Chile Eboe-Osuji
Engobo Emeseh *Editors*

Nigerian Yearbook of International Law 2017

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The NYBIL has as its main aim analysis of, commentaries on, and reporting of developments in international law that are mostly of relevance within the context of Nigeria in particular, Africa, the black diaspora of the world, and the developing world more generally. But, it is stressed that the publication is not exclusive in that regard: contributions from the perspective of the wider world are also strongly encouraged and welcomed.

Analysis of international law within the context of developing countries in general, the black diaspora, Africa and Nigeria in particular is an area of increasing scholarly and professional interest. This interest will only continue to grow in light of current and emerging global issues such as trade and investment, human rights, armed conflict, humanitarian intervention, transitional justice, international and transnational crimes, transnational migration, environment, international terrorism. The NYBIL provides an authoritative platform for focused analysis of these developments to be readily available to students, academics, practitioners, governments, and international bodies.

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Chile Eboe-Osuji • Engobo Emeseh
Editors

Nigerian Yearbook of International Law 2017

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Foreword

I am pleased to write these few prefatory words to the first issue of the *Nigerian Yearbook of International Law*.

The Yearbook is launched against the backdrop of increasing scholarly and professional interest in the analysis of international law within the context of developing countries in general and of Africa and Nigeria in particular. This interest is hardly surprising in the light of current and emerging issues in the areas of human rights, armed conflicts, humanitarian interventions, transitional justice, international crimes, the environment, trade and investment and more, all of which have immediate significance for the African continent and Nigeria. The aim of the Yearbook is to provide an authoritative platform that enlarges the existing forums of critical discourse from varying perspectives—as well as information dissemination about developments in international law in general. All of this is done from perspectives of especial relevance to Africa and its people, including those in the diaspora.

Of note, of course, is the eponymous axiom that the Yearbook has a Nigerian orientation. That is inevitably the case, particularly given the exclusively Nigerian make-up of the Editorial Board—and the very verdure of the book cover itself. Indeed, the sheer size of Nigeria's population and her dynamism, together with the attractions that her economic potentials offer the world, truly combine to command a place for a yearbook devoted exclusively to issues and information about Nigeria, in the context of international law. Nevertheless, a deliberate editorial policy has rightly been taken to expand the scope of the Yearbook, in order to accommodate voices from beyond Nigeria and Africa, while keeping it relevant in the indicated way.

In that connection, it is noted that the roll call of contributors in this inaugural issue includes eminent international law jurists from all corners of the world. They include, from New Zealand, **Judge David Baragwanath** (Judge and former President of the Special Tribunal for Lebanon, former Judge of the Court of Appeal of New Zealand); from Nigeria, **Professor Dakas C. J. Dakas** (Dean of Law, University of Jos; former Ben Nwabueze Distinguished Professor of Law, Nigerian Institute of Advanced Legal Studies (NIALS), Abuja, Nigeria; former Director of Research, NIALS); from Hungary, **Judge Péter Kovács** (Judge of the International Criminal

Court; former Professor and Head of the Department of Public International Law of the Faculty of Law of the Péter Pázmány Catholic University, Budapest, Hungary); from Uganda, **Judge Daniel David Ntanda Nsereko** (Judge of the Special Tribunal for Lebanon, Member of the Advisory Committee on Nomination of Judges of the International Criminal Court, former Judge of the International Criminal Court, former Professor of law and Head of the Department of Law of the University of Botswana); from Ireland, **Ambassador Patricia O'Brien** (Ambassador of Ireland to France, former Permanent Representative of Ireland to the United Nations and other International Organisations at Geneva, former Under-Secretary-General for Legal Affairs and United Nations Legal Counsel); from Nigeria, **Professor Obiora Chinedu Okafor** (Professor and Research Chair in International and Transnational Legal Studies at the Osgoode Hall Law School, York University, Toronto, Canada; former Member and Chairperson of the United Nations Human Rights Council Advisory Committee, Geneva, Switzerland; Gani Fawehinmi Distinguished Chair in Human Rights Law, NIALS); from Australia, **Judge David Re** (Judge of the Special Tribunal for Lebanon; former international Judge in the War Crimes Chamber of the Court of Bosnia and Herzegovina, Sarajevo); from Canada, **Professor William Schabas** (Professor of international law, Middlesex University, London, United Kingdom; Professor of international criminal law and human rights, Leiden University, the Netherlands; *Emeritus* Professor of human rights law, National University of Ireland Galway); and, from Brazil, **Judge Antônio Augusto Cançado Trindade** (Judge of the International Court of Justice; former Judge and President of the Inter-American Court of Human Rights; *Emeritus* Professor of international law of the University of Brasilia, Brazil; former President of the Latin American Society of International Law).

I congratulate the Editorial Board for this effort. I am confident that they will sustain in the coming years the seriousness of the publication to which this eminent participation attests.

Minister of Foreign Affairs, Abuja — Geoffrey Onyeama
Nigeria

Preface

On behalf of the Editorial Board, I welcome you to the *Nigerian Yearbook of International Law [NYbIL]*.

A Nigerian adage likens the world to an awe-inspiring mask, which must be viewed from all angles in order to be seen well. Though the magnificent Idia mask—a leading figure of Nigerian iconography—cannot be viewed from all angles on the book cover, our aim remains that the *NYbIL* represents one more angle from which the world in all its awesomeness (and, regrettably, awfulness, too) is viewed in the round. There have been other national- and regional-themed yearbooks and journals that have provided their own vistas to the world of international law. Those include publications from beyond the African region but also those important efforts that speak from within, such as the *African Yearbook of International Law* and the *South African Yearbook of International Law*. The *Nigerian Yearbook of International Law* now joins them to provide yet another angle to enrich global views of international law.

For my part, the birth of the *NYbIL* is a humbling actualisation of a dream that has endured a professional lifetime: to have a yearbook that affords a forum that is primarily Nigerian in the exchange of scholarly ideas in international law. For this achievement, I thank the jurists and scholars from Nigeria, Africa and around the world, whose erudite contributions are featured in this inaugural volume. But, most importantly, I must personally avow a huge debt of gratitude to my colleagues on the Editorial Board (all of them very busy Nigerian academics around the world) for heeding my call to this labour of love. In that regard, I heartily thank Professor Engobo Emeseh (Head of the School of Law of the University of Bradford, England). Her hard work and dedication as the Managing Editor has made this achievement possible. I similarly thank Ms Odo Ogwuma LLB, LLM, our Editorial Assistant, whose day job is to assist me in my own day job at the International Criminal Court. In addition to her phenomenal hard work, her calmness was legendary in the face of my own anxieties as they waxed and waned concerning multifarious issues along the way. I must also individually thank each member of the Editorial Board, namely, Professor Dapo Akande, Professor Moshood Baderin,

Professor Dakas Clement James Dakas, Professor Uche Ewelukwa Ofodile, Professor Ikechi Mgbeoji, Professor Jide Nzelibe, Professor Ibironke Odumosu-Ayanu, Dr Jumoke Oduwole, Professor Obiora Okafor, Dr Olaoluwa Olusanya and Professor Nsongurua Udombana. On their behalf, I express, in turn, our profound gratitude to Springer Publications Ltd: for undertaking both the actual publication of the series and the work that it entails. In that regard, I particularly thank Dr Brigitte Reschke, Ms Julia Bieler, Ms Abishag Devamani J and Mr Bibhuti Sharma.

Heeding the wisdom of the Nigerian proverb that cautions the farmer against boasting of a good harvest when not yet assured that the stock of yams will last until the following season, we are keenly aware on the Editorial Board that as hard as starting the yearbook may seem, the harder part lies in keeping it going. We are well aware that this first volume is only the first step of a journey intended to endure. I look forward to the continuing interests of all the contributors and to the dedication of team members who have made this volume possible. I am confident that these reflect the shared ambitions and visions of all those who have been a part of this journey thus far.

This first volume was intended to be published as the 2016 edition. But we have been constrained to issue it as the 2017 edition, due to unforeseen delays that occurred in the process of publication. We take full responsibility for the resulting inconvenience, where for that reason any of the articles published appear out of date.

The Hague, The Netherlands Chile Eboe-Osuji
2018

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Antônio Augusto Cançado Trindade

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1 Preliminary Observations

Although the discussion in this paper derives from an address originally presented to the European Court of Human Rights (ECtHR) in 2014 on the occasion of the opening of its judicial year, it is hoped that its publication in the *Nigerian Yearbook of International Law* might assist in sharing more broadly experiences gained at the

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Judge at the International Court of Justice The Hague, The Netherlands; former President of the Inter-American Court of Human Rights; Emeritus Professor of International Law of the University of Brasilia, Brazil; Former President of the Latin American Society of International Law. This paper is based on an address delivered by the Author in the Seminar of the opening of the Judicial Year of 2014 of the European Court of Human Rights, held at the Palais des Droits de l'Homme, in Strasbourg, on 31 January 2014; originally published on the website—Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility? Dialogue between Judges 2014/La mise en oeuvre des arrêts de la Cour européenne des droits de l'homme: Une responsabilité judiciaire partagée?—Dialogue entre juges 2014, Strasbourg, European Court of Human Rights/Cour européenne des droits de l'homme, 2014, pp 10–17, http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf, accessed on 20 May 2016.

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Inter-American Court of Human Rights (IACtHR), in the hope that those experiences might assist sister human rights courts in Africa and elsewhere in tackling possibly common problems.

As a preliminary matter, it may be observed that the IACtHR does not count on a Committee of Ministers for the implementation of its judgments, as compared, notably, to a court like the ECtHR. Given this gap in the mechanism under the American Convention on Human Rights (ACHR), I deemed it fit to insist, during my years of Presidency of the IACtHR (1999–2004), on the need to establish a *permanent* mechanism of supervision of the execution of, or compliance with, the judgments and decisions of the IACtHR. In successive *Reports* that I presented to the main organs of the Organization of American States (OAS), I advanced concrete proposals to that effect. In my *Report* of 17 March 2000, for example, I warned that in case of 'non-compliance with a Judgment of the Court, the State concerned incurred into an additional violation of the Convention'.[1]

Despite the attention with which the delegations of Member States of the OAS listened to me, the gap has persisted as of the date of writing. On one particular occasion, a respondent State (which had denounced the ACHR), availing itself of the gap, felt free not to provide any information at all concerning compliance with judgments in the case of *Hilaire, Benjamin and Constantine v Trinidad and Tobago* (2001–2002). This omission occurred despite the fact that, as President of the IACtHR, I had communicated such non-compliance to the OAS General Assembly (held in Santiago, Chile, in 2003), just as I had done three years earlier, in relation to the *Peruvian cases*, in the OAS General Assembly of 2000 held in Windsor in Canada,[2] in conformity with Article 65 of the ACHR, which provides: 'To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.'

2 Referral of Non-compliance to the Main Organs of the OAS

Within the IACtHR, I constantly insisted on the pressing need of having non-compliance with judgments (partial or total) by the respondent States submitted to the consideration of the *competent organs of the* OAS in order to take due measures to preserve the integrity of the mechanism of protection of the IACtHR.

[1] Report of 5 April 2001 presented to the Commission on Legal and Political Affairs of the Permanent Council of the OAS, reproduced in: A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección* (IACtHR, vol II, 2nd edn, San José of Costa Rica 2003) 125.

[2] As documented in the OAS General Assembly's *Annual Reports* of 2000 and 2003.

The supervision of the execution of the judgments of the IACtHR could not keep on taking place only once a year, and in a very rapid way, by the OAS General Assembly itself.

A proposal that I advanced and insisted upon, during my Presidency of the IACtHR, was the creation, within the Commission on Legal and Political Affairs of the OAS Permanent Council (CAJP), of a nuclear commission, composed of representatives of the States Parties to the ACHR, to be in charge of the supervision, on a *permanent* basis, within the OAS, of the execution of the judgments of the IACtHR so as to secure compliance with them and, thereby, the realisation of justice.[3] In successive Reports to the main organs of the OAS, I stressed the pressing need of providing mechanisms—of both domestic and international laws—tending to secure the faithful and full execution of the judgments of the IACtHR at domestic law level.

The ACHR expressly provides that States Parties are bound to comply with decisions of the IACtHR in every case to which they are party.[4] The Convention adds that the part of the judgments of the IACtHR stipulating compensatory damages may be executed in the concerned State by the domestic process in force for the execution of judgments against the State.[5] By the end of the last decade, at *domestic law* level, only two States Parties to the ACHR had in effect adopted *permanent* mechanisms for the execution of international judgments.[6] Throughout the last decade, five other States Parties have adopted norms relating to the execution of the judgments of the IACtHR.[7]

[3]Trindade (n 1) 47-49, 111, 125, 234-235, 664, 793-795 918-921, esp. 793-794.

[4]See Article 68(1) of the ACHR.

[5]See Article 68(2) of the ACHR.

[6]They are, respectively, Peru, which attributes to the highest judicial organ in domestic law (the Supreme Court of Justice) the faculty to determine the execution of, and compliance with, the decisions of organs of international protection to the jurisdiction of which Peru has engaged itself (judicial model); and Colombia, which has opted for the attribution to a Committee of Ministers of the same function (executive model).

[7]Namely, Costa Rica, Guatemala, Brazil, Venezuela and Honduras. Moreover, the duty of compliance with the judgments and decisions of the IACtHR has been expressly acknowledged by the Supreme Courts of a couple of States Parties: it was done so, e.g., in 2007, by the Supreme Court of Justice of Argentina, as well as the Constitutional Tribunal of Peru, among others. Despite these advances, there subsists to date the problem of *undue delays* in the full compliance by respondent States with the IACtHR's judgments and decisions.

3 Supervision of Compliance with IACtHR Judgments and Decisions

In the other States, the judgments of the IACtHR kept on being executed pursuant to empirical—or even casuistic—criteria, in the absence of a permanent mechanism of domestic law to that end. Given the absence of legislative or other measures to that effect, in my *Tratado de Direito Internacional dos Direitos Humanos*, I expressed the hope that States Parties seek to equip themselves to secure the faithful execution of the judgments of the IACtHR in their domestic legal orders.[8] And even if a given State Party to the ACHR has adopted a procedure of domestic law to this effect, it cannot be inferred that the execution of the judgments of the IACtHR is *ipso jure* secured within the ambit of its domestic legal order. The measures of domestic law are to be complemented by those of international law, particularly by the creation of a permanent mechanism of international supervision of the execution of the judgments of the IACtHR—as I maintained throughout the whole period of my Presidency of that Court.

Thus, in my extensive *Report* of 5 April 2001, in which I presented to the CAJP the document I had prepared, as *Rapporteur* of the Court, containing the *Bases for a Draft Protocol to the American Convention on Human Rights, to Strengthen Its Mechanism of Protection*, I proposed the creation of a mechanism of international supervision of the judgments of the IACtHR, within the ambit of the OAS (in the form of a working group of the CAJP). That mechanism was to operate on a *permanent* basis so as to overcome a gap in the inter-American system of human rights protection.[9] Such supervision, I pointed out, is incumbent upon all the States Parties to the ACHR, in the exercise of their *collective guarantee*, so as to give due application to the basic principle *pacta sunt servanda*.[10]

Subsequently, in my *Report* of 19 April 2002, to the CAJP, I insisted on my proposal (which I had taken to the consideration of the Permanent Council itself and of the General Assembly of the OAS in 2001), aiming at filling a gap in the inter-American system of human rights and thus strengthening the mechanism of protection offered by the ACHR.[11] Once again, the matter was taken to the attention of the OAS Permanent Council in 2002 and also in 2003. Faced with the embolism of the OAS in this respect, I took up the subject again—with special emphasis—in my *Report* of 16 October 2002 to the Permanent Council of the OAS, on *The Right of Access to International Justice and the Conditions for Its Realization in the Inter-American System of Protection of Human Rights*. On that occasion, I again pondered

[8] A A Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, (vol II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999) 184.

[9] Trindade (n 1) 369. For a recent reassessment of that and other proposals, See A A CançadoTrindade, *Le Droit international pour la personne humaine* (Paris, Pédone, 2012) 169-214.

[10] ibid 378.

[11] ibid 794-795.

that States Parties are *individually* bound to comply with the judgments and decisions of the IACtHR, 'as established by Article 68 of the ACHR in application of the principle *pacta sunt servanda*, and, moreover, as an obligation of their own domestic law'. They are likewise *jointly* bound to guarantee the integrity of the ACHR; 'the supervision of the faithful execution of the sentences of the Court is a task that falls upon all the States Parties to the Convention'.[12]

I then recalled that the ACHR, in creating obligations for States Parties *vis-à-vis* all human beings under their respective jurisdictions, requires the exercise of the *collective guarantee* for the full realisation of its object and purpose, whereby its mechanism of protection can be enhanced. 'The faithful compliance with, or execution of, their judgments is a legitimate preoccupation of all international tribunals' and is a 'special concern' of the IACtHR.[13] It so happens that, in general, States Parties have been satisfactorily complying with the determinations of reparations in the forms of indemnisations (i.e., compensatory damages), satisfaction to the victims and harmonisation of their domestic laws with the provisions of the ACHR. But the same has not happened in respect of the duty to investigate the facts and to sanction those responsible for grave violations of the protected human rights (as the *cycle of cases of massacres* was to disclose clearly along the last decade).[14] This remains a cause for concern as one cannot prescind from such investigation and sanction in any effort to put an end to impunity (with its negative and corrosive consequences for the social tissue as a whole).

Still in my aforementioned *Report* of 19 April 2002, I observed that, in view of the persisting institutional gap in the inter-American system of protection in this domain, the IACtHR took the initiative of supervising, *motu propio*, the execution of its judgments, in the course of its periods of sessions. Yet this was without prejudice to the *collective guarantee*—by all States Parties to the ACHR—of the faithful execution of judgments and decisions of the Court. My reiterated proposal to the OAS for the creation of a 'nuclear Commission' of the CAJP to undertake the supervision of compliance with the IACtHR's judgments and decisions on a *permanent* basis did not, unfortunately, see the light of day. Such measure was to be complemented by measures to be taken by States Parties at the domestic law level; the principle *pacta sunt servanda* would thus become effective with measures that were to be taken, *pari passu*, at both international and national levels.[15]

The gap persists to date. The OAS took note of my proposal in successive resolutions until early 2007. The only point that materialised was another proposal I had made to create a fund of free legal assistance to petitioners in need of it. The other points have remained presumably 'under study'. And, nowadays, the IACtHR

[12] ibid 919-920.

[13] ibid.

[14] See A.A. Cançado Trindade, *The Access of Individuals to International Justice*, (Oxford University Press, 2011b) 179-191; A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, (Universiteit Utrecht, 2011a) 1-71.

[15] ibid 919-921.

continues to take on the additional task of supervising the execution of its judgments at the domestic law level of the respondent States. It has been doing so by means of successive resolutions (on State compliance), at times preceded by post-adjudicative public hearings.

Earlier examples—and remarkable ones—of compliance with the IACtHR's judgments can be found in the cases of *Barrios Altos* (2001), *cas célèbre* on the incompatibility of amnesties with the ACHR, and *Loayza Tamayo* (1997)—both concerning Peru. In the latter, the respondent State promptly complied (on 2 October 1997) with the Court's determination (Judgment of 17 September 1997) to set free a political prisoner. In the case of *Juan Humberto Sánchez v Honduras* (Judgment of 7 June 2003), the IACtHR recalled its own case law to the effect that acts or omissions in breach of the protected rights can be committed by any power of the State (executive, legislative or judicial) or any public authority.

4 Supervision *Motu Propio* by the IACtHR Itself: The Leading Case of *Baena Ricardo and Others* (*270 Workers v Panama*, 2003)

The supervision, assumed *motu propio* by the IACtHR, of the execution of its judgments is what has been occurring in successive cases in recent years. As a pertinent illustration, it may help to recall the leading case of *Baena Ricardo and Others (270 Workers) v Panama*. In its memorable Judgment on competence (delivered on 28 November 2003) to supervise compliance with its previous Judgment on merits and reparations (delivered on 2 February 2001), the IACtHR determined as follows:

> [. . .] Its jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. It is therefore necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the jurisdictional function. Monitoring compliance with judgments is one of the elements that comprises jurisdiction. [. . .] Compliance with the reparations ordered by the Court in its decisions is the materialization of justice for the specific case and, ultimately, of jurisdiction.[16]
>
> [. . .] [. . .].
>
> Compliance with judgment is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention.[17]

[16] *Baena Ricardo and Others (270 Workers) v Panama*, Inter-American Court of Human Rights Series C No 104 (28 November 2003), para 72 (footnote omitted).

[17] ibid para 74.

And the IACtHR lucidly added, in the same line of thinking, that to guarantee the right of access to justice, it was not sufficient to have only the final decision, declaring rights and obligations and extending protection to the persons concerned. It was, moreover, necessary to count on the existence of

> [. . .] effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. The execution of such decisions and judgments should be considered an integral part of the right to access to justice, understood in its broadest sense, as also encompassing full compliance with the respective decision. The contrary would imply the denial of this right.[18]

> [. . .] If the responsible State does not execute the measures of reparations ordered by the Court at the domestic level, it is denying the right to access to international justice.[19]

In the same Judgment, the IACtHR, to my particular satisfaction, endorsed the understanding that I had expressed in my Concurring Opinion in its Advisory Opinion No 18 (delivered on 17 September 2003), on the *Juridical Condition and Rights of Undocumented Migrants*—even expressly citing my Individual Opinion (No 70)[20]—in the sense that the faculty of the IACtHR of supervision of execution of its judgments was grounded on its 'constant and uniform practice' (keeping in mind Articles 33, 62(1) and (3) and 65 of the ACHR and 30 of the Statute) and the 'resulting *opinio juris communis* of the States Parties to the Convention' (reflected in its several resolutions on State compliance with the IACtHR's judgments). And the IACtHR added, retaking my own doctrine on the *universal juridical conscience* as the ultimate *material* source of international law and of all law[21]:

> The *opinio juris communis* means the expression of the universal juridical conscience[22] through the observance, by most of the members of the international community, of a determined practice because it is obligatory. . . This *opinio juris communis* has been revealed because these States have shown a general and repeated attitude of accepting the monitoring function of the Court, which has been clearly and amply demonstrated by their presentation

[18] ibid para 82.

[19] ibid para 83.

[20] For the complete text of my aforementioned Opinion, see A. A. Cançado. Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)* (Mexico, Edit. Porrúa/Univ. Iberoamericana, 2007) 52-87.

[21] See on this issue: A.A. Cançado Trindade, 'International Law for Humankind: Towards a New *Jus Gentium*—General Course on Public International Law, Part I' (2005), *Collected Courses of the Hague Academy of International Law*, Brill 316, 177-202; A.A. Cançado Trindade, *A Humanização do Direito Internacional*, (Belo Horizonte/Brazil, Edit. Del Rey, 2006) 3-106 and 394-409.

[22] See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, Inter-American Court of Human Rights Series A No. 18 (17 September 2003), Concurring Opinion of Judge A.A. Cançado Trindade, para 81.

> of the reports that the Court has asked for, and also their compliance with the decisions of the Court when giving them instructions or clarifying aspects on which there is a dispute between the parties regarding compliance with reparations.[23]

In effect, the Court proceeded that the sanction foreseen in Article 65 of the ACHR assumes the free exercise by the IACtHR of its inherent faculty of supervision of the execution of its judgments within the ambit of the domestic law of the respondent States.[24] Such exercise corresponds to its constant practice, from 1989 until the end of 2003.[25] In the merits and reparations Judgment, the IACtHR recalled that the respondent State had not questioned its competence of supervision earlier on; hence, the Court indicated that it would supervise compliance with the Judgment.[26]

And the Court concluded, in this respect, that the conduct of the State itself showed 'beyond doubt' that the State had recognised the competence of the IACtHR to supervise 'the compliance with its decisions' along 'the whole process of supervision'.[27] After summarising its conclusions on the question at issue,[28] the IACtHR firmly reasserted that it was endowed with competence to 'keep on supervising' 'full compliance' with the merits and reparations Judgment in the *cas d'espèce*.[29] It thereby thus discharged, categorically, the challenge of the State concerned, which was never again formulated before the IACtHR. And the respondent State then proceeded to give compliance with the respective Judgment.

5 A Setback in the Practice of the IACtHR: 'Partial Compliances'

Despite the earlier application (in 2000 and 2003) of Article 65 of the ACHR in cases of manifest non-compliance with judgments of the IACtHR, from 2004 up to now, the IACtHR has no longer applied Article 65 of the ACHR (as it should), thus rendering impossible in the last decade the exercise of the *collective guarantee* (underlying the ACHR). This, in my perception, is ultimately affecting the inter-American system of protection as a whole. It reveals that there is no linear progress

[23] The IACtHR added that its function of supervision has been accepted by the States and the Inter-American Commission of Human Rights, as well as by the victims or the legal representatives; the IACtHR has thus been able to exercise regularly and consistently its function of supervision of compliance with its own judgments (para 103).

[24] *Baena* (n 16) paras 90, 113 and 115.

[25] ibid paras 103-104 and 107.

[26] ibid para 121.

[27] ibid para 127.

[28] ibid paras 128-137.

[29] ibid para 138-139.

in the operation of an international tribunal (or of any other institution of domestic public law or of international law).

If the non-compliance (total or partial) by States with the judgments of the IACtHR is not discussed and considered within the ambit of the competent organs of the OAS—as now happens to be the case—this generates a mistaken impression or assumption that there is a satisfactory degree of compliance with judgments of the IACtHR on the part of respondent States. Regrettably, that is currently not the case—much to the detriment of the victims. I thus very much hope that the IACtHR will return to its earlier practice and principle of applying Article 65 of the ACHR in cases of manifest non-compliance with its judgments.

The new majority viewpoint prevailing in the IACtHR in recent years (since the end of 2004), avoiding the application of the sanction foreseen in Article 65, has been a 'pragmatic' one, in the sense of avoiding 'undesirable' clashes with the respondent States and of 'stimulating' them to keep on complying, gradually, with the judgments of the IACtHR. Hence the current practice of adoption, on the part of the IACtHR, of successive resolutions of supervision of compliance with judgments of the IACtHR, taking note of one or other measures taken by the States concerned and 'closing' the respective cases partially in respect of such measure(s) taken and in this way avoiding discussions on the matter within the OAS.

