or allocated to, the UK,⁸⁸ including within the territorial sea.

The UK's current requirements for the registration of fishing vessels, which were softened in order to comply with the freedom of establishment,⁸⁹ have attracted considerable investment of other EU Member States. This is of particular relevance for territorial sea fisheries because they can be excepted from the principle of equal access and, therefore, the access arrangements in Annex I of the Basic CFP Framework Regulation and the existing voisinage agreements are the only avenues of fisheries access. The issue is also relevant in the context of the UK's voisinage agreements themselves as not all of these agreements necessarily provide for sufficiently strict requirements for vessels to make use of the access rights granted. For example, EU Member States other than Ireland are able to make use of the UK-Ireland voisinage agreement.⁹⁰

⁸⁷ See discussion by J. M. Sobrino Heredia, 'Legal Framework for Governance', in European Parliament, Directorate General for Internal Policies (ed.), *Research for PECH Committee: Common Fisheries Policy and BREXIT* (2017), available at [www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU\(2017\)601981_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/601981/IPOL_STU(2017)601981_EN.pdf) (last visited 17 October 2019), 18–20; House of Lords, European Union Committee, 'Brexit: Fisheries, 8th Report of Session 2016–17' (2016), 17–18, available at <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/78/78.pdf> (last visited 17 October 2019); Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13.

⁸⁸ Sobrino Heredia, 'Legal Framework for Governance', *supra* note 87, 18–20; House of Lords, 'Brexit: Fisheries, 8th Report of Session 2016–17', *supra* note 87, 17–18; Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13.

⁸⁹ Insofar as the UK has in the past imposed strict requirements for the ownership of fishing vessels through the 1988 Merchant Shipping Act, this legislation has been held to be in conflict with the freedom of establishment by the European Court of Justice. See R. Churchill & D. Owen, *The EC Common Fisheries Policy* (2010), 164–166 and 202–210.

⁹⁰ This was also highlighted in *Barlow & Ors*, *supra* note 68, para. 6.

Unless a future agreement between the UK and the EU provides otherwise, the UK's withdrawal from the EU will have the effect of removing the freedom of establishment in its current form for the UK and thus allow it to (re)impose stricter requirements for fishing vessel registration.⁹¹

V. Impact of Brexit

Post-Brexit, the entitlements to fisheries access under Article 5(2) in conjunction with Annex I of the Basic CFP Framework Regulation will no longer apply to the UK. The same is true of the application of the freedom of establishment under EU law unless a future trade agreement between the EU and the UK continues its application. On the other hand, fisheries access based on the voisinage agreements preserved by Article 5(2) of the Basic CFP Framework Regulation is not affected by Brexit. A guidance issued by the UK government acknowledges that although fisheries access arrangements under the CFP would cease to apply, there might be continued access under “any existing agreements relating to territorial waters”.⁹² Thus, the UK's withdrawal from the EU will not affect these agreements unless the UK chooses to terminate them under their own terms. Whether a termination of either of these two voisinage agreements is politically desirable, however, is a question that deserves careful consideration in light of the political sensitivity of their historical background. In addition to the voisinage arrangements, fisheries access arrangements stemming from treaties or customary international law that are valid independently of the CFP and EU law may provide legal bases for access to fisheries in the UK's territorial sea post-Brexit. All potential sources of fisheries access to the UK's territorial sea post-Brexit are analysed in the following section (C.).

⁹¹ Sobrino Heredia, ‘Legal Framework for Governance’, *supra* note 87, 19–20; ‘UK White Paper’, *supra* note 5, 27; Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13. Under the international law of the sea, the regulation of vessel registration, including that of fishing vessels, falls within the competence and discretion of the flag State. See Art. 91(1) UNCLOS; *The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ITLOS Case No. 2, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf (last visited 17 October 2019); J. Harrison & E. Morgera, ‘Article 62’, in Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS) – A Commentary*, *supra* note 26, para. 7.

⁹² UK No-Deal-Guidance, available at <https://www.gov.uk/guidance/the-fisheries-sector-and-preparing-for-eu-exit> (last visited 17 October 2019).

C. Post-Brexit Fisheries Access to Waters Within 12 nm

As far as fisheries access to coastal State waters of up to 12 nm⁹³ is concerned, Part II of UNCLOS does not contain express rules for fisheries access. However, UNCLOS also does not prevent States from concluding bilateral and multilateral fisheries access agreements, which may contain relevant rules. In this respect, the prospect of Brexit has brought back to the stage one of the oldest European fisheries access agreements, namely the LFC (C. I.). In addition, the UK's *voisinage* agreements with Ireland and France are valid sources of fisheries access rights under public international law independently of the Basic CFP Framework Regulation (C. II.). Besides these treaties, the question of historic fishing rights in the waters of the UK and neighbouring EU Member States deserves attention (C. III.). For the sake of completeness, and distinct from historic fishing rights, it is also justified to briefly address the issue of fishing rights derived from royal privileges (C. IV.).

I. The 1964 London Fisheries Convention

The prospect of the UK's withdrawal from the EU initially triggered discussion as to whether the LFC would be relevant for reciprocal fisheries access between the UK and some EU Member States after the CFP ceases to apply to the UK.⁹⁴ In order to address this issue, the following discussion begins with an introduction to the historical background of the LFC and its content before it turns to the role of the LFC after the establishment of the CFP and the UK's withdrawal from the LFC.

1. Historical Context and Content of the LFC⁹⁵

Originally, the LFC was a milestone in the gradual extension of coastal State fisheries jurisdiction. The parties to the LFC reciprocally recognized each other's right to claim an exclusive fishery zone (EFZ) of up to 12 nm.⁹⁶ The LFC recognizes the right of coastal States to exclusive jurisdiction in fisheries matters

⁹³ In most but not all areas, EU Member States have declared full territorial seas of 12 nm.

⁹⁴ On this discussion, see Churchill, 'Possible Fishery Rights in EU Waters Post Brexit', *supra* note 42, 3–12; Schatz, 'Brexit and Fisheries Access', *supra* note 42.

⁹⁵ On this, see Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 75–78.

⁹⁶ Arts. 1(1), 2 and 3 LFC. For a detailed discussion of the contribution of the LFC specifically to the gradual extension of coastal State fisheries jurisdiction, see V. J. Schatz, 'The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone: A Historical Perspective', 5 *Journal of Territorial and Maritime Studies*

within 12 nm.⁹⁷ In the belt between 6 and 12 nm, however, the coastal State's exclusive fisheries jurisdiction is qualified by a right to fish of the other parties to the LFC "the fishing vessels of which have habitually fished in that belt between 1st January 1953 and 31st December 1962."⁹⁸ This was a remarkable development in the 1960s because only a territorial sea of up to 3 nm was then firmly established under public international law and claims to a broader territorial sea (or a functional zone such as an EFZ) remained contested.⁹⁹ Accordingly, the 1882 *International Convention for Regulating the Police of the North Sea Fisheries* (NSFP Convention),¹⁰⁰ which regulated fisheries in the high seas of the North Sea until the conclusion of the LFC, had only provided for exclusive fishing rights within a zone of 3 nm.¹⁰¹ Thus, the coastal States, which became parties to the LFC, traded the recognition of their EFZ claims for a right of other states to continued access to the 6-12 nm belt of the EFZ based on historical fishing practices between 1953 and 1962. In the belt between 0-6 nm, no permanent right of access was envisaged under the LFC, but transitional arrangements had to be made to grant access to fishers "who have habitually fished in [that] belt [...] to adapt themselves to their exclusion from that belt".¹⁰² In addition, the LFC allowed coastal States to grant permanent access to "other Contracting

(2018) 2, 5, 12–13 [The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone].

⁹⁷ Arts. 1(1), 2, 3 and 5 LFC.

⁹⁸ Arts. 1(1) and 3 LFC. Notably, Art. 1(2) in conjunction with Art. 14(1) LFC grants any State party to the LFC a right to maintain a fisheries access regime applicable before 9 March 1964 if that regime is more favorable than the access regime established by the LFC itself.

⁹⁹ D. W. van Lynden, 'The Convention on Conduct of Fishing Operations in the North Atlantic, London, 1967', 14 *Netherlands International Law Review* (1967) 3, 245, 246 and 250–251; Schatz, 'The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone', *supra* note 96, 10–11.

¹⁰⁰ *Convention for Regulating the Police of the North Sea Fisheries*, 6 May 1882, available at <https://iea.uoregon.edu/treaty-text/1882-policenorthseasfisheryentxt> (last visited 17 October 2019) [NSFP Convention].

¹⁰¹ See Art. II NSFP Convention. On the historical background of the failure of the NSFP Convention, see Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 69–75.

¹⁰² Art. 9(1) LFC. See *Agreement as to Transitional Rights Between Ireland and Belgium, the Federal Republic of Germany, France, the Netherlands, Spain and the United Kingdom of Great Britain and Northern Ireland*, 9 March 1964, 581 UNTS 89; *Agreement as to Transitional Rights between the United Kingdom of Great Britain and Northern Ireland and Belgium, the Federal Republic of Germany, France, Ireland and the Netherlands*, 9 March 1964, 581 UNTS 83.

Parties of which the fishermen have habitually fished in the area by reason of voisinage arrangements”.¹⁰³ This last option was also used to establish the UK-Ireland voisinage agreement discussed above.

Article 5(1) LFC grants the coastal State prescriptive and enforcement jurisdiction in its EFZ as far as fisheries are concerned. Under Article 5(2) LFC, this jurisdiction is subject to a duty to inform the other parties to the LFC of any new laws and regulations, as well as being subject to a duty to consult with them “if they so wish”. However, the coastal State must not discriminate “in form or in fact against fishing vessels of other Contracting Parties fishing in conformity with articles 3 and 4.”¹⁰⁴ Thus, the coastal State may take enforcement measures against fishing vessels which either cannot claim a right to fish under Article 3 LFC or which violate their obligation not to direct fishing efforts based on Article 3 LFC “towards stocks of fish or fishing grounds substantially different from those which they have habitually exploited” under Article 4 LFC.

The fishing rights granted by Article 3 LFC are sometimes called “historic” because their existence depends on past fishing practices and because Article 4 LFC also limits these rights to such stocks which were the subject of past fishing practices. However, from a legal perspective, the term “historic fishing rights” is generally used to refer to customary rights created through the exercise of an exceptional claim with the acquiescence of the coastal State.¹⁰⁵ In contrast, the fishing rights granted by Article 3 LFC are treaty-based and therefore have their source in the LFC and not in customary international law.

2. Role of the LFC After the Establishment of the CFP

In the wake of, *inter alia*, the increasing regional integration processes during the second half of the 20th century, Article 10 LFC expressly envisaged the possibility of “the maintenance or establishment of a special régime in matters of fisheries” between certain groups of States exhaustively listed in Article 10(a)-(f) LFC. With the exception of “Spain, Portugal and their respective neighbouring countries in Africa”¹⁰⁶ all of these exceptions relate exclusively to European States or regions. For the present purposes, it is the exception for “States Members and Associated States of the European Economic Community [EEC]” that is most interesting.¹⁰⁷ The reference to the EEC must today be read as a reference

¹⁰³ Art. 9(2) LFC.

¹⁰⁴ Art. 5(1) LFC.

¹⁰⁵ C. III.

¹⁰⁶ Art. 10(e) LFC.

¹⁰⁷ Art. 10(a) LFC.

to the EU as its successor. As discussed above, a special fisheries access regime was created under the auspices of the CFP in 1970 (and entered into force in 1973¹⁰⁸) and that special regime is now contained in Article 5 and Annex I of the Basic CFP Framework Regulation. The effect is that the fisheries access regime under the CFP applies as between all parties to the LFC, which are also EU Member States. Given that all of the twelve parties to the LFC (Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden, and the UK)¹⁰⁹ are also EU Member States, it follows that the legal framework of the CFP has applied in lieu of the LFC to these States since it entered into force in 1973. The fishing opportunities granted under the LFC were incorporated into Annex I of the Basic CFP Framework Regulation.¹¹⁰ As a consequence, all relevant fishing rights have derived from EU law rather than from the LFC since the CFP has been set up.¹¹¹

3. The UK's Withdrawal From the LFC to Avoid its Revival

Accordingly, the question arose whether the LFC would regain relevance for fisheries access regulation within parts of the 6-12 nm belt of the UK and its neighbouring EU Member States¹¹² once the CFP, as well as any transitional arrangements under a future withdrawal agreement, would cease to apply.

In order to prevent such a situation, the UK notified its denunciation of the LFC to the depositary of the LFC (i.e. itself¹¹³) in accordance with Article 15 LFC on 3 July 2017.¹¹⁴ Even though the extent of fishing opportunities granted

¹⁰⁸ For the first fisheries regulation of the EEC, see Regulation (EEC) 2141/70 of the Council OJ 1970 L 236/1. For a brief discussion of the fisheries access regime established by that regulation, see Churchill, 'Possible Fishery Rights in EU Waters Post Brexit', *supra* note 42, 4–5.

¹⁰⁹ UK Depositary Status List: Fisheries Convention (1964), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/625470/15._Fisheries_Convention__1964__status.pdf (last visited 17 October 2019). The LFC never succeeded in winning the important support of Norway, Iceland, and Denmark insofar as the Faroe Islands and Greenland are concerned. See Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 76–78.

¹¹⁰ Tables 1 and 2.

¹¹¹ See references in *supra* note 42.

¹¹² This concerns only those of the entitlements in Tables 1 and 2 above, which are based on the LFC.

¹¹³ Somewhat ironically, the Foreign and Commonwealth Office of the UK is itself the depositary of the LFC. See Arts. 12 ff. LFC.

¹¹⁴ UK Depositary Status List: Fisheries Convention, *supra* note 109. According to the UK government, this move formed "part of the wider process of becoming an independent

by the LFC is limited, it has been argued that the denunciation of the LFC will benefit the small-scale inshore fishing fleet of the UK.¹¹⁵ Article 15 LFC stipulates that the LFC is of “unlimited duration”, but subject to denunciation by its parties after 20 years (i.e. 1986). A denunciation of the LFC takes effect after a period of two years (in the case of the UK on 2 July 2019) unless they envisage a later date.¹¹⁶ The UK added a condition that the denunciation will “take effect 2 years from the date of this letter or on the date on which the [UK] ceases to be a Member State of the European Union, whichever is the later date.”¹¹⁷

If the original date for Brexit of 29 March 2019 had been upheld and the UK ceased to be an EU member State on that date, the denunciation of the LFC would have taken effect only several months after the UK’s formal withdrawal from the EU. During these months (i.e. from 1 April 2019 to 2 July 2019), the LFC would again have been applicable to the fisheries access relationship between the UK and the other parties of the LFC which are also EU Member States. This somewhat awkward transitional application of the LFC would have been prevented if the *Third Draft Withdrawal Agreement* would have been adopted, as the transitional arrangements for fisheries access under this agreement would have applied in lieu of the LFC until 2020, i.e. until well after the denunciation of the LFC takes effect.¹¹⁸ However, an application of the LFC for only a few months would have been unlikely in practice and other solutions (such as transitional fisheries agreements) might have been adopted by the States concerned.¹¹⁹ In any case, the EU Commission would have had to take over the implementation of the LFC for the remaining EU Member States *vis-à-vis* the UK in light of the EU’s exclusive competence for the CFP.

As the withdrawal date was again postponed (this time to 31 October 2019), the UK’s denunciation of the LFC will take effect before Brexit and the question of whether the LFC could have applied to fisheries access within the UK’s territorial sea has been rendered moot. In this context, it had been claimed

Coastal State”. See ‘Explanatory Notes to UK Fisheries Bill’, *supra* note 12, 11. See also ‘UK White Paper’, *supra* note 5, 18.

¹¹⁵ B. D. Beukers-Stewart & B. C. O’Leary, ‘Post-Brexit Policy in the UK: A New Dawn? Fisheries, Seafood and the Marine Environment’ (2017), 5, available at <https://www.york.ac.uk/media/yesi/yesiolddwebsite/researchoutputs/Brexit%20Fisheries%20Brief.pdf> (last visited 17 October 2019).

¹¹⁶ Art. 15 LFC.

¹¹⁷ UK Depositary Status List: Fisheries Convention, *supra* note 109.

¹¹⁸ See Section D.

¹¹⁹ Schatz, ‘Brexit and Fisheries Access’, *supra* note 42.

that, based on two alternative arguments derived from Articles 30(3) and 59(1) VCLT, the LFC is either no longer in force or at least is no longer applicable due to being incompatible with UNCLOS.¹²⁰ The present author does not share the view that the relevant provisions of the LFC – and even less so the LFC in its entirety – are incompatible with Part II of UNCLOS, but the issue need not further be explored in the present article. In any case, there will be no post-Brexit fisheries access to the waters of up to 12 nm for either the UK or EU Member State.

II. The UK-France and UK-Ireland Voisinage Agreements

Unlike the LFC, the UK has not terminated its voisinage agreements with France and Ireland.¹²¹ Therefore, these agreements would continue to provide for reciprocal fisheries access between these States post-Brexit. If the UK should desire to keep its voisinage agreements in place without creating a loophole for nationals of EU Member States other than France and Ireland, it might become necessary to renegotiate at least the Irish agreement to impose sufficiently strict requirements for access in addition to mere nationality of fishing vessels.¹²² Otherwise, the freedom of establishment among EU member States might at least in theory allow businesses from other EU Member States to use, for example, Irish access rights to fisheries in the UK's territorial sea.

If the UK's voisinage agreements with Ireland and France are to remain in place post-Brexit, they will no longer fall within the remit of Article 5(2) of the Basic CFP Framework Regulation because they will cease to constitute “existing neighbourhood relations *between Member States*”.¹²³ As such, they would fall within the exclusive competence of the EU for external fisheries access relations. In principle, such agreements can remain in force, but the EU Commission would oversee their implementation.¹²⁴ The negotiation of new agreements

¹²⁰ Churchill, ‘Possible Fishery Rights in EU Waters Post Brexit’, *supra* note 42, 6–12.

¹²¹ See Section B.III.2.

¹²² The same concerns are shared among Irish fishers. See Ní Aodha, ‘Government Finally Wins Battle to Allow NI Boats to Fish Along Ireland’s Coasts - So What Does it Mean?’, *supra* note 84.

¹²³ Emphasis added.

¹²⁴ For example, the EU acts on behalf of Sweden in the implementation of the *Agreement Between the Government of Sweden and the Government of Norway Concerning Fisheries*, 9 December 1976, 1258 UNTS 83. See Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13.

directly with individual EU Member States, on the other hand, will not be an option post-Brexit.¹²⁵

III. Historic Fishing Rights

1. General Doctrine of Historic Fishing Rights

Another issue that has gained new traction in the context of Brexit is that of historic fishing rights of EU Member States in the UK's waters.¹²⁶ From an international legal perspective, the term "historic fishing rights" generally denotes rights short of sovereignty that have accrued through the exercise of an exceptional claim with the acquiescence of the coastal state.¹²⁷ As such, they must be distinguished from treaty-based rights. As the International Court of Justice (ICJ) stated in its judgment of 1951 in the *Fisheries Case (United Kingdom v. Norway)*, a historic right "must [...] be recognized although it constitutes a derogation from the rules in force [and] would otherwise be in conflict with international law".¹²⁸ This approach has been upheld by the arbitral tribunal in the *South China Sea Arbitration*, which described historic fishing rights as "any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances".¹²⁹ Thus, historic fishing rights are acquired by "the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States".¹³⁰ While a full appreciation of the question of historic fishing

¹²⁵ This was arguably not fully appreciated by O. Paterson, 'National Policy on Fisheries Management in UK Waters: A Conservative Party Green Paper' (2005), 12, available at <http://www.eureferendum.com/documents/fishinggreenpaper.pdf> (last visited 17 October 2019).

¹²⁶ For example, the government of Denmark is reported to have a claim to fisheries access in UK waters dating back to the 1400s. See D. Boffey, 'Denmark to Contest UK Efforts to 'Take Back Control' of Fisheries', *The Guardian* (18 April 2017), available at www.theguardian.com/politics/2017/apr/18/denmark-to-contest-uk-efforts-to-take-back-control-of-fisheries (last visited 17 October 2019).

¹²⁷ For an explanation of the relevant terminology, see C. R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal*, 2nd. ed. (2018), 1-13 [Historic Waters and Rights], with further references.

¹²⁸ *Fisheries Case (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, 116, 130-131.

¹²⁹ *South China Sea Arbitration*, Award of the Arbitral Tribunal, 12 July 2016, PCA Case No. 2013-19, para. 225.

¹³⁰ *Ibid.*, para. 265.

rights is beyond the scope of this article,¹³¹ it is shown that such rights are of very limited relevance in the present context.

2. Survival of Historic Fishing Rights in the 0-3 nm Belt of the Territorial Sea

There is widespread agreement that, unlike in the EEZ,¹³² historic fishing rights in the territorial sea have not been extinguished after the entry into force of UNCLOS.¹³³ At first sight, this result might be counterintuitive as coastal States enjoy sovereignty in the territorial sea, which goes beyond the sovereign rights of coastal States in the EEZ.¹³⁴ However, the regime of the territorial sea, unlike the EEZ, existed long before the UNCLOS and has long been compatible with foreign fishing activity, which is also documented by the vast amount of bilateral and multilateral treaties in this respect. Thus, there was sufficient time to establish historic fishing rights in the territorial sea where such fishing took place in the absence of a legal basis such as a fisheries access agreement. As the arbitral tribunal in the *South China Sea Arbitration* stated, UNCLOS “continued the existing legal regime largely without change”.¹³⁵ It further noted that there was “nothing that would suggest that the adoption of [UNCLOS] was intended to alter acquired rights in the territorial sea”.¹³⁶ Accordingly, the arbitral tribunal held that “within that zone—in contrast to the exclusive economic zone—established traditional fishing rights remain protected by international law”.¹³⁷ The argument that historic fishing rights are compatible with the regime

¹³¹ For an in-depth analysis, see Symmons, *Historic Waters and Rights*, *supra* note 127, in particular 1-62.

¹³² As far the EEZ is concerned, historic fishing rights are widely regarded as having been extinguished by Part V of UNCLOS. See Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13, with further references; Symmons, *Historic Waters and Rights*, *supra* note 127, 44-57, with further references.

¹³³ *Award of the Arbitral Tribunal in the Second Stage of the Proceedings Between Eritrea and Yemen* (Maritime Delimitation), 17 December 1999, XXII RIAA 335, 361, para. 109; *South China Sea Arbitration*, *supra* note 129, para. 407; Symmons, *Historic Waters and Rights*, *supra* note 127, 57-61.

¹³⁴ Accordingly, it has been argued that historic fishing rights should be extinguished *a fortiori* in the territorial sea. See Churchill, ‘Possible Fishery Rights in EU Waters Post Brexit’, *supra* note 42, 13.

¹³⁵ *South China Sea Arbitration*, *supra* note 129, para. 804(c).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

of the territorial sea under Part II of UNCLOS is also widely considered to be supported by Article 2(3) UNCLOS.¹³⁸

However, it should be noted that only the 0-3 nm belt of the territorial sea was firmly established in international law prior to the conclusion of the UNCLOS and that the UK only extended its territorial sea from 3 nm to 12 nm in 1987.¹³⁹ Prior to this extension of its territorial sea, the UK had claimed a 12 nm EFZ in accordance with the LFC.¹⁴⁰ As shown below, the LFC established its own fisheries access regime that would have prevented the acquisition of historic fishing rights in the UK's EFZ. Therefore, historic fishing rights may only have accrued in the 0-3 nm belt of the UK's territorial sea.

3. Extinction of Historic Fishing Rights in the UK's Territorial Sea

Having established that, in principle, historic fishing rights could have existed in the 0-3 nm belt of the territorial sea of the UK and neighbouring EU Member States, the question remains whether any relevant historic fishing rights do exist today. This would have required a continuous exercise of claimed fishing rights by a state in the territorial sea of another State in conjunction with acquiescence by that other state. In addition, it would require that subsequent practice of the States concerned did not lead to an extinction of such historic fishing rights.

However, already prior to the conclusion of the LFC in 1964, territorial sea fisheries access between the UK and its neighbours was primarily based on consensual arrangements rather than acquiescence, namely through the various voisinage agreements.¹⁴¹ When the LFC was concluded in 1964, it expressly removed any possible historic fishing rights in the 0-6 nm belt by providing, in Article 9(1) LFC, that these rights had to be incorporated into transitional arrangements, which in turn provided for a phasing-out of these rights to "allow [affected fishers] to adapt themselves to their exclusion from that

¹³⁸ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award of the Arbitral Tribunal, 18 March 2015, PCA Case No. 2011-03, paras. 499–517; *South China Sea Arbitration*, *supra* note 129, para. 808; Barnes, 'Article 2', *supra* note 26, para. 23.

¹³⁹ *Territorial Sea Act*, 15 May 1987, available at www.legislation.gov.uk/ukpga/1987/49 (last visited 17 October 2019).

¹⁴⁰ See Section C. I .1.

¹⁴¹ See Section B. III. 2.

belt".¹⁴² Afterwards, the access regime of the LFC was taken over by the special access provisions of the CFP, which were themselves closely modelled on the LFC, in line with Article 10(a) LFC.¹⁴³ Thus, even if the LFC had not effectively extinguished historic fishing rights in the UK's territorial sea, they would have been replaced by consensual access regimes and no longer exercised.¹⁴⁴ Access based on explicit consent, however, does not lead to new (or support existing) acquired rights based on acquiescence.¹⁴⁵ Therefore, although it cannot be ruled out that historic fishing rights may have existed prior to the conclusion of the LFC with respect to the UK's territorial sea in the 0-3 nm belt that existed at the time, these access rights were removed by the LFC. Thus, any historic fishing rights of parties to the LFC and EU Member States in the UK's territorial sea have been extinguished.¹⁴⁶

4. Example: The Rockall Fisheries Dispute

The issue has recently resurfaced in the context of a dispute between the UK (or rather Scotland) and Ireland about access of Irish fishing vessels to fisheries in the territorial sea of the island of Rockall.¹⁴⁷ Rockall is a small rock¹⁴⁸ located in the Atlantic Ocean north of Ireland and west of Scotland in the EEZ of the UK.¹⁴⁹ Ireland has long disputed the UK's sovereignty over

¹⁴² See C. I. and in particular the two transitional agreements cited in, *supra* note 102. Compare also Wise, *The Common Fisheries Policy of the European Community*, *supra* note 2, 75-76.

¹⁴³ Section C. I.

¹⁴⁴ Churchill, 'Possible Fishery Rights in EU Waters Post Brexit', *supra* note 42, 12-13.

¹⁴⁵ *Ibid.*; Schatz, 'Brexit and Fisheries Access', *supra* note 42; Symmons, *Historic Waters and Rights*, *supra* note 127, 39.

¹⁴⁶ Cf. House of Lords, 'Brexit: Fisheries, 8th Report of Session 2016-17', *supra* note 87, 15; Schatz, 'Brexit and Fisheries Access', *supra* note 42.

¹⁴⁷ For a legal analysis of the historical Rockall dispute, see C. R. Symmons, *Ireland and the Law of the Sea*, 2nd ed. (2000), 73-76 and 144-153 [Ireland and the Law of the Sea]. For a good recent legal analysis, see J. Harrison, 'Unpacking the Legal Disputes over Rockall', *SPICe Spotlight* (18 June 2019), available at <https://spice-spotlight.scot/2019/06/18/guest-blog-unpacking-the-legal-disputes-over-rockall/> (last visited 17 October 2019) [Legal Disputes over Rockall]. See also C. Lysaght, 'Ireland's Stance in the Rockall Dispute is Largely Nonsense', *The Irish Times*, 17 June 2019, available at <https://www.irishtimes.com/opinion/ireland-s-stance-in-the-rockall-dispute-is-largely-nonsense-1.3927368> (last visited 17 October 2019) [Ireland's Stance in the Rockall].

¹⁴⁸ It is also a "rock" within the meaning of Art. 121(3) UNCLOS and, therefore, does not generate an EEZ. See Symmons, *Ireland and the Law of the Sea*, *supra* note 147, 150-153.

¹⁴⁹ Figure 1.

Rockall and has also disputed, accordingly, the UK's claim to a territorial sea around Rockall.¹⁵⁰ However, both these claims are clearly unfounded as no other State than the UK has asserted sovereignty over Rockall¹⁵¹ and islands generate a territorial sea irrespective of whether they are rocks or not.¹⁵² As the UK has not granted Ireland access to fisheries within the territorial sea of Rockall in accordance with a voisinage agreement or through an arrangement under Annex I of the Basic CFP Framework Regulation, Irish fishing vessels cannot rely on the principle of equal access to fish in Rockall's territorial sea.¹⁵³ In the absence of access under the CFP, it has been suggested that Irish fishing vessels have been fishing in Rockall's territorial sea for some 20-30 years,¹⁵⁴ which has been partly admitted by the Scottish government (increasing "incursions" in 2015-2018 are mentioned).¹⁵⁵ In this context, one commentator has stated with a view to the UK's withdrawal from the EU:

"Once the CFP stops applying to the UK, EU vessels will no longer have automatic access to the UK's EEZ and they will require special authorisation to continue fishing in this area. However, any purported historic rights of Irish vessels in the territorial sea around

¹⁵⁰ Symmons, *Ireland and the Law of the Sea*, *supra* note 147, 73-76 and 144-153.

¹⁵¹ Harrison, 'Legal Disputes over Rockwall', *supra* note 147.

¹⁵² *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, 659, para. 302; *Territorial and Maritime Dispute Between Nicaragua and Colombia (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624, para. 36. This also follows from an *a contrario* interpretation of Art. 121(3) UNCLOS. See S. Talmon, 'Article 121', in Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS) – A Commentary*, *supra* note 26, paras. 2 and 56. Specifically for Rockall, see Harrison, 'Legal Disputes over Rockwall', *supra* note 147.