In effect, this gives the wrong impression of efficacy of the 'system' of protection as the cases cannot be definitively 'closed' because the degree of partial compliance is very high, just as is also the degree of partial non-compliance. And all this is taking place to the detriment of the victims. The cases already decided by the IACtHR are thus kept in the Court's list, for an indeterminate period of time, waiting for definitive 'closing', when full compliance is met—pursuant to a 'pragmatic' approach, seeking to foster 'good relations' with the States concerned and thus eluding the problem. The IACtHR is an international tribunal, not an organ of conciliation, which tries to 'persuade' or 'stimulate' States to comply fully with its judgments.

6 Final Observations

If there is a point in relation to which there persists in the inter-American protection system a very high degree of non-compliance with judgments, it lies precisely—as already indicated—on the investigation of the facts and the imposition of sanctions of those responsible for grave violations of human rights. In my time in the Presidency of the IACtHR, I gave due application to Article 65 of the ACHR (in the OAS General Assemblies of Windsor, Canada, in 2000 and of Santiago de Chile in 2003)—the last time the Court applied that provision until today, having held a position of principle and not a 'pragmatic' one in this respect. The system of protection exists for the safeguard of the victims, and this consideration ought to have primacy over any other.

On the last two occasions (in 2000 and 2003), under my Presidency of the IACtHR, in which the sanction of Article 65 of the ACHR was applied, the concrete results on behalf of the effective protection of human rights under the ACHR were immediate.[30] In sum, on this jurisdictional point of major importance, the norms of the ACHR exist to be complied with, even if this generates problems with one or another State Party. In ratifying the ACHR, States Parties assumed obligations to be complied with (*pacta sunt servanda*), which are obligations of international *ordre public*. The ACHR calls for a position of principle in this matter; after all, for the safeguard of the protected rights, it sets forth prohibitions that belong to the domain of imperative law, of international *jus cogens*.

A remarkable illustration of full compliance with conventional obligations is provided by the case of the *Last Temptation of Christ*,[31] wherein the IACtHR ordered the end of movie censorship—a measure that required the reform of a constitutional provision.[32] On 7 April 2003, the respondent State reported to the Court its full compliance with the Court's Judgment and added that the movie at issue was already being exhibited (since 11 March 2003) in the *Cine Arte Alameda* in Santiago. In its resolution of 28 November 2003, the IACtHR declared that the case was thereby terminated as Chile had fully complied with its Judgment of 5 February 2001.

This Judgment, delivered under my Presidency of the IACtHR, was not only the first pronouncement of the Court in a contentious case on the right to freedom of opinion and of expression, but likewise of full compliance with the Judgment that required the modification of a provision of the national Constitution itself. This was not an isolated episode. Another one, of similar historical significance—having also occurred under my Presidency—was that of the case of the *Constitutional Tribunal v Peru*, culminating likewise in full compliance, by the respondent State, with the Court's Judgment (merits and reparations, of 31 January 2001), with deep implications for the consideration of the relations between international and domestic laws in the present domain of compliance with judgments concerning the safeguard of the rights of the human person.

In that particular Judgment, the IACtHR had condemned the destitution of the three magistrates of the Peruvian Constitutional Tribunal as a breach of the ACHR and determined that such violation of the right to an effective remedy and to the judicial guarantees and the due process of law under the ACHR required the *restitutio in integrum* of the three magistrates (their effective reinstallment into their posts), given the nature of their function and the need to safeguard them from any 'external pressures'.[33] The resolution of destitution of the three magistrates was

[30]For an account, see A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, (3rd edn, Belo Horizonte/Brazil, Edit. Del Rey, 2013) 29-45.

[31]*Olmedo Bustos and Others v Chile* Inter-American Court of Human Rights Series C No 73 (5 February 2001).

[32]Namely, Article 19(12) of the Chilean Constitution of 1980.

[33]See *Constitutional Tribunal v Peru*, Inter-American Court of Human Rights Series C No 71 (31 January 2001), para 75.

annulled by the Peruvian Congress even before the indicated Judgment, which the IACtHR delivered on 31 January 2001. In effect, the National Congress did so on 17 September 2000, before the holding of the public hearing before the Court on 22 November 2000 in the case of the *Constitutional Tribunal*. The three magistrates were reinstalled in their posts in the Peruvian Constitutional Tribunal, which came to be presided over by one of them. On the two subsequent occasions—after the reinstallment of the three magistrates—when I visited the plenary of the Constitutional Tribunal in Lima (on 12 September 2001 and on 18 November 2003), its magistrates expressed to me their gratitude to the IACtHR. The episode reveals the relevance of the international jurisdiction. In a subsequent letter (of 4 December 2003), which, as President of the IACtHR, I sent to the Constitutional Tribunal, I observed, *inter alia*, that the IACtHR's unprecedented Judgment had repercussions 'not only in our region but also in other continents' and marked 'a starting-point of a remarkable and reassuring approximation between the Judiciary at national and international levels, which nowadays serves as example to other countries'.[34]

This precedent is furthermore reflected in the convergence that has followed between their respective jurisprudences (of the IACtHR and of the Constitutional Tribunal). In the same line of thinking, throughout my long period as a judge of the IACtHR, I sustained the view that the *corpus juris* of protection of the ACHR is directly applicable, and States Parties ought to give full execution to the judgments of the IACtHR. This is not to be confused with 'homologation' of sentences as the IACtHR is an international, and not a 'foreign', tribunal; States Parties are bound to comply directly with the IACtHR's judgments, without the need of 'homologation'.

Contrary to what is still largely assumed in several countries, international and national jurisdictions are not conflictual, but rather complementary, in constant *interaction* in the protection of the rights of the human person.[35] In the case of the *Constitutional Tribunal*, international jurisdiction effectively intervened in defence of the national one, contributing decisively to the restoration of the rule of law (*état de Droit*, *Estado de Derecho*), besides safeguarding the rights of the victimised.

In the history of the relations between national and international jurisdictions, this is a remarkable precedent, which will keep on being studied for years to come. The two historical episodes that I herein recall, of the closing of the cases of the *Last Temptation of Christ* and of the *Constitutional Tribunal*, pertaining to Chile and to Peru, respectively, after due compliance by them with the IACtHR's judgments, reveal that, in the present domain of protection, the interaction between international and domestic laws takes place to safeguard the rights inherent to the human person.

In conclusion, the IACtHR, which does not count on an organ such as a Committee of Ministers (in Europe) to assist it in the supervision of the execution

[34]Text of the letter reproduced *in*: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 2003*, IACtHR, San José of Costa Rica, 2004, Annex LVII, 1459-1460, and 1457-1458.

[35]See A. A. Cançado Trindade, *Reflexiones sobre la Interacción entre el Derecho Internacional y el Derecho Interno en la Protección de los Derechos Humanos*, (Ed. del Procurador de los Derechos Humanos de Guatemala, 1995) 3-41; Trindade (n14) ch. V, 76-112 (on the interaction between international law and domestic law in human rights protection).

of its judgments and decisions, has taken upon itself that task. It has done so in the exercise of its *inherent faculty* of that supervision. Much has been achieved, but it has also experienced a setback (of 'partial compliances'), as we have seen. Its homologue ECtHR counts on the Committee of Ministers and has reckoned the *complementarity* of its own functions and those of the Committee in this particular domain. I hope the present reassessment of the accumulated experience of the IACtHR to date may prove useful to the colleagues and friends of international human rights courts in their own experiences. After all, compliance with the judgments and decisions of contemporary international human rights tribunals is directly related not only to the *rule of law* but also, and ultimately, to the *realization of justice* at national and international levels.

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Part II
Contemporary Challenges/Emerging Issues

Responding to Terrorism: Definition and Other Actions

David Baragwanath

Contents

KNZM, QC, Appellate Judge and former President of the Special Tribunal for Lebanon, Leidschendam, Netherlands. This paper draws on previous extrajudicial visits to this topic: David Baragwanath, 'Liberty and Justice in the Face of Terrorist Threats to Society (2011) 19 Waikato Law Review 61; 'Work in Progress at the First Tribunal Charged with Terrorist Jurisdiction' (2014c) 22 Waikato Law Review 41; 'Terrorism as a Legal Concept' (Second Annual Ashgate Lecture on Criminal Law), Centre for Evidence and Criminal Studies, Northumbria Law School, Newcastle 27 November 2014b; 'The Security Council's Jurisdiction Under Chapter VII of the Charter of the United Nations and Its Relationship with the Judiciary' School of Political Science and International Relations, Tongji University, Shanghai 3 April 2015a; 'Defining Terrorism Under International and Domestic Law' Lecture T.M.V. Asser Centre, The Hague 24 August 2015b and that cited in n 3.

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1 Overview

Terrorism, which has created agony for the people of Nigeria, is a global affliction. To date, there has been a general failure to recognise it as a crime at international law. But that needs to change urgently. As has been recognised by the Court of Appeal of England and Wales, in a decision declining strikeout of a claim against the British government for alleged implication in extraordinary rendition, detention and torture, from which an appeal was dismissed:

> . . . a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place.[1]

In the case of terrorism, there is required not only national but also concerted global response in which international law, including criminal law, can and should play a full part. On different occasions, I have proposed four contributions an international approach may make. One is a concerted response that includes but reaches beyond officialdom—to demystify 'terrorism', identify and deal with those responsible for the terrorist acts and enhance their respect for the rule of law. A second is to assist international institutions, not least the Security Council, in discharging their vital tasks. The third is creation of an international tribunal charged with assisting States to give effect to domestic criminal laws dealing with terrorism. The fourth is to provide an internationally agreed definition of a crime at international law that, as in the case of piracy off the East African coast, would allow all members of the international community to combine their energies and resources in response.

[1] *Belhaj v Straw* [2014] EWCA Civ 1394, 115, [2015] 2 WLR 1105; on appeal [2017] UKSC 3, [2017] 2 WLR 456.

The first proposal is the subject of a published essay[2]; the second, touched on at the end of this paper, is to be published[3]; the third, currently the subject of a similar suggestion by Romania and Spain, was contained in the 2014 Annual Report[4] of the Special Tribunal for Lebanon (hereafter STL). This paper's focus is the fourth: the definition of terrorism as a crime at international law. The special problem of State terrorism falls outside its scope.

2 Introduction

The STL is the first international criminal tribunal with terrorism jurisdiction, albeit in domestic law. The judges of the Appeals Chamber were asked by the Pre-trial Judge (under a rule permitting such course) to answer his request for a definition to the crime of terrorism in the Lebanese Criminal Code. Our *Interlocutory Decision on the Applicable Law: Terrorism et al* of 16 February 2011 ('Interlocutory Decision') sought to offer two definitions:

- of that crime under the domestic law of Lebanon;
- en route to that, of terrorism under customary international law.[5]

The topic of defining terrorism must be approached with caution: first by me—as a member of the Appeals Chamber, convention prevents me from commenting upon the merits of our decision. Second, the topic can be read as suggesting that if one tries hard enough, there can be discovered some single concept that embraces all formulations of what may be described as terrorism. Such notion may lie behind the inability of the international community for the past 80 years[6] to agree on a common definition for adoption in international criminal law. Such exercise is doomed to failure.

[2]David Baragwanath, 'Liberty and Justice in the Face of Terrorist Threats to Society (2011) 19 *Waikato Law Review* 61.

[3]David Baragwanath, 'The Role of the Hague Institutions in Promoting International Justice' University of Waikato, New Zealand 23 September 2015 in a forthcoming edition of the *Waikato Law Review*.

[4]Fifth Annual Report of Special Tribunal for Lebanon (2013-2014) p 44 adopting an idea of Antonio Cassese.

[5]STL AC *The Prosecutor v. Ayyash and others, Interlocutory Decision on the Applicable Law: Terrorism et al,* 16 February 2011, STL Casebook 2011, 27.

[6]The 1937 *International Convention for the Prevention and Punishment of Terrorism* was adopted under the auspices of the League of Nations, but never implemented: Ben Saul, *Defining Terrorism in International Law* (Oxford 2006) xxiii.

The reality is that, unless quite a narrow definition is adopted, 'terrorism' is a word with a multitude of inconsistent senses: *The Routledge Handbook of Terrorism Research*[7] identifies some 250 different definitions of 'terrorism'.[8]

The term has been used for a wide variety of purposes, including rhetoric and insult. Its use as a concept of criminal law has been tainted by its use by tyrants (such as the Nazis) to describe those who resisted their oppression. Undefined, it is simply too vague to be used to denote a criminal offence. The rule of law and its sub-rule, the principle of legality, require specificity in the definition of any crime. For 'terrorism' to constitute a crime at international law, there must be such certainty as to its existence and content that a person accused cannot have a charge dismissed as infringing the principle of legality. It is therefore unsurprising that leading scholars and the Supreme Court of the United Kingdom have rejected the undefined term as a concept of criminal law. So it is necessary either to abandon its use as a concept of criminal law or to find and have adopted a definition with a higher level of specificity than simple use of that term.

3 Abandoning the Term?

The former Australian Federal Independent National Security Legislation Monitor, Bret Walker SC,[9] said of this logical option:

> One of the best arguments against the counter-terrorist laws is that we didn't need any of them, because we've long criminalised murder, conspiracy to murder, and incitement to murder.[10,11]

Informed opinion, however, suggests that there is rather more to terrorism. But what is it? For the purposes of international criminal law, can it be defined?

Fred Vargas contends:

> We lack the word, the word to define a man who reduces the body of another to shreds. The term killer is inadequate and derisory.[12]

[7] Alex P Schmid (ed) (Routledge 2013).

[8] Anthony Richards, 'Conceptualising Terrorism' (2014) 37 *Studies In Conflict and Terrorism* 213, 226.

[9] Appointed under the *Independent National Security Legislation Monitor Act* 2010.

[10] <https://www.youtube.com/watch?v=5flzfOabMNw&feature=youtu.be&t=7h31m05s> accessed 16 May 2016.

[11] Such 'give it up' approach could be supported by adopting the idea, noted by Franciso Bethencourt, of pluralizing the term: *Racisms from the crusades to the twentieth century* (Princeton 2014).

[12] « Le mot manquait, le mot pour définir un homme qui réduisait le corps d'un autre en charpie. Le terme tueur était insuffisant et dérisoire » *Un Lieu incertain* (Viviane Hamy 2008) 49, cited in Gilles Ferragu, *Histoire du Terrorisme* (Perrin 2014).

Professor Neil Boister asks:

> What is terrorism?

And he answers:

> It appears to consist of actions of a different quality from 'ordinary' murders, assaults, or damage to property. In order to avoid the offence being politicized, it can be conceptualized as a range of distinctive but 'political motive free' acts of violence – hostage-taking, bombing, hijacking and so forth – undertaken by non-state actors against civilian targets.[13]

Constant use of the term in Security Council resolutions suggests that terrorist conduct, at least of certain classes, needs a stronger word even than murder (which can shade from outrageous brutality into assisting a loved one's desire for rest from pain).[14] The fact of 250 different definitions of 'terrorism' has been run as an argument that no single definition is possible. Historian Gilles Ferragu considers that

> . . . despite the depth of their analyses, jurists, political commentators and journalists encounter an incontestable conclusion: the difficulty, indeed the impossibility of giving to a protean phenomenon a solid agreed definition. . . . the contours of the term are vague . . . concurrently semantic, juridical and strategic . . .[15]

But such argument can be turned on its head. That so many attempts have been made to find a definition may rather suggest that—whatever the difficulties in achieving uniformity—some notion of terrorism is needed. Even if within the juridical zone *domestic* definitions differ, does it really follow that no commonly accepted narrower definition of a crime at *international* law is attainable?

4 Does 'Terrorism' Meet the Criteria for an International Customary Crime?

Various writers share the opinion of the distinguished former President of the International Court of Justice, Dame Roslyn Higgins:

[13]Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford 2012) 62.

[14]A topic which English law has found difficult: compare *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] 1 AC 657 (the Supreme Court's tentative view that in narrowly defined circumstances the law might permit assisted suicide) and the later rejection by the House of Commons 330 to 118 of a bill to introduce a right to die; Gallagher J and Roxby P, 'Assisted Dying Bill: MPs reject ""right to die" law' (BBC News, 11 September 2015) <http://www.bbc.com/news/health-34208624> accessed 16 May 2016.

[15]Ferragu (n 12) 8 . . . malgré la profondeur de leurs analyses, juristes, politologues et journalistes aboutissent à un constat sans appel : la difficulté, voire l'impossibilité de donner au phénomène structurante et consensuelle. [les contours du] terme demeurent flous, . . . à la fois sémantiques, juridiques et stratégiques . . .

> Terrorism is a term without legal significance. . . The term is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned.[16]

Professor Ben Saul, the author of the leading text on defining terrorism in international law, likewise states:

> Close analysis of customary international law . . . confirms that there is no generic international crime, or distinct legal concept, of terrorism.[17]

In delivering our Interlocutory Decision of 16 February 2011, the STL Appeals Chamber preferred the opposite opinion. In *R v. Gul*[18] (2012), the Court of Appeal of England and Wales agreed. But on further appeal, a Full Court of the UK Supreme Court disagreed, holding that

> there is no accepted norm in international law as to what constitutes terrorism.[19]

The Appeals Chamber's decision has been vigorously challenged by various writers, not least Professor Saul.[20] More recently, it has received support from two authors. In *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (2012),[21] Kirsten J Fisher analyses the criteria for acceptance of crimes against international criminal law, arguing:

> The question must be: what actions are devastating enough to require the explicit condemnation of the international community in the form of classification as an international crime? . . .
>
> First, to be identified as international crime, an action must meet a particular threshold in terms of the type of human rights violation. Second, it must satisfy in the manner in which the rights are violated. This threshold test. . . demands that the criminal activity be a violation of a physical security human right and that it demonstrates a travesty of political organization.[22] . . .
>
> International crimes are the most heinous of crimes and the expressive power of labelling a criminal action a crime [as such] must be protected by assuring that only the very worst perpetrators with the requisite general intent for the base atrocity crime are prosecuted.[23]

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[16]Rosalyn Higgins and Maurice Florey (eds), 'The general international law of terrorism' in *Terrorism and International Law* (Routledge 2003) 28.

[17]Saul (n 6) 8.

[18][2012] EWCA Crim 280, [2012] 1 WLR 3432.

[19]*R v Gul* [2013] UKSC 64, [2013] 3 WLR 1207, [2014] 1 Cr App R 315 following its earlier decision in *Al-Sirri v. Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745, at [37] that 'there is as yet no internationally agreed definition of terrorism'.

[20]B Saul, (ed) *Terrorism* (Hart Publishing Oxford and Portland 2012) lxvii n10 the issue is 'deeply contested'; pp lxx-lxxiii challenging specific aspects of the AC decision.

[21]Kirsten J Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Routledge 2012).

[22]ibid 8-9.

[23]ibid 98.

She argues that the Rome Statute mainly got it right in its fourfold classification of international crimes: crimes against humanity, genocide, war crimes and crimes of aggression. She notes that evaluation of terrorism is a thorny issue because no agreement has yet been reached as to its definition, within or beyond the field of international criminal law. But she contends that under a particular common understanding of terrorist acts, they could, indeed, fall within the domain of international criminal law.[24]

As to terrorism, she notes that although terrorism was on the table for inclusion in the Rome Statute in the early stages of discussion, debate concerning its definition, including anxiety over State-sponsored terrorism or terrorism committed by freedom fighters, prevented its inclusion.[25]

She considers that what is most salient about terrorism is that it uses violence (or threats of violence) to compel people with power to change policies or actions.[26] Using this very broad common understanding of terrorism as a basic definition, the concept would satisfy both severity and associative thresholds by violating a basic physical security human right and by creating a threat to individuals based on their membership in a politically organised group.[27]

Noemi Gal-Or in 'The Formation of a Customary International Crime: Global Terrorism Human (in) Security' (2015),[28] while agreeing with the result of our Interlocutory Decision, cites essays that regard its reasoning as 'incomplete (and erroneous)...'.[29] But she

- denies that a definition is a *sine qua non* of any customary law[30];
- regards as 'not so far-fetched' the STL Appeal Chamber's statement that

> ... a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinion juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged [she prefers 'is emerging'];

- concludes that

> ... rather than awaiting the (unlikely) adoption of a universal definition of terrorism, future international and domestic jurisprudence following in the steps of the precedential *Interlocutory Decision* may prove all it takes in order to finalise this 'cu[s]tomarisation' process.[31]

[24]ibid 30.

[25]ibid 46.

[26]ibid 43.

[27]ibid 41.

[28]Noemi Gal-Or, 'The Formation of a Customary International Crime: Global Terrorism Human (In) Security' (2015) 4 *International Criminal Law Review* 665.

[29]ibid 666.

[30]ibid 669.

[31]ibid 686 and 669 (citing Interlocutory Decision (n 5) para 85) and n 109.

While it is beyond my scope as a serving judge either to assert that our definition is right or to propose a specific alternative, both authors seem to say that there is no reason of principle to resist the formulation of a crime of terrorism at international law. I add that I am not alone in seeing no logical or practical reason to distinguish between terrorism and piracy, which is the original crime at international law and remains an essential protection of the vital activity of seafaring. But no criminal law of terrorism can be said to exist if it lacks the specificity of definition required to comply with the principle of legality. So I turn to whether and, if so, how that can be achieved.

5 Making the Term 'Terrorism' Manageable

While the conduct now broadly termed terrorism has occurred since antiquity,[32] 'terrorism(e)' entered the French language only in 1794[33] and the English the following year,[34] to describe the system of terror used during the French Revolution. Its use has burgeoned. In his valuable analysis, Professor Saul[35] traces the history of its use to describe the conduct of Bismarck,[36] WWI belligerents,[37] Nazi Germany,[38] WWII bombing, Stalin's rule of the USSR[39] and a range of non-State practices.[40]

Likewise, Dr Anthony Richards observes:

[32]François Viangalli, *Qu'est-ce que le terrorisme ? Éthologie de l'horreur et sanction Les éclaireurs du pénal* (L'Harmattan 2012) 240-1.

[33]Julie Alix, *Terrorism et droit penal* (Dalloz 2013) 2.

[34]Oxford English Dictionary.

[35]Saul (n 17).

[36]ibid 1-2.

[37]ibid 272.

[38]ibid 2.

[39]ibid.

[40]He records at p3 the:

> 'shifting and contested meanings of 'terrorism' over time' and 'the peculiar semantic power of the term, beyond its literal signification [the] capacity to stigmatize, … denigrate, and dehumanize those at whom it is directed, including legitimate political opponents. The term is ideologically and politically loaded; pejorative; implies moral, social, and value judgment; and is 'slippery and much-abused'. In the absence of a definition of terrorism, the struggle over the representation of a violent act is a struggle over its legitimacy. The more confused a concept, the more it lends itself to opportunistic appropriation.
>
> The term … has been erratically employed to describe all manner of evils, such as the nuclear 'balance of terror'; rape by 'sex terrorists'; and the Spanish inquisition. It has also been used to describe things that are not evils at all: refugees in Sabra and Shatilla; loggers who caused flooding in Sumatra; and even parliamentary colleagues who sought to release asylum seekers from detention.'

> . . .the concept has been available as a 'free for all' label for any actor who wishes to denounce the activities of their political adversaries for as long as there is no general conviction as to what terrorism really means or what its parameters are.[41]

He instances its use by the Libyan government to describe protestors as 'terrorist gangs made up mostly of misguided youths' who had been exploited and fed 'hallucinogenic pills' by foreign agents.[42]

Then there is the debate whether a member of the resistance to Hitler's iniquities—or Nelson Mandela during the apartheid days of South Africa—could fairly be called a terrorist rather than a freedom fighter. For most of us, the members of the resistance were heroes; for the Nazi government and judges like Roland Freisler who put them to a hideous death, they were terrorists.

The problem is again that of multiple senses of the word 'terrorism', hence the notion I challenge, implicit in much criticism, that no definition of an international crime of terrorism is possible because the multiple senses conflict and cannot all be fitted into a single formula defining the concept of such a criminal offence. It stems from insistence of parties with different views that theirs must be adopted.

5.1 The Urgent Need to Focus on Victims

The consequences for victims demand an end to the stasis by those with power to assist. Over the past decade, the UNHCR refugee statistics have burgeoned appallingly—from less than 20m[43] to nearly 60m,[44] evidencing terrible events that the law is failing to control. The statistics for Nigeria recorded at December 2014 indicate 1,379,052 total population of concern.[45] The 25% addition of Syrian refugees to the 4.5 million population of Lebanon[46] is equivalent to a figure of over 45m for Nigeria or 80m for the USA. Yet it was not until the conflict in Syria was into its fifth year that the tragic photograph of the little boy lying dead on the beach, on top of the unprecedented influx of refugees into Western Europe, captured serious Western attention.

To protect victims, the law must provide a *single* minimalist definition that may sensibly differ both from domestic definitions and from some of the fixed positions of the past.

Of course there will be dissatisfaction on various sides; each of us prefers our own ideas. But just as the international community managed to put aside domestic notions in favour of achieving a Universal Declaration of Human Rights, as it is in

[41] Richards (n 8) 215.

[42] ibid 231.

[43] < http://www.unhcr.org/4486ceb12.html> accessed 16 May 2016.

[44] <http://www.unhcr.org/558193896.html> accessed 16 May 2016.

[45] <http://www.unhcr.org/pages/49e484f76.html> accessed 16 May 2016.

[46] <http://www.un.org/apps/news/story.asp?NewsID=52069#> accessed 16 May 2016.

the course of achieving in relation to the definition of aggression in the Treaty of Rome, so a similar process is required to achieve a common concept of international terrorism. Given the time during which diplomats have been unable to find a solution, unless the political impasse can otherwise be brought to an end, there arises for consideration the residual obligation of judges, in adjudicating, to consider whether their responsibility both to state the law and to help protect the weak permits and requires them to encourage the politicians and perhaps even to offer an interim tentative expedient. The fundamental responsibility of the law and those with power to make it—including, albeit in an ancillary role, the judges—has too long been overlooked. That is the responsibility stated by Sir Edward Coke CJ in *Calvin's Case* (1608),[47] recognising as reciprocal to the citizen's duty of fealty the State's duty to protect the citizen. The latter is now reinforced by the modern slew of human rights conventions forming part of the 'system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place.'[48] It is time for the law to give effect, long overdue, to a human right to have terrorism met by a common definition permitting a common response.