¹⁵³ Section B. Specifically for Rockall's territorial sea, see Harrison, 'Legal Disputes over Rockwall', *supra* note 147. But see Lysaght, *Ireland's Stance in the Rockall Dispute*, *supra* note 147, who states that "[a]s Scottish vessels do not fish from ports on Rockall, which is the adjacent coast, they are clearly not entitled to restrict fishing in the 12 nautical miles around Rockall to those vessels and so exclude others".

¹⁵⁴ See, e.g., E. McClafferty, 'Rockall Fishing Row an SNP Political Stunt', BBC News, 13 June 2019, available at <https://www.bbc.com/news/world-europe-48616917> (last visited 17 October 2019); IrishCentral Staff, 'Ireland and Scotland at War over Disputed Rockall Island in North Atlantic', IrishCentral, 10 June 2019, available at <https://www.irishcentral.com/business/ireland-scotland-disputed-rockall-island-north-atlantic> (last visited 17 October 2019).

¹⁵⁵ The Scottish Parliament, Official Report (Draft), Meeting of the Parliament, 11 June 2019, 9-10, available at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12180> (last visited 17 October 2019).

Rockall, if clearly established, would continue following Brexit, as their basis would be international law rather than EU law.”¹⁵⁶

Given the analysis provided above, in the view of the present author, Ireland cannot rely on pre-existing historic fishing rights in the territorial sea of Rockall.¹⁵⁷ In addition, it is highly unlikely that recent Irish fishing activity in the waters off Rockall has created new “historic” fishing rights.

IV. Access Rights Derived From Royal Privileges

Another potential source of fisheries access in the present context is that of access rights derived from royal privileges granted by a sovereign acting for the UK. These would not constitute historic fishing rights *sensu stricto* because, as will be seen below, they are based on explicit consent rather than acquiescence. Although there might exist a number of such royal privileges dating back hundreds of years, it is beyond the scope of this article to discuss them all. Instead, the merits of invoking such rights derived from royal privileges, which generally have to be assessed on a case-by-case basis, are discussed based on an example from Belgium, which has prominently featured in media reports.¹⁵⁸ In particular, the question arises what, if any, legal relevance such royal privileges have today.

In 1666, Charles II of England awarded to the city of Bruges (a city in Flanders, which is now part of Belgium) perpetual privileges to permit 50 Bruges fishing vessels to fish off the coast of England and Scotland (hereinafter the “Bruges Privileges”) as a token of his gratitude for granting him asylum from 1656 to 1659 during his exile from England.¹⁵⁹ Legally, the Bruges Privileges

¹⁵⁶ Harrison, ‘Legal Disputes over Rockwall’, *supra* note 147.

¹⁵⁷ Cf. Section C. III. 3.

¹⁵⁸ M. Torfs, ‘Bruges Fishermen can Continue Fishing in British Waters After Brexit Thanks to 1666 Charter’, *Flandersnews.be* (6 July 2017), available at <http://deredactie.be/cm/vrtnieuws.english/News/1.3018117> (last visited 17 October 2019); L. Cendrowicz, ‘Belgium Says 1666 Royal Charter Grants its Fishermen “Eternal Rights” to English Waters’, *iNews* (7 July 2017), available at <https://inews.co.uk/news/uk/belgium-says-1666-royal-charter-grants-fishermen-eternal-rights-english-waters/> (last visited 17 October 2019).

¹⁵⁹ For a detailed account of the historical background, see J.-P. Mener, ‘Le Droit de Pêche en Mer Territoriale au Regard des Privilèges Accordés en 1666 par Charles II d’Angleterre à la Ville de Bruges’ (1965), 2 *Revue Belge de Droit International* 2, 431, 432–437 [Le Droit de Pêche en Mer Territoriale]. See also Fulton, *The Sovereignty of the Sea*, *supra* note 56, 461.

appear to be a unilateral act of the British Crown, which creates obligations only for the Crown and which fall broadly within the domain of public law.¹⁶⁰ The addressee of the Bruges Privileges was the city of Bruges. This is obvious from the necessity to implement the Bruges Privileges by selecting 50 fishers among the fishers of Bruges, a process that would have to be overseen by an administration. In the 17th century, some cities enjoyed more autonomy than cities generally do today, and some of them were subjects of public international law,¹⁶¹ although it is unclear whether Brussels would fall within the latter category. Given that the Bruges Privileges were thus granted by a sovereign (the English king) to an entity that was either itself a subject of public international law and/or an entity under the sovereignty of another sovereign, it has been argued that they could be qualified, at the time, as a unilateral act not only under UK public law but also under public international law in the form of a royal privilege.¹⁶² Alternatively, the legal value of the Bruges Privileges might be confined to UK domestic law.¹⁶³

Reportedly, the multiple European wars in the following decades prevented the fishers of Bruges from exercising their privileges without interruption, but one fishing vessel resumed fishing in 1835.¹⁶⁴ When the UK started to enforce its fisheries jurisdiction within 3 nm in the English Channel against Belgian fishing vessels in the late 1840s, Belgium protested and invoked the Bruges Privileges.¹⁶⁵ While the UK could be regarded as the successor of Charles II of England with respect to the obligations arising from the Bruges Privileges, it could be asked whether Belgium has standing to invoke the rights of historical Bruges.¹⁶⁶ In any event, according to Fulton,¹⁶⁷ the invocation of the Bruges Privileges by Belgium was successful insofar as it led to the conclusion of a fully reciprocal voisinage agreement between the UK and Belgium concerning fishing within 3 nm in

¹⁶⁰ Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 441–442.

¹⁶¹ See generally C. Hattenhauer, 'Free Cities', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), paras. 1–4.

¹⁶² Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 442–444.

¹⁶³ Cf. Fulton, *The Sovereignty of the Sea*, *supra* note 56, 167, who mentions that the Belgian government at one point intended to invoke the Bruges Privileges before UK courts.

¹⁶⁴ Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 433.

¹⁶⁵ Fulton, *The Sovereignty of the Sea*, *supra* note 56, 616, who also claims that the Bruges Privileges were generally regarded as "fictitious".

¹⁶⁶ In favour of standing of Belgium: Mener, 'Le Droit de Pêche en Mer Territoriale', *supra* note 159, 452.

¹⁶⁷ Fulton, *The Sovereignty of the Sea*, *supra* note 56, 616–617.

1852.¹⁶⁸ The agreement made no explicit mention of the Bruges Privileges,¹⁶⁹ but Belgian sources at the time said of this agreement that it was “sans préjudice des droits que les pêcheurs belges pourraient tirer des chartes du roi Charles II”.¹⁷⁰ According to a UK view, however, “defined rights were substituted for vague and disputed privileges” in the agreement of 1852.¹⁷¹ Soon after, all fishing activities by Bruges fishers (as opposed to Belgian fishers generally) ceased as a result of the silting up of the port of Bruges, which was followed by a lack of political interest in Belgium in pursuing any claims based on the Bruges Privileges.¹⁷² The matter was then largely forgotten until the 1960s, when a Belgian national from Bruges tried to invoke the Bruges Privileges by having himself arrested by UK authorities.

As a result of this rather lengthy historical exposition, it appears highly unlikely that the Bruges Privileges, if considered a title under public international law, would still be valid today. Even if one considers that the periods of non-usage between 1674 and 1835, as well as for about a century between ca. 1860 and the 1960s, did not invalidate the title,¹⁷³ it has been terminated by subsequent treaty-law. It is likely that already the 1852 voisinage agreement was at least implicitly intended to replace the Bruges Privileges with a modern fisheries access agreement. In any event, the considerations presented above with respect to the effect of the LFC, in particular Article 9(1) LFC, on historic fishing rights would also generally apply to historic titles such as the Bruges Privileges.

D. Arrangements for the Transition Period and Beyond: The (Failed) Third Draft Withdrawal Agreement

The preceding analysis has shown that EU law currently only partially regulates access to fisheries within 12 nm and that fisheries within these limits can be exempted from the principle of equal access and allocation based on relative stability. The analysis has also shown that there is no general obligation to grant access to fisheries in the territorial sea under Part II of UNCLOS that would apply post-Brexit. However, potentially relevant access arrangements exist

¹⁶⁸ *Convention Between Great Britain and Belgium, Relative to Fishery*, 22 March 1852, 2 Recueil des Traités et Conventions Concernant le Royaume de Belgique 400.

¹⁶⁹ Mener, ‘Le Droit de Pêche en Mer Territoriale’, *supra* note 159, 435.

¹⁷⁰ *Ibid.*

¹⁷¹ Fulton, *The Sovereignty of the Sea*, *supra* note 56, 617.

¹⁷² Mener, ‘Le Droit de Pêche en Mer Territoriale’, *supra* note 159, 435.

¹⁷³ *Ibid.*, 453–457.

under the voisinage agreements with Ireland and France. These agreements will not be affected by Brexit because they constitute commitments that are valid independently of EU law. The same would be true for potential historic fishing rights if such rights do exist.

Thus, few arrangements are required for the transition period with respect to fisheries within 12 nm.¹⁷⁴ Accordingly, the issue of access to fisheries within 12 nm was not specifically addressed in the draft withdrawal agreements negotiated between the UK and the EU on 28 February 2018,¹⁷⁵ 19 March 2018,¹⁷⁶ and 14 November 2018 (*Third Draft Withdrawal Agreement*),¹⁷⁷ respectively. Under the *Third Draft Withdrawal Agreement*, the transition period would have lasted from the agreement's entry into force on 30 March 2019¹⁷⁸ until 31 December 2020.¹⁷⁹ Furthermore, the *Third Draft Withdrawal Agreement* provided for an application of EU law throughout the transition period, unless a matter was expressly excluded.¹⁸⁰ The CFP was not excluded from the scope of the transitional application of EU law, and a number of provisions of the *Third Draft Withdrawal Agreement* addressed questions of fisheries access. The key provision dealing with fisheries access was Article 130 of the *Third Draft Withdrawal Agreement*. However, this provision addressed substantive and procedural issues concerning the allocation of fishing opportunities within the scope of the principle of equal access and within the context of international consultations and negotiations (e.g. in the context of the North East Atlantic

¹⁷⁴ The situation is quite different with regard to the EEZ. See Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13.

¹⁷⁵ European Commission, 'Draft Withdrawal Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union and the European Atomic Energy Community' (28 February 2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf (last visited 17 October 2019).

¹⁷⁶ European Commission, 'Draft Withdrawal Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland From the European Union and the European Atomic Energy Community' (19 March 2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf (last visited 17 October 2019).

¹⁷⁷ European Commission, 'Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (14 November 2018), available at https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf (last visited 17 October 2019) [Third Draft Withdrawal Agreement].

¹⁷⁸ *Ibid.*, Art. 185.

¹⁷⁹ *Ibid.*, Art. 126.

¹⁸⁰ *Ibid.*, Art. 127(1).

Fisheries Commission).¹⁸¹ It did not specifically address access to fisheries located in waters within 12 nm, which the UK has excluded from the application of the principle of equal access under Article 5(2) of the Basic CFP Framework Regulation. Accordingly, the relevant rules under the CFP would have continued to apply to the UK's waters. Special rules were contained in Article 6 of the *Protocol relating to the Sovereign Base Areas in Cyprus*,¹⁸² and Article 4 of the *Protocol on Gibraltar*,¹⁸³ which formed an integral part of the *Third Draft Withdrawal Agreement*.¹⁸⁴ However, these rules did not specifically address access to fisheries located in the territorial sea either.

Overall, this means that the current legal *status quo* under the CFP for territorial sea fisheries access would have remained unchanged during the transition period (i.e. until 31 December 2020). For the continued application of the Irish and French voisinage agreements, this would have made no difference. However, this arguably also means that the arrangements under Annex I of the Basic CFP Framework Regulation would have continued to apply until 31 December 2020 despite the fact that the UK had denounced the LFC with effect from July 2019 – unless these arrangements would have been deleted from Annex I. After the expiry of the arrangements for the transition period on 31 December 2020, access to fisheries within 12 nm would have been governed by general international fisheries law. By then, the UK would have no longer been a party to the LFC, meaning that the relevant access arrangements would have had to be renegotiated in separate agreements if so desired. The voisinage agreements would have remained in force, but their implementation would have had to be taken over by the EU Commission due to the UK's new status as a third State. With respect to future regulation, the *Third Draft Withdrawal Agreement* would have obliged the UK and the EU to

“[...] use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration of [DD/MM/2018] and to

¹⁸¹ For discussion, see Schatz, 'Post-Brexit EEZ Fisheries Access', *supra* note 13.

¹⁸² Art. 6 of the Protocol relating to the Sovereign Base Areas in Cyprus provided for the continued application of EU fisheries law to the Sovereign Base Areas of Akrotiri and Dhekelia.

¹⁸³ Art. 4 of the Protocol on Gibraltar directed Spain and the UK to establish a coordinating committee as a forum for regular discussion between the competent authorities of issues concerning, *inter alia*, “fishing”.

¹⁸⁴ European Commission, 'Third Draft Withdrawal Agreement', *supra* note 177, Art. 182.

conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.”¹⁸⁵

The outline of the “political declaration” referred to in the *Third Draft Withdrawal Agreement* concretised this commitment in the following words:

“Within the context of the overall economic partnership, establishment of a new fisheries agreement on, inter alia, access to waters and quota shares, to be in place in time to be used for determining fishing opportunities for the first year after the transition period.”¹⁸⁶

Thus, the conclusion of one (or more) future fisheries access agreement(s) between the UK and the EU was envisaged. While it is clear that any future access agreement would have regulated the management of shared stocks, including the allocation of fishing opportunities with respect to such stocks,¹⁸⁷ it is less clear whether it would also have covered access to fisheries within 12 nm. Since the UK Parliament’s negative vote on the *Third Draft Withdrawal Agreement*, the conclusion of a withdrawal agreement between the UK and the EU has become less likely and, at the time of writing, the situation remains volatile. Besides the adoption of the *Third Draft Withdrawal Agreement*, there is room, for example, for a new withdrawal agreement containing different provisions on fisheries, a withdrawal without a withdrawal agreement, or a withdrawal with only transitional sectoral agreements that might include a fisheries access agreement. It might also be necessary to extend the withdrawal period and/or transition period further in order to agree on workable solutions in some fields, which might include fisheries.

¹⁸⁵ Ibid., Art. 184.

¹⁸⁶ ‘Outline of the Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom’ (14 November 2018), 3, available at https://ec.europa.eu/commission/sites/beta-political/files/outline_of_the_political_declaration.pdf (last visited 17 October 2019).

¹⁸⁷ See discussion by Schatz, ‘Post-Brexit EEZ Fisheries Access’, *supra* note 13.

E. Conclusion

This article has shown that EU Member States currently have only very limited access to fisheries in the UK's territorial sea under the CFP and specifically Article 5(2) of the Basic CFP Framework Regulation. This fisheries access is based on the preservation of historical access arrangements in Annex I of the Basic CFP Framework Regulation (mostly with respect to the 6-12 nm belt of the territorial sea) and two voisinage agreements between the UK and, respectively, France and Ireland (with respect to the 0-6 nm belt of the territorial sea). EU Member States also enjoy a certain degree of "indirect" access to fisheries in the UK's territorial sea through the freedom of establishment under EU law.

After the UK's withdrawal from the EU, and absent the conclusion of agreements to the contrary, the freedom of establishment and the access arrangements under Annex I of the Basic CFP Framework Regulation will cease to exist. However, the two voisinage agreements would remain in force and continue to serve as a legal basis for access to the UK's territorial sea between 0-6 nm unless they are terminated under their own terms.

Therefore, the regulation of territorial sea fisheries access after the UK's withdrawal from the EU would look as follows. Fisheries within the territorial sea are not subject to a general obligation to grant access under Part II of UNCLOS. Thus, any applicable access rights would either have their source in bilateral or multilateral agreements or customary international law. In relation to access to fisheries in the 0-6 nm belt of the territorial sea, the two voisinage agreements grant some access to France and Ireland. If they are to remain in place, and are not renegotiated (with the EU rather than France or Ireland), the EU Commission will have to take over their implementation. If they are renegotiated by the EU Commission, they could also be incorporated into the regime established by a potential framework agreement. As for access to fisheries in the 6-12 nm belt of the UK's territorial sea, this article has shown that the LFC will not be revived as a source of fisheries access due to the UK's denunciation of this treaty. The article has also argued that neither historic fishing rights nor rights to fisheries access derived from royal privileges are likely to be relevant for the future EU-UK fisheries access relationship.

Given that the *Third Draft Withdrawal Agreement* was not accepted by the UK, there is currently no agreed framework for the future regulation of access to territorial sea fisheries between the UK and the EU. However, it is likely that at least a sectoral agreement on fisheries will be concluded even in the event of a "no-deal" Brexit. In the meantime, both the UK and the EU have begun to unilaterally take precautions to mitigate the negative impact of a "no-deal"

Brexit scenario on their respective fishing industries.¹⁸⁸ The EU Commission's proposal is based on the principle that access has to be based on the condition of complete reciprocity.¹⁸⁹

¹⁸⁸ EU Commission, 'Brexit preparedness: European Commission adopts two contingency proposals to help mitigate impact of "no-deal" Brexit on EU fisheries' (23 January 2019), available at http://europa.eu/rapid/press-release_IP-19-584_en.htm (last visited 17 October 2019); UK No-Deal Guidance, *supra* note 92.

¹⁸⁹ EU Commission, 'Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) 2017/2403 as Regards Fishing Authorisations for Union Fishing Vessels in United Kingdom Waters and Fishing Operations of United Kingdom Fishing Vessels in Union Waters' (2019), COM(2019) 49, available at https://ec.europa.eu/info/sites/info/files/com-2019-49-final_en.pdf (last visited 17 October 2019).

Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What Does it Regulate and how Likely is its Adoption by States?

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Abstract

Infringements of human rights through the actions of transnational corporations are common in our globalizing world. While the international community has undertaken numerous attempts to hold private corporations responsible for their actions, only soft law instruments govern this area of public international law. Only recently, a first draft was released for a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, also known as the Zero Draft. This article argues that the Zero Draft, while based on contemporary international law, represents a positive first step in the treaty-making process, but it still needs specification and clarification in order to close the gap in human rights protection effectively. First outlining the need for a closure of the gap in human rights protection, this article then closely examines the content of the Zero Draft. To that end, an in-depth analysis of the core provisions of the Draft is offered, especially focusing on the rights of victims, the prevention of human rights infringements, and corporate liability. Furthermore, this article analyzes current State practice and the expectations of the international community towards a legally binding instrument on the topic of business and human rights. Significantly, this article also compares the Zero Draft to existing soft law and previous recommendations on how to close the gap in a binding manner. Finally, the article concludes that, by indirectly holding companies accountable without depriving States of their sovereign power over their companies, the Zero Draft has the potential to be implemented as a future Treaty on Business and Human Rights.

A. Introduction: Business and Human Rights in a Globalized Economy

The increasing economic power, as well as the far-reaching rights, of corporate actors are still not linked to any obligations arising from international human rights law.¹ Despite this, corporations are able to fundamentally obstruct the enjoyment of human rights.² Recurring infringements mainly affect equality and labor rights, the rights of indigenous peoples, and rights of self-determination over natural resources.³

The focus of our globalized economy lies on transnational corporations. These business units are the principal driving force of global trade and thus the protagonists of most economic activities.⁴ Numerous agreements and effective enforcement mechanisms regulate the protection of the interests of economic actors – whether it be international trade law or international patent and investment protection law – but so far there has been a lack of binding norms obliging corporations to protect human rights.

Merely non-binding and political demands,⁵ which are not enforceable under international law, have been accumulating in this area.⁶ The consequence of this has been a legal asymmetry that provides transnational corporations with strong rights and imposes no human rights obligations upon them.⁷

¹ J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013), xii [Ruggie, *Just Business*].

² A. McBeth, *International Economic Actors and Human Rights* (2009), 6; J. von Bernstorff, *Die völkerrechtliche Verantwortung für menschenrechtswidriges Handeln transnationaler Unternehmen: Unternehmensbezogene menschenrechtliche Schutzpflichten in der völkerrechtlichen Spruchpraxis* (2010), 6; T. Koenen, *Wirtschaft und Menschenrechte: Staatliche Schutzpflichten auf der Basis regionaler und internationaler Menschenrechtsverträge* (2012), 25.

³ Koenen, *supra* note 2, 25.

⁴ McBeth, *supra* note 2, 6.

⁵ Cf. *Guiding Principles on Business and Human Rights: Implementing the United Nations „Protect, Respect and Remedy“ Framework*, UN Doc A/HRC/17/31, 21 March 2011 [UN Guiding Principles]; UN Global Compact, available at <https://www.unglobalcompact.org> (last visited 16 December 2019).

⁶ W. Kaleck & M. Saage-Maaß, *Unternehmen vor Gericht: Globale Kämpfe für Menschenrechte* (2016), 56.

⁷ J. Martens & K. Seitz, *Auf dem Weg zu globalen Unternehmensregeln: Der „Treaty-Prozess“ bei den Vereinten Nationen über ein internationales Menschenrechtsabkommen zu Transnationalen Konzernen und anderen Unternehmen*, Global Policy Forum (2016), 1, 26.

In the absence of effective regulation at both the national and international level, the actions of transnational corporations fall into a protection gap – a vacuum outside the law,⁸ bearing grave risks of un-remedied human rights violations.

The Zero Draft, which was developed by an intergovernmental working group, now carries the potential to close the existing protection gap. The preamble enshrines the goal of expanding the existing human rights regime, embodied by traditional human rights treaties. Legal mechanisms need to be created or adapted so that the existing human rights regime can be applied to all aspects of human coexistence, including the reality of a global economy, an interconnected world and its non-state actors.⁹

In light of the *de facto* human rights violations by transnational corporations, this article, after a brief description of the necessity to close the gap [B.], examines the content [C.] and chances of adoption [D.] of the Zero Draft of the UN working group for a legally binding instrument on business and human rights.

B. On Course to the Zero Draft: Bridging the Gap Between Business and Human Rights

The origin of the growing legal asymmetry lies in the traditional understanding of the human rights regime and the unsuccessful efforts to oblige corporations. An overview of both what the regime of human rights encompasses [I.] and the failed past attempts to oblige corporations [II.] shall illustrate the necessity as well as the potential of the Zero Draft to close the protection gap.

⁸ S. Massoud, *Menschenrechtsverletzungen im Zusammenhang mit wirtschaftlichen Aktivitäten von transnationalen Unternehmen* (2018), 3; D. Kinley & J. Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', 44 *Virginia Journal of International Law* (2004) 4, 931, 935; J. Woodroffe, 'Regulating Multinational Corporations in a World of Nation States', in M. K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), 131, 133; S. Deva 'Scope of the Proposed Business and Human Rights Treaty, Navigating through Normativity, Law and Politics', in S. Deva & D. Bilchitz (eds), *Building a Treaty on Business and Human Rights – Context and Contours* (2017), 154, 156 [Deva, Scope of Business and Human Rights Treaty].

⁹ McBeth, *supra* note 2, 8.

I. Traditional Understanding of Human Rights and a Gap in Protection

First and foremost, human rights are constructed as defensive rights of individuals against the State.¹⁰ For this reason, States traditionally bear sole responsibility for the protection and realization of human rights.¹¹ States' obligations in this regard are twofold: the negative obligation to respect human rights, insofar as to not interfere with the realization of human rights, as well as the positive obligation to ensure the realization of human rights.¹² Corporations, on the other hand, are not bound by human rights; rather, as private entities, they qualify as recipients of human rights protection. Traditionally, their actions are regulated by national law and are largely ignored by international law.

This is where the loophole for private corporations and their actions is located. That becomes evident when looking at the general rule that the conduct of private entities is not attributable to the State under international law.¹³ The actions of States and private corporations therefore need to be differentiated from one another.

Consequently, even though States are bound by human rights obligations, responsibility for human rights infringements that result from actions of private corporations and are not attributable to any State are determined to fall within the loophole. Even though States do have a human rights obligation to prevent individuals from harmful conduct, it is disputed how far-reaching this obligation is and whether, as an obligation of conduct to take reasonable measures,¹⁴ it has the same value as the obligations (of result) specifically laid down in the

¹⁰ A. von Arnould, *Völkerrecht*, 3rd ed. (2016), 274; W. Kälin & J. Künzli, *Universeller Menschenrechtsschutz, Der Schutz des Individuums auf globaler und regionaler Ebene*, 3rd ed. (2013), para. 211.

¹¹ *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810 at 71, 10 December 1948 [UDHR]; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3. [ICESCR]; von Arnould, *supra* note 10, 274; McBeth, *International Economic Actors and Human Rights*, *supra* note 2, 1.

¹² Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 6 [HRC, GC 31].

¹³ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2 *Yearbook of the International Law Commission* (2001) 2, 47.

¹⁴ Committee on Economic, Social and Cultural Rights, *General Comment 24: On State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24, 10 August 2017, para. 32 [CESCR, GC 24].

respective human rights treaties. Further, that obligation only applies in the respective State's jurisdiction or when the State has control over a corporation that causes a foreseeable harm to others and does not infringe upon another State's sovereignty.¹⁵ Sovereignty grants each State the right to govern its jurisdiction without any foreign interference.¹⁶ Depending on corporate structures, which can include the division of parent and daughter corporations, sub-contractors, and lengthy supply chains, transnational corporations are subject to various jurisdictions. In light of the principle of sovereignty, the host State of a parent company is prevented from applying their national laws to a daughter company in another State's jurisdiction. Different national laws therefore govern the same corporation – the duty to prevent of one State only reaches to the point where the duty (and complementary right) of the next State begins.

The unknown scope of States' obligations to prevent infringements and the ensuing gap in human rights protection is illustrated by the *Kiobel* case. It shows that national laws protecting and enforcing human rights usually do not apply to extraterritorial situations. In that case, a group of Nigerian nationals residing in the United States filed a suit against certain Dutch, British, and Nigerian corporations on the basis of the Alien Tort Statute (ATS). The United States Supreme Court found that there was an insufficient link between the United States, the plaintiffs, and the companies, and therefore the ATS did not apply.¹⁷ Further, the ATS was considered inapplicable, since it does not explicitly grant extraterritorial applicability and the violations claimed took place in another State's jurisdiction.¹⁸ Even though that case concerned the direct actions of non-US corporations and would in this form probably not fall within the scope of the Zero Draft, it marks one of the essential problems that allow the gap of protection: States will not apply national laws to companies located in other States.

Regardless of urges from the Committee on Economic, Social and Cultural Rights on States to apply due diligence mechanisms,¹⁹ States cannot apply due diligence in a field that falls without their jurisdiction. The complex and oftentimes obscure set-up of transnational corporations makes it difficult to determine which activity is attributable to which State and what due diligence standards apply.

¹⁵ CESCR, GC 24, *supra* note 14, para. 26, 30.

¹⁶ von Arnould, *supra* note 10, 317.

¹⁷ *Kiobel et. al v. Royal Dutch Petroleum Co. et. al*, 569 U.S. 108 (2013), 14.

¹⁸ *Ibid.*

¹⁹ CESCR, GC 24, *supra* note 14, para. 15, 30, 31.

The ambiguity of the duty to prevent and the fact that human rights law does not bind corporations is pivotal, as States have long ceased to be the only actors to jeopardize the realization of human rights. On the contrary, some of the largest transnational corporations regularly have a turnover that is greater than that of some State budgets²⁰ and are frequently integrated into the markets in such a way that they are equally able to jeopardize the realization of human rights. Nevertheless, according to the traditional understanding of the human rights regime, private corporations are far from being obligated directly. The prevention of human rights violations through corporations still seems to lie outside the scope of the traditional application of the traditional human rights system and the mechanisms that have developed accordingly.²¹

II. Past Attempts to Impose Human Rights Obligations on Private Corporations

Since the 1970's, several attempts at various levels have been made to expand the fragmentary human rights system.²² Within the framework of the United Nations (UN), the International Labor Organization (ILO), and the Organization for Economic Cooperation and Development (OECD), numerous initiatives have aimed to regulate the link between business and human rights.²³ The UN Global Compact, a multi-stakeholder initiative, also requires corporations to implement universal sustainability principles and to commit to the so-called "Ten Principles" that are also directed towards the protection of human rights.²⁴ However, these instruments only constitute *soft law* and are not legally binding on corporations or States.²⁵ They are, therefore, incapable of sufficiently counteracting the abuses of human rights committed by corporations.²⁶

²⁰ Martens & Seitz, *supra* note 7, 22.

²¹ S. Deva, *Regulating Corporate Human Rights Violations, Humanizing Business* (2012), 499 [Deva, *Regulating Corporate HR Violations*]; McBeth, *supra* note 2, 7.

²² Cf. M. N. Shaw, *International Law*, 8th ed. (2017), 197; D. Baumann-Pauly & J. Nolan (eds), *Business and Human Rights, From Principles to Practice* (2016), 70.

²³ P. Miretski & S. Bachmann, "The UN "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights": A Requiem", 17 *Deakin Law Review* (2012) 1, 1, 14.

²⁴ UN Global Compact, available at <https://www.unglobalcompact.org> (last visited 16 December 2019).

²⁵ von Arnould, *supra* note 10, 277.

²⁶ Miretski & Bachmann, *supra* note 23, 14.

1. Draft Norms of 2003

After the development of a code of conduct by an intergovernmental body failed,²⁷ a working group was established in 1998 at the request of a sub-commission of the UN Commission on Human Rights. This working group was tasked with drawing up recommendations and proposals concerning the working methods and activities of transnational corporations.²⁸

In 2003, the final document “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (“2003 Draft Norms”) was adopted by the sub-commission.²⁹ These norms provided for a direct obligation of private corporations, placing special emphasis on employee rights and prohibitions of discrimination.³⁰ Nevertheless, the States did not accept the 2003 Draft Norms. In 2004, the Human Rights Commission announced that the Draft would have “no legal standing”.³¹

2. Alternative Solution: John G. Ruggie

Despite the fact that States rejected the 2003 Draft Norms, several governments agreed that the issue of “business and human rights” continued to require attention.³² In 2005, John G. Ruggie was appointed as Special Representative of the UN Secretary-General for Business and Human Rights. He was to be the antithesis to the rejected 2003 Norms; States requested an approach that would be founded in international law and therefore would not

²⁷ A. Hennings, *Über das Verhältnis von Multinationalen Unternehmen und Menschenrechten, Eine Bestandsaufnahme aus juristischer Perspektive* (2009), 144; Massoud, *supra* note 8, 10.

²⁸ UN Sub-Commission on the Promotion and Protection of Human Rights, *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations*, UN Doc E/CN.4/Sub.2./Res/1998/8, 20 August 1998.

²⁹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Draft Report of the Sub-Commission on the Promotion and Protection of Human Rights*, UN Doc E/CN.4/Sub.2/2003/L.11, 13 August 2003.

³⁰ UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, Art. 1, 4.

³¹ *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/2004/116, para. (c).

³² Ruggie, *Just Business*, *supra* note 1, xvii.

grant international subjectivity to and obligate corporations directly.³³ After years of consultation, various studies and reports, Ruggie presented the framework “Protect, Respect and Remedy” in 2008.³⁴ The framework is based on three pillars: the State’s duty to protect human rights, the corporate responsibility to respect human rights, and appropriate remedial and legal protection mechanisms.³⁵

In State practice, the framework was widely acknowledged and accepted. It also forms the basis for the so-called UN Guiding Principles, which were unanimously adopted by the Human Rights Council³⁶ in 2011 and are viewed as the most important basis in the debate on business and human rights today.³⁷ However, these are regarded as soft law and therefore do not contain binding rules, neither on States nor on corporations.³⁸

3. The German National Action Plan and the French “Loi de Vigilance”

Even though the UN Guiding Principles do not impose hard legal obligations, 21 States have so far followed UN Guiding Principle 1 and implemented National Action Plans (NAPs).³⁹ In this field, a NAP is defined as “evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding

³³ J. G. Ruggie, ‘Business and Human Rights: The Evolving International Agenda’, 101 *The American Journal of International Law* (2007) 4, 819, 824-825; Massoud, *supra* note 8, 13.

³⁴ Ruggie, *Just Business*, *supra* note 1, xx.

³⁵ UN Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/2006/97, 22 February 2006 [Interim Report of Ruggie].

³⁶ Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/RES/17/4Res. 17/4, 6 July 2011.

³⁷ D. Bilchitz, ‘The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?’, 7 *SUR – International Journal on Human Rights* (2010) 12, 198, 199-200; Massoud, *supra* note 8, 15.

³⁸ Cf. *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015, IACtHR Series C, No. 309, para. 166.

³⁹ UN Guiding Principles, ‘Implementation- Tools & Examples, National Action Plans, Business and Human Resource Centre’, available at <https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited 16 December 2019).

Principles on Business and Human Rights”.⁴⁰ NAPs are designed to assess the actual as well as the potential adverse human rights impacts with which a business entity may be involved.⁴¹ States ascertain what they are already doing to implement the UN Guiding Principles and identify gaps, which require further policy action.⁴²

Especially noteworthy are the national legislations of France and Germany, which have both used the UN Guiding Principles as a basis. Germany implemented its comprehensive NAP in 2016, which is to be realized in 2020.⁴³ Its core provisions are of civil liability for corporations regarding violations in and outside of Germany, the possibility of class actions, and international cooperation.⁴⁴ A pivotal role is assigned to due diligence obligations for corporations, which consist of human rights impact assessments, reports, complaint mechanisms, and policy statements to respect human rights.⁴⁵

France also leaned on the UN Guiding Principles when it introduced the new law “loi n°2017-399” (*loi de vigilance*) in March 2017. This law is considered to be the most advanced national instrument, which holds corporations responsible for human rights violations, due to its relatively high standard for due diligence, that can be penalized quite strongly.⁴⁶ At the heart of the *loi de vigilance* is the human rights due diligence of corporations and thus the correlated liability of companies for non-compliance with this duty.

As shown, past attempts have so far not been able to develop a binding solution. However, the need as well as the willingness for more regulation is shown, when 21 States have implemented NAPs and leading European nations are starting to implement strict regulatory frameworks to deal with the actions of corporations.

⁴⁰ *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/69/263, 5 August 2014, para. 6.

⁴¹ *Ibid.*, para. 2; *UN Guiding Principles*, *supra* note 5, Principle 18 and Commentary.

⁴² *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 40, para. 2.

⁴³ German Federal Government, ‘Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte, 2016-2020’ (2017), 10, available at <https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf> (last visited 16 December 2019).

⁴⁴ *Ibid.*, 25.

⁴⁵ *Ibid.*, 8.

⁴⁶ S. Brabant & E. Savourey, ‘French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective’, 50 *Revue Internationale de la compliance et de l’éthique des affaires*, *Supplément à la Semaine Juridique entreprise et affaires* (2017), Articles 91-94, Art. 91, 7.

C. The Zero Draft: A Binding Regulatory Framework at Last?

On 16 July 2018, the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights (OEIGWG) published the first draft for a potentially binding treaty: The Zero Draft.⁴⁷ The OEIGWG was established in 2014 as a new intergovernmental forum, based on Human Rights Council Resolution 26/9. It is mandated with developing an internationally binding instrument to regulate the activities of transnational corporations under international law.⁴⁸ Issues such as the civil and criminal liability of corporations, effective victim protection, extraterritorial State obligations, and the relationship of a possible future treaty to international investment protection law are addressed.⁴⁹

Before looking at how the content is perceived within the international community, it is crucial to analyze what the Zero Draft is aiming to regulate and accomplish. As such, this section looks at the relationship between the aims of the Zero Draft [I.] and their implementation [II.] to determine whether the Zero Draft can close the human rights protection gap effectively [III.].

I. The Aims of the Zero Draft

By expanding and specifying the human rights obligations of States in the context of transnational business activities, the Zero Draft is designed to close the existing protection gap in a binding manner. Transnational corporations should no longer be able to impair human rights unhindered and without legal consequences.⁵⁰ In order to achieve this goal as effectively as possible, the Zero Draft pursues several sub-goals, namely those of international cooperation, the

⁴⁷ ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’, Zero Draft, 16 July 2018, available at <https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf> (last visited 16 December 2019) [Zero Draft].

⁴⁸ Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/RES/26/9, 14 July 2014; Massoud, *supra* note 8, 16.

⁴⁹ *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/34/47, 4 January 2017; Martens & Seitz, *supra* note 8, 17.

⁵⁰ Cf. *Zero Draft*, *supra* note 47, Art. 2(1)(a).

mutual legal assistance of States, obligations to protect, and effective remedies. The central element lies within the protection of victims.⁵¹ This is based on the idea that it is generally of no relevance to the victims whether a human rights violation is caused by a State or by a private actor. Therefore, effective remedial mechanisms are to be introduced.⁵² In order to guarantee the effective protection of victims, the Zero Draft further aims to introduce comprehensive corporate liability.⁵³ The nexus of victim protection and corporate liability is the corporate duty of due diligence, for which the draft provides uniform international standards.

II. Implementation of the Aims: The Framework of the Zero Draft

The following section examines how the Zero Draft attempts to realize the desired aims. The core provisions of the document include Art. 8 (rights of victims), Art. 9 (prevention), and Art. 10 (corporate liability), which link the protection of victims to the corporate duty of due diligence and the associated corporate liability for the first time.

1. Scope of Application of the Zero Draft

In order to assess the range and extent of the provisions of the Zero Draft, the scope of application needs to be determined. It is argued that, due to unclear wording, the scope of application poses a threefold problem: there is no clear definition of which corporations are to be addressed [a.], the extent of extraterritorial obligations is questionable [b.], and there is no specific indication of which human rights are specially protected [c.].

a. Transnational Corporations, Art. 3(1)

The question as to which kinds of corporations should be addressed arose during the sessions of the OEIGWG.⁵⁴ While some States wanted to include all kinds of corporations, regardless of their national or transnational character,⁵⁵

⁵¹ Cf. *ibid.*, Art. 2(1)(b).

⁵² Cf. *ibid.*, Art. 2 (1)(b) in conjunction with Art. 8.

⁵³ Cf. *ibid.*, Art. 9.

⁵⁴ *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business enterprises With Respect to Human Rights*, UN Doc A/HRC/37/67, 24 January 2018, para. 51.

⁵⁵ *Ibid.*, para. 52.

other delegations wanted to specifically exclude national corporations from the scope.⁵⁶ As a result, the draft currently applies to all business activities with a transnational character.⁵⁷ Art. 4(2) defines a business activity as having a transnational character when “[...] actions, persons or impact of the action take place in two or more national jurisdictions”. Upon first glance, the Zero Draft seems to provide an alternative solution that focuses on the activity itself and not the characteristics of an enterprise. The document also assumes that a definition of the companies concerned is not necessary, as the only decisive factor is the transnational activity.⁵⁸

However, as it is, the scope of application is formulated very vaguely and leaves great room for interpretation. Comparing the Zero Draft to other international instruments that concern transnational activities, one could have recourse to the UN Convention against Transnational Organized Crime. There, Art. 34(2) states that the implementation of the Convention must take place regardless of the transnational character of a corporation. The Convention thus includes all corporations, irrespective of their character. The UN Guiding Principles also apply to all corporations, regardless of their transnational character.

Nonetheless, the drafting States have deliberately decided against a definition that clearly includes corporations irrespective of their transnational character. By doing so, the draft overlooks the fact that violations of human rights by national corporations can occur just as frequently and as severely as those of transnational corporations.⁵⁹ Thus, it was noted by several delegations and organizations during the 4th session of the OEIGWG that the structure or nature of a corporation is irrelevant to victims, and so they should be entitled to access to remedy regardless of the corporation committing the abuse.⁶⁰ With the

⁵⁶ *Ibid.*, para. 60.

⁵⁷ Cf. *Zero Draft*, *supra* note 47, Art. 3(1).

⁵⁸ Cf. ‘Elements for the Draft Legal Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights’ (2017), 4, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf (last visited 16 December 2019).

⁵⁹ D. Weissbrodt & M. Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, 97 *The American Journal of International Law* (2003) 4, 901, 909; Hennings, *supra* note 27, 17.

⁶⁰ *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/40/48, 2 January 2019, para. 14.

victim-centered approach that the Zero Draft takes, a definition that included all corporations would be desirable.

b. (Extra-) territorial Scope of Application

Strongly intertwined with the definition of actions of transnational character is the territorial scope of application of the prospective treaty. Art. 9(1) imposes obligations on States “[...] within such State Parties’ territory or otherwise under their jurisdiction or control [...]”. It is argued that the term control is not used as an alternative criterion to the criterion of jurisdiction, but rather to specify what the term jurisdiction entails. It is typical for human rights treaties to connote the term jurisdiction with a factual power that States exercise over territory or individuals.⁶¹ With the explicit mention of the word *control*, the Zero Draft clarifies that it is indeed this factual link between the State and the respective corporation that is decisive to determine jurisdiction. The question remains as to how jurisdiction is to be interpreted.

The wording suggests that States’ obligations may go further than the range of their territory, i.e. extraterritorially. This is in accordance with the current trend of expanding States’ extraterritorial obligations. For example, the Inter-American Court of Human Rights, in its Advisory Opinion 23/17, declares that, when a State has effective control over specific conduct that then causes direct and foreseeable harm in another State’s territory, the former State has jurisdiction over the injury itself and is considered to have human rights obligations towards all who were affected by the injury.⁶² The Committee on Economic, Social and Cultural Rights also considers States to have extraterritorial obligations when they have control over a corporation and harm is foreseeable.⁶³ However, the Committee stresses, the obligations of one State cannot interfere with the sovereignty or diminish the obligations of the host States under the Covenant.⁶⁴ Presumably, it is for this reason that the Advisory Opinion 23/17 relies on the established criterion of *effective control*.

⁶¹ M. Milanović, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’, 8 *Human Rights Law Review* (2008) 3, 411, 418, 430.

⁶² *Medio Ambiente y Derechos Humanos*, Advisory Opinion 23/17 of 15 November 2017, IACtHR, para. 102.

⁶³ CESCR, GC 24, *supra* note 14, para. 27.

⁶⁴ *Ibid.*, para. 26; Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1, 12 July 2011, para. 5, 6.

Usually, as set out by the case law of the International Court of Justice (ICJ)⁶⁵ and the European Court of Human Rights (ECHR)⁶⁶, *effective control* relates to, or over, territory or individuals. Accordingly, States only have extraterritorial jurisdiction in exceptional cases where they exercise effective control through the occupation or physical control over individuals.⁶⁷ The Inter-American Court uses the idea of effective control to establish the factual link between a State and a corporation's conduct. If that conduct leads to foreseeable damage on another State's territory, the Court attributes jurisdiction to the former State.⁶⁸ However, this new approach has so far not been reiterated or confirmed by any other Court decisions and it is also not manifested in State practice.

In the event that the Zero Draft relied on this new approach of establishing jurisdiction, determining direct and foreseeable links along supply chains of transnational corporations would still present a challenge. It is questionable what the term *foreseeable* entails and how far extraterritorial jurisdiction of States would be extended.

To provide an example of a scenario in which this becomes evident, consider the following: State A is the home State to a parent company that exploits inhumane working conditions in State B. If it was foreseeable to State A that their corporation causes harm in the jurisdiction of State B, State A would have (extraterritorial) jurisdiction over the harm. At the same time, State B also has jurisdiction over its territory and has the sovereign right to govern its own affairs without interference from other States. It follows that A could not exercise its extraterritorial jurisdiction without interfering with State B's jurisdiction. It is therefore argued that, if read extensively, States could hardly put this rule into practice without violating the sovereignty of other States.

The explicit mentioning of the term *control* with *territory or otherwise jurisdiction* suggests that the draft incorporates and confirms current practice, i.e. that the term *control* must be interpreted restrictively. This is also supported by the fears expressed by States at the 3rd session of the OEIGWG about the

⁶⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 113.

⁶⁶ *Al-Skeini and Others v. United Kingdom*, ECtHR Application No. 55721/07, Judgment of 7 July 2011, para. 109; cf. also *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, 201, para. 175.

⁶⁷ *Al-Skeini and Others v. United Kingdom*, *supra* note 66, para. 109; cf. also *Democratic Republic of Congo v. Uganda*, *supra* note 66, para. 175.

⁶⁸ *Medio Ambiente y Derechos Humanos*, *supra* note 62, para. 102.

possibility of inappropriate and far-reaching extraterritorial application,⁶⁹ as well as by the fundamental principle of State sovereignty under international law, which prevents States from exercising extraterritorial jurisdiction when another State has territorial jurisdiction. It is argued that, while this clause is to be read rather restrictively, the Zero Draft foresees mutual legal assistance and international cooperation, through which – even if applied only territorially – the protection gap would still be closed effectively.

c. “All International Human Rights”, Art. 3(2)

The Zero Draft is set out to not only apply to specific human rights, but to all.⁷⁰ Nevertheless, the wording is so unclear that the *ratione materiae* cannot be unequivocally established. As stated in Art. 31(1) of the *Vienna Convention on the Law of Treaties*, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Whenever the wording is unclear, one may turn to the object and purpose of a treaty in order to interpret a term.⁷¹

With regards to the Zero Draft, one could come to the conclusion that, as labor and equality rights are the most affected rights, they are essentially the ones that the Draft intends to protect first and foremost. Nevertheless, looking to the reports of the working sessions and the preamble of the Zero Draft, that conclusion is not mandatory. No reference is made to the International Bill of Human Rights,⁷² nor is any reference made to any restrictions imposed by customary international law or *ius cogens*, especially ensuring the right not to be subject to torture, cruel, inhumane, or degrading treatment, as provided by Art. 7 of the International Covenant on Civil and Political Rights (ICCPR). Principle 12 of the UN Guiding Principles, which is based on the International Bill of Human Rights and the ILO Rights on Fundamental Principles and Rights at Work, could serve as a clarifying interpretation. However, the draft does not refer to the UN Guiding Principles, for which this interpretation is not mandatory. On the other hand, an interpretation that is too narrow and focused on specific rights would only run counter to protecting any potentially affected human right. As there is no mandatory interpretation in either direction at this stage in

⁶⁹ *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 78.

⁷⁰ Cf. *Zero Draft*, *supra* note 47, Art. 3(2).

⁷¹ O. Dörr & K. Schmalenbach, *Vienna Convention on the Law of Treaties* (2012), 546.

⁷² Consisting of: UDHR, ICCPR, ICESCR.

the development of the Treaty on Business and Human Rights (the Treaty), it would be desirable for the Treaty to gain in specificity. It is recommended that heavily affected labor and equality rights be included with particular emphasis, without excluding other possibly affected rights.

2. State Obligations

Of particular note, the draft does not directly oblige corporations but leaves the (primary) responsibility for preventing and penalizing human rights infringements with States.⁷³ Above all, the protection of victims remains the responsibility of States.⁷⁴

a. The Obligation to Protect

The perambulatory text already emphasizes that the primary responsibility for the positive implementation of human rights is to remain with the State. Specifically, States must protect individuals within their jurisdiction from any interference that can infringe upon their human rights, including the conduct of corporations.⁷⁵ To this end, Art. 9(1) imposes an obligation on States to ensure through national legislation that corporations observe human rights due diligence obligations. This is to apply to all corporations that are located in the territory of the States or otherwise under their jurisdiction or control. The Draft thus expands human rights to include a mandatory dimension of protection. The State's duty to protect is supposed to apply wherever the State has factual power over an enterprise: on State territory, and in exceptional cases also extraterritorially for corporations that are under the State's effective control.

b. Effective Remedies and Judicial Recourse

The establishment of effective remedial mechanisms, and thus the protection of victims, is of central importance.⁷⁶ Art. 8 not only establishes that there must be remedial mechanisms to compensate and indemnify victims

⁷³ Cf. *Zero Draft*, *supra* note 47, Preamble para. 4; Art. 9(1), Art. 10.

⁷⁴ Cf. *Zero Draft*, *supra* note 47, Art. 8.

⁷⁵ *Zero Draft*, *supra* note 47, Preamble, para. 4; HRC, GC 31, *supra* note 12, para. 8; C. Köster, *Die völkerrechtliche Verantwortlichkeit privater (multinationaler) Unternehmen für Menschenrechtsverletzungen* (2010), 70; cf. *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, IACtHR Series C, No. 4, para. 166.

⁷⁶ *Zero Draft*, *supra* note 47, Art. 2(1)(b).

or their surviving dependents, but it also regulates procedural costs and the treatment of victims. It follows from the systematic connection to Art. 5(1), as well as Art. 10-11, that both the home and host States are obliged to provide appropriate remedies and to cooperate with other States to guarantee their implementation.

First, Art. 8(1) and Art. 8(2) provide that the right of access to legal protection is guaranteed by providing for general remedies and by including the right to bring individual action, as well as collective actions. Also concerning judicial access, Art. 8(4) emphasizes that victims must be provided with all necessary information. A similar regulation can be found in the German NAP, which emphasizes that collective actions are possible and also introduces a multilingual information brochure. The UN Guiding Principles also focus on access to effective remedies in their Principle 25. Additionally, States are required through their domestic law to provide their courts and other competent authorities with appropriate jurisdiction.⁷⁷

The common law principle of *forum non-conveniens* allows courts to deny jurisdiction when they consider another forum to be more appropriate.⁷⁸ Therefore, claims are dismissed as inadmissible when a Court in a different jurisdiction is more appropriate.⁷⁹ In the *Chevron* case, where indigenous peoples from Ecuador tried to bring claims for oil spills caused by Texaco before US courts, these declined jurisdiction.⁸⁰ In order to ensure adequate, timely, and effective legal protection, Art. 8(2) sets out that States provide their courts with the necessary jurisdiction under the Treaty. The report on the 4th session of the OEIGWG further indicates that the *forum non-conveniens* principle shall be prohibited when the Zero Draft finds application.⁸¹

Art. 5 is closely connected to this, when it determines jurisdiction both for the State where the human rights violations took place (host State) and for the corporation's home State. It bases this, similarly to the Rome Statute, on general

⁷⁷ Cf. *ibid.*, Art. 8(2).

⁷⁸ Cf. Deva, *Regulating Corporate HR Violations*, *supra* note 21, 48.

⁷⁹ M. Koebele, *Corporate Responsibility under the Alien Tort Statute, Enforcement of International Law Through US Torts Law* (2009), 325.

⁸⁰ G. Skinner, R. McCorquodale & O. De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business, Bericht des International Corporate Accountability Roundtable, CORE und der European Coalition for Corporate Justice* (2013), 15; Kaleck & Saage-Maaß, *supra* note 6, 75.

⁸¹ *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 104.

principles of international law.⁸² Essentially, this serves in the interest of victims as the Draft aims to make seeking legal redress as easily accessible as possible. Moreover, according to Art. 8(3), States have the duty to “[...] investigate all human rights violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those natural or legal persons allegedly responsible, in accordance with domestic and international law”. Therefore Art. 8(3) further stresses the importance of victim protection by ensuring that human rights infringements are prosecuted.

The reference to “other competent authorities” in Art. 8(2) could mean extrajudicial remedy mechanisms. However, unlike the UN Guiding Principles,⁸³ the Draft does not further deal with extrajudicial or non-governmental remedy mechanisms. Instead, Art. 8(5) of the Draft focuses on the judicial remedy mechanisms and provides above all for financial support from the State. According to Art. 8(6), procedural fees shall be waived. Art. 8(7) draws the link from international cooperation to victim relief, by providing for the establishment of an *International Fund for Victims*. Art. 8(8) ensures the provision of “[...] effective mechanisms for the enforcement of remedies, including national or foreign judgments [...]”, and so stresses the necessity of the effective enforcement of legal remedies, but the Draft does not further deal with detailed procedural questions that would give an indication of how an implementation by States would look like. Finally, Art. 8 guarantees that victims be “[...] treated with humanity and respect for [...] their human rights [...]”. Accordingly, the Draft also addresses the protection of victims after the human rights infringement by a corporate entity has taken place and ensures a safe harbor in the search for legal remedy.⁸⁴

c. Duties of Cooperation

Of particular importance are those measures in the Draft which provide for strong international cooperation, mutual recognition, and support. These can be found in Art. 11 and Art. 12. The significance of these measures can be summarized concisely by the fact that other provisions of the Draft find their basis in them,⁸⁵ essentially devoted to filling jurisdictional gaps.⁸⁶

⁸² von Arnault, *supra* note 10, 149.

⁸³ Cf. *UN Guiding Principles*, *supra* note 5, Principle 27-29.

⁸⁴ Cf. *Zero Draft*, *supra* note 47, Art. 8(9)-(13).

⁸⁵ Cf. above B. II. 3; C. II. 1. b).

⁸⁶ *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*,

Art. 12 stresses the importance of international cooperation, and that above all States must recognize the importance of such cooperation. States are to “[...] undertake appropriate and effective measures in this regard, between and among States [...]”. There exists, therefore, a due diligence obligation for States to ensure international cooperation. Art. 12(I)(a)-(c) contains a non-exhaustive list of how to comply with this obligation. States, for example, are to “promote effective technical cooperation and capacity-building”, “share experiences, good practices, challenges, information and training programs,” and “facilitate cooperation in research and studies”.

Art. 11 specifically deals with the mutual legal assistance of States. States are called upon to exchange information, as well as to aid each other in the investigation of human rights violations. They are further to support each other in criminal and civil proceedings. To this end, central authorities in each State are to be established and empowered, on the one hand, to receive inquiries from other States, and on the other hand, to be able to send inquiries to other States themselves.⁸⁷ When having recourse to Court proceedings that concern transnational companies and human rights, it becomes evident that, without mutual legal assistance, the remaining obligations can easily be rendered meaningless.

Here, Art. 11(9) stands out, in that it states “[a]ny judgment [...] which is enforceable in the State of origin of the judgment and is no longer subject to ordinary forms of review shall be recognized and enforced in any Party [...]”. Accordingly, this guarantees the legal effect of incontestable national judgments in other contracting States. This also seems to go beyond current practice, as national judgments usually only produce legal effect in the jurisdiction where they were ordered. The enforcement of a judgment from one State in another would hardly be obtained without prior mutual legal assistance. According to Art. 11(10), an exception to this general notion can only be made if there is “[...] proof, that (a) the defendant was not given reasonable notice and a fair opportunity to present his or her case, (b) where the judgment is irreconcilable with an earlier judgment validly pronounced in another Party with regard to the same cause of action and the same parties or (c) where the judgment is contrary to the public policy of the Party in which its recognition is sought.”

supra note 60, para. 75.

⁸⁷ Cf. *Zero Draft*, *supra* note 47, Art. 11(7).

3. Obligations of Private Corporations

Although companies currently inflict the most severe infringements of labor and equality rights as well as the right to self-determination of natural resources, they are not meant to be directly bound by the Treaty. The Draft, however, does not completely disregard the risks of corporate actions: corporations are indirectly bound to human rights, with the State as the intermediary.

a. Due Diligence Obligations

In order to indirectly bind corporations, the Draft employs an already recognized approach of human rights due diligence.⁸⁸ Art. 9(2) lit. a-h contains a concrete, non-exhaustive list of the content of the due diligence obligations. In addition to the common (environmental- related) obligations of reporting publicly and periodically,⁸⁹ corporations are also obliged to carry out human rights impact assessments and even prevent human rights violations along their entire supply chain. While obligations of due diligence normally represent obligations of conduct,⁹⁰ the Zero Draft sets the requirements and threshold remarkably high, in that the obligations *de facto* represent obligations of result.⁹¹ That is not only atypical in international law,⁹² but it can also not be found in any national legislation. Even the progressive French *loi de vigilance* does not contain such high requirements. The UN Guiding Principles also do not presuppose such a high standard: instead, they provide for a declaration of principle by corporations,⁹³ even though they assume that the due diligence obligations apply to corporations even if the State fails to comply with its own obligations.⁹⁴

⁸⁸ *UN Guiding Principles*, *supra* note 5, Principle 15; R. McCorquodale & L. Smit, 'Human Rights, Responsibilities and Due Diligence, Key Issues for a Treaty', in Deva & Bilchitz, *supra* note 8, 216, 216.

⁸⁹ *Pulp Mills on the River of Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 20, para. 91.

⁹⁰ *Ibid.*; McCorquodale & Smit, *supra* note 88, 218.

⁹¹ J. G. Ruggie & D. Cassel. 'Comments on the Zero Draft', available at <https://www.business-humanrights.org/en/comments-on-the-“zero-draft”-treaty-on-business-human-rights> (last visited 16 December 2019).

⁹² Cf. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 31, para. 62.

⁹³ *UN Guiding Principles*, *supra* note 5, Principle 17.

⁹⁴ Cf. *Ibid.*, Principle 11.

b. Liability of Private Corporations

Art. 10 provides for both civil and criminal liability for companies as a consequence of the due diligence obligations. Both cases of liability are to be applied independently of each other.⁹⁵

Civil liability is regulated in Art. 10(5) to Art. 10(7). In Art. 10(6), the Draft focuses on the factors “control”, “a strong and direct link”, or “foreseeable risk” in the civil liability of corporations in connection with the actions of their subsidiaries and business partners. It is not clear from the wording whose actions are decisive.⁹⁶ The *loi de vigilance* uses a similar starting point, but uses the criterion of “effective control”⁹⁷ and thus further restricts the scope of application. Also vaguely formulated is Art. 10(4), which provides for the possibility of reversing the burden of proof “where needed”.

Meanwhile, criminal liability is defined in Art. 10(8) to Art. 10(12). The imprecise definition of transnational corporations is particularly problematic in this respect, as the criminal law principle of certainty also applies in international law.⁹⁸ If the Treaty does not specifically define which transnational activities are covered nor which corporations are addressed, the Treaty does not appropriately reflect the principle of certainty.⁹⁹ Here again the difference between corporations, which qualify as human rights recipients, and States, which are human rights guarantors, becomes evident. This fact can and must not be overlooked when determining the international obligations of private corporations.

4. Conflict with Trade and Investment Treaties

There has long been speculation about the relationship between the Treaty on Business and Human Rights and existing investment treaties. Generally, human rights are largely disregarded in such treaties.¹⁰⁰ While human rights

⁹⁵ Cf. *Zero Draft*, *supra* note 47, Art. 10(3), Art. 10(7).

⁹⁶ Ruggie & Cassel, *Comments on the Zero Draft*, *supra* note 91.

⁹⁷ Art. L. 225-102-4, L.225-102-5 *loi relative audevoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (law on the duty of care of parent companies and ordering companies).

⁹⁸ von Arnould, *supra* note 10, 573.

⁹⁹ Cf. *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 56.

¹⁰⁰ Deutsches Institut für Menschenrechte, *Stellungnahme: Die UN- Leitprinzipien als Grundlage für ein verbindliches UN-Abkommen zu Wirtschaft und Menschenrechten, Stellungnahme zu den „Entwurfselementen für ein verbindliches Menschenrechtsabkommen“*

organizations wish for the Treaty to take precedence over investment treaties, corporations naturally advocate for the opposite.¹⁰¹ Contrary to what was originally envisaged in the 2017 Elements,¹⁰² the Draft does not provide for an overarching position on investment protection treaties.

According to Art. 13(3), it applies “[...] without prejudice to any obligation incurred by States under relevant treaties[...]”. Art. 13(6) stipulates that future investment treaties must not conflict with the Treaty. Art. 13(7) regulates that both existing and future investment treaties shall be interpreted in such a way as to limit the Treaty as little as possible. When applying the rules set out in the *Vienna Convention on the Law of the Treaties*, one would thus have to regard investment treaties as part of the context of the Treaty on Business and Human Rights. The potential Treaty would be regarded on the same level as trade and investment treaties, which would have to be interpreted in the light of one another. A fixed superimposition of human rights obligations is thus avoided; the result depends on the situation and the individual case.