5.2 *Terrorism As a Concept of Criminal Law*

> . . . it is impossible to *define* a legal concept, and [. . .] the task of legal writers should be rather to *describe* the use of a word like '[terrorism]' in the particular legal rules in which it occurs. '[Terrorism]' in the legal sense has no meaning at all apart from the rules of law in which it is used as a tool of legal thought.[49]

I have modified this passage from Professor Donald Harris' celebrated essay, which concerned the concept not of terrorism but of possession. His lesson, however, building on writings of Jeremy Bentham and Herbert Hart,[50] identifies the problem of using the word 'terrorism' as a legal term of art.

The dictionary contains no more emotive, passionate and evocative expression than 'terrorism'. To put such a word to use as a legal term of art requires most careful thought. I have noted that the principle of legality requires adequate specificity of any criminal charge. But to achieve that, which elements of the competing definitions are to be accepted and rejected? And who is to make the decision? If others do not care for the attempt by the STL Appeals Chamber, rather than shrug and give up, let them improve on it.

[47] 7 Coke's Reports 1a, 77 English Reports 377.

[48] Baragwanath (n 2).

[49] AG Guest, '*The Concept of Possession in English Law'* in *Oxford Essays in Jurisprudence* (eds) (Oxford 1961) 69 -70.

[50] Donald Harris, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37.

5.3 The Need for an International Legal Concept of Terrorism

The Western concept of war, formerly seen as the foundation and ultimate expression of sovereignty and power of Westphalian States, with a zero sum game between opponents that tends to a return to peace, has recently been seen as obsolescent.[51] Since the end of the Cold War and 11 September 2001, there have been conflicts between and among factions and militias, sometimes without clearly formulated political and rational objectives. With some exceptions, conflicts today are not predominantly waged between nations. War is thus no longer an expression of State power; rather, it is a sign of its fragmentation, its character blurred and uncertain.

From such analysis follows an erosion of the relative certainties of the law of war. Among the responses needed is to withdraw *carte blanche* for terrorists, by adding to the repertoire of the rule of law a clearly defined international legal concept of terrorism.

5.4 The Tension Between Domestic and International Norms

In domestic contexts, criminal law is considered a significant element in securing values of peace and security. But there is a natural reluctance of some judges and jurists to allow external considerations, such as foreign jurisprudence, to play any part in domestic adjudication. Most of criminal law, including attitudes to it, is determinedly domestic. There are several reasons for that, frequently virtuous. They include the following:

- criminal law is a topic of special interest to both citizens and lawmakers in each one of the UN member States;
- different societies have different values that tend to be reflected in different policies to which their laws are intended to give effect;
- personal expertise is involved in local law and practice, coupled with a certain pride in distinctiveness.

Of course the primary base of criminal law must continue to be found in the nation States. Aside from the oceans, polar regions and outer space, it is within a State that one finds the following:

- the region in respect of which relevant criminal laws have been made;
- the *locus delicti*;
- the site of some of the law enforcement capacity available to respond to the crime.

[51] Yidir Plantade, 'Guerres en mouvement' *Le Monde* 23 October 2014, 13 reviewing *Nouvelles guerres. L'état du monde 2015* Ouvrage collectif sous la direction de Bertrand Badie et Dominique Vidal (La Découverte 2014).

Hence, UNSC Resolution 2178 (2014), in relation to foreign terrorist fighters, decided that

> . . .all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense.

But as was successfully argued to justify European search warrants, against these considerations, and even tending to overwhelm them, is the remorseless advance of the globalisation process that, in the course of facilitating lawful international dealing, creates a motorway for transnational crime. By that I refer to both kinds of lawlessness identified by Professor M. Cherif Bassiouni—criminal aspects of international law (e.g., crimes against the international order, such as genocide and aggression) and international aspects of national criminal law (e.g., crimes proscribed by national laws and with an international dimension but not necessarily directed at the international order, such as drug trafficking and—as Professor Erin Creegan suggests—terrorism).[52] In each, for a variety of reasons, the domestic law of individual States can be simply inadequate.

The successive Security Council resolutions demonstrate an ever-increasing concern in relation to terrorism, as constituting a threat to international peace and security and thereby engaging its exceptional jurisdiction under Chapter VII of the Charter of the United Nations.[53] Its elements may include as follows:

- actors who are well resourced, skilfully managed and with sophisticated techniques to commit their crimes and avoid detection;
- probable lack of effective legal systems in the States in which terrorism flourishes;
- modern weapon systems and means of communication that allow massive damage to be committed without significant regard to State borders.

5.5 *The Arguments for and Against a Concept of Terrorism As a Crime in Domestic and International Laws*

The basic problem already identified is the use as a legal term of art of the word 'terrorism' with its multitude of meanings, used by opposing parties to conflict as a term of abuse, as a metaphor for disapproved behaviour, and when describing violence, it comes with its many inconsistent definitions. What should be done about that?

[52]Cherif M. Bassiouni, 'Characteristics of International Criminal Law Conventions' in 1 *International Criminal Law: Crimes* 1, (Bassiouni ed 1986); Erin Creegan, 'A Permanent Hybrid Court for Terrorism' (2011) *American University International Law Review* 26, 237, 245.

[53]See recently UNSC Resolution 2178 (24 September 2014).

Two legitimate reasons for not employing 'terrorism' *simpliciter* in such formulation are that if no more than some very general and thus imprecise notion of 'terrorism' can be achieved:

(1) there can be no sufficient specificity to achieve a workable legal concept;
(2) there is a risk of regarding 'terrorism' as something with an identity of its own requiring no legal analysis.

As to the former, it has been emphasised that lack of specificity of criminal law infringes the rule of law.

As to the latter, some writers on terrorism may have fallen into the same trap as the House of Lords in *Street v Mountford* (1985).[54] Its judgment sought to support with a homely analogy the argument that a licence possesses a specific character that, however defined, necessarily includes exclusive possession.

It argued:

> The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

The argument assumed that as a matter of English law, the example was in point. But because there is no such thing as a 'licence' beyond what the law has to say about it, the analysis begged the question under appeal. The spade argument was no more than an emphatic assertion of what the law was; beyond that, it added nothing to the reasoning process.

The true approach was that of Lord Hoffmann a decade later in *Meridian Global Funds Management Asia Ltd v The Securities Commission* (1995)[55]:

> . . . a reference to a company 'as such' might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no ding an sich, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.

Exactly the same can be said of the word 'terrorism'. What does *the law* mean by it?

If 'terrorism' is to be employed as a legal concept, it must be trimmed down so as to be clearly defined by law in order to provide specificity.

How terrorism *as a legal concept* should be described depends on the context in which it is employed. Of course if a domestic legislature has given a particular definition of 'terrorism', the conventional principle of legislative supremacy requires the courts to follow it. But while 'terrorism' can be used in quite different senses in different contexts, especially in a context of domestic law, in international law the need for a common legal usage is overwhelming.

[54] [1985] UKHL 4, [1985] AC 809.

[55] [1995] UKPC 5, [1995] 2 AC 500 at 506.

6 The Problem of Finding or Creating a Common Legal Usage

While the jurisdiction of domestic legislatures to create a crime of terrorism is beyond dispute, in the absence of an international legislature, how is such a crime to be located, or created, in international law? Even if procedures can be achieved by which international criminal law can be found or created, there are further interesting questions as to what its elements might be.

The nearest we have to an international legislator is the Security Council, which has increasingly used legislation, much of it created by States parties to the UN Charter, to perform its functions.[56] It has made statements such as those in Resolution 1566 (2004) relating particularly to the establishment of the Counter-Terrorism Committee Executive Directorate (CTED):

> . . . criminal acts, including against citizens, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature. . .

In 2015, there was Resolution 2199 (12 February): 'Threats to international peace and security caused by terrorist acts'.

The above provide a fair expression of international public policy as to what courts may fairly construe 'terrorism' to be.[57]

I have suggested that to reject 'terrorism' as being too broad a concept to be justiciable approaches the issue from the wrong end. Why not strive to find or create a definition of an essential core that *is* justiciable?

Those of such opinion might cite Sir Stephen Sedley's 'On Never Doing Anything for the First Time'[58]:

> There was once an activist judge. . . Prometheus J.
>
> Prometheus J was walking by the river, so engrossed in thinking of new ways to make central government's life more difficult that he missed his footing and fell in.
>
> A fellow judge, Sisyphus J, a distinguished constitutionalist, was walking in the opposite direction and saw him struggling in the water.

[56] Baragwanath (n 3).

[57] Domestic courts have become increasingly confident in using legislative policy as a guide to developing the judge-made law. See Roger J. Traynor, 'Statutes Revolving in Common-Law Orbits' *The Traynor Reader* (1968) 17 Catholic University Law Review 401. Given the status of the Security Council, it is inevitable that international judge-made law will place weight on its approach.

[58] Stephen Sedley, *Ashes and Sparks* (Cambridge 2011) chapter 20.

> 'Good heavens,' he said, 'This calls for decisive action. Parliament must legislate at the first opportunity.'

For those who argue that action is needed, the problem is threefold. The first task is to find existing law. If none exists, the second is of belling the cat[59]: who is to consider creating or developing it? The third is what to include.

6.1 Existing Law?

An early port of call for discovering *existing* international law is of course Article 38 (1) of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. [. . .] **judicial decisions and the teachings of the most highly qualified publicists of the various** nations, as subsidiary means for the determination of rules of law.

Sub-paragraphs (a)–(c) have been considered at length both in the STL Appeals Chamber's judgment and by the 'the most highly qualified publicists' whose teachings can be relevant under (d).

6.2 Belling the Cat: Who Is to Deal with the Problem?

The preferable course is a multilateral treaty. But since for some eight decades that has not been possible, there arises the question whether, pending such agreement, judiciaries can and should consider offering some protection for the victims of terrorism.

The STL is required by its Statute to apply the definition of 'terrorism' in the Lebanese Criminal Code. An obvious question for the Appeals Chamber was whether there existed a definition of such crime binding Lebanon as a customary rule of international law, with which the domestic definition would *prima facie* be

[59] Aesop's fable; the young mouse's suggestion of how to deal with the surreptitious approach of their feline enemy and the old mouse's response 'but who is to do it?'

presumed to comply. In our Interlocutory Decision,[60] the Chamber offered, first, its attempt to define terrorism at international law:

> 85. . . a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements:
>
> the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;
>
> the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;
>
> when the act involves a transnational element.

Second is a consequential interpretation of terrorism in the domestic law of Lebanon[61]:

> 111. . . .the subjective element of the crime under discussion is twofold, (i) the intent or dolus of the underlying crime and (ii) the special intent (dolus specialis) to spread fear or coerce an authority. The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.).
>
> The crime of terrorism at international law of course requires as well that [(iii)] the terrorist act be transnational.

And third is an analysis of the difference between the concepts of terrorism in the domestic law of Lebanon and at international law:

> 113. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is much broader with regard to the means of carrying out the terrorist act, which are not limited under customary international law, whereas it is narrower in that
>
> 1. it only deals with terrorist acts in time of peace,
> 2. it requires both an underlying criminal act and an intent to commit that act, and
> 3. it involves a transnational element.

In his book *Terrorism*,[62] Professor Saul's challenge to the Appeals Chamber definition emphasises the following:

- absence of any general crime of terrorism in treaty law;
- variations among treaties of regional organisations;
- differences among the General Assembly's 1994 Declaration on Measures Against International Terrorism,[63] the UN Draft Comprehensive Convention,

[60] Interlocutory Decision (n 5).

[61] Article 314 of the Lebanon Criminal Code states:

> Terrorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products or microbial agents.

[62] Saul (n 20) lxx-lxxii.

[63] UNGAS Resolution 49/60 (9 December 1994).

Security Council Resolution 1556, the 1999 Terrorist Financing Convention and the many different definitions in national laws and regional treaties on certain of which instruments the Appeals Chamber relied.

Professor Saul's rejection of any concept of terrorism in customary international law parallels that of other critics of importance. Competing lines of scholarly thought are presented by Professor Robert Kolb in 'The Exercise of Criminal Jurisdiction over International Terrorists'[64] and by Professor Creegan.[65] On the other side, and worthy of special note, the late President Antonio Cassese, who presided at the hearing and was Rapporteur for the Appeal Chamber's case, had asserted extrajudicially that the crime of terrorism had emerged as a true international crime.[66]

A request might be made to the respected International Law Commission, comprising perhaps *the* most highly qualified publicists, to return to its attempts to produce a definition for use under Article 38(1) (d).[67] But its attempt to secure an acceptable definition of 'aggression' as a crime took over 40 years: three decades of General Assembly debates and 12 years of work by the Working Group for the Crime of Aggression in the context of the Rome Statute of the International Criminal Court before a compromise definition was ultimately reached.[68] Its ultimate contribution would be an invaluable step towards an ideal definition of terrorism as a crime against international law. But in the meantime, a practical interim measure is urgently needed.

So who is to bell the cat—grip the problem of finding a workable definition of terrorism at international law? The admirable new initiative by Romania and Spain, to which I return, awaits consideration. But if the ideal of a multipartite treaty by which States agree to resolve the problem does not command the support it deserves, what about the judges?

6.3 What If There Is No Existing Law?

As noted in a recent lecture, *Interpretative Challenges*,[69] Article 38 deals in terms only with *finding* international law and—save for interpretation—not with its

[64] Andreas Bianchi, *Enforcing International Law Norms Against Terrorism* (1st edn Hart Publishing 2004) 227, 272.

[65] Bassiouni (n 52) 243-3.

[66] Antonio Cassese, 'Terrorism is also disrupting some crucial legal categories of International Law', (2001) 12 European Journal of International Law 993, 994.

[67] 1954 Draft Code of Offences against the Peace and Security of Mankind, 1991 Draft Code, 1996 Draft Code discussed by Ben Saul in The University of Sydney, Sydney Law School Legal Studies Research Paper No. 08/115 October 2008 *Attempts to Define 'Terrorism' in International Law* <http://ssrn.com/abstract=1277583> accessed 16 May 2016.

[68] Creegan (n 52) 253.

[69] David Baragwanath 'Interpretive Challenges of International Adjudication across the Common Law/Civil Law Divide' (2014a) 3 *Cambridge Journal of International and Comparative Law* 450.

creation. On that occasion, I extended a challenge to the Academy of university scholars: what is, or should be, the approach to judges required to deliver a decision where there is no existing law to apply?

There is a dilemma. One horn is that international law, formerly the law of nations, traditionally requires the *consent* of states to be bound, hence the requirements of Article 38(1)(a), (b) and (c) for

- rules expressly recognised by the contesting State;
- a general practice accepted as law;
- the general principles of law recognised by civilised nations,

to which sub-paragraph (d) provides merely

- subsidiary means for the determination of rules of law.

The other horn is the competing principle of law denying a court the escape that the problem is too difficult for decision; as the STL Appeals Chamber put it:

> [j]udges are not permitted to resort to a *non liquet*.[70]

7 Criteria for Developing the Law

In 'Interpretative Challenges',[71] I raised the question of what principles should be applied where there is simply no settled custom and no help available under Article 38.

International law is of enormous dimensions. Unlike Harriet Beecher Stowe's character Topsy,[72] international law did not simply grow and did not all derive from multilateral treaties; since it is not frozen in time, much of it must still be in the course of development or, indeed, creation.

The real question, I suggest, is not whether international law can evolve but rather what the conditions of legitimate development are. Clearly, the principle of State consent is of the utmost importance. To what extent is that implicit in the creation of a court, as was done in the case of the STL by Resolution of the Security Council acting under Chapter VII? Is there conferred on it some implied authority to develop the law in order both to avoid injustice and to help abate public injury?

[70] Interlocutory Decision (n 5) para 23. See also Julius Stone, '*Non liquet* and the Function of Law in the International Community' (1959) 35 *BYIL* 124.

[71] Baragwanath (n 70).

[72] When asked about heaven, and who made her, she answered 'Nobody as I knows on [. . .] I spect I grow'd. Don't think nobody never made me', Harriet Beecher Stowe *Uncle Tom's Cabin*, vol II chapter XX, reproduced in E. Ammons, *Uncle Tom's Cabin* (eds), (2nd edn Norton 2010) 221.

7.1 Avoidance of Injustice

In *El Sayed* (2010–2011), the STL Appeals Chamber encountered the need to avoid injustice. Four generals had been in custody for 31/2 years before the STL came into existence on 1 March 2009. The STL's first task was to release them—on the application of the then prosecutor who advised that he had no sufficient evidence to justify detention. We then received from one of the generals an application to see the documents bearing upon the detention, which had been passed to the prosecution by the Lebanese authorities. The prosecution resisted the application, contending that, as a criminal court, we had no jurisdiction to facilitate a possible civil claim against those responsible for the detention.

Our response was in two stages. We first held that the notion of inherent jurisdiction of an international court to deal with questions of its own authority, or jurisdiction, where no other tribunal was available for the purpose, was well settled and available to be exercised by the Appeals Chamber.[73] So we possessed authority. As to how it should be exercised, we later held that two principles of law pointed to the answer.[74] One was that of access to justice exemplified in the right of a person harmed by an unidentified wrongdoer to secure information about that person who third parties implicated, however innocently, in the harmful conduct. The other was the principle of access to information held by a public authority. So, subject to certain exclusions required by the Rules of the STL, we granted the application for the limited purpose of the general's receiving and using the relevant documents to pursue remedies in other courts. But while Article 38 was of some assistance, it did not tell us whether we could properly extend our criminal jurisdiction to facilitate a civil claim. There being no countervailing context, the need was so pressing that to perform our mandate, including the implied obligation to avoid fundamental injustice, it required us to find a remedy.

7.2 Help Abate Public Injury

As to the need to help abate public injury, the courts of our generation have too often incurred President Lachs' criticism, speaking before the United Nations General Assembly on 12 October 1973, of halting progress in the name of process. Where the courts are able without breach of convention to help protect the citizen against abuse, their role is not to shiver with Sisyphus J on the river bank but to pitch in and help. But what principles govern such process?

[73] STL AC *In the Matter of El Sayed, Jurisdiction and Standing,* 10 November 2010, STL Casebook 2009-2010, 139 at 153-163 paras 38-57.

[74] STL AC *Decision on Partial Appeal by Mr El Sayed,* 19 July 2011, STL Casebook 2011, 317 at 338-353 paras 33-68.

7.3 Judicial Development and Creation of Law

The topic of judicial development, or even creation, of law is controversial in both domestic and international contexts. There is a real problem, candidly acknowledged by Lord Sumption, of lack in judgment writing of that very candour:

> There is … something peculiarly English about the crab-like process by which [the introduction of the concept of *forum conveniens*] came about …, which is characteristic of the way that English judge-made law develops. At stage 1 the court, presented with a new problem which it lacks the necessary tools to resolve, rejects a rational solution which stands outside its traditional concepts. At stage 2, it stretches an existing legal concept so as to achieve substantially the same result, while denying that it is doing any such thing. At stage 3, it throws off the mask and admits that the alien doctrine has arrived and finally calls it by its name.[75]

While the Academy, the legal profession and the judges are the legal experts of the community, judges are not its high priests, performing secret rituals in private and vouchsafing new law by non-transparent process. Rather, the courts are servants of the community charged with delivering justice and doing so candidly. As the Privy Council recently showed in *Singularis Holdings Limited v Pricewaterhouse Coopers*, they must identify and evaluate the policy considerations and deal head-on with the question of what course will best advance the public interest. In that case, the Law Lords declined an invitation to create a power to assist foreign insolvency proceedings by analogy with English practice because, *inter alia*, it was already the subject of extensive international convention law.[76] The present problem, however, is the reverse: the absence of any such regime.

7.4 Grotius and Cicero

The great classical architects of law also focused on the merits, maintaining a robust balance between stability and justice. In 'Interpretive Challenges',[77] I offered for consideration the following notions emanating from Hugo de Groot (Grotius) and from Cicero.

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[75]The Administrative Law Bar Association Annual Lecture 'Anxious Scrutiny' 4 November 2014 < https://www.supremecourt.uk/docs/speech-141104.pdf / > accessed 16 May 2016.

[76][2014] UKPC 36 10 November 2014, [2015] 2 WLR 971 in which Lord Neuberger wrote**:**

> 161. The contention that judges should not be creating the power is reinforced when one considers the extent of domestic statutory law and international convention law in the area of international insolvency… In this highly legislated area, I consider that the power which is said to arise in this case is one which should be bestowed on the court by the legislature, and not arrogated to the court of its own motion.

[77]Baragwanath (n 70).

Grotius wrote:

> Natural right is *the dictate of right reason, shewing the* moral turpitude, or ***moral necessity***, of any act *from its agreement or disagreement with a rational nature*, and consequently that such an act is either forbidden or commanded by God, the author of nature.[78]

> Now *the Law of Nature is so unalterable, that it cannot be changed even by God himself*. For *although the power of God is infinite, yet there are some things, to which it does not extend. Because the things so expressed would have no true meaning, but imply a contradiction. Thus two and two must make four, nor is it possible to be otherwise; nor, again, can what is really evil not be evil* (emphases added).[79]

While making the allusion to God that convention required, Grotius trumped it, arguing that whatever else God may seek to do, the law is what conforms with a rational evaluation of practical necessity. So again in the words of Grotius:

> . . .if a creditor forgive me the debt, which I owe him, I am no longer bound to pay it, not because the law of nature has ceased to command the payment of a just debt, but because my debt, by a release, has ceased to be a debt.[80]

This test of practical necessity is reminiscent of and conceivably related to Cicero's 'right reason'. He argued:

> For there is but one essential justice which cements society, and one law which establishes this justice. *This law is right reason*, which is the true rule of all commandments and prohibitions. Whoever neglects this law, whether written or unwritten, is necessarily unjust and wicked' (emphasis added).[81]

Such an approach evokes techniques of the modern common law and, so far as my experience extends, the civil law as to both the creation and the interpretation of law.[82] It accords with the policy of the Promissory Oaths Act 1868 (UK), adopted across many jurisdictions of the common law, by which judges are required to promise:

> . . . *I will do right* to all manner of people *after the laws and usages of this Realm*.

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[78]H. Grotius, *On the Law of War and Peace* (1625), Book 1 Chapter 1.

[79]ibid.

[80]ibid.

[81]M. T. Cicero, *De Legibus (On the Laws)*, Book I, Chapter XV (translation by C.D. Yonge).

[82]Consider Paul Vinogradoff, *Common-sense in Law* (1914) (The Lawbook Exchange Ltd 2006) 147

> . . .legislation as a source of law is inseparable from a process of interpretation by the Courts, which in itself amounts to a subordinate source of law. It is impossible to curtail the freedom of judges in analyzing cases and applying general rules in ways not indicated in the rule and not premeditated by the legislators. Thus in the simplest and most emphatic expression of the law-making power of societies, we find that another factor asserts itself by the side of that of deliberate prospective commands, namely, the force of public opinion and of professional opinion as manifested in the action of judges. They are undoubtedly persons in authority, but their voice has a decisive weight in such questions not merely on account of this external authority, by chiefly by reason of the necessities imposed by logic, by moral and by practical considerations.

There are competing principles: to do right includes the need to avoid injustice, but the inconsistent laws and usages of the second restrain the operation of the first.

The latter is a high value, emphasised by Napoleon's warning to those, no doubt including judges, who were minded to gloss his precious Code Civil:

> Un seul commentaire, et mon Code est perdu.[83]

But Montaigne had recognised the need for balance: in his essay *On Habit: And on Never Unnecessarily Changing a Traditional Law*, premised on the general need for certainty and stability, he acknowledged:

> [. . .] Fortune [. . .] sometimes presents us with a need so pressing that the laws simply must find room for it.[84]

Jeremy Bentham is celebrated for his advocacy that legislation be codified. But he observed:

> . . . The legislator, who cannot pass judgment in particular cases, will give directions to the Tribunal in the form of general rules, and leave them with a certain amount of latitude in order that they may adjust their decision to the special circumstances.[85]

In performing its duty to adjudicate and avoid *non liquet*, the court may be obliged to identify and give specific effect to more general policies adopted by the primary lawmakers—in domestic cases the legislature, in international cases the practices of States. It is reasonable to infer that the States of the Security Council and those they represent, who by Article 108 have ultimate authority over the terms of the UN Charter, would accept that a tribunal created by the Council should give effect to the essential themes of States' practice and thereby facilitate the Charter's policies and principles.

7.5 Whose Opinion Should Govern?

Despite the 250 competing versions, primarily in domestic contexts, the agonies that underlie them point to a pressing need for a single legal definition of terrorism in international law.

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[83]Cited by Professor Norbert Rouland in « Autonome et autochtonie dans la Zone Pacifique Sud : Une Approche Juridique et Historique » *Polynesie Française, 30 Ans d'autonomie Bilan et Perspectives Acts du Colloque organisé par l'Assemblée de la Polynesie Française* (eds Anthony Angelo – Yves-Louis Sage) 50 < http://www.assemblee.pf/_documents/_acces_special/Actes%20du%20colloque%20-%20Journal%20du%20droit%20compar%C3%A9%20du%20Pacifique%20%E2%80%93%20Collection%20%C2%AB%20Ex%20professo%20%C2%BB%20-%20Volume%20IV%20(2014).pdf> accessed 16 May 2016.

[84]Michel de Montaigne *The Complete* Essays (trs MA Screech Penguin 2003) 138. The topic is developed in Baragwanath, 'Interpretive Challenges' (n 70): especially at 460-1.

[85]Jeremy Bentham, 'Theory of Legislation' (Etienne Dumont edition translated and edited by CM Atkinson 1914) at 62.

But whose opinion is to govern? There is the problem common to adjudication (and cogently identified by Lord Hailsham LC)[86] that two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting the title to be regarded as reasonable. Where the demand for judicial intervention is overwhelming, it is therefore not enough for a judge simply to act 'reasonably'. He or she must do better, abandoning subjective self-confidence in favour of President Canivet's famous aphorism:

> In truth we can deliver justice only with trembling hands,[87]

and adding the adjective 'highest' to 'standard of practical necessity'.

Fortunately, counsel and judges are endlessly creative. So the judicial device of non liquet already mentioned was created, by lifting the Latin of the Roman term for not proven across to the proposition that judges must find a rule to determine every issue argued. It is now employed by judges from both common law and civil law backgrounds. Such technique, responding to the need for finality in adjudication, might be said to be justified by 'the highest test of practical necessity'.