5. Institutional Regulations

While the 2017 Elements,¹⁰³ as well as some delegations of the OEIGWG, were in favor of an international court, Art. 14 of the Draft merely provides for the establishment of a Committee. Similar to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, this Committee is entrusted with the task of monitoring the observance and development of treaties.¹⁰⁴ Within this framework, it is to generate, among other things, General Comments on the basis of State reports and make recommendations.¹⁰⁵ There is no provision for a right of appeal before the Committee. The Committee’s position will thus most probably be comparable to those of the Committees for the conventional human rights treaties, although their Optional Protocols provide for the possibility of individual complaints.¹⁰⁶ In addition to the

der Offenen Zwischenstaatlichen UN-Arbeitsgruppe zu Transnationalen Konzernen und Sonstigen Unternehmen (2018), 6.

¹⁰¹ Massoud, *supra* note 8, 196.

¹⁰² ‘Elements for the Draft Legal Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’, *supra* note 58, 3.

¹⁰³ *Ibid.*, 14.

¹⁰⁴ *Zero Draft*, *supra* note 47, Art. 14(4); cf. ICCPR, *supra* note 11, Art. 40; cf. ECOSOC Res. 17, 28 May 1985.

¹⁰⁵ Cf. *Zero Draft*, *supra* note 47, Art. 14(4).

¹⁰⁶ Cf. *Optional Protocol to the ICCPR*, 19 December 1966, 999 UNTS 171; *Optional Protocol to the ICESCR*, UN Doc A/RES/63/117, 10 December 2008.

Committee, there is to be a conference of States, which will also regularly deal with the implementation and further development of the Treaty.¹⁰⁷ Here, too, the Draft focuses especially on international cooperation.

III. Evaluation of the Zero Draft: Can the Zero Draft Realize Its Aims with the Established Provisions?

The overall structure of the Zero Draft is convincing at first glance. It prioritizes the concerns of victims of human rights abuses, providing detailed remedial mechanisms while also ensuring mutual legal assistance and international cooperation. In view of the current situation, in which it is virtually impossible for victims to obtain legal redress,¹⁰⁸ this presents a positive development.

In particular, access to justice¹⁰⁹ and the obligation of all States to provide their courts with the necessary jurisdiction¹¹⁰ is essential to ensure effective remedial mechanisms in the contracting States. Alongside the provision of jurisdiction of home as well as host States, as guaranteed by Art. 5, victims will be given the opportunity to seek legal assistance at the place most convenient to them, thereby intensifying protection. In this context, the planned financial support from the State is also of great significance, since protracted procedures usually turn out to be cost-intensive.

While this much needed level of protection for victims is desirable, the Draft lacks clear and precise wording at focal points. This could potentially prevent the enforcement of effective victim protection. A fundamental problem constitutes the lacking definition of transnational corporations. While the Draft, presumably based on the tense discussions,¹¹¹ merely focuses on the transnational activities of corporations, it deliberately avoids a wording that specifies which corporations will be affected in concrete terms. It thus seems to tie in with the fact that human rights are particularly affected by the transnational

¹⁰⁷ Cf. *Zero Draft*, *supra* note 47, Art. 14(5).

¹⁰⁸ Skinner, McCorquodale & De Schutter, *supra* note 80, 9; Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 156.

¹⁰⁹ Cf. *Zero Draft*, *supra* note 47, Art. 8(1).

¹¹⁰ Cf. *Ibid.*, Art. 8(2).

¹¹¹ 'Elements for the Draft Legal Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', *supra* note 58, 4; *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 49, para. 14.

activities of corporations and addresses the core of the problem of human rights infringements by corporations.

Nonetheless, the regulation in its present form is too vague to effectively address and eliminate human rights infringements by private actors. It is also unclear whether State enterprises or so-called joint ventures, consisting of State and private shares, fall within the scope of application. The role of States in economic action and their legal responsibility is thus fundamentally ignored by the Draft. In view of the footnote in Res. 26/9 and the discussions based on it,¹¹² it is also obvious that local companies do not fall within the scope of application, even though they may affect human rights in the same manner. The criterion of locality does not exclude these companies from also carrying out (some) transnational activities. Without a precise analysis of the subsequent State practice, the scope of the definition cannot be precisely determined; the current wording opens the door to abuse and circumvention in order to protect corporations' as well as States' economic interests.

It is important to note here that, while States would still be under a due diligence obligation to prevent local companies from committing human rights abuses, it is questionable whether the standard set out by the Committee on Economic, Social and Cultural Rights is the same as the standard that is foreseen in the Zero Draft. Further, the universal standard that the Zero Draft aims to create, not only in terms of protection and prevention obligations but also in terms of remedy, could be undermined if local corporations were excluded. Therefore, it would be more effective to include both local and transnational corporations or to interpret the term transnational activity in such a manner that all businesses would be affected whenever carrying out transnational activities.¹¹³

That the Draft addresses *all international human rights* is a worth while approach. As corporations are in a position to infringe upon all manner of human rights, from labor rights to the right to life, it is necessary for corporations to be bound to respect all human rights.¹¹⁴ In this way, the comprehensive and effective

¹¹² *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 27.

¹¹³ The latter was suggested by delegations in: *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 38.

¹¹⁴ UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, UN Doc A/HRC/8/5, 7 April 2008, para. 23; Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 163.

protection of human rights is ensured. Yet the current wording, without any kind of restriction and emphasis on labor and equality rights that are especially affected, harbors a certain risk of abuse and could perpetuate legal uncertainty.

Furthermore, leaving the primary obligation to protect with the State and using it as an intermediary to indirectly bind corporations to human rights could cost the potential Treaty some effectiveness. In theory, even under current international obligations, States are obliged to prevent human rights violations by third parties.¹¹⁵ Even though that triggers the international responsibility of States, these violations can only be claimed by other States and only if they are injured or specially affected.¹¹⁶ A claim by individuals on the grounds of a State's treaty violation is not provided in international law. It is only under narrow circumstances that individuals can bring forward claims in front of the respective human rights courts,¹¹⁷ and the Zero Draft does not change that. Although the Draft also prescribes explicit liability measures for the fulfillment of these obligations of protection, it is uncertain what will happen if a State continues to refrain from its obligation to protect. Explicit consequences only follow from non-compliance of the corporate responsibilities.¹¹⁸

Additionally, human rights infringements are most severe in "weak government zones" and conflict areas.¹¹⁹ Therefore, it is surprising that, unlike the UN Guiding Principles, the Draft does not address these zones specifically at all. However, it is precisely these States that are expected to fulfill their obligations to protect to the full extent. It is a utopian assumption to expect an improvement of the current situation in this regard.¹²⁰ It is recommended that international cooperation and recognition be expanded and adapted in the Draft in order to guarantee the effective implementation of obligations in every State. This could be developed accordingly in further treaty negotiations.

¹¹⁵ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8.

¹¹⁶ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 13, 31-143, 117.

¹¹⁷ Cf. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 35, 213 UNTS 222 (amended by the provisions of Protocol No. 14 (CETS No. 194))[ECHR]; *American Convention on Human Rights*, 22 November 1969, Art. 46, 1144 UNTS 123, 150 [ACHR].

¹¹⁸ Cf. *Zero Draft*, *supra* note 47, Art. 10.

¹¹⁹ *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *supra* note 114, paras. 46-49.

¹²⁰ Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 161.

The corporate obligations of due diligence are generally set very high in the Draft, possibly to account for the fact that corporations are not directly held responsible. *De facto*, the obligation in Art. 9(2) to prevent human rights impairments requests more from corporations than to apply a certain due diligence. While due diligence obligations are not completely alien to transnational corporations, these are normally based on the voluntary actions of the corporations.¹²¹ Compliance with the obligatory corporate due diligence obligations could be achieved through effectively implementing the liability provisions. By holding a corporation liable under civil and criminal law as soon as it fails to comply with its duty, not only is political pressure exerted but non-compliance would also be costly for the company. In short, the company would have to bear at least part of the costs that were saved by infringing upon human rights. A corporation that reduces production costs because of inhumane working conditions would at least have to carry part of those saved costs when being penalized for exploiting those conditions. From an economic perspective, exploitation would be less worthwhile for companies than might currently be. If these standards are introduced in all States, it will also make it increasingly difficult for corporations to exploit working conditions that are detrimental to human rights.

However, Art. 10 could present problems in the context of the so-called *piercing of the corporate veil*. As a general principle of international law, the legal personality of a company must be separated from that of its shareholders and business partners.¹²² If the Draft bases provisions on the fact that the company is responsible for the actions of its business partners, then it neglects this principle. Courts are generally reluctant to take action against shareholders.¹²³ Some exceptions to this principle have been made, especially in recent human rights procedures.¹²⁴ The Western Cape High Court in Cape Town, South Africa explicitly stated that juristic personality is a legal fiction and that, when the circumstances of a particular case require disregarding this legal fiction, then courts should disregard it.¹²⁵ While the UK Supreme Court left open the question of whether the courts in that jurisdiction truly possess the power to

¹²¹ McCorquodale & Smit, *supra* note 88.

¹²² *Ibid.*, 229.

¹²³ Cf. *Salomon v. Salomon & Co Ltd.* [1897] AC 22; *Faiza Ben Hashem v. Shayif* [2008] EWHC 2380 (Fam).

¹²⁴ Cf. Gore NO and 37 Others NNO, Case No: 18127/2012, 2013, SA, 382 (WCC).

¹²⁵ *Ibid.*

pierce the corporate veil, courts have acted in such a manner over the years that it is to assume they do possess the power.¹²⁶

The Draft therefore does not appear to be heading for new territory here. However, the regulation requires further clarification in order to make clear whose actions are the decisive ones, in order to avoid the potential for abuse and to apply the regulation effectively. The relationship between trade and investment treaties seems to represent a compromise. Considering that the origin of the protection gap lies in the fact that companies are granted many rights yet are imposed with no human rights obligations, this is a rather disenchanting finding. In order to effectively prevent human rights infringements, the treaty should take precedence over trade and investment treaties. In conclusion, there has been some progress towards at least respecting human rights within these treaties.

The existing gap between business and human rights can only be closed effectively if the roots of the problem are addressed. The Draft employs many important and effective approaches. On the points indicated, however, re-writing and specification is urgently needed in order to give the Draft much-needed effectiveness.

D. Challenges of a Global Convention From a Policy Perspective

Regardless of assessments on the content of the Zero Draft, the potential for an international treaty on business and human rights and its adoption by the international community can be evaluated. Ultimately, the chances of its acceptance ultimately depend on the various interests of different States and corporate entities. Therefore, a comparison is drawn with previous attempts to close the protection gap [I.], before assessing what positions are represented by States [II.] in order to evaluate the chances of a successful treaty adoption [III.].

I. Historical Background: Comparison to the 2003 Norms

The need for a binding solution to bridge the protection gap is not a completely new idea. For example, the Draft Norms of the working group of the “UN Sub-Commission for the Promotion and Protection of Human Rights”

¹²⁶ Cf. the conclusion by Rose LJ in *Re H and others* (restraint order: realizable property): [1996] 2 All ER 391, para. 401F.

were completed in 2003 and proposed to the Human Rights Commission.¹²⁷ Although the 2003 Draft Norms were highly appreciated and found approval in literature,¹²⁸ States vehemently rejected them as the Norms foresaw direct obligations on private corporations. That would indeed burden the steadily growing economic players with more responsibility and obligations, which in terms of victim protection is favorable. However, it would provide corporations with a partial subjectivity of international law, ultimately granting them the capacity to maintain their rights by bringing international claims.¹²⁹ This constitutes a situation that most sovereign States would rather prevent, even if NGOs and some delegations spoke in favor of this notion in October 2018.¹³⁰

At the time, Ruggie assumed that the 2003 Draft Norms would fail, because there was no basis for the direct human rights obligations of transnational corporations in international law.¹³¹ The UN Guiding Principles therefore laid all responsibility on States, a concept that the Zero Draft picks up on. Like the Zero Draft, the 2003 Draft Norms recognized that the primary responsibility for ensuring human rights rested with States.¹³² Meanwhile, the 2003 Draft Norms went one step further and directly obligated corporations alongside States.¹³³ The human rights selected in the 2003 Draft Norms were intended to oblige transnational corporations not only to respect human rights, but also to

¹²⁷ *UN Sub-Commission on the Promotion and Protection of Human Rights Res. 2003/16*, UN Doc E/CN.4/Sub.2/2003/L.11, 13 August 2003.

¹²⁸ Miretski & Bachmann, *supra* note 23, 8.

¹²⁹ *Reparation for Injuries Suffered in Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 9; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 57.

¹³⁰ *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 38.

¹³¹ *Interim Report of Ruggie*, *supra* note 35, para. 60; cf. also McBeth, *supra* note 2, 254.

¹³² Cf. UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 30, Preamble, Art. 1; K. Nowrot, 'Die UN-Normen on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights – Gelungener Beitrag zur transnationalen Rechtsverwirklichung oder das Ende des Global Compact?', 21 *Beiträge zum Transnationalen Wirtschaftsrecht* (2003), 5, 13.

¹³³ Cf. UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 30, Art. 1, Art. 2; Miretski & Bachmann, *supra* note 23, 10.

promote and guarantee them.¹³⁴ The 2003 Draft Norms also provided for certain due diligence obligations of companies,¹³⁵ but these were of secondary nature. Rather, the focus was on the direct, far-reaching human rights obligations of private entities. The focus of the 2003 Draft Norms was solely on holding companies accountable and – unlike the Zero Draft– did not mention State obligations, international cooperation, corporate liability, or the protection of victims.

II. Positions of States and State Practice with Regards to the Main Content

As the third and fourth sessions of the OEIGWG show, States largely agree that a legally binding instrument is required in order to close the existing protection gap.¹³⁶ Nonetheless, there is disagreement on how this is to be achieved. Res. 26/9 was far from being adopted unanimously in 2014. Only 20 of the 47 voting States voted in favor of the adoption of the resolution.¹³⁷ The clear difference in opinion of States of the global North and the global South become evidently clear when only looking at the willingness of negotiations on business and human rights. States of the global South, including Pakistan, Namibia, South Africa, and Venezuela, voted in favor of adopting the resolution. The global North, on the other hand, including Germany, France, Austria, the United Kingdom, and the United States, initially voted against negotiations on a legally binding instrument. Germany, in particular, did not participate in the first negotiations.¹³⁸ Striking however, are the positive responses from China and the Russian Federation.

Germany was represented at the third session, but ensured lengthy discussions with the European Union (EU) on the scope of application of the

¹³⁴ Cf. UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 30, Art. 1, Art. 5, Art. 12.

¹³⁵ Cf. *Ibid.*, Art. 15.

¹³⁶ *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 15.

¹³⁷ Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc A/HRC/RES/26/9, 14 July 2014, 3.

¹³⁸ Martens & Seitz, *supra* note 7, 5.

binding treaty.¹³⁹ The main concern, especially of the EU, seems to be the potential competitive advantages for local businesses. If the EU had to introduce high standards for its (predominantly) transnational corporations but, for example, South Africa would not have to fulfill this obligation, as its corporations are classified as local, the local South African company would have a competitive advantage over the EU-based transnational corporation. Despite this concern, many developed States have introduced NAPs.¹⁴⁰ Negatively noted is the fact that even the States that have introduced NAPs do not sufficiently address the access to judicial remedies.¹⁴¹

As the fourth session of the OEIGWG especially shows, different jurisdictions allow for different discussions and possibilities.¹⁴² Having to apply different laws, depending on where the abuse took place, makes the situation even more difficult. As the fourth report also provides, the vague terms of the Zero Draft are far from serving as a concrete legal basis on which national courts could base decisions.¹⁴³ The German NAP provides for extensive State obligations to protect by increasing the level of protection of human rights,¹⁴⁴ especially for corporations linked to the State and imposes due diligence obligations on its corporations.¹⁴⁵ The French *loi de vigilance* also relies on high corporate due diligence obligations. However, even these progressive national regulatory systems let the effective access to remedies slide.

¹³⁹ *Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 54, para. 27.

¹⁴⁰ Business and Human Resource Centre, 'Implementation- Tools & Examples, National Action Plans', available at <https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited 16 December 2019).

¹⁴¹ International Corporate Accountability Roundtable, 'Assessments of existing National Action Plans (NAPS) on Business and Human Rights', August 2017 Update, 5, available at <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/599c543ae9bdfd40b5b6f055/1503417406364/NAP+Assessment+Aug+2017+FINAL.pdf> (last visited 16 December 2019).

¹⁴² *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 18.

¹⁴³ *Ibid.*, para. 39.

¹⁴⁴ *Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte, 2016-2020*, 11, available at <https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf> (last visited 16 December 2019).

¹⁴⁵ *Ibid.*, 20.

There is broad agreement in State practice when it comes to the extraterritorial application of obligations to protect. At the second session of the OEIGWG, some delegations proposed to refer to the “Maastricht Principles on Extraterritorial State Obligations”, which are regarded as *soft law*.¹⁴⁶ However, an extraterritorial obligation to protect cannot be discerned from customary international law *de lege lata*.¹⁴⁷ This is further confirmed by States’ opinions in the different reports of the OEIGWG, especially in the most recent one, where States again have raised their concern over the extraterritoriality aspect in the jurisdiction clause of Art. 9(5) of the Zero Draft.¹⁴⁸

III. Evaluating the Chances of Treaty Adoption – Does the Draft Meet the Needs of the International Community?

The better the Draft strikes a balance between international economic interests on the one hand and human rights on the other, the greater the chances of it developing into a binding UN Treaty on Business and Human Rights. In contrast to the 2003 Draft Norms, the Zero Draft only directly obligates States and only these bear the responsibility. To underline this, the Draft also does not refer to the 2003 Draft Norms, so that there is a clear demarcation and differentiation from the originally rejected proposal.

The fact that the Draft does not directly oblige corporations corresponds to the applicable international law and is therefore likely to meet with the approval of State practice. *De lege lata* (transnational) corporations do not have an international legal personality¹⁴⁹ and it is not in the interest of the States to change this.¹⁵⁰ States remain in a higher position of power if they are able to regulate corporations through domestic law without providing them with the capacity of international subjects. Moreover, no international court is established

¹⁴⁶ *Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 49, para. 39.

¹⁴⁷ Koenen, *supra* note 2, 206.

¹⁴⁸ *Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, *supra* note 60, para. 16.

¹⁴⁹ von Arnould, *supra* note 10, 275; Crawford, *supra* note 129, 66.

¹⁵⁰ Cf. that no international legal personality of corporations can be deducted from current international law: Hennings, *supra* note 27, 37, 184.

through the Draft that would control the verification of States' implementation. This, too, should be in accordance with the interests of States.

The largest issue, also in terms of feasibility, centers on the circumvention of the definition of transnational corporations. Industrial States, which are the home countries of most transnational corporations, especially request that all enterprises fall within the scope of application. The regulatory gap can only be closed effectively if all corporations are addressed but, above all, industrial States do not want to miss out on potential economic profits. Although States may agree that the Draft does not address corporations that are state-owned or at least state-linked, it can be assumed that the existing vague and potentially abusive definition will not be approved by industrial States. Without further clarification of the interpretation of the current definition, industrial States are likely to oppose a Treaty.¹⁵¹

Protection of victims goes beyond all current national legislation. This will not necessarily lead to a rejection among States, but the requirements for international cooperation and support could constitute a major challenge. The fundamental principle of State sovereignty under international law includes the right of every State to regulate its internal affairs without the influence of other States.¹⁵² Accordingly, a State is also not obliged to recognize the national jurisprudence of another State to be legally binding on itself or to ensure that it is enforceable. Art. 11(9), however, requires precisely that. While the mutual recognition of jurisprudence in this particular area would be more than desirable, it is not far-fetched that States will interpret the exceptions in Art. 11(10)(11) broadly in order to reduce the possibility of interference from foreign States to the highest extent possible.

Another point of conflict is likely to be the issue of civil liability. Especially those States, which particularly protect the so-called *corporate veil*, are likely to reject the far-reaching, civil law, corporate liability. While it is regrettable from a human rights perspective that the UN Treaty is not supposed to prevail over trade and investment treaties, this fact should contribute to approval among States. Corporations will continue to receive the protection they enjoy under the *status quo* – human rights considerations must only be taken into account additionally, without them having a predominant effect.

¹⁵¹ See also: Deva, 'Scope of Business and Human Rights Treaty', *supra* note 8, 169.

¹⁵² *Award in the Arbitration Regarding the Island of Palmas Case (or Miangas) between the United States v. Netherlands*, Award, 4 April 1928, II Reports of International Arbitral Awards (1928), 829, 838; Shaw, *supra* note 22, 166.

If, above all, the definition of the corporations to be addressed is revised and the details of international cooperation and civil liability are specified, the chances of adopting the Zero Draft are high. The scope of application of State obligations to protect should also be clearly emphasized. The Zero Draft pursues the realization of its goals with approaches that find their basis in international law and correspond to the general interest of States. It should also not be forgotten that the Zero Draft is the very first draft of the UN Treaty. A long process of negotiation with further drafts is likely to await the final Treaty. With the Zero Draft as the first basis, however, the negotiation process is off to a good start.

E. Conclusion

The steadily growing economic power of non-state actors is accompanied by an increasing danger of human rights infringements. It is therefore important to safeguard human rights without restrictions and without excessively hindering economic growth and the effectiveness of corporations. While transnational corporations have the potential to positively promote and advance human rights,¹⁵³ they can also do the exact opposite. The consequences are countless victims of human rights violations – without them being *de iure* violations, because as long as corporations are not bound by human rights, they cannot technically violate them.

The Zero Draft can now change this. Focusing on the protection of victims and access to legal remedies, it indirectly holds corporations accountable without depriving States of their sovereign power over their corporations. As a result, the State is responsible for compliance with due diligence obligations of companies. Only time will tell whether the legally binding UN Treaty on Business and Human Rights can sufficiently and adequately close the protection gap. The primary task of States is to exert sufficient political and legal pressure on business actors, although this can and will also have economic effects on the States themselves. The most recent development can be seen in a revised Draft, which was published on 16 July 2019. It was discussed at the 5th conference of the OEIGWG in October 2019 and found appreciation among States.¹⁵⁴ Even though it contains advanced and more precise wording, States pointed out that

¹⁵³ Koenen, *supra* note 2, 25.

¹⁵⁴ Draft Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights, UN Doc A/HRC/43/XX, January 2020, para. 8.

it still lacked clear and precise language in crucial parts.¹⁵⁵ The Chair-Rapporteur invites States and other relevant stakeholders to provide their concrete textual suggestions on the revised draft no later than 30 November 2019 as well as to submit their additional textual suggestions no later than the end of February 2020. States suggestions – as well as the Second Revised Draft Legally Binding Instrument – are eagerly anticipated.

¹⁵⁵ *Ibid.* para 14, 22, 33.

CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations

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Abstract

This article examines two different approaches seeking to impose human rights obligations on corporations: Rights-based approaches and societal constitutionalism. Drawing from natural law arguments and from a fundamental basis of universal morality, rights-based approaches focus on the human rights of the rights holders applying against all those that could infringe upon them. On the contrary, societal constitutionalism understands human rights as social and legal counter-institutions to the expansionist tendencies of social systems and places the emphasis on the need to trigger the internal self-regulatory dynamics of corporations. Rights-based approaches favor the establishment of legally binding obligations on corporations through an international treaty, while societal constitutionalism sees in Corporate Social Responsibility codes emerging *civil constitution*. The article concludes with a nuanced normative argument, tailored according to whether the goal sought through social rights protection approaches further the distributional imperative of *sufficiency* or *equality*.

A. Introduction

According to the prevalent view, the current state of international law does not recognize corporations possessing direct human rights obligations.¹ The state-centrism of international law imposes obligations on states that flow from human rights instruments. However, the social power possessed by transnational corporations and their potential to prejudice human rights² has for decades motivated negotiating processes and attempts at the level of the UN to impose some form of human rights standards or obligations on corporate activity. The framework that has resulted after previously unsuccessful efforts³ is the three-pillar *Protect, Respect and Remedy* Framework, encapsulated in the United Nations Guiding Principles on Business and Human Rights of 2011. The Guiding Principles (UNGPs) first reiterate the international human rights law obligations of states to protect individuals against human rights abuses within their territory, clarifying that this includes the duty to protect against human rights abuse by third parties.⁴ Regarding corporate obligations, the UNGPs state that corporations, on their part, “[...] should avoid infringing on the human rights of others and should address adverse human rights impacts with which

¹ The possibility of providing the International Criminal Court (ICC) with jurisdiction over legal persons for the offences listed in the ICC Statute has been repeatedly considered but dismissed. For a discussion of the issues that relate to criminal liability of corporations, and in particular under the jurisdiction of the ICC, see C. Chiomenti, ‘Corporations and the International Criminal Court’ in O. De Schutter (ed.), *Transnational Corporations and Human Rights* (2006). For a heterodox interpretation of international law on the matter, see D. Bilchitz, ‘A Chasm Between ‘is’ and ‘ought’? A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles’, in S. Deva and D. Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013).

² According to data put together by NGO ‘Global Justice Now’, 157 of top 200 economic entities by revenue are corporations not countries, Global Justice Now, ‘69 of the Richest 100 Entities on the Planet are Corporations, not Governments, Figures Show’ (2018), available at <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show> (last visited 21 August 2019). For a list of claims challenging private business activity already from 2001, see S. R. Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’, 111 *Yale Law Journal* (2001) 3, 443, 446 - 447.

³ For a history of the debate and previous efforts, including the UN draft Norms of 2003, see O. De Schutter, ‘The Challenge of Imposing Human Rights Norms on Corporate Actors’ in Olivier De Schutter (ed.), *Transnational Corporations and Human Rights* (2006).

⁴ UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc HR/PUB/11/04, 2011, I. A. 1.

they are involved [...]”.⁵ A core obligation in this regard is for corporations to conduct human rights due diligence.⁶ Attempting to harness already existing risk assessment processes within corporations, John Ruggie, the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (SRSG) and leading figure behind the adoption of the UNGP, understands human rights due diligence as “[...] a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it [...]”.⁷ Yet, the obligation to respect human rights and conduct due diligence is not a legal obligation, carrying no sanctions for failure of compliance and drawing its normative force from social expectations and the subsequent “[...] courts of public opinion [...]”.⁸ The last pillar is the obligation of States to ensure access of victims of human rights abuses by third parties to an effective remedy.⁹

Despite broad consensus around the UNGP from various stakeholders, including States and corporations alike, criticism of the *Protect, Respect, Remedy* Framework has also been widespread. The non-binding nature of the UNGP has been the major focus of critique, including normative arguments on the understanding of human rights per se, as well as arguments of inadequacy, excessive attachment to pragmatism and strategic considerations, and weak implementation mechanisms.¹⁰ These critical voices played an important role

⁵ *Ibid.*, II. A. 11.

⁶ *Ibid.*, II. B. 17.

⁷ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5, 7 April 2008, 9, para. 25. Companies should identify the human rights challenges in the countries they operate, as well as the impacts their own activities may have within that context and to what extent they might contribute to abuse (para. 57). They should also adopt a human rights policy, integrate it throughout the company, and track its performance, in addition to policies that facilitate remediation of adverse human rights impact (para. 60-63).

⁸ *Ibid.*, para. 54. These comprise of “[...] employees, communities, consumers, civil society, as well as investors [...]”.

⁹ UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *supra* note 4, III. A. 25.

¹⁰ Indicatively, for an overall critique see D. Bilchitz & S. Deva, ‘The Human Rights Obligations of Business: A Critical Framework for the Future’ in S. Deva & D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013). For a critique of inadequacy of the soft framework, see J.-M. Kamatali, ‘The New Guiding Principles on Human Rights’ Contribution in Ending the Devising Debate Over Human Rights Responsibilities of Companies: Is It Time for an ICJ Advisory Opinion?’, 20 *Cardozo Journal of International and Comparative Law* (2012) 2, 437. For

in the adoption in 2014 of a UN Resolution, originally drafted by Ecuador and South Africa, establishing an intergovernmental working group with the goal of drafting an international legally binding instrument on corporations and human rights.¹¹ Motivated by this goal, the working group presented a *Zero Draft* of a Treaty and an Optional Protocol in July 2018 and a Revised Draft in July 2019. The purpose of this article is to examine the two different theoretical approaches that underpin the legal instruments and mechanisms seeking to impose human rights obligations on corporate actors: Rights-based approaches and societal constitutionalism. While the context is that of international law, both theoretical endeavors discussed involve a normative substratum that would also make them applicable to national law. Through the juxtaposition of societal constitutionalism and rights-based approaches, I aim to contribute to the debate around the human rights obligations of corporations, especially regarding socio-economic rights, as well as to elucidate the genealogy and practical implications of two distinct ways of approaching the issue of constraining corporate power in the context of globalization. In practice, the article is inspired by and addresses the current opposition in the field of business and human rights between the proponents of strengthening legal accountability for corporations through a new treaty and those defending the UNGP and the effort to embed social values in companies.

My argument is that the attachment to the UNGP and the zeal for a new, binding treaty correspond to different philosophical approaches in thinking about rights and the State in the context of globalization. The UNGP framework constitutes a polycentric approach that tries to uncover nodes of normativity in the interactions between States, business, and civil society, in a way that parallels the theoretical basis of societal constitutionalism and its prioritization of *reflexivity* in questions of law, regulation, and political economy. Before unpacking this in

a critique of the UNGP being overly driven by the need to achieve consensus, sacrificing part of the normative understanding of human rights, see S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013). For a critique by civil society regarding insufficient implementation mechanisms, see Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards' (2011), available at <https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (last visited 15 October 2019).

¹¹ *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN Doc A/HRC/26/L.22/Rev.1, 25 June 2014.

the following sections, it is worth drawing attention to the fact that societal constitutionalism understands change and evolution to be happening *within* social systems (such as corporations or industries), rather than enforced upon them, thus underpinning the notion that enhanced social responsibility of private actors must come through their internal constitutions. On the other hand, the attempt to establish legally binding obligations for corporations through an international treaty rests on a state-centered understanding of law and normativity, as well as on the moral imperative of recognizing and remedying human rights violations. In that sense, the quest for a Binding Treaty on Business and Human Rights is interlinked with rights-based approaches regarding corporate human rights obligations. Indeed, drawing from natural law arguments, rights-based approaches focus on the human rights of the rights-holders applying against all those that could infringe upon them, while they accentuate the importance of legal obligations and external regulation of corporate conduct, as opposed to triggering change within the internal structures of social systems.

For the purposes of this article, I examine the rationales and ramifications of these two approaches not only regarding socio-economic rights (or simple *social* rights), even if these remain a centripetal force and a point of reference for this article. Rather, I examine the theoretical approaches behind the horizontality of human rights obligations in general, for civil, political, and social rights alike, because the arguments invoked in both approaches call for a uniform effect of all categories of rights. These arguments in favor of the horizontal effect of human rights obligations arise from three shared lines of reasoning: (a) A sociological/empirical observation of the rise of private power, (b) a specific concept of rights, and (c) a specific view on the nature of the corporation. As I will show, both rights-based approaches and societal constitutionalism share the observation of the rise of private power and find significant common ground on the conceptualization of the corporation as an – at least on a normative level – not entirely private entity. Yet, they diverge significantly on their understanding of rights, which, unsurprisingly, structures different understandings of the role of the State, regulation, and international politics. The prime goal of the article is to use the comparison between rights-based approaches and societal constitutionalism not to offer a straightforward normative suggestion for future regulatory frameworks, but to contribute to the relevant on-going discussions by suggesting a level of abstraction that allows for further contextualization and a deeper understanding of the connotations and implications of different approaches in favor of imposing human rights obligations on corporations. Beyond this original priority, I do attempt a nuanced normative outlook, tailoring it, however, to the goal that is sought. If the goal of human rights protection,

and especially social rights materialization, is the distribution imperative of *sufficiency*, meaning guaranteeing a floor of protection against deprivation, then rights-based approaches appear more immune to risks of market capture and co-option than societal constitutionalism, while they better accommodate concerns of democratic legitimacy. On the other hand, I acknowledge that societal constitutionalism, if operationalized differently than its current proponents are attempting, holds significant promise for a distribution imperative that is closer to aspirations of *equality*, understood as the erasure of hierarchies and relative differences in the possession of the good things in life.

Part II of the article discusses the competing rationales in favor of human rights obligations for corporate actors. It is divided into one section for each approach, where each section examines the views of each approach on the purpose of rights and the nature of the corporation respectively. Part III focuses on the different operationalizations of the suggested horizontal effect of human rights. While rights-based approaches place increasing emphasis on the need of an international binding treaty (Section A), societal constitutionalism sees the dynamics of self-limitation of corporations emerging through transnational communicative processes as the key to controlling the centrifugal dynamics of the economy, highlighting the role Corporate Social Responsibility (CSR) can play in that regard (Section B). The article concludes with some reflections on the potential of synergy between the two approaches and with the nuanced normative position outlined above.

B. Two Competing Rationales in Favor of Human Rights Obligations of Corporate Actors

I. Rights-Based Approaches

Rights-based approaches are by predisposition oriented towards a moral understanding of rights as commanding obligations regardless of the scope of the law.¹² It is from this cognitive claim to universal morality, associated with dignity, freedom, and autonomy, that rights-based approaches commence to construct their normative edifice regarding the need to interpret current positive

¹² See, for example, F. Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide', 22 *Business Ethics Quarterly* (2012) 4, 739, 740 citing A. Sen, 'Elements of a Theory of Human Rights', 32 *Philosophy & Public Affairs* (2004) 4, 315, 321 according to whom human rights are "[...] quintessentially ethical articulations, and they are not, in particular, putative legal claims [...]".

law¹³ or expand it in such a manner that corporations become obligation-holders. Rights-based approaches supplement this philosophical foundation with a view on the corporation that challenges shareholder primacy.

1. The Purpose of Rights

Why should corporations be bound by international human rights law? To answer this question of normative orientation, the *rights-based* approaches commence with an empirical/sociological observation of the rise of private power and its influence on large segments of the global population. Corporations, it is concluded, can severely and adversely impact on human rights, while, at the same time, they are not normatively bound by the constraints these impose, other than what has been translated into domestic legislation and regulations. This tension intensifies when one is confronted with a fundamental question behind the concept of human rights: What is the foundation, the *raison d'être* of rights? The answer that most elegantly aligns with the drive to make corporations rights-bound is that rights are important and justified because of the interests they safeguard, namely liberty and well-being.¹⁴ This is an approach that starts with the desired consequences that rights can achieve. Building on the distinctly Dworkinian premise that “[...] each individual’s life is to be treated as being of equal importance to that of every other individual [...]”,¹⁵ as well as on the claim that certain conditions are necessary for individuals to realize “[...] lives of value [...]”,¹⁶ rights-based approaches underline the *purpose* of rights with regards to individual lives. That purpose of guaranteeing liberty and well-being can only be fulfilled if rights apply against everyone. Taking into consideration the social

¹³ See, Bilchitz, ‘A Chasm Between ‘is’ and ‘ought’? A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles’, *supra* note 1, 113 on why existing human rights treaties should be understood to bind corporations legally. See also, Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’, *supra* note 12, 743 who brings up the Universal Declaration of Human Rights, which “[...]even though principally focusing on nation-states, does not exclude other institutions as duty bearers, but explicitly states in its preamble that it applies to ‘every individual and every organ of society’[...]”. Same in D. Weissbrodt, ‘Corporate Human Rights Responsibilities’, 6 *Journal of Business, Economics, and Ethics* (2005), 279, 285.

¹⁴ D. Bilchitz, ‘Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law’, 23 *Indiana Journal of Global Legal Studies* (2016), 143, 147.

¹⁵ D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), 58.

¹⁶ *Ibid.*, 58.

reality of private power, if rights were to burden only the State with obligations then they would fail to fulfill their purpose of guaranteeing individuals these fundamental interests.

On the contrary, if rights are justified in a non-consequentialist way, then their horizontal effect does not necessarily follow. Even though dignity and the inherent worth of individuals are powerful foundations for human rights, they do not unequivocally lead to the conclusion that obligations flowing from those rights should burden private actors.¹⁷ Status theories of rights, drawing from the Kantian imperative against treating humans as means to an end, focus on the inalienability of rights and see them as side constraints on the pursuit of even desired consequences.¹⁸ Such deontological approaches may say little about how the rights should be rendered functional – in fact, they emphasize a paradigm of autonomy and non-interference associated with liberty.¹⁹ This non-interference with the enjoyment of natural rights may mean that social power, also accrued in the process of the enjoyment of rights (such as the right to liberty and right to property) remains unrecognized. This seems to be a point that rights-based approaches, in their effort to strike a balance between deontological and consequentialist approaches to rights – exemplified in the cornerstones of *liberty* and *well-being* – have underestimated. Rights are not only the privilege of those that might feel the consequences of private power, but they can in fact be constitutive of private power themselves. For instance, David Bilchitz discusses the example of a corporation strictly limiting the freedom of expression of employees.²⁰ From a consequentialist perspective, it follows that the only way to make the right to freedom of expression meaningful in this case is to allow for a certain degree of horizontality. From a deontological – natural law perspective on the other hand, it could be counter-argued that the employer makes use of his or her liberty of contract, a right recognized as a natural right already by Grotius.²¹ As employees enter willingly into contract *liberty* appears to be a

¹⁷ See, in this sense the *Universal Declaration of Human Rights*, 10 December 1948, Preamble, affirming the “[...] faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women [...]”.

¹⁸ R. Nozick, *Anarchy, State and Utopia* (2013), 29.

¹⁹ See, *ibid.*, 27, citing John Locke’s claim that the bounds of the law of nature require that “[...] no one ought to harm another in his life, health, liberty, or possessions [...]”.

²⁰ Bilchitz, ‘Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law’, *supra* note 14, 147.

²¹ R. Pound, ‘Liberty of Contract’, 18 *Yale Law Journal* (1909) 7, 454, 455. It is important to note that this analysis leaves out the important topic of fundamental rights of corporations. For an overview in comparative perspective, P. Oliver, ‘Companies and

two-sided coin, not necessarily leading to direct human rights obligations of corporations.²²

It is, therefore, rather the latter purpose of rights *well-being*, that fuels the call for horizontality of human rights, especially when the focus is on social right. *Well-being* necessarily implies a vision of good life, highlighting the vital and essential quality of certain aspects of the human experience. Despite the debates and disagreements around the *capabilities approach* and the variations between *thin* and *thick* theories of the good,²³ rights-based approaches that aim to extend the application of the binding force of human rights to corporations recognize a common ground of value for individual. *Well-being* becomes, therefore, an objective category that is foundational of obligations for all that might be infringing upon it, including instances of private power. An element of objectivity is necessary for the focus on the rights-holder to lead to the implied recognition of the horizontal obligation to respect his or her human rights that guarantee precisely this – perhaps minimum – objective level of *well-being*. A relativistic dismissal of the notion of the *good* leads to the impossibility to discern any extra-legal obligations other than those of non-interference. Why, to return to the example of freedom of expression, should a company be required to tailor its speech codes directed toward the maximum freedom of expression for its employees and not resort to liberty of contract, if there is no recognition that freedom of expression makes part of an objective order of values necessary for individuals' well-being? Or, on the level of positive obligations, why should a pharmaceutical company be required to give free access to life-saving medication

their Fundamental Rights: A Comparative Perspective', 64 *International and Comparative Law Quarterly* (2015) 3, 661.

²² Alternatively, it can lead to a restriction of corporate obligations only to 'negative' duties, meaning avoiding the infringement upon individual rights, see S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *supra* note 2, 517.

²³ Only indicatively, see M. C. Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' 20 *Political Theory* (1992) 2, 202, defending essentialism as the view that human life has certain defining features that merit protection. See, also A. Sen, 'Human Rights and Capabilities', 6 *Journal of Human Development* (2005) 2, 151, drawing from Rawlsian 'objectivity' in ethics, even though Sen and Nussbaum's approach is already meant to take more note of the diversity of human experience, as opposed to Rawls' resourcist approach. Bilchitz, *Poverty and Fundamental Rights*, *supra* note 15, 17, supports a *thin* theory of the good that aims to give even more weight to the diversity of human experience.

to the poor, if there is no recognition that the right to life and to health constitute a common ground of value?²⁴

2. The Nature of the Corporation

The second line of argument as to why corporations should be bound by human rights goes back to the nature of the corporation. According to Ruggie, it is precisely the nature of the corporation as a “[...] specialized economic organ [...]” not a “[...] democratic public interest institution [...]”, that leads to the restricted nature of its duties with respect to human rights.²⁵ This position reiterates in a moderate way the predominantly *private* nature of corporations, while acknowledging the importance of their function in society, from which their limited human rights obligations are derived. However, according to rights-based approaches, corporations cannot be conceived as entirely *private* but instead as partially *public* entities and genuine carriers of remedial responsibility. Florian Wettstein, drawing from a number of political philosophers, underlines that remedial responsibility is proportionate to an agent’s capabilities.²⁶ Considering that the positive duties to protect and realize the moral claims that make up human rights burden the moral community of human beings as a whole, those agents with increased capabilities have increased responsibility towards the fulfilment of these moral claims.²⁷ Bilchitz, drawing from social-contract theory, suggests that the State’s reason for being is to guarantee certain human rights and therefore, it legitimizes corporations only to the extent they have a social purpose and can bring benefits to society.²⁸

Even though there seems to be a distinct disagreement over the nature of the corporation between the views that inspired the UNGP and the views of rights-based approaches aspiring to a new binding treaty on business and human rights, their differences seem to a certain extent bridgeable when the issue is examined on the level of corporate governance. That is because both views can, with different degrees of intensity, be placed under the auspices of

²⁴ Example drawn from D. Bilchitz, ‘Do Corporations Have Positive Fundamental Rights Obligations?’, 57 *Theoria* (2010) 125, 1, 2.

²⁵ Ruggie, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, *supra* note 7, para. 53.

²⁶ Wettstein, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide’, *supra* note 12, 753.

²⁷ *Ibid.*

²⁸ Bilchitz, ‘Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law’, *supra* note 14, 163-164.

the *stakeholder approach* in corporate governance. This approach contends that the interests of stakeholders, that is, “[...] persons or groups with legitimate interests in procedural and/or substantive aspects of corporate activity [...]” are of “[...] intrinsic value [...]” and “[...] merit consideration [...]” by the corporation regardless of instrumental considerations.²⁹ Stakeholder theory might benefit from instrumental considerations that relate to strategic management as a component of improved performance,³⁰ but it is also supported by normative justifications that arise from the interdependencies of the corporation with various groups and communities.³¹ Contrary to the dominant view of shareholder primacy, which asserts that the sole responsibility of business is to maximize returns for shareholders,³² stakeholder theory adopts an evolving understanding of property rights as embedded in human rights and carrying restrictions with respect to the interests of others.³³

However, if stakeholder theory recognizes the partially social purpose of the corporation and thus commands some level of human rights obligations of corporations, it is flexible enough to allow for the accommodation of both the *soft* agenda of the UNGP and the more demanding normative framework of rights-based approaches. What separates the rights-based approaches further is their implicit recognition of the concession theory of corporate personality.³⁴ In other words, in their effort to provide philosophical foundations for the human rights obligations of corporate actors, rights-based approaches underscore that

²⁹ See, T. Donaldson & L. E. Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’ 20 *Academy of Management Review* (1995), 1, 67.

³⁰ E.g., R. E. Freeman, *Strategic Management: A Stakeholder Approach* (1984) 96-98.

³¹ See, Donaldson and Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’, *supra* note 29, 81-82, citing American Law Institute, ‘Principles of Corporate Governance: Analysis and Recommendations’ (1992) 80, “Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account, and it would be unwise social policy to preclude them from doing so.”

³² See for example, M. Friedman, ‘The Social Responsibility of Business Is to Increase Its Profits’, in W. C. Zimmerli, K. Richter & M. Holzinger (eds), *Corporate Ethics and Corporate Governance* (2007) 173.

³³ Donaldson & Preston, ‘The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’, *supra* note 29, 83-84. This view is further legitimized by the fact that even strong defendants of property rights accept limitations to property rights. See, for example, Nozick’s example of the appropriation of the single waterhole in the desert and the worsening of the position of others. Nozick, *Anarchy, State and Utopia*, *supra* note 18, 140.

³⁴ E.g., Bilchitz, ‘Do Corporations Have Positive Fundamental Rights Obligations?’, *supra* note 24.

corporations are fundamentally State creations that can be regulated on the basis of the public interest – rather than corporations being the aggregate of natural persons with the rights to resist regulation.³⁵ It is State law that enables the benefits of the corporate form, including limited liability and perpetual succession, and it is precisely because of the social purpose of the corporation to fulfill certain functions in society that these advantages are granted. Reversing the equation and adopting a consequentialist perspective that aims to constrain corporations, it is only possible to justify the demand for corporations to be *good citizens* and assume their remedial responsibility if the corporation is seen as having a separate personality. Indeed, social responsibility cannot arise from merely an aggregate of shareholders.³⁶ Concession theory of corporate personality emerges as a justification of and aligns itself with stakeholder theory on the level of governance, leading to the treatment of corporate governance as a “[...] species of public law [...]”.³⁷

II. Societal Constitutionalism

Societal constitutionalism aims to provide an answer to the conundrum of how to constrain global capitalism in the absence of global democratic institutions. Imagining constitutionalization without the State, societal constitutionalism posits the emergence of a multiplicity of civil constitutions beyond the representative institutions of international politics.³⁸ The challenge

³⁵ S. Padfield, ‘Rehabilitating Concession Theory’, 66 *Oklahoma Law Review* (2014) 2, 327, 333-337.

³⁶ This was recognized early by E. M. Dodd in his exchanges with A. Berle. See, E. M. Dodd, ‘For Whom Are Corporate Managers Trustees?’, 45 *Harvard Law Review* (1932) 7, 1145; E. M. Dodd, ‘Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?’, 2 *University of Chicago Law Review* (1935) 194.

It is important to highlight that rights-based approaches challenge shareholder primacy while focusing on corporate personality. They do not engage with the inverse critical perspective that aims to challenge the ‘Limited Liability – Shareholder Primacy’ dualism by suggesting a return to unlimited liability and thus an attenuation of corporate personality. For the relevant discussion of the two possible critiques of the current priorities of company law, see P. Ireland, ‘Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility’, 34 *Cambridge Journal of Economics* (2010) 5, 837.

³⁷ S. Padfield, ‘Corporate Social Responsibility & Concession Theory’, 6 *William & Mary Business Law Review* (2015), 1, 24-25, citing S. M. Bainbridge, ‘Director Primacy: The Means and Ends of Corporate Governance’, 97 *Northwestern University Law Review* (2003) 2, 547, 549.

³⁸ G. Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’, in C. Joerges, I. Sand & G. Teubner (eds), *Transnational Governance and*

then becomes for these sub-constitutions to combat the centrifugal dynamics of social subsystems in global society.³⁹

1. The Purpose of Rights

To understand how societal constitutionalism conceives rights, it is necessary to take a step back and view the entirety of society through the lenses of systems theory. According to systems theory, society is made up of social systems that are defined by boundaries between themselves and the environment. Systems consist of communications that are self-referential, being determined by themselves and determining themselves.⁴⁰ However, self-referentiality does not contradict the system's openness to the environment. Systems remain responsive to the increasing complexity of the environment by translating this complexity into their own functionally differentiated form of communication. Change, learning and evolution are not excluded, but redefined to be understood as happening within the system.⁴¹

This prompts a broader project of social transformation based on the internal functioning of social (sub)systems. Acknowledging the functional differentiation of contemporary society, reflexive law was conceived as a shift from substantive law, aiming to achieve social co-ordination not by centralized, top-down regulation, but by enhancing the self-reflecting capacities and promoting the self-limitation of social systems.⁴² According to Gunther Teubner, "[...] law realizes its own reflexive orientation insofar as it provides the structural premises for reflexive processes in other social subsystems [...]"⁴³ Since society has no center, law's production needs to be decentralized to better respond to the changing societal needs, allowing for system self-governance, flexibility, experimentation, and learning. In that direction, societal constitutionalism emphasizes the need to strengthen the democratic potential of the social sub-

Constitutionalism (2004), 1, 8.

³⁹ G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012), 4.

⁴⁰ N. Luhmann, *Social Systems* (1995), 61-62.

⁴¹ G. Teubner, 'Introduction to Autopoietic Law', in G. Teubner (ed.), *Autopoietic law: A New Approach to Law and Society* (1987), 1, 7-8.

⁴² See, in general, G. Teubner, 'Substantive and Reflexive Elements in Modern Law', 17 *Law & Society Review* (1983), 239.

⁴³ *Ibid.*, 275. In Teubner's later work, this is taken to include the possibility of dissent, which in the social system of the economy could for example mean ethics commissions and external mechanisms of support for *whistleblowers*. See, Teubner, *Constitutional Fragments*, *supra* note 39, 89.

areas.⁴⁴ In sharp contrast to the morality-inspired justifications presented above, the lack of a center of society further insinuates that there is neither a common morality according to which social systems operate, nor the universal reason that will provide grounds for legitimation structures; instead, legitimacy is a mere mode of reproduction for social systems.⁴⁵ Systems theory, as well as its progenies reflexive law and societal constitutionalism, relocate the focus from the supposedly self-determining individual and the subsequent normative aspirations of modernity, to anonymous matrices of communication, which individuals simply make a part of.

Does this mean that rights, traditionally conceived as belonging to the rights-holder as translations of pre-legal moral claims, are obsolete? On the contrary, human rights are integral in this decentered conceptualization of society; nevertheless, not because of the fundamentality of the affected legal interests, but because they function “[...] as social and legal counter-institutions to the expansionist tendencies of social systems [...]”.⁴⁶ Human rights are not about intersubjective relations but about “[...] the dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices [...]”.⁴⁷ Rights are not addressed against the State but against political power.⁴⁸ This approach is consistent both with the descriptive understanding of society as made up of autopoietic social systems, law being one of them, and with the normative aspect of reflexive law and societal constitutionalism expressed in the idea of triggering the self-limitation of social systems in order to prevent them from expanding their rationalities to a degree that it would create unsurmountable problems to other functional systems. Indeed, a necessary ramification of the autopoiesis of the legal system is that it produces its own social reality and that its legal operations produce human actors as “[...] semantic artefacts [...]”.⁴⁹ At

⁴⁴ G. Teubner, ‘Transnational Fundamental Rights: Horizontal Effect?’, 40 *Netherlands Journal of Legal Philosophy* (2011) 3, 191, 206.

⁴⁵ According to Luhmann, the question of legitimacy as a moral condition about the conditions of exercise of political power is tied to a metaphysical view of the world that assumes a generalized human consciousness, an ultimate point of reference of claims to Truth, not unlike premodern metaphysical philosophy. See, N. Luhmann, *Soziologische Aufklärung I* (1970), 159. For an excellent overview of Luhmann’s understanding of legitimacy, see C. Thornhill, ‘Niklas Luhmann: A Sociological Transformation of Political Legitimacy?’, 7 *Journal of Social Theory* (2011) 2, 33.

⁴⁶ Teubner, ‘Transnational Fundamental Rights: Horizontal Effect?’, *supra* note 44, 210.

⁴⁷ *Ibid.*

⁴⁸ Teubner, *Constitutional Fragments*, *supra* note 39, 132.

⁴⁹ G. Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’, 23 *Law & Society Review* (1989) 5, 727, 730. Yet, this does not mean that human actors

the same time, human rights are an integral part of the reflexive structures that are necessary to prevent the expansionist tendencies of social systems, including the economy. The horizontal effect of human rights logically follows from these assumptions, along with the recognition that the state-centered view of rights or their conceptualization as spheres of individual autonomy cannot be sustained. Besides, Teubner espouses the view that natural law arguments, not dissimilar to the ones presented above, cannot withstand the test of pluralism and diversity of human experience and beliefs.⁵⁰

The purpose of rights is then, according to Teubner, double-edged: Both inclusionary, in including the population in the political processes, and exclusionary, in their effect of demarcating non-political arenas from the political field.⁵¹ This means that human rights both guarantee the inclusion of the entirety of the population into all function systems, while they also protect areas of autonomy from these systems. As a result, human rights are both constitutive of sub-constitutions of social subsystems by guaranteeing their autonomy and they act as factors of self-limitation, restraining the expanding logic of system dynamics. Fundamentally, however, especially to the extent socio-economic rights are concerned, human rights operate as the entrance gates for the entirety of the population into functional systems. Therefore, societal constitutionalism views human rights as the guarantor of access to institutions and resources for the entirety of the population.

2. The Nature of the Corporation

Societal constitutionalism anchors its normative orientation significantly on the question of constitutionalizing polycontextuality. Transcending binary distinctions of public/private, societal constitutionalism points out the fragmentation of society and the need for a multiplicity of perspectives of self-description. This approach has an effect on both the understanding of politics and the economy. On one hand, polycontextuality means that social systems should not be allowed to express solely private rationalities. Instead, they should be infused with public rationalities, whereby public means the relation of the

are reduced to the one-dimensional semantic artefact of the *person*. Acknowledging the complex interrelations between the social person, the psyche, and the body, a systems theory perspective recognizes an institutional, a personal, and an individual dimension of human rights, see G. Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors', 69 *The Modern Law Review* (2006) 327, 327.

⁵⁰ Teubner, 'Constitutional Fragments', *supra* note 39, 125.

⁵¹ *Ibid.*, 132-134.

system to the entirety of society. Human rights protection is such a public rationality. On the other hand, the private should be seen as an obstacle to what Teubner characterizes as the “[...] unstoppable growth of the welfare state [...]”, transforming social activities into public services.⁵² This type of double movement of de-economizing and de-politicizing is meant to both restrain the centrifugal dynamics of social systems and to prevent the totalizing presence of the public through state regulation of social activities. Law is meant to intervene in order to sustain this delicate balance between social responsibility and self-realization.⁵³ As the singularity of reason of modernity has faded, the constellation of partial rationalities enables both the self-constitution of social systems and coordination between them.

Therefore, the economic system should not be allowed to incorporate only economic rationalities. At the level of their autopoietic self-description, social subsystems should already incorporate a mix of partial rationalities, both private and public. The subsequent break with the distinctly private character of corporations is reminiscent of rights-based approaches of imposing human rights obligations on corporate actors. Societal constitutionalism, nevertheless, takes a different turn, shifting the focus on the internal workings of organizations. Corporations should, already as part of their internal processes and irrespective of state regulation, take into consideration their normative effects on society at large. The parallels of this theoretical approach to corporate self-limitation and the approach of Ruggie, manifested in the UNGP, are already discernible. Yet, the breadth and transformative potential of polycontextuality is too large to be confined to processes of economic self-regulation. This is because societal constitutionalism, drawing from the tradition of reflexive law, goes beyond the need to establish self-reflective (and hence self-limiting) structures within organizations; in fact, a prerequisite for genuine self-reflection is the existence of discursive structures within social systems in the direction of an organizational democracy. Indeed, societal constitutionalism is, in theory, a project of democratization not only of institutionalized politics, but of the entirety of social spheres; crucially, however, this process of democratization should take place internally within social systems. Furthermore, it is not proper to transfer the democratic institutions and procedures that have been associated with the

⁵² G. Teubner, ‘Societal Constitutionalism and the Politics of the Common’, 21 *Finnish Yearbook of International Law* (2010) 111, 113-114. Teubner places the emphasis around his disagreement with A. Negri especially on the notion of public, highlighting the need to resist the idea that a unified political collective can represent society.

⁵³ *Ibid.*, 5.

political system to all social arenas; instead, every social subsystem should find its own way to democratization.⁵⁴ Hence, corporations, as social subsystems of the economic system, need to be democratized from within. The role of the state is to produce such a framework that will generate the internal forces that are necessary to generate self-reflective structures and the subsequent self-limitation.

III. Recapping the Comparative Analysis

Before examining the different operationalizations of human rights obligations that rights-based approaches and societal constitutionalism point toward, it is worth recapping the main points drawn from this comparative analysis. While both rights-based approaches and societal constitutionalism stress the importance of the horizontal effects of human rights, they differ fundamentally in their presuppositions. Rights-based approaches build on a moral understanding of rights as commanding obligations flowing from the rights-holders themselves. Rights are important to concretize lives of value and to safeguard individual liberty and well-being. On the contrary, societal constitutionalism perceives rights as institutions, the function of which is to limit the expansionist tendencies of social systems, including corporations, industries, and the economy more broadly. Furthermore, rights-based approaches conceive corporations as not entirely private entities but as partially public, having been created by and enjoying special benefits thanks to the State. This is meant as a legitimation of external regulation of corporate conduct by public institutions. Societal constitutionalism takes the notion of *public* nature of corporations into a different direction, suggesting that all social systems need to incorporate public rationalities within their inner workings. These theoretical divergences inform different conceptualizations of how human rights obligations are to be operationalized, with rights-based approaches stressing the importance of external regulation and a determined scope of legal obligations and societal constitutionalism highlighting the need for internal corporate transformation and coordination of multiple actors in conditions of complexity.

⁵⁴ *Ibid.*, 13.

C. The Different Operationalizations of Corporate Human Rights Obligations

I. Rights-Based Approaches: The Example of the Draft Treaty on Business and Human Rights

Considering that human rights correspond to primordial moral claims, rights-based approaches place increasing emphasis on the notion of bindingness and see the UNGP Framework and its soft nature as necessitating amendment. On the level of international law,⁵⁵ this shift towards *harder* instruments is meant to come through an international treaty. Indeed, the Revised Draft of the Treaty on Business and Human Rights provides in its preamble that all businesses shall respect human rights by both avoiding adverse human rights impacts and by addressing such impacts when they occur.⁵⁶ Yet, the Draft maintains a state-centered approach, attributing the primary responsibility for human rights protection to States.⁵⁷ It purports to strengthen human rights protection and access to justice and remedy for victims of violations in the context of business activities, particularly those of transnational character.⁵⁸ Socio-economic rights fall within the ambit of the Draft, which aims to cover “[...] all human rights

⁵⁵ Rights-based approaches are not restricted to embedding human rights obligations for corporations in international law. In national (or supranational) law, this could take the form of legislation, along the lines of the French Duty of Vigilance Law of 2017. It could also take the form of horizontal effect of constitutional provisions, as is for example famously the case in South Africa. Indicatively, on the question of social rights, see the recent *Daniels v. Scribante and Another (CCT50/16) [2017] ZACC 13* establishing direct horizontality on the grounds of dignity, following to a significant extent the rights-based approaches presented in this article.

⁵⁶ *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Revised Draft*, 16 July 2019, Preamble.

⁵⁷ Contrary to the original contemplation of a binding international enforcement mechanism, the *Zero* Draft treaty relied on the enforcement by states and monitoring by a committee of experts. The primary responsibility for human rights remains with the states. D. Cassel, *At Last: A Draft UN Treaty on Business and Human Rights* (2018), available at <https://lettersblogatory.com/2018/08/02/at-last-a-draft-un-treaty-on-business-and-human-rights/> (last visited 27 August 2019).

⁵⁸ *Revised Draft*, *supra* note 56, Art. 2, 3, 4. The earlier *Zero* Draft was criticized for attempting to only regulate transnational activities of business enterprises. The Revised Draft clarified that the proposed treaty will cover all business enterprises, maintaining nevertheless a special focus on transnational corporate activity.