7.6 Tentative Principles

My intention in this paper, as in others given previously, is to raise some ideas prepared *ex parte* for discussion. I reserve the right to modify them if argument in an actual case indicates they are wrong. But my tentative view is that if to discharge the duty to avoid *non liquet* a court cannot avoid playing a part in the development of law, it must

(1) be patient, especially if there is a better potential decision-maker[88];
(2) be candid;
(3) obey the principle of legality expressed in Article 15.1 of the International Covenant on Civil and Political Rights: to be punishable, the conduct of an accused must both be a criminal offence and, at the time of its commission, have been criminal according to the general principles of law recognised by the community of nations;
(4) comply with the principle of Article 38 that international lawmaking is dependent on State consent, but unless some context otherwise requires, where the need for justice is so pressing that the law simply must find room for it, the very creation of a court of law created pursuant to Chapter VII of the Charter must be

[86] *In re W (an infant)* [1971] AC 682, 700.

[87] G Canivet, *Audience solennelle du 6 janvier 2006 – Discours de Guy Canivet, Premier président de la Cour de cassation* (Paris, 8 January 2006). <http://www.courdecassation.fr/IMG/File/pdf_2006/audience_solennelle_2006_discours_pp.pdf> accessed 16 May 2016.

[88] Consider Professor Campbell McLachlan's argument to that effect in Lis pendens *in International Litigation* (Hague Academy of International Law, Martinus Nijhof 2009).

taken to presume such consent. As Elihu Root, surely a 'highly qualified publicist', put it in his Nobel address on a parallel topic:

> The theoretical postulate of all diplomatic discussion between nations is the assumed willingness of every nation to do justice;[89]

(5) subject to (1)–(4), assume a responsibility to give effect to Judge Greenwood's formulation adopted by the International Law Commission Special Rapporteur and presumptively within Article 38(1)(d):

> International law is not just a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.[90]

While the decision will bind the parties in the instant case, for its decision to become law in subsequent cases will require the later acceptance of it under Article 38(1) (d).

Returning to the STL, it will be recalled that in defining 'terrorism', the Appeal Chamber's responsibility was to construe a provision of the domestic Criminal Code of Lebanon. It was not deciding that a person charged of a crime of terrorism ***under international law*** *should be exposed to risk of conviction before the STL.* Since its consideration of international law was en route to the true interpretation of a domestic statute, the question for others is whether that course, for which there is well-settled authority, was appropriately applied in our examination of contested questions of international law.

8 An International Criminal Law Against Terrorism: What Should It Provide and Who Should Create It?

I began with the reasons suggesting why an international criminal law against terrorism is needed. The competing argument is not that it is really unnecessary but rather that the task of creating it is simply too hard.

Despite the considerable and powerfully reasoned literature to that effect, such response may be thought unacceptable because of failure by those with lawmaking authority

[89] 'Towards Making Peace Permanent' *Nobel Lectures Peace 1901-1925* (1912) 247, 258 (World Scientific Publications Co Pte Ltd for the Nobel Foundation 1999).

[90] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* ICJ Judgment 19 June 2012, Declaration of Judge Greenwood para 8, cited by Sir Michael Wood Special Rapporteur *First Report on formation and evidence of customary international law* International Law Commission 17 May 2013 (A/CN.4/663) at para 19.

- to focus sufficiently on the need to protect actual and potential victims of international terrorism and, in doing so, to distinguish between domestic law and values and international law;
- to engage *on the basis of that distinction* with what the latter should provide.

So how should a lawmaker approach the task?

8.1 Need for Precision

I have emphasised that any international criminal law against terrorism must be precise. While domestic laws may vary, international law cannot accept a compromise that fails to resolve inconsistencies: no accused may properly be tried on a charge that is unclear. Unless the accused knows with precision the nature of the charge, the trial is unfair and—whatever he (it is rarely she) may or may not have done—the accused is entitled to acquittal.

8.2 Consequent Need to Trim the Concept

From that follows that the gallons of options as to what could constitute international terrorism must be distilled into the pint pot of a neatly precise formulation. This is the hard choice that has led many commentators to reject the notion that it can be achieved.

The problem is well described by Professor Boister:

> The difficulty with any enumeration is what to include. Should it include actions that do not involve intentional violence to persons but only to property? Lists also date quickly. Moreover, these actions do not address the full extent of the harm done to all of terrorism's victims. More specific concepts of terrorism have relied on the inclusion of a special intention to inculcate terror in the victim to shape otherwise distinct acts of violence into a single offence.[91]

He adds:

> Even more narrowly, terrorism can be characterized as a 'strategy of violence designed to instill terror in a segment of society in order to achieve' some ulterior purpose.[92]

He considers

> requirements that there should be a specific motive, viz 'the purpose of advancing a political, religious, racial, or ideological cause. Certain states find this overtly political concept of terrorism difficult to accept, particularly former colonies that support the use of violence to achieve self-determination but also states that use political violence to suppress dissent. The

[91] Boister (n 13) 63.

[92] ibid.

> question whether political motives should be part of the definition of terrorism or serve to excuse terrorism has plagued agreement on a general definition of terrorism.[93]

I do not propose here to embark on the pint pot distillation process, which the STL Appeals Chamber has attempted. Having argued that such process needs to be performed, the next question is, who should carry out the careful and energetic consideration required?

8.3 *In the Case of Terrorism, Can and Should the Judges Properly Perform a Distillation?*

As the community's legal experts, the Academy, the Bar and the judiciary enjoy great privileges, which must carry with them reciprocal obligations to those affected by it. They will ideally have performed the analyses required by States to equip them to agree upon a treaty. Failing that, in considering the judicial option, reference may perhaps be made to the broader and evolving responsibility of judges and others to recognise not only legitimate reasons for interstate difference but, as well, certain wider considerations. Some of these emerge from Lord Neuberger's 2014 Conkerton Lecture 2014 to the Liverpool Law Society, *The Supreme Court and the Rule of Law*.[94] They ultimately derive from the obligation of the court to find and state the law wherever (1) that is needed to resolve a serious dispute and (2) it possesses the practical competence to deal with the issue.[95]

The real challenge is that, despite such notable exceptions as the various human rights conventions and Lord Bingham's short and celebrated text,[96] there has been insufficient effort—either domestically or internationally—to turn the rule of law into the systematic measure of protection of human dignity that is fundamental to the Charter of the United Nations.

Rather, the courts' approach has too often been blinkered by ignoring the global human picture and the principles that their response to terrorism should

(1) recognise their own overarching obligation to protect potential victims;
(2) treat all humans according to common standards;
(3) as far as possible, look across State borders to punish those who commit cross-border terrorism.

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[93]ibid.

[94]UK Supreme Court website https://www.supremecourt.uk/docs/speech-141009-lord-neuberger.pdf > accessed 16 May 2016.

[95]The fact that in *Nicklinson* (n 14) the House of Commons rejected the Supreme Court's tentative view (that in narrowly defined circumstances the law might permit assisted suicide) emphasizes why judges must avoid intruding upon issues of political controversy where they lack such practical competence.

[96]Lord Bingham, *The Rule of Law* (Allen Lane 2010).

There are notable unblinkered exceptions. On the point of equal treatment, in a post 9/11 decision, described by Lord Phillips as the most impressive in his lifetime,[97] the House of Lords quashed counterterrorism legislation purporting to authorise long-term or indefinite detention of a non-UK national whom the Home Secretary wished to remove. It was held to be disproportionate, permitting detention of suspected international terrorists in a way that discriminated on the ground of nationality. Lord Bingham wrote:

> 54 The undoubted aim of the relevant measure, section 23 of the 2001 Act, was to protect the UK against the risk of Al-Qaeda terrorism. … [T]hat risk was thought to be presented mainly by non-UK nationals but also and to a significant extent by UK nationals also. The effect of the measure was to permit the former to be deprived of their liberty but not the latter. The appellants were treated differently because of their nationality or immigration status. The comparison contended for by the Attorney General might be reasonable and justified in an immigration context, but cannot in my opinion be so in a security context, since the threat presented by suspected international terrorists did not depend on their nationality or immigration status.[98]

And on looking beyond State borders, in *B v The Commissioner of the Independent Commission Against Corruption*,[99] the Final Court of Hong Kong construed anti-corruption legislation as applying to the bribery in Hong Kong not only of local officials but also of foreign officials, stating per Bokhary PJ:

> 21… Such a course makes a positive and important contribution to the world-wide struggle against corruption, an endeavor inherently and highly dependent on cross-border cooperation. Acting cooperatively, each jurisdiction properly protects itself from the scourge of corruption and other serious criminal activity. [100]

It is time for John Donne's 'no man is an island',[101] echoed by the UN Charter's 'dignity and worth of the human person', to be taken seriously by judges, as among those responsible for contributing to the international criminal law of an ever more globalised international society.

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[97] 'Closed Material' *London Review of Books*, Vol 36 No 38, 17 April 2014, 29.

[98] *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

[99] FACC No 6 of 2009, decided 28 January 2009.

[100] See to similar effect *Standard 304 Ltd v R* [2008] NZCA 76 interpreting legislation protecting the public from drugs manufactured in New Zealand as applying to export sales. The current high water mark may be *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* Case CCT 02/14, 30 October 2014 where a duty of investigation *in absentia* was held to rest upon a State which had no current jurisdiction to try any consequential proceedings without the accused coming on to its own soil.

[101] No man is an island,
Entire of itself,
…
Any man's death diminishes me,
Because I am involved in mankind,
And therefore never send to know for whom the bell tolls;
It tolls for thee.

Meditation XVII Devotions upon Emergent Occasions.

On such an approach, there could be a double recognition:

(1) given the 250 different attempts, largely in domestic law, finding a definition of terrorism is something worth pursuing by those—primarily legislators but also judges—with responsibility for developing international law; as far as possible, they should do so in harmony with one another's efforts[102];
(2) when weighed against the public interest of a common international formulation, local idiosyncrasies in relation to terrorism should be re-examined with a view to trimming them away in favour of the kind of common consensus that is nearly achieved in relation to the crime of aggression.

As to method, why not begin with Judge Greenwood's concept of international law as a single, unified system of law?

If there be justification for a court seized of such issues, as was the STL's Appeals Chamber, to help develop a single international law of terrorism, might not a similar principle encourage other courts in their various jurisdictions to join in and assist the process? If the approach of the STL Appeals Chamber to the definition of terrorism at international law is imperfect, is there any reason why the courts of other States exposed to that topic should not make their own contribution to a better international model? Might distinguished State courts perhaps see themselves as labourers in a common vineyard, preferring the broader approach to international human problems seen in the UK Supreme Court in *A's case* and in Lord Neuberger's Conkerton Lecture to that adopted in *Gul*, and strive together to find the optimum result? That was the approach of Lord Steyn in *R v Secretary of State for the Home Department; ex parte Adan* (2000):

> In principle... there can be only one true interpretation of [the Refugee Convention] ... in practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.[103]

Whether the STL should express more specific views on whether and, if so, how concepts of terrorism might be trimmed to achieve law of an acceptable international shape and size, I leave for the future.

8.4 The Role of the Academy and the Profession

Like the States Parties that carry the prime responsibility, members of the Academy and the profession are not only free of the fortuities that attend judicial consideration

[102] I refer to the developing notion that each should seek to respect, learn from and work with the other in the common interest of the community. See JF Burrows and RI Carter, *Statute Law in New Zealand* (4th edn LexisNexis 2009) chapter 16 'Common law and statute'.

[103] [2000] UKHL 67 at p12, [2001] 2 AC 477.

of these questions but, in many instances, possessed of greater specialist knowledge than most judges. Much effort has been devoted to finding an acceptable distillate of an international criminal law of terrorism; Dr Anthony Richards's 'Conceptualising Terrorism'[104] is a recent example.

Of particular note is the interest currently displayed by international statesmen, notably the definition proposed by the Lebanese Minister of Justice, Major-General Rifi, in Article 2 of a project he is overseeing:

> Unlike any other definition, the term 'terrorist act' means any subversive act, organized or unorganized, emanating from an individual or group of individuals, by any means, in order to terrorize the society and undermine its security, economy, social or political security of the State and undermine civil and national peace (unrevised translation).

I hope that other scholars and practitioners will continue their efforts to find the most principled and practical solution that may be used by decision-makers—whether the Security Council, States or, indeed, judges—using the Academy's work as the 'teachings of the most highly qualified publicists' to provide the international community with a common vehicle for responding to transnational terrorism.

9 Other Actions[105]

While I have concentrated on the topic of defining terrorism, the potential actions to respond to terrorism are and, to be fully effective, must be seen as complementary. I mentioned at the outset assisting international institutions, not least the Security Council, in discharging their vital tasks. By Article 24(1) of the United Nations Charter:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

As well as its jurisdiction under Chapter VI for pacific settlement of disputes, under Chapter VII the Council has power to take action up to and including the use of armed force to discharge its responsibilities.

The suggestion is that the Security Council might consider inviting the ICJ to assess its systems in terms of law via a request for an advisory opinion under Article 96 of the Charter of the United Nations. A possible reference could enquire whether it is the duty of the Security Council to

[104] Richards (n 8).

[105] See generally Ana Maria Salina De Frías, Katja LH Samuel and Nigel D White (eds) *Counter-Terrorism in International Law and Practice* (Oxford 2012).

- monitor systematically threats to international peace and security;
- devise, lay down, promulgate and implement systems consistent with Article 27 of the Charter[106] to promote the effective, timely and continuous maintenance of international peace and security;
- seek assignment by the Secretary-General of appropriate staff to perform such functions continuously.

The further suggestion—the creation of an international tribunal charged with assisting States to give effect to domestic criminal laws dealing with terrorism—follows a similar path to that proposed by Antonio Cassese.

An alternative option—considered but not adopted in the discussions of the Rome Statute—would be to add such jurisdiction to the International Criminal Court.[107] Certainly a division of that invaluable court might be created for such purpose. But there could be advantage in creating a distinct, relatively small, specialist tribunal that could be associated with the work of the CTED.[108] Its functions could include monitoring terrorist developments, determining whether the State legal systems with primary responsibility required assistance from the international community and, in that event, either assisting interstate cooperation or, after consultation, itself assuming the task of dealing with cross-border terrorism.

Achieving a single concept of terrorism at international law would transform the effectiveness of the response, both domestically and globally.

All are means to the ultimate goal of dealing with the conduct of those responsible for the terrorist acts.[109]

10 Conclusion

In 2015, Nigeria suffered a series of hideous terrorist attacks, with loss of many hundreds of lives and more victims of grave injuries. Three recent enormities—the Sharm el-Sheikh air disaster killing 224 people, the bombings in Beirut that killed at least 46 people and injured more than 200 others and the Paris attacks that killed some 130 people and injured hundreds more—have been claimed to have a common source. They and many other such attacks in a number of countries tragically illustrate the range and scope of modern terrorism and the critical need for coordination of a common response, both to the specific events and to the prospect of more, that must be added to the efforts of the States whose people, aircraft and territories have been desecrated.

[106] Which permits veto by each permanent member.

[107] See Chile Eboe-Osuji, 'Another Look at the Intent Element for the War Crime of Terrorism' (2011) 24 *Cambridge Review of International Affairs,* 357.

[108] United Nations Counter-Terrorism Committee Executive Directorate, discussed in 'Liberty and Justice in the Face of Terrorist Threats to Society (2011) (n1) 76-7.

[109] Baragwanath (n 2).

Whatever military responses are considered, there is a compelling need for an overarching reflection upon wider considerations. Recent events show that the strategy of terrorist groups has changed. They are taking an internationalist approach, presenting a threat to international peace and security that has no boundaries of distance, target or time. The responses must therefore not be limited to the immediate events and their results. What is needed is an approach that is internationalist both geographically and in other dimensions.

Certainly, local geography and military means have their place. But the Global Terrorism Index 2014[110] reports that since the late 1960s, only seven per cent of terrorist groups were eliminated by full military engagement; the two most successful strategies for ending such groups have been either policing or the initiation of a political process. These strategies were the main reason for the ending of over 80% of terrorist organisations that ceased operation. So wide public policy and strategy must determine tactics.

The law, including a common definition of terrorism, has a vital place as a public statement of the means by which such principles can be given effect, first as an element of public education and where necessary as a means for applying the rule of law. Further, our institutions, domestic and international, from the Security Council down, require our combined assistance to apply the big principles and to subordinate differences that would impede them.

And while we do what is necessary by way of physical defence of ourselves and others, we must recall that from the Nazi abyss emerged the Nuremberg Principles, now sustained by the Nuremberg Principles Academy established in 2015 by Germany, which set the modern standards for international criminal justice. We need to strive for a similar outcome from the current horrors. The proposal by Romania and Spain, presented at the T.M.C. Asser Centre in The Hague on 17 November 2015 for combating terrorism with the tools of law, including a single definition and an International Court against terrorism, points the way.

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The Evolution of the Status of the Individual Under International Law

Daniel David Ntanda Nsereko

Contents

1 Introduction

While in their state of nature, individuals lived under constant friction, anarchy and lawlessness. So when individuals left that state to form organised or civil society, their most pressing desire was to ensure security for themselves and the protection of their liberty and property. The Americans echo this desire in their Declaration of Independence (1776):

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

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> That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government. . .

They went on to emphatically assert:

> Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; . . . But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under Despotism, it is their right, it is their duty, to throw off such Government. . .

The French, too, understood the nature and function of the State in a similar vein. They asserted in their Declaration of the Rights of Man and of the Citizen (1789) that 'The aim of every political association is the preservation of the natural and imprescriptible rights of man. The rights are liberty, property, security, and resistance to oppression'.

However, to secure the blessings of organised society, individuals had to surrender part of their individual autonomy and freedom of action to the organised society—the State and its institutions. They had to pay allegiance to the State, to submit to its authority and to obey its laws. In consideration for this allegiance and submission to its authority, the State undertook to protect the individuals—their person, their rights and their property. Thus, protecting citizens in this manner is the very *raison d'être* for the existence of the State and its institutions. In this sense, then, the State is a means to an end and not the end itself. It is also for this reason that citizens retain for themselves the 'natural right' to rebel against the State should the State fail to deliver on its undertaking. Some have referred to this arrangement as the social compact.

Sad to say, and as the history of the human race so poignantly reveals, the State has often not lived up to the purpose of its existence. It has turned itself and its institutions into an end rather than a means to an end. It has failed to discharge its part of the social compact. In many parts of the world, the State, instead of providing security, has produced insecurity and the resultant ceaseless streams of refugees. Instead of protecting the citizens' right to life, liberty and property, the State is often the number one violator of these rights. Instead of enabling citizens to pursue happiness, the State has often been the source of untold woe, sorrow and suffering. The State has, throughout history, been responsible for pogroms, massacres, summary executions, unspeakable barbarities and other facinorous acts. This forced French philosopher Jean-Jacques Rousseau to lament that 'Man is born free and everywhere he is in chains'. Consequently, bloody revolutions, rebellions and insurgencies have been waged and continue to be waged by citizens in the exercise of their natural right to rebel, to overthrow tyrannical regimes and to regain their rights. Africa and Africans have had a disproportionate share of these unsavoury episodes.

The function of law—good law—whether domestic or international, is ultimately to serve the interests of the members of the community, national or international. It is also axiomatic that the ultimate beneficiaries of the law, whether national or

international, are individual human beings. They are the ones that make up their national communities and, ultimately, the international community. The question that this essay endeavours to probe is why international law, in particular, was impotent to stop or to check the occurrences of the events described above. Why was it unable to protect individual human beings? What were the conceptual and other impediments in its path? The essay also notes that it is not all gloom and doom. International law has undergone changes that inure to the benefit of the individual. The changes have cleared the conceptual path that enables the international community to respond differently to similar episodes today.

2 The Status of the Individual Under Traditional International Law

The first impediment in the way of the international community to come to the rescue of the individual was the conception of traditional international law that considered individual human beings as mere objects and not subjects of that law. International law was defined in terms of rules that governed the conduct of sovereign States in their relations *inter se* and not of their citizens. Additionally, according to the then prevailing positivist theory of law, international law was believed to be binding on States, primarily because they voluntarily consented to be bound. This belief was inspired by the positivist conception of sovereignty: a person who was a law giver to his subjects but who, because of his absolute and unlimited powers within a State, could not himself be bound by the law.[1] Consequently, States solely and exclusively were considered to be the subjects of international law.[2] Only States could be direct beneficiaries of rights or assume duties under international law, and only States had the procedural capacity to enforce those rights at the international level. The Statute of the International Court of Justice (ICJ), the successor to the Permanent Court of International Justice (PCIJ), exemplifies this notion. It provides that 'Only States may be parties in cases before the Court'.[3]

In the few instances when international law vouchsafed some rights to individuals, it did so only indirectly, usually by way of treaties, by imposing on their State of nationality a duty to observe and to ensure that certain categories of individuals enjoyed certain rights.[4] If the State concerned did not recognise the rights or did not

[1]See Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd edn OUP 1994), at 50 where he describes "the position occupied by the sovereign above the law: he creates law for others and so imposes legal duties or 'limitations' upon them whereas he is said himself to be legally unlimited and illimitable."

[2]Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co. 1905) 18.

[3]Statute of the ICJ, 1946, Article 34(1).

[4]See Oppenheim (n 2) 343, where the author states: "Although such treaties mostly speak of rights which individuals shall have as derived from treaties, this is nothing more than an inaccuracy of language. In fact such treaties do not create these rights, but they impose the duty upon the

carry out its obligation to actualise those rights under its laws, individuals had no recourse at either the national[5] or the international plane.

For instance, in the area of diplomatic relations, while duly accredited diplomats enjoyed privileges and immunities, such privileges and immunities did not belong to them. They belonged to the sending State, which could waive them as and whenever it was in its interest to do so. The affected diplomat had no say in the matter. Similarly, in the area of the law of asylum, an individual, however pathetic or desperate his or her position might have been, had no right to demand that a State admit him or her onto its territory or grant him or her asylum from his or her persecutors. First, in the absence of a treaty stipulating the contrary, every sovereign State has the absolute right to determine who to admit onto its territory. As an individual, the asylum seeker does not possess such a right. In this respect, it may be noted that while Article 14(1) of the Universal Declaration of Human Rights provides that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution', it does not say that such an individual also has a right to be granted such asylum. So, in the past, where an individual was forcibly abducted by agents of one State from the territory of a State that granted him asylum and brought to the territory of the wronging State where he was charged before the courts of that State, he or she could not impugn the jurisdiction of those courts on the ground that he or she was before them illegally on account of his or her 'right of asylum' having been violated.[6] That right belongs not to him or her but to the State of asylum. He or she could not argue that his or her abduction violated the rights of the State from whence he or she was abducted—particularly its territorial integrity and independence.

Similarly, where an individual was charged with violating the law of a country, he or she was not allowed to set up as a defence the fact that the law was invalid under international law. This was the case in *In re Garbe*, where Garbe was charged with wounding a policeman who was arresting him for deserting the German army and refusing to participate in the war of 1939. He argued that the war being waged by Germany violated the 1928 Kellogg Briand Pact, the German–Polish

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contracting states to call these rights into existence by their municipal law." Later editions of the book have modified this language.

[5]See *Attorney-General for Canada v Attorney General for Ontario* [1937] AC 326 (PC); *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL); *R* (*on application of Wang Yam) v Central Criminal Court* [2015] UKSC 76, paras [35]-[36]. These cases show a practice in some countries that unless treaties concluded by the State have been specifically incorporated into the national *corpus*, individuals may not be able to successfully invoke them before the national courts.

[6]This happened in cases such as *Adolf Eichmann v Attorney General of Israel* (1962) 36 Intl L Rep 277; *Godfrey Miyanda v The Attorney-General* [1983] Zambia L Rep 78; *United States v Noriega* 746 F Supp 1506 (SD Fla 1990); *S v Ebrahim* [1991] S Afr 553 (A); and *Alfarez-Machain v United States* 112 S Ctt 2188 (1992). For a new approach see *Prosecutor v Mle Mrksic Miroslav Radic, Veselin Sljivvanchnin and Slavko Dokmanovic,* ICTY Case No IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Domanovic, 22 October 1997; and *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42.

Non-aggression Pact and other international engagements and was therefore illegal. Rejecting his arguments, the German court held:

> The breach of international obligations gives rise only to the responsibility of States and not individuals, for only States are subjects of international law. The individual has rights and duties only in relation to the law of his State. According to international law international delinquencies give rise only to a duty on the part of States to pay compensation.[7]

Concerning duties, and as the above case demonstrates, traditional international law did not impose duties on individuals. If it did, it did so indirectly through States. Notable is Article 1 of the United Nations (UN) Convention on the Prevention and Punishment of the Crime of Genocide[8] to the following effect:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9] similarly provides:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Apparently, these provisions do not confer direct rights on the individual to not be subjected to genocide or to torture. They also do not impose direct obligations on others to not commit such acts. Therefore, where the States Parties to the conventions do nothing to enforce the obligations imposed on them, particularly where they fail to legislate against the forbidden acts and fail to prosecute the perpetrators on their territory,[10] such perpetrators may continue to flout international norms with impunity.[11] This is particularly the case with respect to persons in positions of power and authority.

Another impediment to the protection of individuals under international law was the rule that forbade intervention in the States' internal affairs. States held this rule to be sacrosanct. The rule is based on the principle of State sovereignty. Sovereignty imports territorial integrity and political independence. It accords every State the exclusive power to exercise legislative, administrative and judicial authority over people, property and any occurrences on its territory. It entitles States to adopt the

[7] *In re Garbe* (1947) 15 Intl L Rep 419 (Case No 125) (Oberlandesgericht of Kiel) 419-20. This language is re-echoed in the decision of the Israeli District Court in *Adolf Eichmann v Attorney General of the Government of Israel* (n 6).

[8] A/RES/260 (III), 9 December 1948; entry into force on 12 January 1951.

[9] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/39/46, 10 December 1984, entry into force on 26 June 1987, in accordance with Article 27(1).

[10] For instance see *Mani Kouraou v Niger*, ECW/CCJ/APP.08/07, Judgment of 27 Oct 2008 in which the ECOWAS Community Court of Justice cited Niger for condoning modern forms of slavery.

[11] T Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554, 555.

political, economic and social systems of their choosing and to determine their relations with other nations without let or hindrance. Absent a treaty or rule of customary international law stipulating the contrary, other States have no right to question or interfere with how a State exercises its sovereignty. As recent history so poignantly reveals, States, in the exercise of their sovereignty, developed pernicious ideologies and wicked systems of government that were antithetical to the human rights and fundamental freedoms of their citizens. Individuals residing under absolutist, despotic or tyrannical regimes had no recourse to outside help. Other States could not intercede on their behalf, let alone attempt to protect them. If they did, they would face accusations of interfering in the internal affairs of the States concerned or of violating their sovereignty and territorial independence.[12] However, we must also admit, just in passing, that quite often many States, even if they had the power and legitimate reasons to remonstrate with other States over the treatment of their citizens, lacked the moral authority to do so. They too behaved in the same manner.

There were a few exceptions to the above general position, which benefited individuals. By and large, however, these exceptions related to the treatment of foreign nationals on the territory of other States and not to the general citizenry. Customary international law required that foreign nationals on the territory of any State must be treated in accord with 'the minimum standard of justice' or 'the ordinary standards of civilization'.[13] Failure by a State to meet these standards entitled an individual's State of nationality to remonstrate or to espouse claims on their behalf at the international level against the recalcitrant State. However, for a State to be able to do so, there had to exist a bond of nationality between the State and the individual concerned. As the PCIJ declared, 'in the absence of a special agreement it is the bond of nationality between the State and the individual which confers upon the State the right of diplomatic protection'.[14]

However, while it is the sovereign prerogative of every State to establish the bond by conferring its nationality on whomsoever it wishes,[15] international law requires that that bond be effective. If it is not, then other States are entitled to reject it and to not recognise the State's right to espouse a claim on behalf of the individual concerned. For the bond to be effective, there must exist genuine links between the individual and the State in question.[16] Such links include the individual having his or her centre of social life in the country concerned, as well as performing his or her civic duties there. Insistence on an effective nationality thus meant that stateless

[12]The problem persists even today. See "Kagame attacks 'other nations' over third term bid", *Daily Monitor* (Kampala, Uganda, 7 December 2015). President Paul Kagame of Rwanda expressed resentment over criticism by the European Union and the United States of the Rwandan Parliament's action in amending the country's constitution to make exception only to Mr. Kagame as an individual, allowing him to run for a third term, contrary to the current rule restricting presidential terms to only two. The critics thought that this action undermined democratic principles.

[13]See *Harry Roberts Claim (USA v United Mexican States)* [1926] 4 UNRIAA 77.

[14]*Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* [1936] PCIJ Series A/B No 76, 16.

[15]See *The Nationality Decrees in Tunis and Morocco Case,* [1923] PCIJ, Series B, No 4.

[16]See, for instance, the *Nottebohm Case (Liechtenstein v Guatemala)* [1995] ICJ Reports, 4.

persons did not enjoy the privilege of diplomatic protection by any State. Refugees, too, though they formally possessed a nationality, were similarly hapless and unprotected because other States were not entitled to espouse their claims for lack of the bond of nationality and because they were in an antagonistic relationship with their State of nationality and wished to have nothing to do with it. In this sense, refugees might be considered stateless *de facto*.

Consequently, 'apart from morality, there [was] no restriction whatever upon a State to abstain from maltreating to any extent such stateless individuals'.[17] In this respect, it may also be noted that previously some States were wont to arbitrarily strip hundreds of erstwhile nationals of their nationality and leave them stateless and without diplomatic protection by any State. This was particularly so in Nazi Germany and Fascist Italy, between World I and II, when Jews were stripped of their nationality and expelled from those countries. A more recent episode of mass expulsion and denationalisation occurred in Uganda in the 1970s, when President Idi Amin expelled thousands of Ugandans of Asian origin whom he accused of 'milking the economy'.[18]

Furthermore, when a State decided to take up a matter against another State or to espouse a claim before international adjudicatory bodies, it did so not as agent or trustee of the individual but in exercise of its own right. This stance was explained by the PCIJ in the *Mavrommatis Palestine Concessions* (Jurisdiction) case as 'taking up the case of one of its subjects, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure in the person of its subjects, respect for the rules of international law'.[19] Consequently, the affected individual had apparently no stake in the diplomatic action or, indeed, proprietary rights in the results of such action. This was so, again, because the individual did not have rights flowing directly from international law. For instance, by the treaty of 1842 between the Queen of England and the Emperor of China, the Emperor agreed to pay the British Government 3,000,000 dollars on account of debts due to British subjects by some Chinese merchants who had become insolvent. Being one of the creditors, the plaintiff filed an action by way of a claim of right, asserting that the money was paid to the government for the purpose of paying his claim. He failed. In upholding the lower court's decision, Lord Coleridge, C.J., held:

[17]Oppenheim (n 2) 344. Due to the changes that international law has undergone, the 9th edition of the book, (Jennings and Watts (eds) OUP 2008) at 849 (cited in full at n 29) has modified the cited language to read thus: "As far as international law is concerned, there is, apart from obligations (now quite extensive) expressly laid down by treaty – and in particular the general obligation, enshrined in the Charter of the United Nations, to respect human rights and fundamental freedoms – no restriction upon a state maltreating such stateless individuals."

[18]Yash P Ghai, 'Remarks on "Expulsion and Expatriation in International Law"' (1973) 67 Proc ASIL 122.

[19]*Mavrommatis Palestine Concessions (Jurisdiction) Case* [1924] PCIJ Series A, No 2, 12.

> The Queen might not, as she saw fit, have made peace at all; she might not as she thought fit, have insisted on this money being paid. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts. It is a treaty between herself as sovereign, and the Emperor of China as sovereign, and though he might complain of infraction, if infraction there were, of its provisions, her subjects cannot. We do not say that under no circumstances can the Crown be an agent; but it seems clear to us that in all that relates to the making and performing of a treaty with another sovereign the crown is not, cannot be, either a trustee or an agent for any subject whatever.[20]

Thus, in espousing a national's claim, a State's motive might be merely to protect its own honour and not necessarily to vindicate its citizens' rights. Quite often, the State's decision to espouse or not to espouse a claim might be dictated by political considerations, and the affected citizen would have no right to demand that the State take up the claim or, if it did, that it pursue the claim to the full and final conclusion. This is because the right of diplomatic protection belongs to the State and not to the individual. The Swiss case of *Gischwind v Swiss Confederation* is also in point. The plaintiff, who had suffered damage as a result of the actions of the British Government during the war, induced the Swiss Federal Government to put forward claims for compensation against the British Government. When he subsequently learned that the British Government denied liability, he supplied the Swiss Government with further and better particulars and asked it to pursue the claim further. The Swiss Government declined. Thereupon, the plaintiff sued the Swiss Government for damages, arguing that an agency relationship existed between him and the government, that the government failed to exercise due care in executing its duty under this relationship and that, as a result, he suffered damage. The action failed. Holding that the government's discretion in the conduct of Swiss international relations must not be fettered, the court said:

> The fact that he has been injured in breach of international law does not confer upon the citizen a right to assistance by the Confederation in a manner desired by him. This cannot be so, simply for the reason that the competent authority cannot be guided only by the interests of the injured individual; *it has to consider, simultaneously and primarily, the general interest of the State and the possible reactions of such proposed steps on the political and other relations with the foreign State.* Now what is true with regard to initiating diplomatic protection is equally true of the scope and continuation of the measures taken in cases in which the foreign Government adopts a negative attitude. . .. If in the light of these considerations further diplomatic action is inexpedient then this must influence decisively the attitude of the intervening authority.[21]

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[20] *Rustomjee v The Queen* [1876] 2 QBD 69. This decision was cited with approval by the House of Lords in *Civilian War Claimants' Association v The King* [1932] AC 14 (HL), 26, wherein Lord Atkinson stated, ". . . when the Crown is negotiating with another Sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the sovereign State, unless indeed the Crown chooses expressly to declare that it is acting as agent." For a similar position see: *Giscwind v Swiss Confederation* [1931-32] Ann Dig 242 (No 120) (Federal Court); *William Parker (USA) v United Mexican States* (1926) 4 UNRIAA 35; *US v Weld* (1886) 127 US 51.

[21] *Giscwind v Swiss Confederation* (n 20). See also the more recent case of *Abbasi & Anor. v Secretary of State for Foreign and Commonwealth Affairs & Anor.* [2002] All ER 70 in which the

States could thus decline to exercise the right of diplomatic protection, but individuals could not renounce or waive that right by entering into contracts with foreign governments with stipulations purporting to preclude their States of nationality from exercising that right in appropriate cases.[22] Objection to such a stipulation, the so-called Calvo Clause, was the argument that since international law governed the conduct of States only, its operation could not be hampered by acts of private individuals. The corollary is also true. The assumption by a State of a national's international claim precludes such national from settling it on his or her own terms or abandoning it completely without the State's consent.[23]

Again, with respect to foreigners, where their life or limb was in mortal danger and the State of residence was unable or unwilling to protect them, their State of nationality could intervene to rescue them by military force. This intervention, billed as 'humanitarian intervention', was based on a State's right of diplomatic protection of its nationals wheresoever they might be. However, it is true that humanitarian intervention could and has been abused by powerful States to meddle in the affairs of weak States. As a consequence, the right of humanitarian intervention is a hotly contested issue among jurists. Nevertheless, while we may quibble about its legality, intervention of this kind has been used to save lives.[24] And, given the current spate of terrorist abductions and the shedding of innocent blood, it would be difficult, if not callous, to argue that States whose nationals face imminent execution by terrorists are not entitled to intervene on the territory of other States to rescue those nationals when those States are unable or unwilling to protect them.

In the case of persons fleeing from persecution, international law also recognised the right of other States to grant them asylum and to protect them from abduction, assassination and harassment by their erstwhile State of origin. International law considered the granting of asylum as a humanitarian, and not a hostile, act.

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appellant, a British national and detainee at the Guantanamo Bay in Cuba, sought (through his relatives) by judicial review to compel the British Government to make representations on his behalf to the US Government regarding his continued detention. The English Court of Appeal declined to do so, saying that this was a matter that involved conduct of foreign policy with which the courts do not interfere. It stated: 'On no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time.' The UK Supreme Court approved and followed this decision in *Youssef v Secretary of State for Foreign and Commonwealth Affairs & Anor.* [2016] 261 All ER 70.

[22] *First National City Bank of New York Claim* (1957) 26 ILR 323; James Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 700.

[23] ibid Crawford.

[24] Israel intervened in Uganda in 1976 to rescue Israeli nationals held hostage from a high jacked Air France plane; the United States (US) intervened in Iran in 1980 in an attempt to rescue American nationals detained in Teheran; the US intervened in Liberia in 1990 to rescue US nationals and certain other foreign nationals; the US intervened in Somalia in 1991 to rescue American nationals there; France and Belgium also intervened in Zaire (now the Democratic Republic of the Congo) in 1991 to rescue their nationals whose lives were in mortal danger.

International law also recognised the right of the State of asylum to refuse to extradite individuals to whom it had granted asylum to States where they would be tried and punished for offences of a political character or where they were likely to face persecution for their political views. Nevertheless, again, because of the individual's perceived incapacity to directly derive rights from international law, or to enforce them at the international level, the right of asylum did not belong to the individual; it belonged to the State granting it, and in granting asylum to an applicant, it did so merely as a matter of grace and not as an obligation. A State could not then, and still cannot, be forced to grant asylum or not to revoke asylum already granted. For this reason, it is probably flippant to say, as Article 14 of the Universal Declaration of Human Rights says, that '[e]veryone has the right to seek *and to enjoy* in other countries asylum from persecution'.

Regarding the African and other hitherto colonised peoples, they suffered the same legal disabilities and deprivations as their fellow human beings elsewhere in the world. However, colonised peoples suffered the additional yoke of colonial subjugation, which stripped whole population groups of the right to their territory—which colonisers considered *terra nullius*; colonised peoples were denied sovereign status and the ability to exercise the right of diplomatic protection and were excluded from the community of 'civilized nations'. According to traditional international law, colonised peoples lacked the requisite capacity under international law to fight against their invidious situation within the ambit of the law. They were left at the mercy of their metropolitan masters, who treated them as they wished and without any recourse.[25]

All in all, then, under traditional international law, individuals and victims of tyranny by their States were in a vulnerable and precarious position. Short of rebellion, they had no avenues of recourse from beyond their borders. Additionally, because of the then dominant positivist school of jurisprudence, and the faulty notions of international law being based solely on State consent, protection of the individual's rights was not considered a proper subject for international law.

3 New Era

A foremost impediment to the recognition of the individual as a subject of international law was the positivist conception of national sovereignty and of law and its binding effect. With the wane of positivism and its influence, certain progressive trends favouring the individual became noticeable, particularly after World War I. It may be recalled that positivism postulated the sovereign as an all-powerful authority, who subdued his subjects and imposed his will on them in the form of commands or rules. Being the supreme law giver, the sovereign was himself not subject to the law.

[25]Generally see Vincent O Nmehielle, 'A Just World under Law: An African Perspective on the Status of the Individual in International Law' (2006) 100 *ASIL* 252-57.

Likewise, as far as international law was concerned, the sovereign, because of his supposedly untrammelled supremacy, was not bound by that law unless he expressly consented to be bound. With the development of the ideas of individual liberty and representative democracy, which stress government by law, this conception of sovereignty was eventually discredited.[26] Sovereignty came to be understood not in the sense of a supreme ruler or supreme executive authority but in the sense of a supreme law-making power. Similarly, the positivist teaching anchoring the binding effect of international law on State consent, express or implied, was also discredited because it did not tally with State practice. States obey a given rule of customary international law not because they have consented to it but because they believe it to be binding on them. New members of the international community, though they may not be satisfied with this or that rule, generally feel that they have no choice in the matter but to conform to existing law.[27] A surer basis for the binding effect of the law is the fact of the existence of a community, be it national or international. According to the Latin maxim *ubi societas ibi ius*, where there is a society, law will also be there. As Elihu Root, former US Secretary of State, put it:

> Men cannot live in neighbourhood with each other without having reciprocal rights and obligations toward each other arising from their being neighbours. . .. It is not a matter of contract. It is a matter of usage arising from the necessities of self-protection. It is not a voluntary matter. It is compelled by the situation. The neighbours generally must govern their conduct by the accepted standards or the community will break-up. It is the same with nations.[28]

Thus, scholars abandoned the notion that 'the Law of Nations is based on the common consent of individual States'.[29]

The assertion that States, solely and exclusively, were the subjects of international law, and, consequently, of rights and duties under that law, was also abandoned.[30] There was indeed no intrinsic value in this positivist view. If the needs of the international community warranted recognising entities other than States as subjects of international law, there was no good reason why this could not be given effect. As the ICJ again opined in the *Reparations for Injuries* case:

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[26]See Hart (n 1) Chapter X; See also Dennis Lloyd, *The Idea of Law* (Penguin Books 1983) 170–80.

[27]See Brierly, *The Law of Nations* (5th edn, OUP 1954) 50-57; Brierly, 'The Basis of Obligation in International Law' (1959) 17 *Cambridge Law Journal* 1, 121-23, Chapter 1; Hart (n 1) Chapter X.

[28]Elihu Root, 'A Requisite for the Success of Popular Diplomacy' (1922) 1 *Foreign Affairs* 3, 8. Reprinted in (1937) 15 *Foreign Affairs* 405, 410.

[29]Robert Jennings and Arthur Watt, *Oppenheim's International Law* (Vol 1, 9th edn, OUP 2008) at 16 now reads that "States are the principal subjects of international law."

[30]ibid 14 now reads "It is . . . in accord with practical realities to see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law – international law – to govern their conduct as members of that community. . . This 'common consent' cannot mean, of course, that all states must at all times expressly consent to every part of the body of rules constituting international law, for such consent could never in practice be established. . ."

> [t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.[31]

The Court then recognised international organisations such as the UN as subjects of international law, having international legal personality and capacity to espouse claims at the international level on behalf of their employees. To international organisations add the Holy See, a State of a peculiar kind, which is recognised as an international person with rights that accrue under international law. From this standpoint, then, the individual can also be, and is slowly being recognised as being, a subject, albeit a unique subject, of international law capable of directly deriving rights and incurring duties from that law.[32] Such recognition acknowledges the existence of 'the rights of man grounded in a law superior to that of the State'.[33] Attribution of duties on the individual is a necessary corollary of rights. Although the individual still lacks the prowess of a State wherewithal to enforce his or her rights on the international plane, yet like an infant under the municipal law, that disability alone is not a valid ground to deny him or her rights. Consequently, as Reut-Nicolussi put it:

> While the States were considered the only subjects of International Law, the individuals and their rights were juridically neglected. But already a dawn of a new idea is in sight where governments are reminded that States are not celestial bodies but products of man for man.[34]

This change has been particularly evident with the establishment of the UN. The Allied Powers, after their triumph over Hitler and the Axis Powers, considered that protection of the individual's rights worldwide was an indispensable element in the scheme to maintain international peace and security. For this reason, the UN Charter lists as one of the organisation's purposes the protection and the encouragement of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.[35]

The UN Charter is a treaty between sovereign States, governed by international law. International law ordains that parties to a treaty must observe and carry out the obligations they assumed under the treaty in good faith.[36] Accordingly, the Charter requires as follows:

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[31] *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 174, 178.

[32] This view was echoed in a recent statement by the England and Wales Court of Appeal in *Belhaj & Anor. v Straw* [2014] EWCA, Civ 1394, para [115], that "a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. . ."

[33] Hersch Lauterpacht, *International Law and Human Rights* (Archon Books, New York, 1968) 36.

[34] Eduard Reut-Nicolussi, 'Displaced Persons and International Law' (1948) 73 *Le Recueil des cours* 14.

[35] See UN Charter, Articles 1(3), 55(c), 62(2), and 76(c).

[36] Vienna Convention on the Law of Treaties (1969) Art 26.

> All Members [of the UN], in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

By including the promotion of human rights and fundamental freedoms among its aims, the Charter, for the first time, formally recognised human rights and the protection of the individual as forming part of the international *corpus juris*, independent of municipal law. States now have an obligation flowing directly from international law to observe and to protect individuals on their territory. The International Court of Justice has had the occasion to remind States of this obligation. In the *Namibia* case, it reminded South Africa that the human rights provisions of the Charter were not mere moral exhortations but legally binding obligations, which States had to carry out. The Court found South Africa in flagrant violation of its obligations when it introduced the pernicious apartheid system in Namibia.[37] In the *Armed Activities on the Territory of the Congo* case (*Democratic Republic of the Congo v Uganda*), the Court similarly found Uganda's activities in the Democratic Republic of the Congo (DRC) to be a violation of its obligations under international human rights law and international humanitarian law.[38] Interestingly, this law was contained not only in treaties to which Uganda was a party but also in custom—customary international law.[39] Consequently, Uganda incurred an obligation to make full reparation for the injury caused by the activities of its army, the Uganda People's Defence Force (UPDF), in the DRC.

In connection with the issues or reparations that the Court might order a State to make in respect of human rights and humanitarian law violations, note may be made of Judge Cançado Trindade's plea for a 'victim-centred outlook'. In the *Armed Activities on the Territory of the Congo* case, supra, the Court left the issue of quantum and modalities of payment of reparations by Uganda to the Democratic Republic of the Congo to the parties to settle by agreement. The Court would step in only when the parties failed to reach an agreement. Unfortunately, the Court did not impose any time limits within which the parties were to reach the agreement. Consequently, the matter dragged on without solution for ten years, when the Court decided to 'resume the proceedings in the case with regard to the question

[37] *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Reports 16, 57.

[38] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) Judgment* [2005] ICJ Reports 168, 280. The Court found, that "the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law."

[39] ibid 168, para [219].

of reparations'.[40] In a separate declaration, Judge Cançado Trindade expressed dismay that the Court omitted to impose time limits within which the parties were to resolve the matter and that because of that omission 'the members of the affected segments of the population keep waiting, for almost a decade, for the reparations due to them for the damages they suffered'.[41] He opined thus:

> Reparations, in cases involving grave breaches of the International Law of Human Rights and of International Humanitarian Law, cannot simply be left over for 'negotiations' without time-limits between the States concerned, as contending parties. Reparations in such cases are to be resolved by the Court itself, within a reasonable time, bearing in mind not State susceptibilities, but rather the suffering of human beings, – the surviving victims, and their relatives, – prolonged in time, and the need to alleviate it. The aforementioned breaches and prompt compliance with the duty of reparation for damages are not separated in time: they form an indissoluble whole.[42]

Judge Cançado Trindade's victim-centred views, if accepted, would represent a shift from the traditional position that denied the individual any stake or right in the subject matter of diplomatic protection or international claims pursued by his or her State of nationality on account of the damage he or she suffers at the hands of foreign States. Contrary to views such as those expressed in the *Rustomjee* case, supra, international law would impose on the State a duty to act with due diligence and expedition as a trustee or agent of the victims who have a stake in the subject matter of negotiations or judicial settlement. These views apparently find support in the Court's previous views in the *Diallo* case when it enlarged the scope of diplomatic protection beyond the then existing standard. It stated:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.[43]

In light of this view, it was significant that the Court subsequently noted that 'the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury'.[44] In this author's view, the Court's stance in the *Diallo* case manifests a further advance of the idea of the individual being a subject of rights under international law and a departure from the old view expressed in the *Mavrommatis Palestine Concession* (Jurisdiction) case, supra, that when a State takes up a case on behalf of a national, it 'is in reality asserting its own rights' without due regard to the interests or rights of the national.

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[40]See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Order of 1 July 2015*, [2015] ICJ Reports, para [8].

[41]ibid Declaration of Judge Cançado Trindade, para [4].

[42]Ibid para [7].

[43]*Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of the Congo*) (Preliminary Objections: Judgment) [2007] ICJ Reports, para [39].

[44]*Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of the Congo*) (Compensation owed to the Democratic Republic of the Congo to the Republic of Guinea: Judgment), [2012] ICJ Reports, para [57].

Furthermore, the rule that an individual while abroad cannot limit by contract the right of his or her State of nationality to protect him or her has been relaxed. One basis for the rule was the desire by States to protect their nationals abroad from contractual stipulations that might have been induced by duress. Today, tribunals seem to be inclined to uphold such stipulations—the Calvo Clause—where there was no duress or denial of justice.[45] Indeed, if the individual's right of movement across national boundaries is to be meaningful, it should be accompanied by power to order his or her affairs as he or she deems proper.

It is also significant that, by declaring human rights protection as one of the purposes of the UN and by creating specialised agencies dedicated to this task, the UN Charter unwittingly opened the door for victims of human rights violations to individually file complaints to the UN against their erring States. For a while, the agencies, the Sub-Commission on the Prevention and Protection of Minorities and the Human Rights Commission initially, ignored the complaints, saying that they had no power to take action on such complaints or that they could not act as judge between the complainants and their governments.[46] Yet thousands of complaints continued to flood the offices of the UN every year. The agencies could no longer ignore the complaints. The UN recognised that merely telling the authors of the complaints that they had rights but that it lacked the capacity to enforce them would create a tantalising mirage. Surely, where there are rights, there must also be remedies: *ubi jus ibi remidium*. Accordingly, in the famous UN Economic and Social Council (ECOSOC) Resolution 1503 (XLVIII) of 27 May 1970, the ECOSOC established a machinery under which individuals could directly complain to UN human rights agencies against State violations of human rights.[47] The resolution provided individuals with the procedural capacity at the international plane that they had hitherto totally lacked. The resolution was epochal.

Additionally, today there exist a myriad of instruments, both global and regional, inspired by the UN Charter's human rights provisions, geared toward the promotion of various aspects of human rights. Some instruments, such as the Universal Declaration of Human Rights, are norm-creating resolutions of UN bodies that bind States as part of customary international law. Others are treaties that are directly binding on States Parties to them. Some of these treaties, because of their normative character, may be binding on even States not parties to them, because they reflect customary international law on the topic in question. An example of such a treaty that has been held to be so binding is the Convention on the Prevention and

[45]See *North American Dredging Company of Texas (United States v Mexico)* (1926) 4 UNRI AA 26. Generally see Chittharanjan F Amerasinghe, *Diplomatic Protection* (OUP 2008) 191-211.

[46]See ECOSOC Resolution 75 (V) of 5 Aug 1947, confirming the view of the Human Rights Commission that it had no power to entertain complaints. See also Resolution 728 F (XXVIII) of 30 Jul 1959 by which ECOSOC reaffirmed its previous stand. It also instructed the UN Secretary-General to inform complainants that the Commission had no power to act on the complaints.

[47]The Sub-Commission on Prevention and Protection of Minorities, on authorisation from ECOSOC adopted the procedures on the admissibility of the complaints by Resolution 1 (XXIV) 13 Aug 1971.

Punishment of the Crime of Genocide.[48] Some treaties are general and cover a whole gamut of rights. These include the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights and Fundamental Freedoms. Others are thematic and relate to such topics as the rights of workers, rights of refugees, rights of women, rights of children, right against discrimination and right against torture.

These treaties impose legally binding obligations on States to respect and ensure observance of those rights. Most of them also require States Parties to them to provide periodic reports on the progress they may be making in enforcing them. These reports provide all States Parties to the treaties with the right and duty to ask each other questions, to provide explanations and to carry out investigations on the way they treat their inhabitants. In addition to the reporting system, many human rights treaties have enforcement mechanisms, including committees, commissions, rapporteurs and courts, with power to directly consider complaints by other States, individuals and non-governmental organisations, to make on-the-spot investigations to adjudicate such complaints and to recommend or order remedies and redress.[49]

It is true that, as a general rule, for any complainant to be able to utilise these procedures, his or her State of nationality must have assented by making a declaration to that effect or by ratifying a particular instrument or additional protocol. The complainant must also exhaust available local remedies and meet other procedural prerequisites. However, some regional instruments do dispense with some of these prerequisites. For instance, under the African Charter on Human and Peoples' Rights, States Parties to the Charter need not make prior declarations before they can allow or file complaints against each other before the African Commission on Human and Peoples' Rights. Under the Charter, individuals are also not deterred from filing complaints before the Commission by the absence of such declarations.[50] Others, such as the Court of Justice of the Economic Community of West African States (ECOWAS), dispense with the requirement of the exhaustion of local remedies.[51]

All in all, even where these procedural hurdles exist, there has still been a breakthrough. Erring States can no longer legally invoke the non-intervention principle as a bar to other States or the international community to remonstrate, complain, condemn or even take concrete action to prevent or stop violations—all

[48] See *Reservations to the Genocide Convention*, [1951] ICJ Reports 15.