[...]”,⁵⁹ even though there is no provision for positive obligations of corporations besides cases of violations. The attempt to place victims of human rights violations in the foreground conveys the focus of rights-based approaches on individuals as holders of legal and moral claims. Beyond a functionalist approach that would only target the mechanics of institutional change, the Draft Treaty seeks to place concrete individuals and their suffering at the center of the quest for corporate accountability.⁶⁰

Core provisions of the Draft Treaty are the due diligence obligations and the provisions for legal liability.⁶¹ Due diligence obligations build on the framework established by the UNGP (identification, prevention, monitoring and communicating) to include a more detailed set of responsibilities, including undertaking environmental and human rights impact assessments, carrying out consultations with relevant stakeholders, reporting on non-financial matters, and integrating human rights due diligence requirements across contractual relationships in supply chains.⁶² Unlike the UNGP, due diligence requirements are meant to become legally binding by means of national law, as State parties need to introduce national procedures to ensure compliance.⁶³ The emphasis

⁵⁹ *Ibid.* Art. 3(3). According to Carlos Lopez, a reference to treaties or custom would make more sense than such a broad phrasing, C. Lopez, *Towards an International Convention on Business and Human Rights* (Part I) (2018), available at <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/> (last visited 27 August 2019).

⁶⁰ See for example, the provision of an *International Fund for Victims*, designed to provide legal and financial aid to victims, *Revised Draft*, *supra* note 56, Art. 13(7). The focus on victims has been a point of critique, with the argument that the state cannot rely solely on regimes of liability that place the burden on victims. Instead, it should have a proactive role in controlling or preventing abuses in the spheres where it facilitates or shapes business activity, see G. Quijano, *A new draft Business and Human Rights treaty and a promising direction of travel* (2019), available at <https://www.business-humanrights.org/en/a-new-draft-business-and-human-rights-treaty-and-a-promising-direction-of-travel> (last visited 1 December 2019).

⁶¹ *Ibid.* Art. 5, 6.

⁶² *Revised Draft*, *supra* note 56, Art. 5. A point of critique has been the reference to businesses’ “[...] contractual relationships [...]”, as opposed to the broader “[...] business relationships [...]” of the UNGP. This narrow phrasing could prove an additional obstacle in imposing human rights due diligence obligations on parent companies. Indicatively, see R. Meeran, *The Revised Draft: Access to Judicial Remedy for Victims of Multinationals’ Abuse* (2019), available at <https://www.business-humanrights.org/en/the-revised-draft-access-to-judicial-remedy-for-victims-of-multinationals-abuse> (last visited 1 December 2019).

⁶³ *Revised Draft*, *supra* note 56, Art. 5(4). The Revised Draft softened the phraseology of the Zero Draft, which required national procedures to *enforce* (rather than *ensure*)

on the role of public authority is consistent with rights-based approaches' understanding of the nature of the corporation as a partially public entity. Ruggie, however, laments in this renewed approach the rendering of due diligence into "[...] a standard of results [...]", requiring companies "[...] to prevent [...]", rather than "[...] seek to prevent [...]".⁶⁴

The Draft further requires States to elaborate a regime of legal liability for human rights violations occurring in the context of business activities. More specifically, parent companies could be liable for the actions or omissions of natural or legal persons with which they have contractual relationships, if parent companies "[...] sufficiently control[] or supervise[] the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities [...]".⁶⁵ It is beyond the scope of the present article to discuss the ramifications of this provision. It suffices to say that a crucial question would be the extent to which this provision enables the piercing of the corporate veil. Furthermore, the Draft lists a number of criminal offences (including war crimes and forced labor) for which State parties must provide a regime of criminal, civil, or administrative liability of legal persons.⁶⁶

In the context of the discussion of the foundations and operationalization of human rights obligations for corporations, of particular interest is Ruggie's brief, albeit foundational, critique of the Draft Treaty regarding the issues of scale and complexity of the corporate form.⁶⁷ Ruggie suggests that the scale of transnational business activity, which includes a vast number of suppliers as part of supply chains, is such that successful regulation of corporate behavior requires instrumentalities of implementation matching the magnitude of the task. While Ruggie does not state that such an implementation dynamic is impossible, there is an implicit assumption that a uniform, centric, and static solution as that of an international treaty is ill-equipped to deal with the complexity of transnational

compliance.

⁶⁴ J. G. Ruggie, 'Comments on the "Zero Draft" Treaty on Business & Human Rights', *Business & Human Rights Resource Centre* (2018) available at <https://www.business-humanrights.org/en/comments-on-the-%E2%80%9Czero-draft%E2%80%9D-treaty-on-business-human-rights> (last visited 27 August 2019) [Ruggie, Comments on the Zero Draft].

⁶⁵ *Revised Draft*, *supra* note 56, Art. 6(6).

⁶⁶ *Revised Draft*, *supra* note 56, Art. 6(7).

⁶⁷ In that sense it differs from the reformist spirit of the critical comments made by Cassel, *At Last: A Draft UN Treaty on Business and Human Rights*, *supra* note 57 and Lopez, *Towards an International Convention on Business and Human Rights*, *supra* note 59.

business activities.⁶⁸ Other commentators go further, suggesting that it is already from the outset questionable whether a legally binding instrument of public international law is capable of effective protection against corporate human right abuses.⁶⁹ Instead, corporate accountability should perhaps be based on national tort, criminal, contract, regulatory law, and the self-regulatory dynamics of corporations themselves, following the soft obligations of the UNGP. The scepticism towards human-rights centrism and the highlighting of social complexity as the foundational condition of postmodernity finds its theoretical pinnacle in the conceptualization of rights enforcement through societal constitutionalism.

II. Societal Constitutionalism: CSR Codes as Transnational, Civil Constitutions

The major task in operationalizing societal constitutionalism, especially in the field of the economy, is to exert such a level of external pressures on social systems that trigger forces of self-limitation to develop within their internal processes.⁷⁰ The role of the law in this process is to facilitate the permeability of private institutional structures to deliberation and contestation.⁷¹ In turn, this accentuates the importance of soft law and regulation that may open corporate activity to the scrutiny of global civil society and trigger self-regulatory dynamics as a reaction to potential reputational sanctions. Therefore, the UNGP, the OECD Guidelines for Multinational Enterprises, the earlier Global Compact, legislation imposing transparency obligations regarding human rights and

⁶⁸ See, in this spirit, the explanation of the American vote against the resolution, seeing a binding treaty as competing to the UNGP, S. Townley for the US Delegation, *Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument: Statement by the Delegation of the United States of America* (26 June 2014), available at <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/> (last visited 27 August 2019).

⁶⁹ P. Thielborger & T. Ackermann, A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop', 24 *Indiana Journal of Global Legal Studies* (2017) 1, 43, 72.

⁷⁰ Teubner, 'Societal Constitutionalism and the Politics of the Common', *supra* note 52, 7.

⁷¹ C. Parker, *The Open Corporation: Effective Self-regulation and Democracy* (2002) 37-40.

environmental impact of corporate activity,⁷² as well as civil regulations⁷³ are examples in this direction. Indeed, Ruggie stresses the importance of informal cooperation, responsiveness, and public-private partnerships in this “[...] new governance [...]”.⁷⁴ The intertwining of international non-binding instruments and private corporate codes of conduct is projected as potentially leading to transnational, functional equivalents to the classical constitutional state.⁷⁵ The abstract norms entailed by non-binding instruments serve as starting points for the generation of intracorporate norms, which then produce actual standards for internal and external review. This indicates a reversal of the qualities of law, whereby the private ordering of corporations adopts characteristics of hard law, while state norms maintain a soft character.⁷⁶ A central role in this transformation is attributed to the learning pressures exerted to corporations, meaning the internal changes induced by external constraints, such as the abovementioned reputational sanctions.⁷⁷ The role of legislation or non-binding instruments is therefore to enable these pressures by harnessing existent social dynamics, thus steering intracorporate norms toward transnational public policy.⁷⁸ This corresponds to the fundamental motive of reflexive law being reciprocal adaptation, rather than direct intervention.⁷⁹

⁷² See for example, the 2014/95/EU Directive on nonfinancial reporting, the UK Modern Slavery Act of 2015, and the California Transparency in Supply Chains Act of 2010 imposing *soft* obligations of reporting.

⁷³ See D. Vogel, ‘The Private Regulation of Global Corporate Conduct’, 49 *Business & Society* (2010) 1, 68.

⁷⁴ J. G. Ruggie, ‘Global Governance and New Governance Theory: Lessons from Business and Human Rights’, 20 *Global Governance* (2014), 5, 9 [Global Governance and New Governance].

⁷⁵ Indicatively, O. Dilling, M. Herberg & G. Winter, ‘Introduction: Private Accountability in a Globalising World’ in O. Dilling, M. Herberg & G. Winter (eds), *Responsible business: Self-Governance and Law in Transnational Economic Transactions*, 2008; G. Teubner, ‘Self-Constitutionalizing TNCs? On the Linkage of “Private” and “Public” Corporate Codes of Conduct’, 18 *Indiana Journal of Global Legal Studies* (2011) 2, 617 [Teubner, Self-Constitutionalizing TNCs?].

⁷⁶ Teubner, ‘Self-Constitutionalizing TNCs?’, *supra* note 75, 630.

⁷⁷ *Ibid.*, 635.

⁷⁸ *Ibid.*, 637.

⁷⁹ According to this perspective direct, top-down regulation faces a *regulatory trilemma* of under-effectiveness, over-effectiveness, or regulatory capture. See G. Teubner, ‘After Legal Instrumentalism? Strategic Models of Post-Regulatory Law’ in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1986), 310-312 [Teubner, After Legal Instrumentalism].

Therefore, according to such an approach of constitutionalization of the economic subfields, effective operationalization of the corporate responsibility to respect human rights depends on the corporate uptake of social norms – following the guidance provided by public instruments. CSR codes become then an integral part of international private regulation and of global legal pluralism. Corporate codes institutionalize a form of corporate self-governance that permeates – at different levels – supply chains by applying to contractors and potentially sub-contractors.⁸⁰ Teubner sees in these codes and in their potential to bind private actors emerging “[...] civil constitutions [...]”.⁸¹ According to his analysis, like state constitutions, private regulations employ mechanisms of self-restraint to reduce intrusions on individuals. In that direction, the codes appear to break with the state-fixation of human rights and recognize explicitly a direct effect of human rights on private actors.⁸² The enforcement of these human rights obligations does not fall solely upon the national courts, but is instead a result of a nexus of actions that involve public interest litigation,⁸³ corporate self-regulation,⁸⁴ and external monitoring and multi-faceted control by civil society

⁸⁰ Most codes apply to the first tier of the supply chain but the use of CSR codes by TNCs further down the supply chain has steadily increased. UNCTAD, *Corporate Social Responsibility in Global Value Chains* (2012), 2-4.

⁸¹ G. Teubner, ‘The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination’ in R. Nickel (ed.), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, 2009, 204 [Teubner, Corporate Codes of Multinationals]. Precisely because of this analysis, CSR is not seen as *management ethics* or as a *moralization* of corporate actors, contra R. Shamir, ‘The age of responsabilization: On market-embedded morality’, *37 Economy and Society* (2008) 1, 1, according to whom CSR corresponds to a morality grounded in neoliberal epistemology that dissolves the distinction between society and economy See also C. Hackett, *On the Moral Landscape of Corporate Obligations Within International Law*.

⁸² G. Teubner, ‘Corporate Codes in the Varieties of Capitalism: How Their Enforcement Depends on the Differences among Production Regimes’ (2017) 24 *Indiana Journal of Global Legal Studies* (2017) 1, 81, 96 [Teubner, Corporate Codes in the Varieties of Capitalism].

⁸³ See for example, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, [2013] (US Supreme Court) and in general the use of the Alien Tort Statute in the U.S.

⁸⁴ See the example of Apple Inc. and its organizing principles and Code of Conduct, its values that are addressed universally to workers and suppliers through education and socialization programs, as well as its power to settle disputes, L. C. Backer, ‘Transnational Corporations’ Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc’, 20 *Indiana Journal of Global Legal Studies* (2013) 2, 805, 832-847.

actors.⁸⁵ This control could take different forms, including ethical shareholder activism,⁸⁶ organization of public campaigns, and, perhaps most importantly, institutionalized forms of monitoring and certification. An example of the latter is offered by the international organization Fair Labor Association, which integrates labor rights in its Code of Conduct, it monitors participating companies and ensures the transparency of their operations, and it offers accreditation to companies' compliance programs.⁸⁷ Similarly, certification bodies such as FLOCERT certify Fair Trade standards that aim, among other things, to increase investment in social, economic, and environmental development. It is, then, through a recourse to consumer preferences and priorities (“[...] consumer politicisation [...]” according to Teubner) that corporate actors are incentivized to uptake human rights obligations, especially with regards to socio-economic rights in the developing world. Such complex processes of transnational law, whereby private regulatory bodies without legal or constitutional authority impose norms, oversee, and evaluate the performance of private economic actors regarding goals of social responsibility, highlight the autonomy of legal operations from statehood and the emergence of obligations that are not strictly speaking derived, but only inspired by standards set by public authority.⁸⁸ Another possible avenue for enhancing and diversifying the enforcement of human rights obligations under CSR Codes is to render corporate codes judicially enforceable. This could be by means of national private law, especially, but not exclusively, through a recourse to competition law and the possibility to draw undue competitive advantages from advertised supposedly socially responsible practices

⁸⁵ Teubner, ‘Corporate Codes in the Varieties of Capitalism’, *supra* note 82, 97.

⁸⁶ I.e., NGOs gaining status and voice within corporations through share ownership.

⁸⁷ The vagueness of primary rules set either by international bodies or by private regulators and civil society leads to a jurisgenerative role of regulatory intermediaries who, through their interpretations of rights (such as freedom of association) shape their concrete content. See P. Paiement, ‘Jurisgenerative role of auditors in transnational labor governance’, 13 *Regulation & Governance* (2018) 2, 125, 280.

⁸⁸ According to J. Ellis, ‘Constitutionalization of Nongovernmental Certification Programs’, 20 *Indiana Journal of Global Legal Studies* (2013) 2, 501, 1035, 1041-1042, certification programs “rely on perceptions of their legitimacy and credibility”. This underscores that the constitution is understood not as a body politic, but as communications.

that do not correspond to reality.⁸⁹ This has been a recent object of study and analysis in private law and legal theory.⁹⁰

Following such a theoretical analysis that aims to elevate the status of CSR beyond voluntarism, without at the same time directly confronting shareholder primacy or returning to mandatory state regulation of corporate behavior, a number of developing States have created binding CSR obligations with direct relevance for social rights. Most strikingly, India's Companies Act of 2013 requires large companies to spend at least 2% of their profits in pursuance of their CSR policy, with preference given to the areas in direct proximity with its operations.⁹¹ In the first years of after the implementation of the Act, companies have been predominantly directed their CSR spending on health and education.⁹² However, it is important to highlight that, in line with the urge of the reflexive approach to avoid direct State intervention, this obligation is not followed by sanctions other than the obligation to justify non-compliance (comply-or-explain-approach), which in turn makes sanctions dependent on the outcry of

⁸⁹ See also, the famous case *Kasky v. Nike, Inc.* 27 Cal. 4th 939 (2002), cert. granted, 123 S. Ct. 817, and cert. dismissed, 123 S. Ct. 2254 (2003), where an activist brought a lawsuit against Nike Inc. for false advertising and unfair competition resulting from its advertisements about the treatment of its workers in supply chains. Nike Inc. paid an out-of-court settlement to the Fair Labor Association. In that direction, even though eventually settled, the *Lidl* case, *Verbraucherzentrale Hamburg v. Lidl Dienstleistung GmbH & Co KG*, LG Heilbronn, 21.04.2010 - 21 O 42/10. According to Anna Beckers, an example of an instrument in this direction is Article 2(d) of the EU Consumer Sales Directive, which makes it possible to enforce public declarations that traders use in marketing, insofar as these characterize the product. See generally, A. Beckers, *Enforcing Corporate Social Responsibility Codes: On global Self-Regulation and National Private Law*, 2015, as well as the positivist analysis of M. Torrance, 'Persuasive Authority Beyond the State: A Theoretical Analysis of Transnational Corporate Social Responsibility Norms as Legal Reasons Within Positive Legal Systems', 12 *German Law Journal* (2011) 8, 1573. This discourse is also supported by theoretical accounts that aim to go beyond the positivistic discussion on CSR's bindingness, conceptualizing it as a space for "[...] compromise between incommensurable logics of action", K. H. Eller, 'Private governance of global value chains from within: Lessons from and for transnational law', 8 *Transnational Legal Theory* (2017) 3, 296, 317.

⁹⁰ For a series of articles debating the ideal way of maximizing the regulatory effect of CSR Codes, see *Indiana Journal of Global Legal Studies* Vol. 24 (2017).

⁹¹ Companies Act 2013, sec 135(5).

⁹² According to KPMG, 'India's CSR reporting survey 2017' (Jan 2018), available at <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2018/02/CSR-Survey-Report.pdf> (last visited 17 December 2019), compliance is robust and findings are encouraging regarding both CSR spending and reporting.

civil society and the courts of public opinion.⁹³ In Mauritius, a similar – and this time sanctionable – CSR obligation was legislated, whereby corporations should contribute the 2% of their chargeable income to a CSR Fund to be dedicated to CSR activities.⁹⁴ In South Africa, a country famous for the constitutional recognition of the horizontal effect of human rights, CSR provisions have also been enshrined in legislation for specific sectors of the economy. For example, the South African Mineral and Petroleum Resources Development Act sets as one of its objectives to ensure that “[...] holders of mining and production rights contribute towards the socio-economic development of areas in which they operate [...]”.⁹⁵ Even softer forms of legislated CSR, where there is no mechanism of implementation, can be found in China and Indonesia.⁹⁶ These initiatives maintain a distance from both a state-enforced paradigm of corporate human rights obligations and from the transnational, deterritorialized communicative networks that constitute the fundament of obligations within the paradigm societal constitutionalism. Yet, insofar as sanctions are dismissed as an option and the companies enjoy a broad margin of choice regarding the target of their CSR contributions, such legislative initiatives can arguably be seen as the type of external constraints that aim to produce internal corporate change, eventually reaching to the core of corporate culture.

⁹³ Companies Act 2013, sec 135(5).

⁹⁴ Interestingly, however, according to Daniel Kinderman, ‘Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?’, 35 *Policy and Society* (2017) 1, 29, the CSR clause was introduced as part of a package-deal that involved cutting the corporate tax rate from 25% to 15%.

⁹⁵ Mineral and Petroleum Resources Development Act 2002, sec. 2(i). From a sociological perspective, according to Maha Rafi Atal, the reception of the corporate welfare and service provision programs by the workers ranges between their rejection as a continuation of apartheid-style paternalism and their endorsement as part of companies’ obligations. According to the same research, corporate managers framed their CSR programs as part of a wider project to combat labour resistance, including strikes. M. R. Atal, ‘White capital: Corporate social responsibility and the limits of transformation in South Africa’, 4 *The Extractive Industries and Society* (2017) 4, 735, 738-740.

⁹⁶ M. Yan, ‘Corporate Social Responsibility vs. Shareholder Value Maximization: Through the Lens of Hard and Soft Law’, *Queen Mary School of Law Legal Studies Research Paper No 280/2018* (2018) 25-26.

D. Conclusions: Synergies, Divergences, and Social Rights Between the Distribution Imperatives of Sufficiency and Quality

How to navigate between these different approaches? Is it possible to imagine a synergetic effect leading to a more enhanced human rights protection, despite their radically different theoretical underpinnings? They both lend themselves in support of human rights obligations applying to corporate actors. Yet, even though both approaches recognize the increasing incapacity of State institutions alone to mitigate the effects of globalizing corporate power, they diverge greatly on the question how the centrifugal dynamics of the economic system are to be addressed. Rights-based approaches cling on a Kantian idea of globalization of public law as a result of a legalization of international politics. There is a latent belief in the idea of a just global legal order, mediated through binding international agreements. The answer to the disjunction between the globalization of corporate power and the weakening of State institutions is a constitutionalized global polity, a constitutionalized international law.⁹⁷ This – perhaps overly – optimistic stance regarding the possibilities of politicization of international law within international institutions dominated by powerful capital-exporting States is contrasted by the postmodern scepticism of systems theory that sees in world society an ensemble of highly fragmented and contradictory processes, wherein politics has lost its formerly leading role and such top-down approaches are bound to fail. According to societal constitutionalism, societies have an informal constitutionality that is not centered on States⁹⁸ and it is precisely on these processes of partial constitutionalization that normative arguments should focus. It would not only be misplaced to expect the globalization of autonomous law through centralized global governance. It could also potentially adversely impact on the autopoietic processes of constitutionalization initiated through learning pressures. Indeed, the medium of the law should restrain itself to the role of the facilitator of the permeability of private structures to this type of learning pressures, realizing thusly its own self-reflexion.

⁹⁷ G. Teubner, 'Constitutionalizing Polycontextuality', 20 *Social & Legal Studies* (2011) 2, 210, 210-211. See also J. Klabbers, A. Peters & G. Ulfstein, *The constitutionalization of international law*, 2009.

⁹⁸ C. Thornhill, 'Constitutional Law from the Perspective of Power: A Response to Gunther Teubner', 20 *Social & Legal Studies* (2011) 2, 244 [Thornhill, Constitutional Law].

This conscious divergence⁹⁹ of approaches embedded in transnational legal theory and the normative project of societal constitutionalism from ideas of a constitutionalized global polity stems from a deeper mistrust of centralized public authority – both due to its limited resources and its latent potential for overreaching and colonizing social spheres. However, in a moment of increasing international fragmentation, when forces of backlash against most institutionalized forms of international cooperation or supranational unity are gaining ground continuously, the fear of an all-engulfing State that threatens to annex the entirety of the Social seems misplaced. As Chris Thornhill has insightfully suggested, invoking the example of fascist European States of the 1930s, totalitarian tendencies are actually supported by a model of “[...] weak statehood [...]” that rests on the colonization of the Social by co-opted private actors in the peripheries of government.¹⁰⁰ In a world of ever-increasing corporate power, the priority of a normative project of socio-legal transformation cannot be the conditions that enhance an – already existing – self-realization of the autopoietic economic system through, for example, mechanisms of corporate self-governance and industry self-regulation. Instead, the goal must be the regulatory transformations that will allow for the curbing of this power in the face of public considerations.

Even though the descriptive aspect of societal constitutionalism, devoid of the transcendental and inherently arbitrary invocations of natural law, retains an explanatory power, its normative aspect risks indulging the view of a self-adjusting, self-regulating society, with only a limited role for public authority. The dependence of social constitutionalization on market mechanisms (if one only thinks of examples such as certification, accreditation, general consumer preferences, etc.) carries the risk of a colonization of any emerging constitution by economics. This translates in an institutionalization of dynamics of inequality, even if the inclusionary aspect of human rights requires the openness of functional systems to all members of society. This is because, if the

⁹⁹ Approaches with practical orientation are more likely to appreciate possible synergies in the frame of the common goal of imposing rights obligations on corporations. See B. Choudhury, ‘Balancing Soft and Hard Law for Business and Human Rights’, 67 *International and Comparative Law Quarterly* (2018) 4, 961, placing the emphasis on ‘harder’ law rather than a binding treaty or O. K. Osuji & U. L. Obibuaku, ‘Rights and Corporate Social Responsibility: Competing or Complementary Approaches to Poverty Reduction and Socioeconomic Rights?’, 136 *Journal of Business Ethics* (2016) 2, 329, suggesting CSR should be the legal translation of broad human right commitments into concrete programs.

¹⁰⁰ Thornhill, ‘Constitutional Law’, *supra* note 98, 246.

access of the participating individuals to a system is subject to the translation of these individuals into semantic artefacts of a code oriented toward profit-maximization, then the different economic capacities of individuals translate in differentiated access. Simply put, only small parts of the global population (but perhaps significant parts of the global market) can steer corporations toward Fair Trade certification. Therefore, even if the outcome of such a process might lead, for example, to increasing protection of social rights in the developing world, it comes at the price of the absence of participation of precisely those individuals that are supposed to benefit from the enjoyment of the rights. It comes to them as a gift endowed by the anonymized processes of globalized capitalism and the change of the consumption discourses in places far away. Harder laws regarding required CSR contributions, despite their immediate positive effect, fall within the same paradigm, drawing the critique of being a “[...] legislation of corporate philanthropy [...]”.¹⁰¹ This de-politicization and de-localization effectuated by such a transnational, horizontal effect of human rights disrupts the delicate balance between the imperatives of democracy and rights that supposedly rests in the co-originality of public and private autonomy.¹⁰²

On the other hand, rights-based approaches, in their persistence for legally binding obligations,¹⁰³ approach further what Jacques Rancière characterizes as a form of visibility of equality, derived from the inscription of human rights in words.¹⁰⁴ Setting aside questions of philosophical foundations and the claims of a universal morality, from the moment these rights are inscribed (as in the case of a treaty), they enable their addressees to “[...] make something out of that inscription [...]”.¹⁰⁵ This both recognizes the individuals subject to corporate power as autonomous agents, rather than as parts of anonymous communicative processes, and it enables processes of politicization through contested

¹⁰¹ See R. G. Pillay, ‘The Limits to Self-Regulation and Voluntarism: From Corporate Social Responsibility to Corporate Accountability’, 99 *Amicus Curiae* (2014), 10, 12, according to whom corporations could be paying only a living wage to employees or engage in massive lay-offs and still be considered as *socially responsible* if they make the required contributions.

¹⁰² J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), 121.

¹⁰³ Ruggie calls them *legal formalists*, J. G. Ruggie, ‘Comments on Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?’ (2014), available at <https://www.business-humanrights.org/sites/default/files/media/ruggie-comment-surya-deva-david-bilchitz.pdf> (last visited 02 September 2019).

¹⁰⁴ J. Rancière, ‘Who Is the Subject of the Rights of Man?’, 103 *South Atlantic Quarterly* (2004) 2-3, 297, 303.

¹⁰⁵ *Ibid.*

interpretations of the extent of corporate obligations. Indeed, social rights, precisely because of their role in sheltering certain fundamentals of existence from market allocations require a type of entrenchment that is immune to the vagaries of the market.¹⁰⁶ To the extent that social rights mandate a certain unquestionability about a minimum of social solidarity, their dependence – as societal constitutionalism would have it – on mechanisms of reflexivity subject to market capture and the dynamics of a volatile consumer society appears to destabilize such a conceptual foundation.

However, this position needs further nuancing as well. The quest to entrench social rights precisely as the sheltering of “[...] minimums of existence [...]”¹⁰⁷ reflects the sufficiency imperative of distribution, which, as Samuel Moyn convincingly shows, can easily coexist with significant socio-economic inequalities.¹⁰⁸ Sufficiency guarantees a floor of protection against insufficiency, but not a ceiling on inequality, remaining uncritical of societal hierarchies. Sufficiency might be a more immediate priority in certain contexts, such as in developing countries. Yet, if social rights are to be conceived in a way that equality and not only sufficiency is addressed, then the inscription of human rights obligations of corporations is only a first step. Deeper changes in the relationship of law to the political economy are required, including changes in corporate governance that challenge shareholder primacy and are indeed capable of shifting the priorities of corporations toward social responsibility. From such a perspective, it appears that the ultimate goal of societal constitutionalism to democratize the economy from within carries a certain potential for egalitarian aspirations that could possibly go beyond the regulation of only some minimum obligations through hard law. The open-endedness of societal constitutionalism could indeed enable transformative projects of democratization to sprout. Fleshing out and operationalizing the objective of triggering systemic self-limitation needs, in this case, extensive reimagination in order to correspond to demands of democratic legitimacy and avoid market capture and the risk of institutionalizing socio-economic inequalities. Such a project of publicization of private actors would need to go further than the current framework of the

¹⁰⁶ See E. Christodoulidis, ‘Social Rights Constitutionalism: An Antagonistic Endorsement’, 44 *Journal of Law and Society* (2017) 1, 123.

¹⁰⁷ See Bilchitz, *Poverty and Fundamental Rights*, *supra* note 15 and the development of a *thin* theory of the good, as well as J. Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now*, 2017, and the elaboration of the concept of *minimum core obligations*.

¹⁰⁸ S. Moyn, *Not Enough: Human Rights in an Unequal World*, 2018.

UNGP, possibly involving a more prescriptive approach from public authority in the regulation of both corporate conduct and corporate governance.¹⁰⁹

These reflections lead to the tentative speculation that, while rights-based approaches seem better equipped, at least in their practical orientation, to guarantee the minimum standards of social rights by imposing human rights obligations on corporations, a re-envisioned societal constitutionalism might hold more promise for the structural transformations that could elevate social rights beyond the moral demand of sufficiency. This is not to say that societal constitutionalism is the only approach in that regard; more traditional approaches along the lines of the welfare State could also be effective, although, contrary to societal constitutionalism, it remains a point of question the extent to which they could have transnational effect. If the goal of effectuating social rights is the fight against poverty and lack of access to institutions and resources, imposing human rights obligations through international law on corporations that have a significant impact on people's lives around the world appears to be a necessary first step in attenuating the effects of their social power. Yet, if the goal is related to aspirations of equality then social rights are only part of the answer.¹¹⁰

¹⁰⁹ An example in that direction could possibly be the *inclusive ownership fund* (IOF), a suggested employee ownership scheme in the UK that would transfer part of the ownership of a company to the employees, distribute dividend payments, and direct further dividends to a national fund for public services and welfare. See R. Syal, 'Employees to be Handed Stake in Firms Under Labour Plan', *The Guardian* (24 September 2018), available at <https://www.theguardian.com/politics/2018/sep/23/labour-private-sector-employee-ownership-plan-john-mcdonnell> (last visited 02 September 2019).

¹¹⁰ Donaldson & Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications', *supra* note 29, 83-84. This view is further legitimised by the fact that even strong defendants of property rights accept limitations to property rights. See, for example, Nozick's example of the appropriation of the single waterhole in the desert and the worsening of the position of others. Nozick, *Anarchy, State and Utopia*, *supra* note 18, 140.