[49] For instance see the following cases in which the Southern African Development Community Tribunal ordered Zimbabwe to pay compensation to Zimbabwean farmers whose farms had been compulsorily seized without compensation: *Fick and Anor v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010); *Mike Campbell (Pvt) Ltd Anorv Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008); *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009).

[50] African Charter on Human and Peoples' Rights, Articles 47 and 56.

[51] See Karen J Alter, Laurence R. Helfer and Jacqueline R. McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *AJIL* 737.

for the good of the individual. Here it is apposite to ask whether States are limited to asking questions, conducting debates, passing resolutions and condemnations and doing nothing more concrete to protect population groups from massacre or brutal treatment or from famine and other natural disasters. Short of exercising their inherent right of self-defence, may States forcibly intervene on the territory of other States to protect population groups facing such massacre and disasters? The impediment to such intervention has invariably been the consideration of the sovereignty of the State concerned and the principle of non-intervention.[52] On the issue of State sovereignty, this author has opined elsewhere thus:

> After all, what is sovereignty without the people? The issue is not sovereignty. The issue is humanity and the right to life. Sovereignty must not be set up as the impregnable veil behind which states commit crimes against humanity with impunity.[53]

Today, one notes with interest the recent development of the notion of intervention on humanitarian grounds. The Constitutive Act of the African Union incorporates this notion in a provision that acknowledges 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[54] This provision was a sequel to the Rwanda genocide of 1994, which both Africa and the wider international community failed to prevent. For a continent that has for long been plagued by incessant similar atrocious episodes and catastrophes, the notion is salutary. It has since metamorphosed into the principle of responsibility to protect. The responsibility to protect has been expressed thus:

> Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[55]

This responsibility includes the responsibility to prevent, to react with force if need be and to rebuild. With appropriate safeguards in place to prevent abuse, the concept of the responsibility to protect is vital for protecting population groups from atrocious crimes or from imminent danger of extermination. As a general rule, intervention should not be undertaken unilaterally. It should, whenever possible, be undertaken under the mandate of the UN or regional organisation with clearly

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[52]In situations of armed conflict, the International Committee of the Red Cross may carry out humanitarian operations in areas not under the control of the government of the country concerned without the consent of that government. It did so during the Nigerian-Biafran war. See LC Wiseberg, 'Humanitarian Intervention: Lessons from the Nigerian Civil War' (1974) 7 *HRJ* 61.

[53]Daniel D Ntanda Nsereko, 'Victims of Abuse of Power, with Special Reference to Africa' (1994) 28 *University of British Columbia Law Review* 171-192, 183. Reprinted in (1998) 60 *The Review of the International Commission of Jurists* 199-219.

[54]The Constitutive Act of the African Union (2000/2001), Article 4(h), Lome, Togo, July 2000, entry into force in May 2001.

[55]Generally see *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa, Canada (2001).

defined terms of reference.[56] However, as now reformulated by the UN, use of force under the responsibility to protect must be limited to situations with well-grounded allegations of actual or impending genocide, crimes against humanity, war crimes and ethnic cleansing and must be authorised by the UN Security Council under its Chapter VII powers. Indeed, in the cases of Libya,[57] Ivory Coast,[58] the Central African Republic[59] and Burundi,[60] where military intervention was undertaken under the cover of 'responsibility to protect', the Council approved the interventions. It is nevertheless submitted that insistence on Security Council approval may frustrate efforts to protect people in danger of annihilation. Given the political miasma that enshrouds that body, action may be stymied because of political opposition by States that see action as inimical to their political, economic or ideological interests.[61] Provided that intervening States act under the authority of some intergovernmental organisation and all the criteria for such intervention otherwise exist, Security Council support, though beneficial, should not be a *conditio sine qua non*.

4 Individual Criminal Responsibility for International Crimes

Probably the most decisive shift from traditional international law is seen in the developments in the area of international criminal law, a branch of international law, leading to the mushrooming of international criminal tribunals. It is true that individuals have for long been liable for committing international crimes such as piracy *jus gentium*, violation of blockades, carrying contraband, slavery and the slave trade. However, as has been noted above, individuals were punished, curiously, not for violating international law but for violating municipal law, where the State in question had a law on its statute books prohibiting such crimes.[62] This was

[56]Nsereko (n 53) (1994) 184.

[57]S/RES/1970 (2011).

[58]S/RES/1975 (2011).

[59]S/RES/2127 (2013).

[60]S/RES/2248 (2015). See also the *Communiqué* of the Peace and Security Council of the African Union PSC/PR/COMM (DLXV) of 17 December 2015. Under paragraph 15 of the *Communiqué* the AU Peace and Security Council requested the UN Security Council "to adopt, under Chapter VII of the UN Charter, a resolution in support of the present communique." At the time of writing the UN Security Council had not responded to the request.

[61]For instance, in 2014 sixty eight States, including the United States, co-sponsored a resolution before the UN Security Council (UN Doc S/2014/348 of 22 May 2014) that would have referred the situation in Syria to the ICC for investigation and action. China and the Russian Federation, two out of the five permanent members of the Security Council vetoed the resolution.

[62]See Jennings and Watts (n 29), 16, indicating that "[D]uties which might necessarily have to be imposed upon individual human beings according to international law are, on the traditional view,

so because, as has already been noted, individuals, as mere objects, did not owe any duty under international law. Under such a state of affairs, an individual charged with international crimes could hide behind the veil of the State and say: 'I acted in accord with the laws of the State or on the orders of the State; and as a loyal citizen I had to obey, first and foremost, my state and its law; as a mere object of international law, I do not owe any duty under international law.' However, since the pronouncement of the Nuremberg Judgment, individuals charged with international crimes before an international criminal tribunal cannot validly raise such defences. The defences are contrary to the Nuremberg Principles. These Principles were synthesised from the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.[63] They have since been adopted by the UN General Assembly and have crystallised into rules of customary international law. Today, they constitute core principles of international criminal law. The Rome Statute of the International Criminal Court (ICC) and those of the other international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL), adopt the Principles.[64]

The first Nuremberg Principle provides:

> Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

In other words, such person is individually and personally accountable for his or her criminal acts. In a familiar passage, the Nuremberg Tribunal succinctly stated the rationale for this Principle:

> Crimes against international law are committed by man, not by abstract entities, and only by punishing individuals who commit such crimes can provisions of international law be enforced.[65]

For instance, save in the cases of self-defence or UN-sanctioned action, the UN Charter forbids States to use or threaten to use force against the territorial integrity or political independence of each other. As the *Nicaragua*[66] and *Military Activities in*

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not international duties, but duties imposed by a state's internal law in accordance with a right granted to, or a duty imposed upon, the state concerned by international law."

[63] 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal', *Yearbook of the International Law Commission* 1950, 97.

[64] See for example, Articles 25, 27 and 28 of the Rome Statute; Articles 1 and 7 of the Statute of the ICTY; Articles 1 and 6 of the Statute of the ICTR; Articles 1 and 6 of the Statute of the SCSL.

[65] International Military Tribunal, *Trial of Major War Criminals, Trial of Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (1947) vol 1, 223.

[66] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports, 14, 136. The Court decided, *inter alia*, that "the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984, an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an

the DRC[67] cases reveal, any State that contravenes this rule incurs international responsibility and the concomitant obligation to pay reparations. Unfortunately, the Charter only addresses States and not the individuals within the State, who are the real actors within the State, the ones who actually mastermind, order or carry out the offensive activities. Moreover, when reparations are ordered against the offending State, as was the case in the two above-mentioned cases, it is ultimately the innocent taxpayers in that State who bear the brunt of their effect. This is where the responsibility and punishment of the State officials and other individuals complicit in the commission of the offending conduct become so vital to the ends of justice. While individual responsibility does not in and of itself relieve the State of its responsibility under international law, it at least serves to deter individuals from dragging their States into the path of lawlessness. Such deterrence is extremely vital to international law abidingness.

The second Principle ordains:

> [T]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who commits the act from responsibility under international law.

This Principle is significant. While absence of a law criminalising conduct already outlawed under international law is necessary for the purpose of vesting a domestic court with jurisdiction over an international crime, its absence is no bar to international criminal tribunals[68] or to courts of other countries acting under the universality principle[69] to assume jurisdiction over an alleged offender before them. As to the possible defence that the individual may have been acting in obedience to the laws of his or her State, the Nuremberg Tribunal categorically declared as follows:

> *[I]ndividuals have international duties* which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain

attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State."

[67] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 38) at 280, the Court found that "the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention".

[68] See for instance, the International Convention on the Suppression and Punishment of the Crime of Apartheid, General Assembly Resolution 3068 (XXVII) of 30 November 1973. Article V vests jurisdiction in the courts of States Parties or "an international penal tribunal having jurisdiction with respect to those States Parties which shall accept its jurisdiction."

[69] For example, see *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Others*, CCT 02/14, 30 October 2014. Generally see Manuel J Ventura, 'The Duty to Investigate Zimbabwe Crimes against Humanity (Torture) Allegations' (2015) 13 *Journal of International Criminal Justice* 861–89.

> immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[70]

Regarding another possible defence, that since under the laws of a given State the individual in question may not be tried or punished because he or she has already been pardoned, the Special Court for Sierra Leone has stated, correctly, as follows:

> [A] state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.[71]

Therefore, not only does international law trump national law; it also imposes a direct duty on the individual to act in obedience to it. If this were not so, international law would have no efficacy and would be flouted with impunity.

The third Principle declares:

> The fact that the person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

By repudiating official immunity, the Principle lends effectiveness to the first and second Principles. International crimes are most often committed by persons in authority who traditionally enjoy immunity under national and traditional customary international law. The Statute of the ICC, as well as those of the other international criminal tribunals set up by the UN, enshrines this Principle among their provisions.[72] State Parties to the Rome Statute agree to waive the immunity. So do UN Member States, under Articles 24, 25 and 103 of the UN Charter. While official immunity under customary international law may still be invoked before national courts to bar prosecution of visiting heads of state or their emissaries,[73] this is not

[70]Nuremberg Trials (n 65) [Emphasis added].

[71]*Prosecutor v Kallon &Anor*, SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para [71].

[72]See for instance Article 27 of the Rome Statute: '(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

See Article 7(2) of the Statute of the ICTY. See also *Prosecutor v Slobodan Milošević* (Decision on preliminary Motions) ICTY -99-37-PT (8 November 2001), paras [27]-[33], where the Trial Chamber rejected any insinuation that this provision was invalid. It stated: 'There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law.' See also Article 6 (2) of the Statute of the ICTR; and Article 6 (2) of the Statute of the SCSL.

[73]See the *Yerodia* case - *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Reports, 3, para [54]. The ICJ concluded that the 'functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and

allowed with respect to officials on the territory of States that are party to the Rome Statute who may be sought by the ICC[74] or with respect to similarly circumstanced persons sought by UN tribunals set up under Chapter VII of the UN Charter. The principle of *pactum sunt servanda* obliges such States to honour the obligations that they assume when they ratify the Rome Statute or when they become members of the UN.[75] If they do not honour such obligations, then this would defeat the purpose of setting up the ICC or the tribunals—ending impunity for international crimes. It was on the basis of these principles that the Special Court for Sierra Leone rejected claims for immunity by Mr. Charles Taylor, the former President of Liberia, who was charged with crimes against humanity and with war crimes allegedly committed in Sierra Leone.[76] While passing a 50-year custodial sentence on Mr. Taylor for the crimes, which it described as 'some of the most heinous and brutal crimes recorded in human history',[77] the Trial Chamber of the Special Court stated as follows:

> The lives of many more innocent civilians in Sierra Leone were lost or destroyed as a direct result of his actions. As President and as Commander-in-Chief of the Armed Forces of Liberia, Mr Taylor used his unique position, including his access to state machinery and public resources, to aid and abet the commission of crimes in Sierra Leone, rather than using his power to promote peace in the region. The Trial Chamber finds that Mr Taylor's special status, and his responsibility at the highest level, is an aggravating factor of great weight.[78]

The Chamber added that 'leadership must be carried out by example, by the prosecution of crimes not the commission of crime. . .. [T]he Trial Chamber wishes to underscore the gravity it attaches to Mr Taylor's betrayal of public trust.'[79] These

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that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.'

[74] *See Prosecutor v Al Bashir* (Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139-Corr (13 December 2011), para [41]. Pre-Trial Chamber I stated as follows: "[A]ll the States referenced above have ratified this Statute and/or entrusted this Court with exercising 'its jurisdiction over persons for the most serious crimes of international concern.' It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret Article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified."

[75] See Article 26 of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." The Convention codifies customary international law.

[76] *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction) SCSL-03-01-0059 (31 May 2004), para [51]. The Appeals Chamber while confirming the Trial Chamber's decision stated as follows: 'the principle of state immunity derives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community'.

[77] *Prosecutor v Taylor* (Sentencing Judgment) SCSL-03-01-1283 (30 May 2012), para [70].

[78] ibid, para [97].

[79] ibid para [102].

words encapsulate the very essence of the rule of law: accountability and equality before the law. They must resonate more and more throughout Africa and beyond. With such pronouncements as these, it can no longer be maintained that international law does not impose direct duties on individuals or that it regulates only the conduct of States solely and exclusively.

5 Concluding Remarks

In this essay, it has been shown that under traditional international law, an individual human being was not considered a subject of that law. He or she was considered only an object. He or she had neither rights nor the procedural capacity to enforce such rights at the international plane. In the few instances when international law vouchsafed some rights to individuals, it did so only indirectly by imposing on their State of nationality a duty to observe and to ensure that certain categories of individuals enjoyed certain rights. If the State concerned did not carry out such duty, the individuals had no recourse at the international plane. Equally true, traditional international law imposed no duties on individuals. If it did, it imposed duties indirectly through States.

Traditional international law's attitude toward the individual was influenced by its very definition as law governing the conduct of States in their relations with each other and not those of their citizens and by the flawed positivist theory of law that considered consent by States as the only basis for its binding effect. In turn, the notion of consent was based on the perceived absolute power of the sovereign, which envisioned no other authority above it.

The essay has shown that with time, international law has undergone considerable evolution. There has occurred a gradual but sure shift from the exclusivity of the State to the inclusion of individual human beings among the subjects of international law, albeit of a peculiar kind. Increasingly, individuals are being recognised as the *raison d'être* for the existence not only of the State but also, ultimately, of the international community.

This evolution has largely been due to the increase in interaction and the strengthening of the bonds between peoples and nations, to the development of notions of individual liberty and representative democracy and to the increased awareness of the correlation between respect for human rights and peace. The evolution has also been accelerated and spurred on by the horrors of the last two World Wars and by the imperative to prevent their reoccurrence, as well as the growth of the human rights and anti-colonial movements. The evolution is clearly underscored by the preamble to the Charter of the UN, which proclaims that it was 'We the Peoples of the United Nations' that established the new people-centred legal order, in contradistinction to 'the Contracting Parties' that established the short-lived League of Nations. From thence forth, the focus and ultimate aim of all the efforts of the UN and its organs was the promotion of the welfare of humankind and the dignity of the individual. Thus, treatment of individuals was to be no longer a matter

within the exclusive domain of States. The rest of the international community has an interest in their well-being and, in case of their mistreatment, the right to intervene on their behalf.[80] While non-interference in the *essentially* internal affairs of States remains a fundamental principle of international law, flagrant violations of fundamental rights of the individual is no longer an essentially internal matter; intervention by other States to protect victims of those violations is therefore not forbidden and is, in fact, a responsibility.[81]

Admittedly, the State remains the pre-eminent and dominant, albeit not the sole, subject of international law. Nonetheless, it must be recalled that the State was never meant to be an end in itself but a means to an end: the well-being of individual human beings.

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[80] See *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre & Others*, CCT 02/14 (30 October 2014), para [37], where the Constitutional Court of South Africa stated that: "Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because all states have an interest as they violate values that constitute the foundation of the world public order."

[81] ibid, para [78]. Ordering the National Commissioner of the South African Police to investigate complaints of torture in Zimbabwe by the Zimbabwe Exiles' Forum, the Constitutional Court of South Africa stated as follows: "Given the international and heinous nature of the crime, South Africa has a substantial connection to it. An investigation within the South African territory does not offend against the principle of non-intervention and there is no evidence that Zimbabwe has launched any investigation or has indicated that it is willing to do so. . ."

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Admission into Diplomatic Buildings As an Alternative or Substitute to Diplomatic Asylum?

Péter Kovács and Tamás Vince Ádány

Contents

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1 Introduction: Silence of the Vienna Convention

The 1961 Vienna Convention on Diplomatic Relations does not contain any explicit clause on diplomatic asylum. For authors discussing the issue of asylum or refuge in diplomatic premises in the context of the Convention, the usual logical starting point is of course the disposition on immunity of diplomatic sites. This is set out in Article 22 on the premises of the mission[1] and Article 30 on the diplomat's residence.[2]

As Denza revealed, in the *travaux préparatoires* of the International Law Commission (ILC), there was a special—but in itself very restrictive—clause on shelter:

> Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under the local law, not being charges preferred on political grounds.[3]

Sir Gerald Fitzmaurice proposed a more precise formulation:

> Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds.[4]

The majority of the ILC, however, shared the point of view offered by J.P.A. François and contested the very *raison d'être* of such a clause. The Dutch member warned about the complexity of the issue and pointed out that the Rapporteur formulated his proposition without a preliminary study and emphasised that the proceedings of the Sixth Committee leading to the adoption of Resolution 685(VII) of the United Nations General Assembly had not revealed any intention to deal with diplomatic asylum. Addressing the matter would have amounted to an ultra vires act on behalf of the ILC,[5] and a decision was made to delete the draft article 'on the

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[1] Article 22:

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

[2] Article 30:

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.

[3] Eileen Denza, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations* (Oxford Commentaries on International Law, 3rd edn, OUP 2008) 141.

[4] ibid.

[5] ibid.

understanding that under modern international law and practice a failure by the mission to comply with the rules on diplomatic asylum did not entitle the receiving State to enter mission premises'.[6]

It is not astonishing that the governments in the Sixth Committee or in the General Assembly did not complain about this deliberate silence.[7]

In 1975, the ILC discussed putting the question of diplomatic immunity on its agenda. The ICL finally concluded, however, that the governments were not at all ready to adopt any concrete disposition on this subject. This was due to fears of complicating interstate relations in a context where even the customary basis is doubtful.[8]

The Institute of International Law issued a resolution in 1950 that offered a definition of asylum, including territorial and diplomatic locations as well.[9] However, unlike some other resolutions of the Institute, this one seems to have failed to significantly alter subsequent State practice.

2 How to Survive Without a Universal Written Rule on Diplomatic Refuge: Some Historical and Contemporary Examples

2.1 The South American Answer Based on Regional Treaties, Regional Custom and Ambiguous Practice

2.1.1 The Relevant South American Treaty Law

The South American approach is manifested in three conventions, namely the Convention on Asylum[10] (Havanna, 1928), Convention on Political Asylum[11] (Montevideo, 1933) and Convention on Diplomatic Asylum[12] (Caracas, 1954).

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[6]ibid.

[7]ibid.

[8]Patrick Daillier, Mathias Forteau, Nguyen Quoc Dinh, Alain Pellet, *Droit international public* (8th edn, LGDJ 2009), s 460, 751.

[9]L'asile en droit international public (à l'exclusion de l'asile neutre), for the full text see: http://www.justitiaetpace.org/idiF/resolutionsF/1950_bath_01_fr.pdf, accessed 22 May 2016.

[10]Ratified by: Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic and Uruguay. (Status as of 2014).

[11]Ratified by: Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Dominican Republic. (Status as of 2014).

[12]Ratified by: Argentina, Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela. (Status as of 2014).

Following the early example of the Treaty on International Penal Law[13] signed at Montevideo in 1889, the Havanna Convention recognises a limited form of diplomatic asylum reserved for political offenders as a right or a humanitarian gesture, as custom or applicable conventions or national laws prescribe it.[14] As the International Court of Justice observed: 'the intention was (. . .) to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness. This is borne out by the wording (. . .) which is at times prohibitive and clearly restrictive.'[15] The Montevideo Convention, inter alia, rephrased the introductory articles[16] and clarified the qualifying competence of the hosting State.[17]

[13]Title II on asylum refers to territorial asylum (articles 15, 16 and 18) and diplomatic asylum (article 17):

> Such persons as may be charged with non-political offences and seek refuge in a legation shall be surrendered to the local authorities by the head of the said legation, at the request of the Ministry of Foreign Relations, or of his own motion.
>
> Said asylum shall be respected with regard to political offenders, but the head of the legation shall be bound to give immediate notice to the Government of the State to which he is accredited; and the said Government shall have the power to demand that the offender be sent away from the national territory in the shortest possible time.
>
> The head of the legation shall, in his turn, have the right to require proper guarantees for the exit of the refugee without any injury to the inviolability of his person.
>
> The same rule shall be applicable to the refugees on board a man-of-war anchored in the territorial waters of the State.

[14]Havanna Convention,

Article I: "It is not permissible for States to grant asylum in legations, warships, military camps or military aircraft, to persons accused or condemned for common crimes, or to deserters from the army or navy. (. . ..)"

Article II: "Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:

First: Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.

Second: Immediately upon granting asylum, the diplomatic agent, commander of a warship, or military camp or aircraft, shall report the fact to the Minister of Foreign Relations of the State of the person who has secured asylum, or to the local administrative authority, if the act occurred outside the capital. (. . .)".

[15]*Colombia v Peru asylum case*, (Judgment) [1950] ICJ Rep 266, 282.

[16]Montevideo Convention, Article 1: "In place of Article 1 of the Convention of Havana on Right of Asylum, of February 20, 1928, the following is substituted: 'It shall not be lawful for the States to grant asylum in legations, warships, military camps, or airships to those accused of common offenses who may have been duly prosecuted or who may have been sentenced by ordinary courts of justice, nor to deserters of land or sea forces.

> The persons referred to in the preceding paragraph who find refuge in some of the above-mentioned places shall be surrendered as soon as requested by the local government.

[17]Montevideo Convention, Article 2: "The judgment of political delinquency concerns the State which offers asylum".

Generally, the Caracas Convention is considered to be the reaction of the Organization of American States to the Haya de la Torre Judgment (see under 2.1.2.). Here, the political motives of persecution are emphasised,[18] the institution is stipulated as a 'right'[19] and the urgency[20] of the action is formulated in a much more precise manner than before. The premises suitable for granting diplomatic asylum were enumerated.[21]

From the above three treaties, it is only the Caracas Convention that recognises the diplomatic asylum as a genuine *right* of the State, while the Havana Convention and the Montevideo Convention treat it rather as a special *institution* that could be considered—under certain circumstances—lawful.

From the South American practice, let us emphasise the *communis opinio* as formulated by the International Court of Justice (ICJ), i.e. 'asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population'.[22]

[18]Caracas Convention, Article I: "Asylum granted in legations, war vessels, and military camps or aircraft, to persons being sought for political reasons or for political offenses shall be respected by the territorial State in accordance with the provisions of this Convention. For the purposes of this Convention, a legation is any seat of a regular diplomatic mission, the residence of chiefs of mission, and the premises provided by them for the dwelling places of asylees when the number of the latter exceeds the normal capacity of the buildings. War vessels or military aircraft that may be temporarily in shipyards, arsenals, or shops for repair may not constitute a place of asylum".

[19]Caracas Convention, Article II: "Every State has the right to grant asylum; but it is not obligated to do so or to state its reasons for refusing it".

[20]Caracas Convention, Article V: "Asylum may not be granted except in urgent cases and for the period of time strictly necessary for the asylee to depart from the country with the guarantees granted by the Government of the territorial State, to the end that his life, liberty, or personal integrity may not be endangered, or that the asylee's safety is ensured in some other way".

Article VI: "Urgent cases are understood to be those, among others, in which the individual is being sought by persons or mobs over whom the authorities have lost control, or by the authorities themselves, and is in danger of being deprived of his life or liberty because of political persecution and cannot, without risk, ensure his safety in any other way".

Article VII: "If a case of urgency is involved, it shall rest with the State granting asylum to determine the degree of urgency of the case".

Article IX: "The official furnishing asylum shall take into account the information furnished to him by the territorial government in forming his judgment as to the nature of the offense or the existence of related common crimes; but this decision to continue the asylum or to demand a safe-conduct for the asylee shall be respected".

[21]Caracas Convention, Article I: "(...) For the purposes of this Convention, a legation is any seat of a regular diplomatic mission, the residence of chiefs of mission, and the premises provided by them for the dwelling places of asylees when the number of the latter exceeds the normal capacity of the buildings. (...)"

[22]ICJ *Colombia v Peru asylum case*, 282-83.

2.1.2 Haya de la Torre's Famous Refuge of the Columbian Embassy in Lima

On 3 October 1948, Víctor Raúl Haya de la Torre, a Peruvian politician—previously exiled several times—tried to take power by a military coup. After this attempt was crushed, the government named him and his party, the American People's Revolutionary Alliance, responsible for the plot. The Minister of the Interior sent a 'note of denunciation' against Haya de la Torre to the Minister for the Navy, who approved it, and the Public Prosecution qualified the object of the investigation as a crime of military rebellion.

On 27 October 1948, a military junta seized power and 'issued on November 4th a decree providing for Courts-Martial for summary procedure in cases of rebellion, sedition and rioting, fixing short time-limits and severe punishment without appeal'.[23] The decree was not, however, applied by the magistrates in the proceedings against Haya de la Torre. The junta renewed the state of the siege and the suspension of constitutional rights, which was ordered on 4 October 1948 by the former, since then reversed, government.

On 3 January 1949, Haya de la Torre entered the Colombian Embassy, asked for and was granted refuge—refuge that he enjoyed until 1954. The dispute between Peru and Colombia concentrated on the proper interpretation of the Havana Convention (the only relevant international treaty on asylum in force between the two countries) and the relevant custom. Colombia stated, and Peru contested, that the Ambassador had the right to qualify the criminal procedure launched against Haya de la Torre as political persecution.