Unpacking the Debate on Social Protection Floors

Viljam Engström*

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Abstract

Social protection policies have been adopted by numerous international actors and are embedded in a wide array of policy and legislative instruments. Conceptually, social protection is ambiguous. This is also true of its different embodiments, such as the concept of vulnerability, and the idea of protection floors. This article looks at social protection floors as manifested in a human rights-based approach and in the context of the International Monetary Fund (IMF). The article situates protection floors in the protection of socio-economic rights, and uses that regime as a reference point for examining the materialization of protection floors in IMF policy-making. Against this background, this article revisits two ongoing debates around social protection: the dichotomy between universalism and targeting, and the capacity to induce change. The article calls for a more nuanced debate on protection floors.

A. Introduction

Around 50 per cent of the world's population lives without any social protection.¹ At the same time, informality persists in emerging markets, and the changing nature of work is challenging traditional social protection schemes in advanced economies.² For good reason, therefore, social protection is high on the agenda of international actors ranging from the human rights sphere to international financial/economic organizations.

Commonly social protection refers to policies and actions building resilience and a capacity to cope for the poor and vulnerable. However, with social protection manifested as both an economic question as well as a question of human rights, approaches to social protection vary across international regimes. Social protection and its various embodiments, such as protection of vulnerable groups, are conceptually ambiguous and substantively contested.³ One of the issues where this contestation manifests itself, concerns the question of protection floors.

As a question of human rights, the essence of social protection is captured in the right to social security. As a consequence, the idea of protection floors becomes an embodiment of the idea of a minimum core / essential level of socio-economic protection. As the bedrock of socio-economic rights, this connection raises high expectations also concerning the realization of protection floors. As the Special Rapporteur on extreme poverty and human rights has noted, controversy reigns at the international level especially in terms of whether protection floors should be seen as a matter of human rights, and whether such floors should be universal and unconditional.⁴ This controversy also extends to the way in which core principles such as *universality* should be defined. Universal social protection for specific (vulnerable) groups has been noted to be an oxymoron, reflecting the confused State of the debate.⁵

¹ UNICEF, UNDP, UNHCR, ILO, 'Joint Fund Window for Social Protection Floors: A pooled financing mechanism to implement social protection floors, including in fragile and crisis conflicts, and realize Sustainable Development Goal 1.3' (2018), 3.

² World Bank, 'World Development Report 2019: The Changing Nature of Work' (2018); M. Rutkowski, 'Reimagining Social Protection', 55 *Finance & Development* (2018) 4, 10.

³ See e.g. K. Brown, K. Ecclestone & N. Emmel, 'The Many Faces of Vulnerability', 16 *Social Policy & Society* (2017) 3, 497.

⁴ Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, UN Doc A/69/297, 11 August 2014, para. 23.

⁵ S. Devereux, 'Is Targeting ethical?', 16 *Global Social Policy* (2016) 2, 166, 168.

Among international financial institutions, the International Monetary Fund (IMF) seems to have experienced something of a social awakening, and it has recently adopted a social protection strategy.⁶ This emerging *social awakening* comes at a time, when it is seen as the “[...] single most influential international actor not only in relation to fiscal policy but also to social protection, even if both it and its critics might prefer that this were not the case”.⁷ The statement not only recognizes the importance of IMF policy-making for the development of social protection frameworks, but also captures the fundamental skepticism that exists towards IMF social protection engagement.

Amidst the growing attention, also critical discourse on the compatibility of conceptions of social protection has gained renewed interest. The IMF is seen to paint too positive an image of its policies; floors are considered weakly enforced compared to economic targets; floors are not considered ambitious enough; their establishment is accused for being non-transparent; and universalism is considered preferable to the IMF practice of targeting.⁸

The effectiveness of floors is also questioned. The nationally defined spending floors required in IMF-supported low-income country programs have been found often to be too broad to be useful in protecting critical spending for social protection.⁹ Memoranda of understanding between Governments and IMF also “[...] often lack details on coverage and monitoring, and on reporting arrangements”.¹⁰ Targeting has also been accused of potentially weakening

⁶ IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper, 14 June 2019. The increased attention has been noted also by non-governmental organizations, see e.g. C. Mariotti, N. Galasso & N. Daar, ‘Great expectations: is the IMF turning words into action on inequality?’, Oxfam Briefing Paper (2017).

⁷ Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, UN Doc. A/HRC/38/33, 8 May 2018, para. 55.

⁸ Mariotti, Galasso & Daar, ‘Great expectations: is the IMF turning words into action on inequality?’, *supra* note 6, 21. A. Kentikelenis, T. Stubbs & L. King, ‘IMF Conditionality and Development Policy Space’, 23 *Review of International Political Economy* (2016) 4, 543. Further references can be found e.g. in Devereux, ‘Is Targeting Ethical?’, *supra* note 5.

⁹ J. Klugman *et al.*, ‘The IMF and Social Protection: Seven Low-Income Country Cases’, Independent Evaluation Office (IEO) Background Document No. BD/17-01/06, 5 July 2017, 7.

¹⁰ IMF, ‘Social Safeguards and Program Design in PRGT and PSI-Supported Programs’, IMF Policy Paper, 6 June 2017, 14.

social protection through exclusion errors, as well as through administrative and political costs.¹¹

The present article revisits this discussion on social protection floors. The aim of the article is to critically unpack two of the more principled aspects of the critique directed at the IMF, both of which relate to the scope of the protection offered. The article sets off by situating protection floors in international law and the protection of socio-economic rights in particular, as a mechanism for protecting vulnerable groups. At a second stage the article discusses the social protection policy of the IMF, and the materialization of protection floors in IMF policy making. Against this background, the article turns to two critiques of IMF policy-making: the dichotomy between universalism / targeting in social protection, and an alleged lack of attention to structural concerns. The article claims that these questions are often discussed in an overly polarized manner, this way failing to acknowledge a more complex reality and at worst reinforcing an unhelpful adversarial positioning. By revisiting the protection floor debate, the article calls for a more nuanced approach, as a prerequisite for bridging competing social protection / protection floor approaches.

B. Social Protection and Protection Floors

There is no universally accepted definition of social protection, nor consensus about what policies social protection includes. As the World Bank has noted:

“The international community has come to consensus that social protection programs and policies have a key role to play in poverty reduction. Traditionally, this has been viewed singularly through the lens of equity and redistribution. The innovation in the last ten years is the linking of social protection to the economic growth agenda. [...] Social protection figures prominently in many international conventions, but there is divergence among agencies as to how this right is actually perceived.”¹²

¹¹ International Organizations Clinic at NYU School of Law, *The IMF and Social Protection* (2017), 81-84.

¹² World Bank, ‘Resilience, Equity, and Opportunity The World Bank 2012-2022 Social Protection and Labor Strategy’ (2012), 98.

The concept of a social protection floor emerged from the International Labor Organization (ILO) concept of a social minimum, comprising pensions, child benefits, access to health care, and unemployment provision. Global political support for the idea of minimum social protection crystallized in 2009, with the adoption of the UN Social Protection Floor Initiative, which set out to coordinate and improve the efficiency of the UN's development efforts in the area of social protection.¹³ The initiative is led by the ILO and the World Health Organization (WHO) but involves many other UN agencies, including the World Bank and the IMF.¹⁴

The ILO strategy on the extension of social protection (adopted in 2011), aims at the rapid implementation of national social protection floors containing basic social security guarantees that ensure universal access to essential health care and income security, and the progressive achievement of higher levels of protection within comprehensive social security systems. In 2012, the ILO Recommendation 202 on Social Protection Floors was adopted unanimously.¹⁵ The recommendation itself contains two main objectives, which are to guide States: establishing and maintaining social protection floors as a fundamental element of national social security; and implementing social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible (Article I(1)).

According to the ILO Recommendation 202, social protection floors are nationally defined sets of basic social security guarantees, aimed at preventing or alleviating poverty, vulnerability and social exclusion. These guarantees should ensure at a minimum that all in need have access to essential health care and basic income security, which secure access to goods and services (Article II(4)).¹⁶ The UN Sustainable Development Goals (SDG) similarly underline the extension of social protection and the establishment of national social protection

¹³ M. Sepúlveda & C. Nyst, *The Human Rights Approach to Social Protection* (2012), 7.

¹⁴ As well as bilateral partners, research institutes and international non-governmental organizations, see <http://www.ilo.org/global/topics/dw4sd/themes/sp-floor/lang--en/index.htm> (last visited 6 March 2019).

¹⁵ ILO, 'R202 - Social Protection Floors Recommendation' (2012); ILO, *C102 – Social Security (Minimum Standards) Convention*, (1952); E. Durojaye, 'The ILO Social Protection Floors Recommendation 202, and Poverty Reduction', 25 *Development in Practice* (2015) 2, 270.

¹⁶ ILO, 'R202 - Social Protection Floors Recommendation' (2012), Article II(5) further specifies that these floors should comprise *inter alia* access to nutrition and education for children, and basic income security for individuals in vulnerable situations as well as for older persons; ILO, *The Strategy of the International Labour Organization. Social security for all. Building social protection floors and comprehensive social security systems* (2012), 1.

floors as key to reducing and preventing poverty. Target 1.3 of SDG 1 on ending poverty guides States to: “Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.”¹⁷

The adoption by all States of social protection floors is commonly considered to be the most promising *human rights-inspired* approach to the elimination of extreme poverty. One of the greatest merits of the protection floor idea is seen to derive from its capacity to transcend the assumed incompatibility between human rights norms and economic realities that an advocacy of the right to social security faces. The fact that the initiative is broadly embraced outside the human rights field is also seen to bring with it a capacity to bridge discourses and mobilize broad-based coalitions to promote its implementation.¹⁸ While this does not set aside the fact that protection floors are strongly embedded in human rights (*discussed below*), it raises questions about the *ownership* of social protection discourse at large, and the interaction of regimes in social protection work.

C. Protection Floors as a Question of Rights

Social protection systems can assist in the realization of several rights, in particular the right to an adequate standard of living (including the right to adequate food and housing), the right to social security, the right to education and the right to the highest attainable standard of health.¹⁹ Article 22 of the Universal Declaration of Human Rights as well as Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognize the right of human being to social security.²⁰ The Covenant further mandates States to devote the maximum available resources to progressively realize economic and social rights, even during times of severe resource constraints. States are endowed with an immediate minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of all economic, social and cultural rights. These minimum essential levels are those, which are crucial to securing

¹⁷ GA Res. 70/1, UN Doc A/RES/70/1, 21 October 2015.

¹⁸ Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, *supra* note 4, paras 2-3.

¹⁹ Sepúlveda & Nyst, *The Human Rights Approach to Social Protection*, *supra* note 13, 11.

²⁰ GA Res. 217 A (III), UN Doc. A/RES/3/217 A, 10 December 1948; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS vol. 993, 3 [ICESCR].

an adequate standard of living through basic subsistence, essential primary health care, basic shelter and housing, and basic forms of education.²¹ These obligations are echoed in ILO Recommendation 202 which States that national social protection floors should comprise at least the following four social security guarantees: access to essential health care, including maternity care; basic income security for children, providing access to nutrition, education, care and any other necessary goods and services; basic income security for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and basic income security for older persons.²²

While the ILO has adopted a rights based-approach to social security, the human rights community has reciprocally acknowledged the idea of protection floors. The Committee on Economic, Social and Cultural Rights (CESCR) explicitly endorsed the idea in 2015 through a Statement on social protection floors, characterizing General Comment 19 (on the right to social security) and ILO Recommendation 202 as “[...] mutually reinforcing [...]”.²³ The establishment of nationally defined protection floors is by the CESCR regarded as a basic set of essential social guarantees in cash and in kind, “[...] pivotal in promoting basic income security and access to health care, and in facilitating the enjoyment of several economic and social rights by the most marginalized groups of the population”.²⁴

Situating the idea of protection floors as a question of rights, brings with it an expectation of compliance with core principles of a human rights-based approach, such as universality and non-discrimination. As to the expectation of universal application, that principle is echoed explicitly in the ILO Recommendation 202 and in the ICESCR.²⁵ The principles of equality and non-discrimination require, for example, that States eliminate discrimination in law, policy and practice, and take special measures to protect the most vulnerable

²¹ *Ibid*; CESCR, *General Comment No. 19, The right to social security (Art. 9)*, UN Doc E/C.12/GC/19, 4 February 2008, para. 59.

²² ILO, ‘R202 - Social Protection Floors Recommendation’, *supra* note 15, para. 5.

²³ CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, UN Doc. E/C.12/54/3, 6 March 2015, para. 4; J. Linarelli, M.E. Salomon & M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018), 250-252.

²⁴ CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, *supra* note 23, para. 1.

²⁵ ILO, ‘R202 – Social Protection Floors Recommendation’, *supra* note 15, para 3; ICESCR, *supra* note 20, articles 2(2) and 3.

segments of society as a matter of priority. When applied to social protection programs, these obligations require that social protection systems mainstream inclusiveness, ensure accessibility by all those who suffer from structural discrimination (such as women, children, older persons, persons with disabilities, ethnic minorities, indigenous peoples, and people living with HIV/AIDS), and do not stigmatize beneficiaries.²⁶ Social protection floors guarantee access to social security by providing, together with adequate access to essential services, a minimum level of benefits *to all*.²⁷ Universal social protection schemes are also in CESCR General Comment 19 envisaged as the most likely way for States to meet their human rights obligations to ensure that there is no discrimination in the selection of beneficiaries.²⁸

Constituting protection floors as a right is of additional importance, because of the link to the idea of a minimum core that is hereby established. The minimum core idea is seen to offer guidance on how to prioritize competing demands arising from human rights obligations; set limits on permissible trade-offs and compliance delay; and to specify a level of immediate compliance with covenant rights.²⁹ Protection floors thereby become a means by which to protect the minimum core content of rights, a link found to be particularly important during fiscal consolidation.³⁰ The guarantees provided through protection floors constitute the core of the obligation of States to ensure social security.³¹

Embedding social protection floors in the minimum core doctrine, in combination with universality, infuses protection floors with a sense of absoluteness and general applicability. While this sets the parameters by which to assess the IMF approach to protection floors, it also opens up for a discussion on the meaning of universality and on how the idea of a minimum core can be reconciled with the need to take into account economic realities and the

²⁶ Sepúlveda & Nyst, *The Human Rights Approach to Social Protection*, *supra* note 13, 32.

²⁷ CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, *supra* note 23, para. 9.

²⁸ CESCR, General Comment No. 19, *The right to social security* (Art. 9), *supra* note 21, para 4.

²⁹ J. Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now', *World Bank Working Paper* (2017), 14-15.

³⁰ *Guiding Principles on Human Rights Impact Assessments of Economic Reforms*, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN doc. A/HRC/40/57 (19 December 2018), 10, para. 9.5.

³¹ CESCR, *Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals*, *supra* note 23, para. 8.

importance of economic productivity.³² In this context universal aspirations run the risk of creating false dichotomies and raising unrealistic expectations.³³

D. The IMF and Protection Floors

I. The IMF in Social Protection

The idea of protection floors has entered IMF practice as part of an emerging attention to the social dimension of its policy-making, and the need to protect vulnerable groups in particular. By the late 1990's, the Executive Board supported inclusion of social safety nets and related conditionality in IMF-supported low-income country programs. Starting in 1999, the IMF worked to introduce Poverty Reduction Strategies and social spending floors in IMF-supported lending programs. However, at the time, views were divergent among directors as to the desirability of such policies, and their weight among IMF policy goals.³⁴ The Revised Operational Guidance to IMF Staff on the 2002 Conditionality Guidelines (adopted in 2014) explicitly introduced vulnerability as a parameter to take into account in IMF policy-making by stating that “[...] if feasible, any adverse effects of program measures on the most vulnerable should be mitigated”.³⁵

In the aftermath of the 2008 crisis, the IMF Board agreed that Poverty Reduction and Growth Trust (PRGT)-supported programs (that offer interest free financial support to low-income countries) should safeguard and, where possible, increase social spending. PRGT-supported programs were therefore required to include explicit program targets for what is called “[...] social and other priority spending [...]”. The definition of what comprised such spending was to be determined by countries in keeping with national poverty reduction

³² Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, *supra* note 4, paras 2-3.

³³ N. Kaber, ‘The Politics and Practicalities of Universalism: Towards a citizen-centred perspective on social protection’, 26 *European Journal of Development Research* (2014) 3, 338.

³⁴ A. Abrams, ‘The IMF’s Role in Social Protection: Fund Policy and Guidance’, IEO Background Document No. BD/17-01/01, 5 July 2017, 3; K. Donald & N. Lusiani, *The Gendered Costs of Austerity: Assessing the IMF’s role in budget cuts which threatened women’s rights* (2017), 6.

³⁵ IMF, ‘The Revised Operational Guidance to IMF Staff on the 2002 Conditionality Guidelines’, IMF Policy Paper, 23 July 2014, 4.

strategies.³⁶ In 2009, the IMF became a collaborating agency in the UN Social Protection Floor Initiative that promotes universal access to essential social transfers and services.³⁷

Some current research claims that this *awakening* is, in fact, the re-emergence of an idea – the roots of which can be found in the Bretton Woods agreements that established the framework of the post-second world war international economic order. While there are certainly differences to the current social protection floor framework, the two also display many similarities. Helleiner concludes that the idea of instituting worldwide minimum levels of social protection, was an idea originally at the core of the international economic order in particular. This idea, Helleiner claims, is now in the process of being revived in the IMF/World Bank context.³⁸

The historical origin of protection floors aside, in 2010, the IMF and the ILO agreed to carry out joint studies on the feasibility of social protection floors for people living in poverty and in vulnerable situations, within the context of a medium to longterm framework of sustainable macroeconomic policies and strategies for development.³⁹ In an address to the Monetary Authority of Singapore (in February 2011), the IMF Managing Director argued that “[a]dequate social protection, drawing on a basic social protection floor as proposed by the ILO, can protect the most vulnerable from the brunt of the crisis”.⁴⁰

Further, in a 2015 official document, the IMF declared that it is “[...] strongly committed, within the scope of its mandate [...]” to the Sustainable Development Agenda and that it had “[...] started deepening its focus on aspects of economic, social, and gender inclusion, and environmental protection, which are core SDG objectives and vital for balanced and sustained growth”.⁴¹ The

³⁶ Klugman *et al*, *The IMF and Social Protection*, *supra* note 9, 4.

³⁷ IEO, *The IMF and Social Protection: 2017 Evaluation Report* (2017), 6.

³⁸ E. Helleiner, ‘Back to the future? The Social Protection Floor of Bretton Woods’, 14 *Global Social Policy* (2014) 3, 298.

³⁹ M. Bachelet, *Social Protection Floor for a Fair and Inclusive Globalization* (2011).

⁴⁰ D. Strauss-Kahn, ‘The Right Kind of Global Recovery’ (2011), available at <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp020111> (last visited 29 September 2019).

⁴¹ IMF, ‘The Role of the IMF in Supporting the Implementation of the Post-2015 Development Agenda’, 17 August 2015. The document asserts that the IMF will expand its focus on inequality, in particular in developing a framework to analyze the distributional impacts of macroeconomic policies and structural reforms, deepening its analysis of the role of fiscal policy on inequality, creating a template for evaluating the distributional impacts of energy subsidy reform, analyzing the gender dimensions of financial inclusion, and conducting more country-level analysis of policies to raise female labor

Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries further States that “[m]inimum floors on social and other priority spending should be included, wherever possible [...]”, further relating this policy to SDG Goal 1.3.⁴² Under the current review of conditionality and design of IMF supported programs, one of the core issues is whether IMF-supported programs give enough attention to the social impact of program measures.⁴³ IMF social protection work peaked in June 2019 with the adoption of a Strategy for IMF Engagement on Social Spending. The strategy makes clear that social spending (defined as social protection, health and education spending) is a key policy lever for, *inter alia*, promoting inclusive growth, addressing inequality, and protecting vulnerable groups. Distributional objectives, in other words, are to be seen as compatible with economic growth.⁴⁴

Inter-agency collaboration efforts, however, are illustrative of the difficulties raised by diverging social protection conceptions. IMF-ILO collaboration that sought to identify fiscal space for financing national floors only led to one serious effort (Mozambique), which was soon abandoned. In 2012, the IMF was invited to join a Social Protection Inter-Agency Coordination Board (created for expanding social protection coverage), but reportedly participated in only a few meetings. Various authors have described how there has been a “[...] fundamental clash of approaches, ideologies and policies [...]” between the ILO Social Security Department (now the Social Protection Department) and the Social Protection and Labor Division of the World Bank. Those conflicts have played out especially “[...] in the fields of pension policy, of safety net versus universal cash benefits policies, [and] of even the definitions and purposes of social protection [...]”.⁴⁵

force participation. Also see IMF, ‘The IMF and the Sustainable Development Goals’, September 2016, available at https://d37djvu3ytnwxt.cloudfront.net/assets/courseware/v1/5a3eed1c5e90f5cbc50b0ce68520545c/asset-v1:WBGx+F4D01x+1T2017+type@asset+block/The_IMF_and_the_Sustainable_Development_Goals_.pdf (last visited 30 September 2019).

⁴² IMF, ‘Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries’, IMF Policy Paper, 11 July 2018, 3, note 2.

⁴³ IMF, ‘Consultation on the 2018 Review of Conditionality and Design of IMF Supported Programs’, May 2018, available at <https://www.imf.org/external/np/exr/consult/2018/conditionality/> (last visited 29 September 2019).

⁴⁴ IMF, ‘A Strategy for IMF Engagement on Social Spending’, *supra* note 6, 13.

⁴⁵ J. Zhou, ‘IMF Collaboration with Partner Institutions on Social Protection’, Independent Evaluation Office, Background Document No. BD/17-01/07, 5 July 2017; Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption of social protection floors*, *supra* note 4, para 25.

While statistics display a rising trend of including protection floors in lending programs,⁴⁶ the IMF is regularly considered as the “odd man out” in its attitude to social protection.⁴⁷ The World Bank, ILO and UNICEF, in particular, regard IMF social protection policies with skepticism, and underline that the policies of the IMF stand in contrast with a universal approach to social protection.⁴⁸ Also the Independent Evaluation Office (IEO) of the IMF has noted that, there is a tension between the targeting approach traditionally preferred by the IMF and the rights-based approach to social protection.⁴⁹ Often this tension is pictured as one between the neoliberal policy preferences of the IMF, and the social justice labor standards of the ILO.⁵⁰

II. Protection Floors in IMF Policy-Making

Social protection issues can arise in the context of all main tasks of the IMF (i.e., surveillance, financial assistance, and capacity development). As to concessional financing for low-income countries, poverty reduction is the core objective of IMF programs. Since 2009, a *social and other priority spending* target has been required in such programs, which includes minimum floors for social spending, and specific measures to protect vulnerable groups.⁵¹

According to the Handbook of IMF Facilities for Low-income Countries, social spending is considered to include spending on health, education and social safety nets,⁵² which is similar to the emphasis of ILO Recommendation 202.⁵³ The share of low-income country arrangements with social and other priority spending floors amounted to 93 percent of the 57 arrangements approved during

⁴⁶ This trend is illustrated in S. Gupta, M. Schena & S.R. Yousefi, ‘Expenditure Conditionality in IMF-Supported Programs’, IMF Working Paper WP/18/255, December 2018, 22.

⁴⁷ The expression used by P. Bakvis, ‘What lies behind the thinking of those driving development at the IMF?’, available at <https://www.developmentpathways.co.uk/blog/what-lies-behind-the-thinking-of-those-driving-development-at-the-imf/> (last visited 11 February 2019).

⁴⁸ Demonstrated at length in International Organizations Clinic at NYU School of Law, *The IMF Social Protection*, *supra* note 11.

⁴⁹ IEO, *The IMF and Social Protection: 2017 Evaluation Report*, *supra* note 37, 13.

⁵⁰ D.F. Frey, ‘Social Justice, Neoliberalism, and Labor Standards at the International Labour Organization’, in G. Mac Naughton & D.F. Frey (eds), *Economic and Social Rights in a Neoliberal World* (2018) 285, 288-289.

⁵¹ IMF, ‘Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries’, *supra* note 42, 6.

⁵² IMF, *Handbook of IMF Facilities for Low-Income Countries* (2017); IMF, ‘Social Safeguards and Program Design in PRGT and PSI-Supported Programs’, *supra* note 10.

⁵³ See above, note 16 as well as accompanying text.

2010-15.⁵⁴ While a few emerging market economy arrangements also included a floor on social spending, there were no social spending floors in advanced economy programs.⁵⁵ Spending floors have most often been established as indicative targets, or structural benchmarks, and are as such part of the loan conditions.⁵⁶ One of the core guiding principles of IMF social protection policies is the *national ownership* in defining social and priority spending,⁵⁷ again, echoing ILO Recommendation 202. Domestic authorities and country teams have flexibility in defining the program targets – only on social spending or on social and other priority spending combined – depending on country circumstances, and in accordance with national poverty reduction strategies.⁵⁸

As a general policy, the Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries asserts that while in many programs social and other priority spending is based on the aggregate budgets of key ministries (such as education and health), there is merit in defining spending floors more narrowly if this would help ensure that the needs of the most vulnerable are covered. If targeting capacity is low and financial resources are available, country authorities can choose to combine universal access to key social protection with targeting of scarce resources to fill existing education, health and social protection gaps among poor and vulnerable groups.⁵⁹ By way of examples, indicative targets (floors) for social spending have included total spending in education, health, HIV/AIDS, infrastructure development, agriculture, rural

⁵⁴ However, only 19 percent of these arrangements (10 arrangements in 7 countries) contained indicative targets defined to focus primarily and specifically on social protection. IEO, *The IMF and Social Protection*, *supra* note 37, 21.

⁵⁵ See *ibid.* 20-22 for country references.

⁵⁶ Gupta, Schena & Yousefi, 'Expenditure Conditionality in IMF-Supported Programs', *supra* note 46, 27. Whereas indicative targets are quantitative measures, structural benchmarks are non-quantifiable reform measures that refer to objectives aimed at improving the social protection system overall. IMF, 'IMF Conditionality', 5 March 2019, available at <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality> (last visited 30 September 19).

⁵⁷ The Revised guidelines on conditionality confirm, as general guiding principles, the national ownership of programmes, and that any assessment of a member's policies and IMF advice shall take into account the circumstances of the member, and, to the extent allowed by Article IV, take into account other objectives of the member State, as well as respect domestic and social policies. IMF, 'Decision on bilateral and multilateral surveillance', Decision No. 15203-(12/72), 18 July 2012.

⁵⁸ Klugman et al, 'The IMF and Social Protection', *supra* note 9, 4.

⁵⁹ IMF, 'Guidance Note on IMF Engagement on Social Safeguards in Low-Income Countries', *supra* note 42, 6-7 (with examples). Also IMF, 'Social Safeguards and Program Design in PRGT and PSI-Supported Programs', *supra* note 10, 19.

development, and governance and the judicial system (Mozambique); health, education, the environment, the judicial system, social safety nets, sanitation, and rural water supply (Senegal); “[...] expenditure on health and education [...]” (Zambia); and “[...] anti-poverty spending [...]” and “[...] social investment spending [...]” (Honduras).⁶⁰

A recent IMF study indicates that social spending floors in low-income country programs have been an ineffective means for safeguarding social protection expenditure. One of the reasons is that the spending categories, as in the examples above, have usually been defined very broadly to include capital and / or current expenditures of several ministries.⁶¹ Such efficiency problems have more lately led to the conclusion within the IMF, that while minimum floors for certain types of spending can be helpful in ensuring allocation for poverty reduction and growth-enhancing programs in the short term, this short-term conditionality should be combined with medium or long-term structural conditionality covering public financial reforms.⁶² This is an interesting acknowledgement, given the critique directed at the social protection engagement of the IMF.

E. Unfolding the Universality v. Targeting Dichotomy

I. Human Rights and Targeting

Protection floors mainly enter IMF policy-making as spending floors. As a point of departure, this is well in line with the goals of the human rights regime, which recognizes that one of the main challenges of social protection coverage, is the need to increase the aggregate level of public expenditure on social protection.⁶³ At the same time, as discussed above, a human rights-based conception of protection floors ties the idea to the minimum core doctrine, and brings with it an expectation of universal application.

Universal social protection also constitutes a goal to be reached, in order to achieve the SDGs.⁶⁴ When considered in this light, the IMF’s preference for targeting social benefits stands out as problematic (calling into question the

⁶⁰ Klugman *et al.*, ‘The IMF and Social Protection’, *supra* note 9, 14-36.

⁶¹ *Ibid.*, 7.

⁶² Gupta, Schena, & Yousefi, Expenditure Conditionality, *supra* note 46; IMF, ‘A Strategy for IMF Engagement on Social Spending’, *supra* note 6, 29.

⁶³ ILO, *World Social Protection Report 2017–19: Universal social protection to achieve the Sustainable Development Goals* (2017), xxxiv.

⁶⁴ *Ibid.*, 167.

IMF's commitment to the SDGs).⁶⁵ At the same time, it should be noted that CESCR General Comment 19 defines the text of article 9 (the right to social security) as indicating that the measures for providing social security benefits can include “[n]on-contributory schemes such as universal schemes (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency) or targeted social assistance schemes (where benefits are received by those in a situation of need)”.⁶⁶

The UN Development Group has observed that the immediate realization of a social protection floor is not a realistic policy goal for many countries. Instead, countries can build a “[...] social protection path with milestones and timelines best suited to the needs of the people and the national contexts”.⁶⁷ While the aim of the UN Social Protection Floor Initiative is to ensure universal protection, this does not mean, however, that every person receives the same benefit. Rather, the goal is to prevent or alleviate poverty, vulnerability and social exclusion, through floors that secure basic social security guarantees for health care, as well as income security for children, older persons and those unable to work (especially in cases of sickness, unemployment, maternity and disability).⁶⁸ Targeting, in other words, does not seem categorically incompatible with a human rights-based approach, especially when targeted schemes are used to prioritize the most vulnerable and disadvantaged.⁶⁹ Protecting vulnerable groups this way becomes a qualification of the principle of universality.⁷⁰

Taking a more pragmatic approach, truly universal social protection programs that would provide resources to every member of society are in fact rare. Most programs make use of targeting in some form.⁷¹ Pensions target the

⁶⁵ Kentikelenis, Stubbs & King, ‘IMF Conditionality and Development Policy Space’, *supra* note 8; Mariotti, Galasso & Daar, ‘Great expectations: is the IMF turning words into action on inequality?’, *supra* note 6, 21.

⁶⁶ CESCR, *General Comment 19*, *supra* note 21, article 4(b) (emphasis added).

⁶⁷ United Nations Development Group, *UNDG Asia-Pacific Social Protection Issues Brief* (2014), 8.

⁶⁸ Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, paras. 35 and 39.

⁶⁹ Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 38.

⁷⁰ As also suggested e.g. in A. Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’, in M. Fineman & A. Grear, *Vulnerability: Reflections on a new ethical foundation for law and politics* (2013), 147, 169, and L. Peroni & A. Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’, 11 *International Journal of Constitutional Law* (2013) 4, 1056, 1084.

⁷¹ M. Förster & P. Whiteford, ‘How Much Redistribution do Welfare States Achieve? The Role of Cash Transfers and Household Tax’, 35 *Center for Economic Studies* (2009) 3,

elderly, education spending targets children, and public works programs target people willing to work for the wage on offer. A claim can be made that even *universal* food subsidies incorporate a degree of targeting, by subsidizing basic-quality foods that the middle classes prefer not to consume.⁷² Conversely, many targeting schemes share the functional principles of universality. For example, unconditional cash transfers that use geographical targeting essentially mean that everyone in a specific and often very large, area receives the same benefits. Universalism and targeting, in other words, are difficult to position as binary poles but instead exist on a spectrum. As a consequence, the debate should rather be about extent and form of targeting.⁷³

While simple targeting mechanisms such as categorical targeting, which selects beneficiaries by targeting everyone within a selected age group, (for example, benefits might go to all children under 18 or all persons above 65), do not pose human rights challenges, things change when means-testing is introduced. Mechanisms intended to select beneficiaries on the basis of their income (or, poverty level) are more complex and potentially problematic from a human rights point of view. This follows from the principle of non-discrimination.⁷⁴ However, even the prohibition of discrimination does not require the provision of equal benefits for all. Targeting, in other words, is human rights compliant if resources are not available for universal (non-discriminatory) schemes or it is a way to promote substantive equality.⁷⁵ In accordance with ICESCR General Comment 20 a failure to remove differential treatment on the basis of a lack of available resources can be justified if “[...] every effort has been made to use all resources that are at the [State party’s] disposition [...]” to eliminate the discrimination.⁷⁶ The European Committee of Social Rights, for example, has on its part found

<https://www.cesifo-group.de/DocDL/dicereport309-rr1.pdf> (last visited 6 March 2019).

⁷² D. Coady, M. Josh & J. Hoddinott, *Targeting of Transfers in Developing Countries: Review of Lessons and Experience* (2004), available at http://siteresources.worldbank.org/SAFETYNETSANDTRANSFERS/Resources/281945-1138140795625/Targeting_En.pdf (last visited 26 November 2019).

⁷³ International Organizations Clinic at NYU School of Law, *The IMF and Social Protection*, *supra* note 11, 81-82.

⁷⁴ Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 38.

⁷⁵ M. Langford, ‘Social Security and Children: Testing the boundaries of human rights and economics’, in B. A. Andreassen, S.P. Marks & A.K. Sengupta (eds), *Freedom from poverty as a human right: economic perspectives* (2010), 211, 222.

⁷⁶ CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2)*, UN Doc. E/C.12/GC/20, 2 July 2009, para. 13. Also see CESCR, *General Comment 3: ‘The Nature of States Parties’ Obligations (Art. 2, para. 1)*, UN Doc. E/1991/23, 14 December 1990, paras 10-12.

that prioritizations also within vulnerable groups can be made, finding no violation in restricting pension rights, when the impact of that restriction was not too big on the “[...] most vulnerable households [...]”.⁷⁷

II. Inclusion v. Exclusion Errors

Accepting that the choice between universalism and targeting is always in reality a matter of degree (and recognized as such across regimes), interest is instead turned to the design of protection floors and to an assessment of comparative merits and flaws. In this comparison, a human rights-based approach and the IMF exhibit markedly different points of departure. This difference manifests itself in how the two regimes relate to inclusion errors (providing the benefit to someone who is not in the target group) and exclusion errors (failure to provide the transfer to those intended).

In a human rights-based approach, exclusion errors stand out as more serious, potentially constituting a violation of beneficiaries’ right to social security.⁷⁸ Exclusion errors are also potentially discriminatory. This underlines the inclusiveness of the human rights-based approach. As to the IMF, an avoidance of inclusion errors is the very reason for preferring targeted mechanisms. The IMF preference for targeted approaches derives from a conception of targeting as the more efficient way of achieving the aims and purposes of the IMF.

A characterizing feature of intergovernmental organizations, is that they are limited in all their tasks, to the pursuit of their individual aims and purposes (in respect of the IMF: to ensure the stability of the international monetary system, and facilitate the expansion and balanced growth of trade). The threshold of macro-criticality that guide IMF policy-making (and by extension, social protection engagement) is a defining feature of the conferral of powers to the IMF, setting the limits of IMF action. Such a qualification of the social protection engagement with the mandate of the organization, in fact characterizes all organizations. For this very reason the WHO focuses on health insurance and HIV/AIDS, whereas UNICEF focuses on child labor, safety nets, and HIV/AIDS.⁷⁹ For the IMF, its limited mandate and the requirement of

⁷⁷ European Committee of Social Rights, xiv conclusions 2009, Finland. This argument was also raised by the Greek government in Decision on the merits: Federation of employed pensioners of Greece (IKA-ETAM) v. Greece, Collective Complaint No. 76/2012, para 67.

⁷⁸ Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 40.

⁷⁹ The World Bank 2012-2022, *Social Protection and Labor Strategy* (2012), 96.

macro-criticality means that, inclusion errors as a point of departure need to be avoided because of their likely economic implications.

Another issue to be raised in unfolding the *universality versus targeting critique*, is whether the well recorded preference by the IMF for targeted approaches categorically excludes universal schemes. Targeting by definition denies equal benefits to all vulnerable groups. The narrower the targeting approach, the more exclusionary it will also be. Yet, at the same time this need not mean that universal schemes would per definition be incompatible with the financial objectives of IMF programs. The Strategy for IMF Engagement on Social Spending States that use of “[...] *universal and targeted social assistance benefits* [...]” (emphasis in original) depends on country circumstances as well as fiscal and administrative constraints. This means that universal mechanisms are not excluded from the toolbox of policy advice, as long as such mechanisms can be sustainably financed. For example, in respect of Mongolia, country authorities did not implement IMF staff policy advice on targeting. As this deviation was not however considered macro-critical, it did not affect the continuation of the program.⁸⁰ A recent analysis published in the IMF *Fiscal Monitor* acknowledges that targeting requires adequate administrative capacity and that, where such capacity is lacking, there is often “[...] undercoverage of the poor and leakage of benefits to the rich”. As a result, the analysis explores the option of universal basic income schemes as a *second-best* alternative to targeted social protection.⁸¹ Universal basic income can be seen as the most radical form of the income component of a social protection floor.⁸² Basic income, it should be added, is also among the only truly universal social protection mechanisms.⁸³

Finally, to add yet another layer to the discussion, the question should be asked whether any protection floor policy can avoid having an impact on the rights of others. First of all, once it is accepted that all protection schemes in practice target to some degree, avoiding exclusion altogether seems illusory.

⁸⁰ IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper, *supra* note 6, at 30; IMF, ‘A Strategy for IMF Engagement on Social Spending – Case Studies’, IMF Policy Paper no. 19/018, 14 June 2019, 60.

⁸¹ ‘Tackling Inequality’, *Fiscal Monitor* (October 2017). Also see Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, para 41.

⁸² I. Ortiz *et al.*, ‘Universal Basic Income proposals in light of ILO standards: Key Issues and global costing’, ESS Working Paper No. 62 (2018), 5.

⁸³ Devereux, ‘Is Targeting Ethical?’, *supra* note 5, 167. See I. Ortiz *et al.*, Universal Basic Income, *supra* note 82, for a more detailed discussion, suggesting that not all basic income programs however comply with ILO standards such as universality.

Furthermore, as all social protection requires public spending, this spending will always have an impact on the rights of others (especially in a situation of economic crisis). The more costly a protection scheme will be, the higher the impact will also be on the realization of rights in other societal areas. Looking at exclusion solely within a particular vulnerable group (or even an entire segment of society), in other words, can be too narrow an approach to assess the impact on rights of social protection policies.

III. Minimum Core and Efficiency

The minimum core doctrine constitutes the link that couples the idea of protection floors with the principle of universality.⁸⁴ However, the minimum core doctrine also functions as a means of prioritizing individuals and groups most in need. The minimum core doctrine, in this view, does not set absolute standards of protection that could not be derogated from or prioritized among,⁸⁵ but is subject to “[...] contextual relativity [...]”, allowing for a margin of appreciation and to a proportionality test (when challenged by countervailing considerations).⁸⁶ As such also the design and scope of protection floors is subject to a reasonableness assessment.

Reasonableness, as a “[...] localized expression of the proportionality test”,⁸⁷ contextualizes the idea of core obligations and brings with it an element of prioritization where core obligations can be overridden for example in situations where the realisation of the minimum core of a particular right would prevent the realisation of the minimum core of other rights.⁸⁸ At the same time the number of parameters (such as degree of poverty, available resources, and administrative structure and efficiency of individual countries) affecting the cost-benefit analysis necessary for weighing universality and targeting, is too vast to be reducible to a simple *economics v human rights* constellation. Instead, it gears attention to efficiency.⁸⁹

⁸⁴ CESCR, *Statement on social protection floors*, *supra* note 23, paras. 7-8.

⁸⁵ As recognized also in CESCR, *General Comment 3*, *supra* note 76, para. 10.

⁸⁶ Tasioulas, *Minimum Core*, *supra* note 29, 28. This is arguably at odds with General Comment No.14, paragraph 47: “It should be stressed, however, that a State party cannot, under any circumstance whatsoever, justify its non-compliance with the core obligations [...] which are non-derogable.” *Ibid*, 17.

⁸⁷ K. G. Young, *Constituting Economic and Social Rights* (2012), 125.

⁸⁸ D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), 212.

⁸⁹ The nature of the enquiries necessary for determining the content of minimum core standards is also the very reason why courts have been unwilling to enter into such an

From an ethical perspective, equity is best achieved through policies that treat every member of a society equally. Universal schemes are also often claimed to be superior in reaching those living in poverty.⁹⁰ On the other hand, some developing countries have been noted to be moving to targeting because of poor experiences with and high costs of universal subsidies.⁹¹ Means testing is even defended with the higher overall welfare it generates through concentrating benefits to the poor (compared to the overall costs of a universal scheme). In this light, the universal scheme would only come out ahead in case of significant targeting errors or income inequalities.⁹² Whereas some studies, for example, by the ILO show that universal social protection programs are affordable even in the poorest countries,⁹³ affordability is not sufficient alone to guarantee an ideal social protection outcome. While targeting may be distortive if misapplied, positive discrimination (targeting) can be regarded as more equalizing than universalism, if the latter reproduces societal biases. Frustration with this endless loop of claims and counterarguments has produced concepts such as *progressive universalism* or *targeted universalism*, which above all should be seen as recognitions of the fundamental tradeoffs (both economic, social, and political) that any social protection scheme will contain. Incidentally, the notion of progressive universalism is embedded also in the IMF Social Spending Strategy.⁹⁴

assessment. See *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), paras 37-46. Also see M. Langford, 'Social Security', *supra* note 75, 223 and 230, and M. Wesson, 'Grootboom and beyond: Reassessing the socio-economic rights jurisprudence of the South African Constitutional Court', 20 *South African Journal of Human Rights* (2004) 284, 304.

⁹⁰ S. Kidd, *Social Protection: Universal provision is more effective than poverty targeting*, Development Pathways, 9 February 2016.

⁹¹ R. Yemtsov, *Social Protection: Universal & poverty targeting approaches are not in contradiction*, Agence Française de Développement blog, 16 August 2016.

⁹² "Put another way, per-beneficiary transfers would have to be much smaller for universal programs than for targeted transfers, usually because of overall budget constraints and competing priorities for government spending [...]" R. Hanna, A. Khan, & B. Olken, 'Targeting the Poor. Developing economies face special challenges in delivering social protection', 55 *Finance & Development* (2018) 4, 28, 30.

⁹³ See e.g. references in Sepúlveda & Nyst, *The Human Rights Approach*, *supra* note 13, 38.

⁹⁴ A. M. Fischer, 'On the Macroeconomics of Universalistic Social Policy and Economic and Social Rights', 16 *Global Social Policy* (2016) 1, 97. B. Leubolt, K. Fischer & D. Saha, 'Are targeting and universalism complementary or competing paradigms in social policy?', 6 *International Journal of Labour Research* (2014) 1, 75. U. Gentilini, 'What lessons for social protection from universal health coverage?', *Let's Talk Development Blog*, 22 August

A turn to efficiency comes with its own set of problems. As a real-life comparison between alternative solutions cannot be done, the critique of targeting is often based on general literature which contains contradictory conclusions about impact.⁹⁵ While IMF self-assessments are accused for being self-referential and methodologically flawed,⁹⁶ also regression analysis fails to provide closure.⁹⁷ If evidence is inconclusive in retrospect, the equation becomes even more complex when a prospective dimension is added that weighs current protection schemes and their costs against future gains both in terms of economic growth and social welfare. The CESCR embodies this tension in General Comment 19, in stating that social security schemes need to ensure that the rights to social security “[...] can be realized for present and future generations”.⁹⁸ While efficiency claims have a hard time with squaring the discourse on how to best design protection floors (so as to protect the minimum core of rights) simply because of a lack of agreement on the parameters by which to measure that efficiency, such a focus does however direct interest to the aims of the use of protection floors.

F. Looking for Lost Ambition

I. Structural Issues in IMF Policy-Making

Turning to the purpose of protection floors leads into a second strand of debate on the design of social protection mechanisms. The critique directed at the IMF accuses it of not being ambitious enough, that its targeting approach amounts to no more the *poor help*, and that it fails to consider underlying structural issues.

The interest of the IMF has been noted to be in mitigation instead of transformation.⁹⁹ Such mitigating measures also typically have a stigmatizing

2018. IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper, *supra* note 80, at 31.

⁹⁵ International Organizations Clinic at NYU School of Law, *The IMF and Social Protection*, *supra* note 11, 41.

⁹⁶ T. Stubbs & A. Kentikelenis, *The truth behind IMF’s claims to promote social protection in low-income countries*, Bretton Woods Project, 16 June 2017.

⁹⁷ As illustrated e.g. in Langford, ‘Social Security’, *supra* note 75. For multiple references to assessments of the impact of IMF programs, see e.g. Gupta, Schena, & Yousefi, *Expenditure Conditionality*, *supra* note 46.

⁹⁸ CESCR, *General Comment 19*, *supra* note 21, para. 11.

⁹⁹ Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, para. 36.

effect.¹⁰⁰ For present purposes, two questions could be distinguished in this critique; one concerns how the IMF relates to structural concerns, the other concerns the position of social spending floors among other targets in lending arrangements.

To start with the first of these, when looking at policy advice provided to States, the IMF commonly encourages socio-economic structural reforms. According to the Guidance Note for Surveillance, surveillance should cover structural issues as long as they are macro-critical (affecting domestic, external, or global stability). This includes issues such as public financial management, tax policy and revenue administration, natural resource management, and reforms to energy subsidies, pensions and public health care. Fiscal sustainability also brings in issues of long-term spending pressures (health care, pensions and education), and threats to revenue collection (demographic trends, migration, growth outlook, and international tax arbitrage). While the Guidance note States that potentially macro-critical structural issues cannot be exhaustively defined, it identifies by way of examples jobs and growth, infrastructure, labor markets, social safety nets, public sector enterprises, governance, gender, and climate change.¹⁰¹ In low-income countries in particular, macro-critical social issues cover for example poverty reduction, economic inclusion, human capital development and macro-critical governance issues.¹⁰²

In respect of corruption, for example, the IMF notes that high levels of corruption can significantly impede a State's ability to carry out other basic functions, which can have macroeconomic impact (and hence, be macro-critical). While deploring many of the social costs of corruption, the IMF also notes that countries with high levels of corruption may achieve rapid economic growth. The impact of corruption on rights (and the fact that vulnerable groups and persons suffer disproportionately from corruption) can only become a matter of engagement for the IMF in cases where corruption risks are severe enough to have a negative impact on the economy. Once that threshold is reached, however, the New Framework for Enhanced Engagement on Governance States that the IMF will address corruption. In such a case, the IMF is envisaged also to proceed into governance issues.¹⁰³

¹⁰⁰ Mariotti, Galasso & Daar, *Great expectations*, *supra* note 6.

¹⁰¹ IMF, Guidance Note for Surveillance under Article IV Consultations (19 March 2015), para. 81 and note 55.

¹⁰² *Ibid*, para. 11.

¹⁰³ See IMF, *Corruption: Costs and Mitigating Strategies* (11 May 2016). IMF, *Review of 1997 Guidance Note on Governance-A Proposed Framework for Enhanced Fund Engagement* (6 April 2018).

As to lending conditionality, it should be noted that the IMF moved away from structural performance criteria in 2009, as a reaction to accusations that structural conditions erode country ownership of lending programs.¹⁰⁴ This resulted in a decrease of total structural conditionality, and a closer focus of structural conditions on IMF's core areas of expertise.¹⁰⁵ The IMF approach to social protection may rightly be characterized as “[...] individualistic [...]”, diagnosing injustice as a result of market failure and vulnerability, failing to address root causes of poverty.¹⁰⁶ A recent IMF working paper, however, finds that while conditionality on specific elements of spending could help achieve a program's short-term objectives, structural conditionality delivers lasting benefits, boosting long-term level of education, health, and public investment expenditures. In fact, the empirical analysis of the IMF working paper suggests that while spending floors may help program countries achieve short-term protection objectives e.g. during economic adjustment, such floors might exert pressure on the rest of the budget and limit allocations to other expenditures (hence, indicating that they might affect the prospect of reaching the long-term objectives). The paper therefore suggests that programs should be cognizant of the trade-off, and combine short-term conditionality (such as spending floors) with long-term structural conditionality covering public financial reforms.¹⁰⁷

The Strategy for IMF Engagement on Social Spending makes explicit that, subject to being critical for the program's success, programs should consider structural measures to strengthen social safety nets, and in order to improve the quality and efficiency of social spending and outcomes in the medium-term.¹⁰⁸ This coincides well with the approach of the ILO, which proclaims that protection floors are most effective if well-coordinated with employment, labor market, wage and tax policies.¹⁰⁹

Turning to the position of spending floors among other targets in lending arrangements, there is a built-in structural concern that works to the detriment

¹⁰⁴ C. Andersen, *IMF Survey: New Rules of Engagement for IMF Loans* (13 April 2009). IMF, Press Release: *IMF Overhauls Lending Framework* (24 March 2009).

¹⁰⁵ Independent Evaluation Office, *Structural Conditionality in IMF Supported Programs* (2018).

¹⁰⁶ S. Hickey, 'Relocating Social Protection within a Radical Project of Social Justice', *26 European Journal of Development Research* (2014) 3, 322, 324.

¹⁰⁷ Gupta, Schena, & Yousefi, *Expenditure Conditionality*, *supra* note 46, at 7 and 15 in particular.

¹⁰⁸ IMF, 'A Strategy for IMF Engagement on Social Spending', IMF Policy Paper, *supra* note 80, at 34.

¹⁰⁹ ILO, *World Social Protection Report*, *supra* note 63, 23.

of social spending floors in IMF lending programs. This derives from the non-binding nature of *social and other priority spending* targets, compared to key fiscal and monetary targets. Although the social spending targets appear in the conditionality tables of IMF loan reports, they are commonly defined as so-called indicative targets. An indicative target is assessed in the context of overall program performance. Such targets differ, however, from quantitative performance criteria in that a failure to meet indicative targets does not require a waiver from the IMF Executive Board, and has no impact on loan disbursements.¹¹⁰

Across all lending facilities, only 5 percent of social spending floors were set as quantitative performance criteria (since 2012).¹¹¹ Nevertheless, in the largest loan in IMF history (Argentina in 2018), a social assistance floor was included as a performance criteria, elevating the spending floor to a full loan condition.¹¹² As it is up to country teams to set program targets as either performance criteria or indicative targets, the broadening conception of macro-criticality allows defining spending floors as binding targets.

In June 2018 the IMF released a note on Operationalising Gender Issues in Country Work. The note urges country teams to consider the impact on gender and equality of macro-economic policies. It therefore advises IMF staff in such instances to

“[...] consider an alternative policy mix to prevent such negative externalities or – if the former is not feasible – suggest some mitigating measures [...]. In addition, policy design may need to consider potential trade-offs between government conditionality to improve targeting, such as means-testing, and their gender impact”.¹¹³

¹¹⁰ Special Rapporteur on extreme poverty and human rights, *Report on the International Monetary Fund and its impact on social protection*, *supra* note 7, para 50.

¹¹¹ IMF, ‘A Strategy for IMF Engagement on Social Spending’, IMF Policy Paper *supra* note 80, at 34.

¹¹² IMF, Country Report No. 18/297, ‘Argentina: First Review under the Stand-By Arrangement; Inflation Consultation; Financing Assurances Review; and Request for Rephasing, Augmentation, Waivers of Nonobservance and Applicability of Performance Criteria, and Modification of Performance Criteria-Press Release; Staff Report; and Staff Supplement’ (26 October 2018). Social spending for the purpose of the program is defined as the sum of all federal government spending on 4 main social protection programs. See report, 77-78.

¹¹³ IMF, ‘How to Operationalize Gender Issues in Country Work’, IMF Policy Paper, 13 June 2018.

This could be another indication of elevating social protection concerns (in this case a gender perspective) to something of a guiding principle, with the potential to override (other) macro-economic considerations.

II. Protection Floors and Resilience

Eventually the debate on design and scope of protection floors should also be situated in a broader discourse on vulnerability, resilience, and the function of rights as a counterhegemonic force. In this respect, the “[...] technocratic approach [...]” offered by social protection at large has been criticized for situating poverty in the personal characteristics and circumstances of individuals and households.¹¹⁴ The SDGs have been accused for failing to challenge the global neoliberal economic order, not living up to the promise of tackling inequality and social injustice. In fact, addressing poverty through “[s]ustained, inclusive and sustainable economic growth [...]”, which is the expression used in the SDGs,¹¹⁵ sounds suspiciously similar to the approach of the IMF.¹¹⁶ The “[...] innovation [...]” of linking social protection to the economic growth agenda (as noted by the World Bank), then, lies at the heart of the SDGs themselves.¹¹⁷

Also the human rights-based approach, as embodied in ILO Recommendation 202, has been noted to fail to address the causes of inequality.¹¹⁸ There seems to be a lack of attention to how a social protection focus can be reconciled with reform of international economic governance necessary to address root causes. Even when social protection succeeds in confronting economic injustice, it leaves structural issues intact.¹¹⁹ Human rights lawyers tend to trace this failure to the absence of a clear human right to social security,

¹¹⁴ S. Devereux & J.A. McGregor, ‘Transforming Social Protection: Human Wellbeing and Social Justice’, 26 *European Journal of Development Research* (2014) 3, 296.

¹¹⁵ GA Res. 70/1, UN Doc. A/RES/70/1, 21 October 2015, 8.

¹¹⁶ For a general critique of the Sustainable Development Goals, see C. Williams & A. Blaiklock, ‘Human Rights Informed the Sustainable Development Goals, but ‘Are They Lost in New Zealand’s Neoliberal Aid Program?’’, in MacNaughton & Frey, *Economic and Social Rights*, *supra* note 49, 235, 241-242.

¹¹⁷ See above, quote attached to note 12.

¹¹⁸ L. Lamarche, *Unpacking the ILO Social Protection Floor Recommendation from a Women’s Rights Perspective*, in B. Goldblatt & L. Lamarche (eds), *Women’s Rights to Social Security and Social Protection* (2014), 65, 68. Also see K.G. Young, *Introduction*, in Katherine G. Young (ed.), *The Future of Economic and Social Rights* (2019), 13-14.

¹¹⁹ Linarelli, Salomon & Sornarajah, *The Misery*, *supra* note 23, 254-255.

which would turn social protection into an empowerment instead of a charity.¹²⁰ At the same time, there is a growing awareness of the paradox inherent in a right to social security, whereby the right acts as the main discourse for a critique of capitalism, while at the same time having internalized the assumptions of that ideology.¹²¹

If this critique is accepted, it undermines the idea that rights (and in particular, socio-economic rights), can offer an alternative to the effects of neoliberal economic policies. The very idea of spending floors, irrespective of whether targeted or universal, rather epitomize the subjection of social protection to neoliberal preferences. The problem, then, is not the design of the protection floor opted for. Instead, the far more problematic issue is that the resilience that floors seek actively to build,¹²² is in itself an expression of the naturalization of neoliberal systems of governance.¹²³ This way, social protection approaches, such as protection floors, can serve as a distraction from the larger framework of how vulnerabilities are reproduced.¹²⁴ An emphasis on the minimum core and protection floors as a means of coping with vulnerability, can at worst accelerate a “[...] race to the bottom for scarce resources and a narrowing of entitlement [...]”.¹²⁵

The IMF unquestionably pursues a neoliberal agenda – its very purpose is to uphold it. This is reflected in the IMF approach to social protection. At the same time it is important to acknowledge that also international human rights law is “[...] ideologically porous [...]” (to say the least) to the same neoliberal ideology implicated in the production of human suffering.¹²⁶

¹²⁰ Special Rapporteur on extreme poverty and human rights, *Report on the implementation of the right to social protection through the adoption by all States of social protection floors*, *supra* note 4, para 30.

¹²¹ Linarelli, Salomon, & Sornarajah, *The Misery*, *supra* note 23, 258.

¹²² Statement by UN High Commissioner for Human Rights Michelle Bachelet, ‘The UDHR: A prevention tool to achieve peace and sustainable development’, 26 September 2018, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23640&LangID=E> (last visited 6 March 2019).

¹²³ D. Chandler & J. Reid, *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (2016), 66-67 in particular.

¹²⁴ S. Marks, Human Rights and Root Causes, 74 *Modern Law Review* (2011) 1, 57, 71.

¹²⁵ Brown, Ecclestone & Emmel, *The Many Faces*, *supra* note 3, 505.

¹²⁶ A. Gear, ‘The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective’, 2 *Journal of Human Rights and the Environment* (2011), 23, 35 (building on U. Baxi, *The Future of Human Rights* (2006)). It should be noted however, that even among economists, critical voices are being raised. See J.D.

None of this is to say that different ways of constructing protection floors should not be critically contrasted and assessed. Yet, if it is accepted that there is a causal link between neoliberalism and deepening human vulnerability,¹²⁷ these competing constructions will always be confined within the limits of the neoliberal ideology. To paraphrase Chandler and Reid, it is in fact the recourse to resilience that is the problem (irrespective of whether provided on the principle of universality or through targeting), in that such a discourse fails to provide the means for change.¹²⁸ In this light, while protection floors are undoubtedly an important tool for mitigating the effects of poverty and for protecting vulnerable groups, any transformative ambitions seem beyond its reach.

G. Concluding Remarks

The IMF has not been, and has not become, a primarily humanitarian actor. The emerging IMF social policy engagement needs to be scrutinized, and the regime of rights provides established parameters by which to do that. An altogether different question is whether and how the IMF can contribute to social protection. With the importance of economic sustainability and growth for development and eradication of poverty firmly acknowledged, so too is the central role of the IMF for social welfare.

With the emerging social protection engagement in the IMF, it is of interest what conception of social protection the IMF is propagating, and how it relates to a human rights-based approach. This discussion is characterized by extreme polarization. In order to transcend this polarization, the aim of the article has been to unpack two strands of the protection floor discourse.

A human rights-based approach and the macroeconomic focus of the IMF certainly constitute different points of departure to social protection. These differences have translated into a perceived incompatibility. Yet, the article claims, reality may be more nuanced. To begin with, many of the dichotomies through which this incompatibility is constructed, fail to withstand closer scrutiny. This, in turn, opens up for identifying common elements (as well as common challenges) in the approach to protection floors of the two regimes.

Ostry, P. Loungani, & D. Furceri, 'Neoliberalism: Oversold?', *53 Finance & Development* (2016) 2.

¹²⁷ P. Kirby, Vulnerability and Globalization: Mediating Impacts on Society, *2 Journal of Human Rights and the Environment* (2011) 1, 86.

¹²⁸ Chandler & Reid, *The Neoliberal*, *supra* note 123, 2.

As IMF endorsement of protection floors is qualified by its mandate, it inevitably operates with a more limited conception of protection floors. However, there does not seem to be any *a priori* reason not to believe that a blend of universal and particular approaches can reach positive results. The emerging social protection interest in the IMF seems too valuable a turn, to be simply dismissed or lost in “naïve assertiveness or a pessimistic bias”.¹²⁹ If anything, the interaction of the universal and the particular should invite further exploration of the dynamics and possibilities of social protection. A more nuanced debate on protection floors is a necessity in order not to foreclose that endeavor.

¹²⁹ Neil Walker, ‘Universalism and Particularism in Human Rights: Trade-Off or Productive Tension?’, University of Edinburgh, School of Law, *Research Paper Series*, No 2012/10, 24.