The ICJ—having considered the effective South American practice ambiguous[24]—emphasised the strict interpretation of the criteria of urgency[25] and

[23] ICJ *Colombia v Peru asylum case*, 272.

[24] "In the absence of precise data, it is difficult to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State to recognize the validity of asylum which has been granted against proceedings instituted by local judicial authorities. The facts which have been laid before the Court show that in a number of cases the persons who have enjoyed asylum were not, at the moment at which asylum was granted, the object of any accusation on the part of the judicial authorities. In a more general way, considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.

If these remarks tend to reduce considerably If these remarks tend to reduce considerably the value as precedents of the cases of asylum cited by the Government of Colombia, they show, none the less, that asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors. The good-neighbour relations between the republics, the different political interests of the governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system. Even if the Havana Convention, in particular, represents an indisputable reaction against certain abuses in practice, it in no way tends to limit the practice of asylum as it may arise from agreements between interested governments inspired by mutual feelings of toleration and goodwill". ICJ *Colombia v Peru asylum case*, 286.

[25] "In principle, it is inconceivable that the Havana Convention could have intended the term "urgent cases" to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country; nor can it be admitted that in referring

warned against abuses on both the side of the States granting asylum[26] and the side of the prosecuting States, i.e. the territorial States.[27] The Court pronounced *in merito* that 'the grant of asylum by the Colombian Government to Victor Raul Haya de la Torre was not made in conformity with Article 2, paragraph 2 ("First"), of that Convention'.[28]

Colombia was not right to attest having 'a right for Colombia, as the country granting asylum, to qualify the nature of the offence by a unilateral and definitive decision, binding on Peru'.[29] But Peru cannot speak either 'on a violation of Article 1, paragraph 1, of the Convention on Asylum signed at Havana in 1928'.[30]

The Court concluded 'that on January 3rd/4th, 1949, there did not exist a danger constituting a case of urgency within the meaning of Article 2, paragraph 2, of the Havana Convention. (...) The Court is thus led to find that the grant of asylum from January 3rd/4th, 1949, until the time when the two Governments agreed to submit the dispute to its jurisdiction, has been prolonged for a reason which is not recognized by Article 2, paragraph 2, of the Havana Convention.'[31]

Peru and Columbia did not understand how to execute the Judgment, and that is why they seized The Hague judges with a request for interpretation. The ICJ refused to answer *in merito*,[32] and finally, the two States arrived to an agreement granting safe leave for Haya de la Torre, who departed the Embassy in April 1954 and left Peru.

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to "the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety", the Convention envisaged protection from the operation of regular legal proceedings". ICJ *Colombia v Peru asylum case*, 284.

[26]"The foregoing considerations lead us to reject the argument that the Havana Convention was intended to afford a quite general protection of asylum to any person prosecuted for political offences, either in the course of revolutionary events, or in the more or less troubled times that follow, for the sole reason that it must be assumed that such events interfere with the administration of justice. It is clear that the adoption of such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of States; besides which, no confirmation of this criterion can be found in Latin-American practice, as this practice has been explained to the Court". ICJ *Colombia v Peru asylum case*, 286.

[27]"In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents". ICJ *Colombia v Peru asylum case*, 284.

[28]ICJ *Colombia v Peru asylum case*, 288.

[29]ibid.

[30]ibid.

[31]ibid, p 287.

[32]*Request for Interpretation of the Judgment of 20 November 1950 in the Colombia v Peru asylum case*, (Judgment) [1950] ICJ Rep 395.

2.1.3 Refuge at the Diplomatic Missions During Pinochet's Coup d'état (1973)

Another example of State practice in Latin America is the refuge secured in embassies during Pinochet's coup (11 September 1973) where cca. 50 Chilean nationals were admitted into the Canadian Embassy and 500 by the Mexican Embassy. The mission of New Zealand and the Swedish Embassy were also active in this field.[33] In retaliation, Edelstam, the Swedish Ambassador, was expelled by the military authorities for this activity. Edelstam said that 'the role of the Swedish Embassy is to save the lives of people who are in danger'.[34]

2.1.4 Manuel Noriega at the Nunciature in Panama City

When in December 1989 American commandos entered Panama in order to capture President Noriega, the dictator asked for and was granted a temporary refuge at the Apostolic Nunciature. The nuncio, Monsignore Laboa, warned him, however, that it was really temporary and did not prejudice at all anything for the future.[35] The Holy See did not speak of asylum but spoke of 'a person in refuge'.[36] Apparently, a nearby non-diplomatic building was also used in these days for the same purpose.[37] Finally, after a five-day stay, the nuncio convinced Noriega to leave the nunciature and to surrender to the Americans.[38]

2.1.5 Pedro Carmona in the Columbian Ambassador's Residence of Caracas

In 2009, Pedro Carmona, who tempted to overthrow Venezuelan leader Hugo Chavez was granted political asylum by the Colombian Government after he flew into the Ambassadors' residence. According to the BBC, Colombian Foreign

[33]The Fall and Rise of Chilean Democracy: 1973-1989, 153. http://www.burmalibrary.org/docs13/Diplomats_Handbook-red.pdf.

[34]ibid.

[35]http://en.wikipedia.org/wiki/Operation_Nifty_Package, accessed 22 May 2016.

[36]ibid.

[37]"Meanwhile, Monsignor Laboa petitioned both Panama and the Vatican to agree to extend the embassy property to include another building; where he had Noriega's four companions moved to prevent them from encouraging Noriega to stay under Vatican sanctuary - allowing him to convince Noriega to leave", ibid.

[38]See also Andrew Rosenthal, 'NORIEGA'S SURRENDER: CHRONOLOGY; Vatican Issues an Ultimatum and a General Takes a Walk' (New York Times, 5 January 1990). http://www.nytimes.com/1990/01/05/world/noriega-s-surrender-chronology-vatican-issues-ultimatum-general-takes-walk.html, accessed 22 May 2016. For a short analysis, see: Sir Ivor Roberts, *Satow's Diplomatic Practice* (6th edn, OUP 2009), s 8.12.

Minister Guillermo Fernandez de Soto said that the decision was taken 'after careful consideration' and 'in accordance with the norms of international law'. Venezuela's Foreign Minister, Luis Alfonso Davila, criticised the decision stating that the fugitive businessman was not facing death or being politically persecuted but was under investigation for a criminal charge.[39] Pedro Carmona was finally allowed to leave Venezuela.

2.1.6 José Manuel Zelaya Rosales, the President of Honduras and His Fellows in the Brazilian Embassy in Tegucigalpa

The former president of Honduras asked for refuge in the building of the Brazilian Embassy on 21 September 2009.

Honduras submitted an application against Brazil before the ICJ on 28 October 2009. The application indicated that '[Mr. José Manuel Zelaya Rosales and] an indeterminate number of Honduran citizens', who have been taking refuge in the Brazilian Embassy in Honduras since 21 September 2009, 'are using [its] premises ... as a platform for political propaganda and thereby threatening the peace and internal public order of Honduras, at a time when the Honduran Government is making preparations for the presidential elections which are due to take place on 29 November 2009'. It is stated that '[t]he Brazilian diplomatic staff stationed in Tegucigalpa are allowing Mr. Zelaya and his group to use the facilities, services, infrastructure and other resources in order to evade justice in Honduras'.[40]

Later, a friendly settlement was reached (7 January 2010—Zelaya could leave the building with safe conduct to the Dominican Republic[41]), and Honduras manifested its intention to discontinue the proceedings.[42]

2.2 The United States' Position

The most famous United States case was probably cardinal Mindszenty's refuge at the Budapest mission between 1956 and 1971, which we shall address *infra* under Sect. 2.3.2.6, alongside the cases in Europe. (Some cases on admission by American

[39] http://news.bbc.co.uk/2/hi/americas/2009907.stm, accessed 22 May 2016.

[40] Press Release No. 2009/30, 29 October 2009, "Filing in the Registry of the Court of an 'Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil'".
http://www.icj-cij.org/docket/files/147/15585.pdf, accessed 22 May 2016.

[41] http://es.wikipedia.org/wiki/Manuel_Zelaya.

[42] Press Release No. 2010/15, 19 May 2010, "Certain Questions concerning Diplomatic Relations (Honduras v. Brazil), Case removed from the Court's List at the request of Honduras". http://www.icj-cij.org/docket/files/147/15937.pdf, accessed 22 May 2016.

diplomats will be presented under the sections devoted to the African or Asiatic examples.)

An up-to-date and comprehensive document is available today, which seems to summarise the current United States approach in the matter. This document,[43] allegedly signed by Secretary of State Hillary Clinton, was published by the Guardian (London) on 28 November 2010. Other than the title 'US Embassy Cables: How to Handle a Defector—A How-To Guide for Embassy Staff', which was inserted by the newspaper, this document[44] seems to be authentic, mostly because of its logic, international legal and political background.[45]

The most important points for this paper are in paras 40–42 and 46–48 of Section E: 'TEMPORARY REFUGE – CAUTIONS AND GUIDANCE':

> 40. (S/NF) Walk-ins sometimes request that they be permitted to remain in an embassy or other USG facility beyond closing hours. The Department considers this a request for temporary refuge, not a request for asylum, and post officials should be particularly careful not to equate the two. In U.S. immigration law, asylum is a status granted to qualified refugees, and an application for 'asylum' can only be made in the United States. A walk-in may request 'asylum' in an embassy based on the erroneous belief that safe passage out of the host country will be assured if the request is granted. While a few mostly Latin American countries recognize such a right of 'diplomatic asylum,' the United States and most other countries do not recognize that concept or accept that the granting of refuge in an embassy is an authorized use of diplomatic facilities. A walk-in who requests 'asylum' may also in substance be requesting an opportunity to resettle in the United States; guidance on such requests is below under long-term options.
>
> 41. (S/NF) Granting a walk-in temporary refuge in an embassy or other USG facility may actually increase the danger to an individual, particularly in hostile countries and if the individual is a host-country national. The longer the person remains, the more likely the host government will become aware of the request for temporary refuge and possibly take retaliatory action. In hostile countries, the United States generally is unable either to assure a walk-in's safe conduct out of the country or continued safety in the country once they leave post premises. Thus granting temporary refuge may lead to a protracted stalemate, with the walk-in effectively residing in post premises. 'Residence within a post' of persons hostile to the host government could be a continuing source of controversy and lead to serious adverse effects on U.S. interests and unexpected financial implications for the post.
>
> 42. (U) In light of these factors, all foreign national walk-ins seeking refuge in a USG facility should be informed that post cannot ensure (a) their safe conduct out of the host country;

[43] http://www.theguardian.com/world/us-embassy-cables-documents/235430, accessed 22 May 2016.

[44] The heading is the following:

Wednesday, 18 November 2009, 17:29 S E C R E T SECTION 01 OF 11 STATE 119085 SECRET//NOFORN EO 12958 DECL: 11/17/2034 TAGS ASEC, CVIS, PINR, PREF SUBJECT: WALK-IN GUIDANCE FOR 2009: HANDLING FOREIGN NATIONAL WALK-INS, DEFECTORS, AND ASYLUM SEEKERS REF: (A) 08 STATE 061194 (B) 7 FAM 180 (C) 09 STATE 030541 (D) 04 STATE 061816 (E) 2 FAM 227 (F) 08 STATE 110175 (G) 09 STATE 110904 (H) 9 FAM 42.1 N4, PN2-5, and PN7.

[45] It helps us in the assessment of the authenticity if we compare the similarity of this text with the diplomatic records that we cite *infra* from the FRUS documentation in the Cardinal Mindszenty case.

(b) their future safety within the host country; or (c) their entry into the United States. They should also be informed that they may actually endanger their own welfare or interests by remaining at post.

46. (S/NF) Temporary refuge may be granted only if there is compelling evidence that the walk-in is in imminent physical danger for any reason, or in imminent danger of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion.

47. (S/NF) Within the kinds of cases described in paragraph 46, post should grant temporary refuge in those rare situations in which an individual faces not just imminent physical danger, but immediate and exceptionally grave physical danger, i.e., possible death or serious bodily injury, either in the host country or in another country to which the individual will be summarily returned by host- country authorities.

48. (S/NF) Also within the kinds of cases described in paragraph 46, post may at its discretion grant temporary refuge if the physical danger or the danger of involuntary repatriation as defined above is less serious but appears imminent. In determining if granting temporary refuge is appropriate in such instances, post should consider the following questions:

(a) How serious and immediate is the threat to the walk-in? (b) Will the threat to the individual increase or decrease if the walk-in is allowed to remain at post? (c) Can the individual leave or be required to leave post without being noticed? (d) If detection by host government authorities is inevitable and the alleged threat is from the host government, can the walk-in's presence and subsequent departure be explained in a manner that will not further endanger the individual? (e) What are the likely consequences of allowing the individual to temporarily remain at the post with regards to the individual, other persons in the host country, the security of the post, and the safety of U.S. Government personnel? (f) Is the individual of intelligence value to the United States? (g) Is the person facing immediate and exceptionally grave physical danger on account of peaceful political, religious, or humanitarian activities consistent with U.S. values and policies?

Summarising the above-quoted points, the humanitarian urgency seems to be the basic consideration for the exceptional admittance of persons in imminent danger because of manifest political or racial persecution of authorities or mobs.

As far as United States practice, we refer first to Private *Sukhanov*, a Soviet soldier who was admitted by the United States Embassy in Kabul (see under Sect. 2.4.2.).

In April 2012, the United States Embassy in Beijing granted refuge to Chinese dissident *Chen Guancheng*,[46] who enjoyed the hospitality until mid-May 2012, when according to a Chinese—United States agreement he could leave the Embassy and fly to the United States.[47]

A very recent example is that of *Meriam Ibrahim* (or Mariam Yahia Ibrahim Ishag). Ibrahim was a Sudanese woman sentenced to death for marrying a Christian man, an act that is considered as apostasy by the Sudanese law. A massive international protest followed the preparation and the subsequent phases of this 'criminal

[46] Alison Duxbury, 'Assange and the Law of Diplomatic Relations' (2012) 16 *ASIL Insights* 32, 1.
[47] http://en.wikipedia.org/wiki/Chen_Guangcheng, accessed 22 May 2016.

procedure' and the pronouncement of the judgment until, finally, a court ordered her release. However, even after she was released from jail and death row—where she gave birth to her second child—Ibrahim was prevented from leaving the country to go the United States. She got refuge at the United States Embassy in Khartoum on 26 June 2014.[48] At the end of July, with the involvement of the Italian Government, she and her family left Sudan and arrived finally in New Hampshire.

2.3 Examples from European Practice

2.3.1 Diplomatic Shelters During the Spanish Civil War (1936–1939)

Citing George Scelle, Denza refers to a large-scale sheltering during the Spanish Civil War (1936–1939), particularly by the Swiss Embassy.[49] The Argentinian Embassy sheltered a politician, Mrs. Pilar Primo de Rivera y Sáenz de Heredia, until she could join the Francoists.[50] The French Embassy did the same for José Ungria Jiménez[51] between 1936 and 1937.

According to Roncal, the following legations granted diplomatic asylum during the civil war: Argentina, 428; Austria, 137; Belgium, 287; Bolivia, 124; Brazil, 71; Colombia, 8; Cuba-Haiti, 600; Czechoslovakia, 204; Chile, 2000; Dominican Republic, 82; France, 900; Germany, 80; Hungary, 18; Mexico, 807; Norway, 900; Netherlands, 137; Panama, 847; Paraguay, 322; Peru, 600; Poland, 350–400; Romania, 718; Sweden, 174; Switzerland, 85; Turkey, 923; Uruguay, 257; Yugoslavia, 21—Total: 11,130.[52]

2.3.2 Historical Examples from Hungary

The examples are from the two tragic periods: the German occupation and the pro-Nazi coup in 1944 and the uprising of 1956.

[48] http://www.nbcnews.com/news/world/meriam-ibrahim-freed-again-sudan-flees-u-s-embassy-n142316, accessed 22 May 2016.

[49] Denza (n 3) 142.

[50] Francisco J Romero Salvadó, *Historical Dictionary of the Spanish Civil War* (Scarecrow Press 2013) 266.

[51] ibid 332.

[52] Antonio Manuel Moral Roncal, *An Analysis of Foreign Diplomatic Aid to the Catholic Clergy during the Spanish Civil War (1936–1939)* (2013) *Religions* 4, 96–115; doi:https://doi.org/10.3390/rel4010096, Table 1, 101 www.mdpi.com/2077-1444/4/1/96/pdf.

Refuge for Prime Minister Kállay at the Residence of the Turkish Envoy

During World War II, Hungary was in the camp of the Axis Powers but as the 'unwilling satellite' according to former American Ambassador John Flournoy Montgomery.[53] In 1942, Miklós Kállay was appointed Prime Minister by Governor Horthy, with the official mandate of ensuring continuity but with the secret mandate of preparing Hungary's surrender (though, if possible, only to the British or American powers in order to avoid Soviet occupation). The German secret services by their own agents were, however, informed about the results of the 'secret' peace negotiations, and Hitler decided to occupy Hungary and to force Governor Horthy to appoint a quisling government.

The plan was executed on 18–19 March 1944, when Horthy was invited to the Klesheim Palace, near Salzburg, upon Hitler's invitation. After Horthy's return, Kállay resigned and took refuge at the residence of the Turkish envoy, upon the latter's invitation, until 19 November 1944. Even if the building was encircled by the Gestapo, Kállay could receive relatives and guests rather easily. His correspondence, however, was photographed—as it became later clear—by the envoy's butler, the built-in agent of the Gestapo. When Turkey's diplomatic relations were declared broken with Germany, the maintenance of the refuge became more and more difficult for the envoy, and, finally, Kállay made the decision to leave. He remembered that Bogdan Filov, former right wing, pro-German and anti-Semitic Prime Minister and one of the regents of Bulgaria, had been surrendered to the Soviet Union after he took refuge at the Turkish legation of Sofia when Bulgaria left the Axis and joined the Allies in September 1944.[54]

After Kállay left the legation and surrendered, he was imprisoned and then deported to Mauthausen and Dachau.

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[53]The expression is taken from the title of the following book: John Flournoy Montgomery, *Hungary the Unwilling Satellite* (Devin-Adair Co 1947).

[54]Nicholas Kállay, *Hungarian Premier: A Personal Account of a Nation's Struggle in the Second World War*, foreward by CA Macartney, (Columbia University Press 1954). (Page reference from the Hungarian version: Kállay Miklós, *Magyarország miniszterelnöke voltam 1942-1944* (Europa Historia, Budapest 1991) 197-212, 209. [At this point, Kállay's memoirs should be slightly corrected. In fact, Filov asked for refuge not in the legation but at the envoy's villa-residence in the famous resort Chamkoria (today: Borovec) in the Rila Mountain on 8 September 1944. The envoy informed the new Bulgarian, coalitional Government led by General Georgiev of the grant of refuge and the Government accordingly ordered Filov's arrest on 12 September 1944. The Government arrested him and handed him, along with other arrested politicians, to the Soviet Army to be sentenced in Bulgaria by the so-called people's court (extraordinary tribunal for liquidating political enemies) and executed in February 1945- The authors of this article are grateful for the valuable help of Assistant Professor Dobromir Mihajlov for clarifying the events in Bulgaria, on the basis of the following book: Maria Zlatkova, *Bogdan Filov. Zhivot mezshdu naukata I politikata (Life between Science and Politics)* (Alteia 2007), 294-295

Refuge for Hungarian Nazi Leader Szálasi at the German Legation in Fall 1944

When Governor Horthy wanted to regain his margin of manoeuvring, in order to confine his temptation to leave the Axis and to surrender to the Allies, the Reich, continuously informed by pro-Hitlerist politicians and high-ranking military officers, decided to prevent it and to reverse Horthy's regime. Horthy ordered the arrest of the leader of the Hungarian pro-Nazi party, Szálasi, but the Hungarian police did not execute the order, and on 27 September 1944, the German legation offered shelter to the Hungarian Nazi leader Szálasi—together with some close collaborators like G. Kemény, G. Vajna and E. Kovarcz—who accepted the offer and enjoyed refuge until 15 October 1944, when the Governor's coup was prevented by the Germans and their Hitlerite allies in the Hungarian army. After Horthy was forced to resign, Szálasi obtained the post of Prime Minister, as well as the title 'leader of the nation'.

Refuge for the Horthy Family at the Nunciature

In the morning of 16 October 1944, SS troops surrounded the royal castle in the Hungarian capital in order to force Governor Horthy to resign and to annul the armistice and the declaration of breaking the alliance with Germany. Horthy's wife, daughter-in-law and grand-son and their nanny left the castle on his order, and a car brought them into the neighbouring building of the nunciature. Half an hour later, the SS entered the nunciature and looked for people hidden in the cave. They left soon after, leaving guards at the entrance. Veesenmayer, the German envoy, arrived some time later and asked the family to join the then resigned Horthy in the building of the German legation. After a short discussion, the family surrendered and accepted the German Schutzhaft (i.e., the SS internment at a castle near Weilheim).[55]

Diplomatic Missions Sheltering Hungarian Jews in Order to Protect Them from Deportation and Murder During the Holocaust (1944): A Series of Heroic Gestures and Humanitarian Assistance

After the occupation of Hungary by German troops on 19 March 1944, a quisling government directed by D. Sztójay was appointed by Governor Horthy. The Sztójay Government issued many decrees on the spoliation, ghettoisation and deportation of the Hungarian Jews. The accelerated deportation effected the whole countryside Jewish community in May–July 1944, but the Budapest Jewry was not yet forced to move into ghettos waiting for their deportation orchestrated by the Hungarian public

[55] Edelsheim Gyulai Ilona, *Becsület és kötelesség (Honour and Obligation)* (Europa 2000), 330-331 (The author's name covers the Governor's daughter-in-law whose memoirs were published some years before her death).

administration, the Hungarian gendarmerie and Adolf Eichmann, the Nazi 'specialist' of the so-called Endlösung with his few collaborators.

Foreign countries tried to stop these events, the outcome of which could be calculated by those who could read the so-called Auschwitz protocol, which had been prepared on the basis of the information furnished by two escaped prisoners.[56] The Holy See, the Swedish King and some governments exercised pressure on Horthy to stop the deportation, and in Budapest the accredited diplomatic missions of neutral States tried to save as many people from the Holocaust as possible. In these operations, the sheltering in diplomatic premises had also its role to play.

Under the quisling Sztójay Government, no ghetto was established for the Jewish population of Budapest, but its members had to move into the so-called David shield (or yellow star) houses, which were ordered to be appointed in each district. Horthy decided not to let the Budapest Jewry be deported, removed Sztójay and appointed the Lakatos Government (with the mission of forsaking the war). After the successful Hungarian Nazi plot of 15 October 1944, organised by the German legation, forced Horthy to resign, the new government, headed by Szálasi 'as nation-leader and prime minister', turned its back on ghettoisation, being the antechamber to deportation.

The diplomatic missions of neutral countries in Budapest intervened with the new government and succeeded to pass agreements ensuring that they continued to issue 'protecting briefs' (*Schutzpass* in German) for Jewish people who had declared their intention to immigrate or having close family ties or economic interest *vis-à-vis* their countries or countries represented by them.[57] This was due to the lack of diplomatic representation for Jewish people falling into this category in Budapest.

In order to better protect those who were persecuted and faced threats to their life—and acknowledging the legitimate fear that the protection afforded by identity cards alone may be insufficient—the missions also agreed to temporarily settle the holders of these documents in buildings under the protection of their governments. Due to the large number of people concerned, traditional diplomatic buildings were insufficient, and the legations bought or hired buildings and flats. These buildings were put under their protection and often bore the diplomatic shield of the mission and inscriptions like 'building under the protection of the Swiss government' or 'building under the protection of the Kingdom of Sweden'.

The initiators of this idea were probably Carl Lutz, the Swiss Vice-Consul, and Friedrich Born, the International Committee of the Red Cross (ICRC) representative.

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[56]'The Auschwitz Protocol: The Vrba-Wetzler Report' (transcribed from the original OSI report of the United States Department of Justice & the War Refugee Board Archives, Holocaust Education & Archive Research Team) http://www.holocaustresearchproject.org/othercamps/auschproto.html, accessed 22 May 2016.

[57]This was the case of El Salvador. Its consul in Bern, Jose Arturo Castellanos with his deputy George Mantello were in close contacts with Carl Lutz, the Swiss consul in Budapest charged also with delivery of El Salvadorian "citizenship certificates" (http://www.raoulwallenberg.net/saviors/others/el-salvador-rescuing-country/, accessed 22 May 2016). In the same manner, the Portuguese legation worked also for Brazil.

The world is much more familiar, however, with Raoul Wallenberg, from the Legation of Sweden. Mention should also be made of the Portuguese Sampayo Garrido and Carlos de Liz-Teixeira Branquinho, the Spanish Angel Sanz Briz and his successor (the otherwise Italian by birth), Giorgio Perlasca, and the nuncio Angelo Rotta.

The temporary protection buildings were located mostly close to each other, and they were mentioned in the contemporary papers and legal texts as the 'international ghetto'.[58] Some subsections of the diplomatic missions were also known under different titles (e.g., office of enquiry for disappeared, office of relief and humanitarian assistance, ICRC orphanage) where persecuted persons could be hidden as employees of the mission.

These shelters offered a certain protection from the chaotic rule of the Hungarian Nazi 'Arrow Cross' Party, under which armed insurgents and members of the Party killed and spoliated. Often, the physical presence of diplomats was also necessary to prevent atrocities and robberies.

The exact number of the people saved in this way cannot be established with certainty, but several tens of thousands rescued are attributed to them. It is assumed that Carl Lutz saved 62,000 lives; Raoul Wallenberg, 30,000; Friedrich Born, 15,000; Angelo Rotta, 15,000; Giorgio Perlasca, 5200; Angel Sanz Briz, 5000; Garrido and Branquinho, 1000. The humanism and bravery of these men cannot be challenged, and most of them are recognised as 'The Righteous Among the Nations' at Yad Vashem.

It is, however, important to consider how this extended interpretation of the diplomatic premises evolved in these tragic weeks to cover more than a hundred buildings.[59]

The special status of these temporary protection buildings cannot be explained only by the classic rules of diplomatic law. On 20 October 1944, Veesenmayer, the German envoy, advised Hungarian Foreign Minister Kemény to reject the proposals of the Budapest diplomatic missions for being contrary to international law.[60] Notwithstanding this, the Szálasi Government entered into talks with them—probably out of their need to seek official recognition. As a coup d'état government widely known for coming to power by the military help of Germany, the regime wanted to break its isolation. In the end, however, only Spain, Turkey and the Holy See recognised the government. Sweden, for its part, succeeded to delay the issue of recognition ad infinitum. The diplomatic missions used other tools as well: threats and pressure concerning the future. Bribery was also used on a large scale—though

[58]For those who know Budapest, the international ghetto or small ghetto could be located to the north, from the Margit bridge at the Pest side of the capital.

[59]According to László Karsai, the leading expert on the Hungarian Holocaust, 76 buildings were protected by the Swiss legation and 36 by the Swedish. (Source: László Karsai, *Az ismeretlen Wallenberg (The Unknown Wallenberg)*, (Népszabadság 2007) p 13. The ICRC had more than 30 orphanages.

[60]ibid.

there were certainly those in the public administration and police who acted according to their own conscience, religious belief, humanism or courage.

Prime Minister Imre Nagy and His Fellows at the Yugoslav Embassy in Budapest in 1956

The reformist communist Imre Nagy, Prime Minister of the Hungarian Revolution and the politician responsible for introducing the multiparty system to Hungary, acted as Prime Minister of a coalitional government and declared Hungary's neutrality. He condemned the Soviet military invasion of Budapest on 4 November 1956 and declared that 'our troops are in combat' but then fled with several members of his government and their relatives to the Embassy of Yugoslavia. The Embassy received them without qualifying the situation as asylum or refuge. They tried to convince Nagy to step down and recognise the new Kadar government[61] and urged the revocation of the above-mentioned decisions.[62] On 22 November 1956, Nagy and his companions left the Embassy upon a promise of *safe conduct.* They were, however, driven directly to a military airport and forced to leave the country the next day to be interned in Snagow (Romania). Nagy and some of his comrades were brought back from Snagow in April 1957 to face criminal investigation and trial. They were sentenced to execution in 1958 or to long-term prison sentences.

Cardinal Mindszenty at the United States Embassy in Budapest Between 1956 and 1971

József Mindszenty, cardinal, archbishop of Esztergom and *ex lege* first archbishop (i.e., Primate) of Hungary, was imprisoned by the Hungarian Nazis in 1944–1945 and again in 1949–1955 by the communist power and then lived under house arrest until he was liberated by a unit of the army during the 1956 revolution on October 30.

On 4 November 1956, when the Soviets invaded Hungary, József Mindszenty—together with Egon Turchányi, his secretary and counsellor—walked to the United

[61]Janos Kadar was also a high ranking communist party member of Nagy's Government who accepted to lead a Moscow oriented policy. He stayed in power until 1988/1989 as General Secretary of the Communist Party.

[62]In a secret meeting on 2-3 November at the Adriatic Brioni Island, the Yugoslav leader Tito convinced the Soviet Khrushchev to trust Kadar and apparently also offered cooperation to isolate Nagy during the changing of the regime. On 8 November, the Yugoslav Foreign Minister Ranković made a formal proposal to Nagy to step down, thus contributing to the normalization of the situation. For more details, see e.g.: Johanna Cushing Granville, *The First Domino: International Decision Making During the Hungarian Crisis of 1956* (Texas A&M University Press 2004). See the Chapter on the "Agreement" at Brioni, 105-110, and in particular 109. (The original source is work of the Yugoslav Ambassador to Moscow: Veljko Micunovic, *Moscow Diary* (with Introduction by George Kennan) (Doubleday 1980)).

States Embassy and asked for refuge. In his diary, he chose the United States Embassy because it was the closest embassy to the Parliament where he was invited to a stock-taking meeting. The subsequent events are depicted both in the Mindszenty Memoirs[63] and the American diplomatic records as published in the Foreign Relations of the United States series (FRUS).[64]

According to Mindszenty, he got Eisenhower's permission for 'asylum' within half an hour, while Turchányi[65] received his within 4 h. There were signs that someone (Imre Nagy or one of his staff) had warned the Embassy that Mindszenty might seek refuge on 3 November.[66] While they were waiting, Mindszenty recognised Béla Kovács (former Secretary General of the Smallholders' Party, arrested in 1947 by the Soviet Army and deported to the Gulags until 1955, brought back to Hungary for the continuation of his sentence (1955–April 1956), a member of Imre Nagy's Government in the Revolution) also waiting at the Embassy. Kovács had also asked for refuge, but on 5 November he was asked by the diplomats to leave.[67]

The FRUS documents refer to a warning from Washington that Mindszenty and Turchányi 'were about to seek asylum at the American Legation'. When asked for his advice, Bearn replied that while the United States opposed asylum in principle, it was nevertheless justified in this case since 'it involved hot pursuit endangering human life'.[68] One FRUS reference cites a cable message as follows: 'Cardinal Mindszenty wishes to seek asylum with Legation. Approval granted.'[69]

It is important to cite the contemporary American perception of diplomatic asylum in the FRUS: 'On November 8, Bearn sent a memorandum to Murphy on the subject of asylum for the Cardinal. He noted that the United States in the past had "strongly disapproved of the principle of diplomatic asylum" but had been willing to afford temporary refuge in order to save human life.' Section 225.2 of the Foreign Service Regulations ('Restrictions on Extending Asylum') was cited. It reads:

> As a rule, a diplomatic or consular officer shall not extend asylum to persons outside of his official or personal household. Refuge may be afforded to uninvited fugitives whose lives are in imminent danger from mob violence but only for the period during which active danger continues. Refuge shall be refused to persons fleeing from legitimate agents of the

[63]Mindszenty József, *Emlékirataim* (Apostoli Szentszék Kiadója 1989). English version: *Memoirs by Jozsef Cardinal Mindszenty* (Widenfeld and Nicholson 1974).

[64]John P. Glennon (ed), FRUS 1955-1957, Volume XXV, Eastern Europe (United States Government Printing Office 1990).

[65]Turchányi left the building several times but he could not escape the arrest and he was condemned to life imprisonment.

[66]Mindszenty, (n 63) 443-444. (The word "asylum" was used by Mindszenty.)

[67]ibid 444, Wailes, the chargé d'affaires telegraphed as follows: "Kovacs apparently left but may come back and I will let him in vestibule with his lieutenants with firm understanding it is tentative and no asylum is granted". FRUS XXV, 384.

[68]FRUS XXV, 386.

[69]FRUS XXV, 386-387.

> local government. In case such persons have been admitted to the diplomatic or consular premises, they must be surrendered or dismissed from such mission or consular office.

Since the Cardinal's life had been in jeopardy as he was in flight from a foreign invader, the provision of sanctuary was considered justified.[70]

The minutes of brainstorming in the White House also evoked the ambiguity of the United States position in the matter of diplomatic asylum: '...Cardinal Mindszenthy is in our legation. We will refuse to turn him over. We will try to keep him quiet. Our international position is not too strong on trying to safeguard him.'[71]

As it is well known, Mindszenty lived at the Embassy until 1971, and these chapters of his memoirs are very bitter, especially concerning the rules isolating him and restricting his contact with Hungary to his mother. While, in the first day of his admission, the American diplomats even organised a press conference for him, it was forbidden for him to meet the Hungarian employees of the Embassy. However, he could perform his functions as a priest at the Embassy and receive visits of other Ambassadors or diplomats accredited in Hungary.

Mindszenty was granted refuge until the conclusion of an arrangement with the Hungarian authorities; however, this depended on the success of discrete negotiations between Hungary and the Holy See. The outcome of these talks was that the Curia invited Mindszenty to move to Vienna or to Rome and declared the seat of the archbishop of Esztergom to be vacant in the meantime.

Mindszenty's isolation was premeditated and perhaps also used as a tool to accelerate the Cardinal's decision to accept the offer to move to Rome. (From time to time, it was suggested that it would be useful to convince Mindszenty to accept transmitting verbal messages through American diplomats instead of sealed letters.[72]) Mindszenty did not want to submit himself to such control, and in order to avoid conflicts, he voluntarily restricted the number of his briefs. At other parts of the memoirs, it is revealed that Mindszenty's returned tuberculosis was considered a threat to the health of the staff of the legacy, and this made his isolation even stricter *vis-à-vis* the American staff.[73] In fact, Mindszenty detected more and more signs that the United States Government—acting in the policy of the *détente*—would be glad if he decided to leave the Embassy.[74]

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[70]FRUS XXV, 387.

[71]5 November 1956. Participants: Eisenhower, Nixon, Phleger, Hagerty, Goodpaster. Phleger's assessment. FRUS XXV, 394.

[72]"Washington, January 24, 1957: Since Cardinal Mindszenty was granted refuge in our Legation in Budapest our position, which has been repeatedly made known to him, has been that he could not be allowed to use our Legation as a base of operation. (...) A possible solution would be to accept occasional oral messages of a brief and personal nature for transmission". FRUS XXV, 555-556.

[73]Mindszenty, (n 63) 479.

[74]Mindszenty, (n 63) 473, 479.

2.3.3 Diplomatic Shelter Granted by Embassies During the 1968 Invasion of Czechoslovakia by Troops of the Warsaw Pact

The Canadian Embassy in Prague sheltered foreign persons, mostly Czechoslovak persons who had fled 'due to genuine fears of concentration of foreign armed forces in the city' when the invasion crushed the so-called Prague Spring (1968) of Dubček.[75]

The official Canadian position was formulated *in abstracto* in 1961:

> . . .our consulates and diplomatic missions abroad may not grant asylum on the premises of a post except in extra-ordinary circumstances. The sort of circumstances that we have in mind is where temporary asylum would be granted on humanitarian grounds to a person, whether a Canadian citizen or not, if he is in imminent personal danger to his life during political disturbances or riots, with care being taken to ensure that the humanitarian character of the mission's intervention should not be misunderstood.[76]

2.3.4 Diplomatic Shelter for Soviet Dissidents in Moscow

Seven Pentecostal dissidents (the Vashchenko family and the Chmikhalov family) lived at the United States Embassy in Moscow between 1978 and 1983 until Soviet consent to their emigration was acquired.[77]

2.3.5 Romanian Citizens Belonging to the Hungarian Minority in the Hungarian Embassy in Sofia (1988–1989)

In its last years, the rule of Romanian communist dictator Nicolae Ceaușescu turned into megalomania. A general policy was launched under the neutral title 'systematisation policy' threatening the disappearance of the visible cultural and architectural monuments of the multicultural Romania. The different linguistic minorities of Transylvania (western Romania that had belonged to Hungary before 1918) were deeply concerned as the policy threatened the demolition of their traditional houses and villages and their forced resettlement in concrete block dwellings of neighbouring cities. Moreover, the contact that the minority of Hungarians living in Romania had with Hungary and family members living on the other side of the border was continuously hindered. (At the same time, Romania made emigration possible for both the German-speaking minority and the Jewish minority,

[75]Simona Leonavičiüte, 'Diplomatic Asylum in the Context of Public International Law' (Masters thesis, Mikolas Romeris University 2012), 47. http://vddb.library.lt/fedora/get/LT-eLABa-0001:E.02~2012~D_20120703_133030-41044/DS.005.1.01.ETD.

[76]Cole Charles V, 'Is There Safe Refuge in Canadian Missions Abroad?' (1997) 9 (4) *International Journal of Refugee Law* 659, cited by Leonavičiüte, ibid 47.

[77]Leonavičiüte, (n 75) 46.

pending a per-capita payment by the Federal Republic of Germany and Israel under the title compensation for costs of schooling.)

Against this background, 12 people belonging to the Hungarian minority of Romania took shelter in the Hungarian Embassy in Sofia for a possible free immigration into Hungary. They stayed there between 14 September 1988 and 17 February 1989, when, according to an ad hoc Hungarian–Bulgarian–Austrian–ICRC agreement, they were brought through Vienna by Austrian Airlines to Hungary.

2.3.6 The East Germans at the Central European Embassies in 1989

When Gorbachev's Perestroika challenged the credibility of the hard-line communist rule, hundreds of German Democratic Republic (GDR) citizens wanted to 'emigrate' to the Federal Republic of Germany (FRG), which was formerly allowed to very few people. A catalyst event for these attempts was the highly publicised case of Berhnard Marquardt, who was allowed to leave East Germany after seeking refuge in the U.S. Embassy in East Berlin.[78] Various measures by the embassies and East German authorities made it more difficult to apply for asylum in East Berlin diplomatic buildings. As a result, many applicants entered into different diplomatic missions (mainly the German embassies in Budapest, Prague and Warsaw) in order to wait for an 'exit visa' from those countries. Some of them applied for political refugee status, but most of them wanted only to leave the GDR to live in West Germany. Their number reached 100–150 per mission, and they at least hindered if not completely paralysed the ordinary functioning of the diplomatic and consular buildings.[79] In Budapest, for example, the German Embassy had to rent some neighbouring houses from private persons to host the people seeking emigration normally.

Finally, the Hungarian Government made an agreement with the ICRC and FRG to bring 101 East Germans by plane to Vienna on 24 August 1989. Hundreds of East Germans waiting in private hostels and camps could leave Hungary when the border was opened at the Pan-European Picnic (Sopron, 19 August 1989). As for the GDR citizens in the diplomatic missions in Prague, it was agreed that they would return formally to the GDR for some days with the promise that their emigration visa applications would be accepted and they would soon continue their trip to the FRG. (Thousands of East Germans wanted to jump onto the operation's special charter trains hired by the embassies, but such attempts were brutally obstructed. The same

[78]John Benjamin Roberts, 'Diplomatic Asylum: An Inappropriate Solution for East Germans Desiring to Move to the West' (1987) *Temple International and Comparative Law Journal*, 236 and 237.

[79]ibid, 231 and 234.

special charter train operation was used also in Warsaw.)[80] Some months later, the GDR collapsed and Germany was unified.

2.3.7 Albanians in the Embassies in Tirana 1989

A similar situation occurred in Tirana in the last months of the rule of communist dictator Enver Hodza, and hundreds of Albanians asked for refuge and emigration possibilities.[81] (According to Leonavičiüte, 6000 people ran into the Belgian, Dutch, Norwegian, Polish and Turkish embassies.[82]). Police forces made futile attempts to prevent them from entering neighbouring countries. Eventually, the situation was resolved by the sudden collapse of the regime.

2.3.8 Refuge in the Romanian Embassy in Chişinău

In September 2008, the Romanian Embassy in Chişinău accommodated the sons of Moldavian politician Sergiu Mocanu, chief counsellor of Vladimir Voronin, the former head of State of Moldova. They were being criminally prosecuted for a brawl in a disco, but they alleged that they were being persecuted because of their father's political activities. The Mocanu brothers stayed for a year at the Embassy, leaving only when a Moldavian court changed their pre-trial detention warrant to a warrant for house arrest.

2.3.9 Julian Assange in the Ecuador Embassy in London

The Australian national Julian Assange has become famous for having created the WikiLeaks homepage, where he published thousands of classified, secret and top-secret documents, most of them written by American diplomats on matters concerning their receiving States and the politicians and policies thereof. The published documents mentioned intelligence activities also within NATO allies and a general taping of governmental and private phone conversations. Many documents concerned Camp Delta of Guantanamo and the treatment of its detainees.

Despite evident warnings, Assange continued and enlarged his activity. In 2010, he was under investigation in both the United States (where intelligence defectors Manning and Snowden were also operating and providing sources for WikiLeaks) and Sweden, where an Interpol arrest warrant was issued against him for sexual offences allegedly committed during a temporary stay in Sweden. According to other sources,[83] a European arrest warrant was issued for sexual molestation and rape, and

[80] Denza (n 3) 142.

[81] ibid.

[82] Leonavičiüte, (n 75) 48.

[83] Alison Duxbury, 'Assange and the Law of Diplomatic Relations' (2012) 16 *ASIL Insights* 32 1.

Assange unsuccessfully applied against the allegations before the Svea Court of Appeal (in Sweden) on 24 November 2010.[84] On or about 19 June 2012, Assange entered the building of the Embassy of Ecuador in London, where he has been living ever since. According to Ricardo Patiño, Minister of Foreign Affairs, Mr. Assange applied for political asylum.[85] Some days after his arrival, it was accepted.[86] Several

[84] http://en.wikipedia.org/wiki/Julian_Assange.

[85] http://en.wikipedia.org/wiki/Julian_Assange#cite_note-246.

[86] News Release No. 042 *Statement of the Government of the Republic of Ecuador on the asylum request of Julian Assange*, 10 May 2013: "(...) The Government of Ecuador, faithful to the asylum procedure, and attributing the greatest seriousness to this case, has examined and assessed all the aspects implied, particularly the arguments presented by Mr. Assange backing up the fear he feels before a situation that this person considers as a threat to his life, personal safety and freedom. It is important to point out that Mr. Assange has made the decision to request asylum and protection from Ecuador because of the accusations that, according to him, have been formulated for supposed "espionage and betrayal" with which the citizen exposes the fear he feels about the possibility of being surrendered to the United States authorities by the British, Swedish or Australian authorities, thus it is a country, says Mr. Assange, that persecutes him because of the disclosure of compromising information for the United States Government. He equally manifests, being "victim of a persecution in different countries, which derives not only from his ideas and actions, but from his work by publishing information compromising the powerful ones, by publishing the truth and, with that, unveiling the corruption and serious human rights abuses of citizens around the world". (...) That, according to several public statements and diplomatic communications made by officials from Great Britain, Sweden and the United States, it is deduced that those governments would not respect the international conventions and treaties and would give priority to internal laws of secondary hierarchy, contravening explicit norms of universal application; (...) Accordingly, the Ecuadorian Government considers that these arguments back up Julian Assange's fears, thus he can be a victim of political persecution, as a consequence of his determined defense to freedom of expression and freedom of press, as well as his position of condemn to the abuses that the power infers in different countries, aspects that make Mr. Assange think that, in any given moment, a situation may come where his life, safety or personal integrity will be in danger. This fear has leaded him to exercise his human right of seeking and receiving asylum in the Embassy of Ecuador in the United Kingdom. (...) Julian Assange's lawyers requested the Swedish justice to take statements of Julian Assange in the premises of the Ecuadorian Embassy in London. Ecuador translated officially to the Swedish authorities its will to facilitate this interview with the purpose of not intervening or obstacle the judicial process that is carried out in Sweden. This is a perfectly legal and possible measure. Sweden did not accept it. On the other hand, Ecuador searched the possibility that the Swedish Government would establish guarantees to avoid the onward extradition of Assange to the United States. Again, the Swedish Government rejected any commitment on that sense. (...) With these antecedents, the Government of Ecuador, faithful to its tradition to protect those who seek shelter in its territory or in the premises of its diplomatic missions, has decided to grant diplomatic asylum to the citizen Julian Assange, on the basis of the request presented to the President of the Republic, through a written communication dated in London on June 19, 2012, and complemented by a communication dated in London on June 25, 2012, for which the Ecuadorian Government, after carrying out a fair and objective assessment of the situation exposed by Mr. Assange, attending his own sayings and argumentations, intakes the requester's fears, and assumes that there are indications that allow to assume that there may be a political persecution, or that such persecution may be produced if the opportune and necessary measures are not taken to avoid it. (...)"

http://cancilleria.gob.ec/statement-of-the-government-of-the-republic-of-ecuador-on-the-asylum-request-of-julian-assange/?lang=en, accessed22 May 2016.

times, Assange has given interviews or taken press conferences from the window of the Embassy.[87]

2.4 Asian Examples

2.4.1 The Persian Shah's Wives at the British Embassy at the End of the Nineteenth Century

Satow refers to a case when 300 wives of the Shah entered the building of the British legation in order to protest against the Shah's decision to marry the daughter of his gardener. The details were written in the biography of Mortimer Durand serving in Tehran between 1894 and 1900.[88] According to Denza, 'taking shelter in a foreign mission to emphasize grievances was particularly a custom in Persia'.[89] In this sense, it was rather a solemn demonstration of the upset of the emperor's wives than a real will to seek protection.

2.4.2 A Soviet Soldier in the United States Embassy in Kabul

During the Soviet invasion of Afghanistan in 1979, surrender was punishable as a military crime. Alexandr Wasilyevich Sukhanov, a Soviet soldier, wanted to return to the Soviet Union without having to face punishment or persecution. He sought refuge in the American Embassy in Kabul on 31 October 1985, and shortly after, on 5 November 1985, in order not to hamper an imminent meeting between Reagan and Gorbachev, an American–Soviet agreement was reached for his safe return.[90]

2.4.3 North Korean Defectors in Embassies Accredited to China and the Chinese Position

Dozens of North Koreans have tried to leave North Korea, one of the most militarised countries of the world. As the immediate neighbourhood of foreign embassies in Pyongyang is strongly protected and controlled, those who would like to emigrate from the communist country try to leave while taking tourist trips in China—the only foreign country to which visits are allowed by the regime.

[87] 'Profile: Wikileaks founder Julian Assange' (BBC News) http://www.bbc.com/news/world-1104781122, accessed 22 May 2016.

[88] Sir Ivor Roberts, (n 38) s 8.26.

[89] Denza, (n 3) 142.

[90] Leonavičiüte *(n 75)* 46.

See also http://articles.orlandosentinel.com/1985-11-05/news/0340230089_1_sukhanov-soviet-soldier-soviet-union, accessed 22 May 2016.

Defectors have tried to enter into the Japanese, Canadian, South Korean and United States embassies, sometimes successful, sometimes not. As we know from reports of Human Rights Watch, the Chinese police in Beijing and some consular towns tolerate these defections at times but on occasion have intervened very strongly. For example, on 8 May 2002, the Chinese police entered Japan's consulate of Shenyang to capture five North Koreans seeking refuge. In May 2002, 24 North Korean refugees were arrested by the Chinese. The Chinese courts later released them on humanitarian grounds and did not put any obstacles in the way of their emigration into South Korea.[91]

In 2002, two defectors entered the United States Embassy, 15 entered the German Embassy and 25 the Spanish mission.[92] (In Vietnam, nine North Koreans were sheltered by the Danish Embassy in Hanoi).[93]

At the time, the Chinese authorities issued a document clarifying their position *vis-à-vis* diplomatic refuge: they do not recognise it and moreover expected the cooperation of embassies in putting an end to this form of emigration and asylum seeking:

> (2002) LINGSIZI NO. 694
>
> To all foreign embassies in China:
>
> The Consular Department of the Ministry of Foreign Affairs of the People's Republic of China presents its compliments to all foreign embassies in China and has the honor to inform the following:
>
> Recently the events occurred in succession that the third country nationals intruded into foreign embassies and consulates in China. This directly endangered the security of the embassies and consulates concerned and disturbed their routine work. It also provoked Chinese law and affected the public security and stability of China. Upon the request of many foreign embassies and consulates in China, the Chinese side has taken a series of measures to protect the security of foreign diplomatic and consular representing institutions. These security measures are in conformity with the interests of both sides. In the future the Chinese side will make great efforts as always to provide safe working and living environment for foreign embassies and consulates, and conscientiously undertake due obligations as receiving country in accordance with 'Vienna Convention of Diplomatic Relations' and 'Vienna Convention of Consular Relations'. According to the principle of international law that embassies and consulates has no right of asylum, the Chinese side also wishes embassies concerned to render cooperation and inform the Consular Department of Chinese Ministry of Foreign Affairs in case the illegal intruders were found, and hand over the intruders to the Chinese public security organs.

[91] 'IV. Getting beyond China: The International Community and its Obligations' in *The Invisible Exodus* (Human Rights Watch, 2002) http://www.hrw.org/reports/2002/northkorea/norkor1102-03.htm, accessed 22 May 2016. See also: Suh Dong-man, *DPRK Briefing Book: North Korean Defectors and Inter-Korean Reconciliation and Cooperation*, (Institute of Foreign Affairs and National Security, South Korea, 7 May 2002).

http://nautilus.org/publications/books/dprkbb/refugees/dprk-briefing-book-north-korean-defectors-and-inter-korean-reconciliation-and-cooperation/#axzz36EX8F9Sp, accessed 22 May 2016.

[92] Leonavičiüte, (n 75) 48.

[93] ibid.

> The above-mentioned principle is also applicable in dealing with the intruders into foreign consulate institutions.
> May 31, 2002, Beijing.[94]

For the case of Chen Guancheng in the United States Embassy in Beijing, see above in Sect. 2.2.

There has also been a report—uncertified yet by the mainstream Western media—stating that dozens of Saudi militants fighting in Syria have surrendered themselves to the Saudi Embassy in Lebanon in order to be sent back home. The militants—fighting for al-Qaeda-linked group Nusra Front—allegedly fled to Lebanon after the Syrian Army took control of the strategic Qalamun area. Reports say the Saudi Embassy has asked the Lebanese authorities to facilitate the entry of any Saudis escaping from Syria.[95]

2.5 *African Examples*

2.5.1 The Durban Six

On 13 September 1984, under the apartheid regime, five persons (Arcie Cumede, Mewa Ramgobin, George Sawpershad, MJ Naidoo and Billy Naier) asked for refuge at the British consulate in Durban. On 17 September 1984, they were joined by another, Davades Paul Davids. They all belonged to different anti-apartheid organisations, also known as the pro-Mandela alliances. The British consul did not want to keep them indefinitely, and they asked for refuge at the embassies in Pretoria of the United States, France, the Netherlands and Germany but were refused. The British consul convinced them to leave the consular building despite the fact that no safe conduct had been promised by the apartheid government. The police took them upon their leaving the consulate. They were sentenced to death and executed.[96]

2.5.2 Meriam Ibrahim's Refuge in the United States Embassy in Khartoum

See under Sect. 2.2.

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[94]'APPENDIX B: LETTER FROM CHINESE MINISTRY OF FOREIGN AFFAIRS TO FOREIGN EMBASSIES, MAY 31, 2002' in *The Invisible Exodus* (Human Rights Watch, 2002) http://www.hrw.org/reports/2002/northkorea/norkor1102-03.htm, accessed 22 May 2016.

[95]'Saudi Embassy in Lebanon shelters insurgents fleeing Syria' (Press TV, 20 April 2014) http://www.dailymotion.com/video/x1pwr4a_saudi-embassy-in-lebanon-shelters-insurgents-fleeing-syria_news, accessed 22 May 2016.

[96]Susanne Riveles, 'Diplomatic Asylum as a Human Right: the Case of the Durban Six' (1989) 11 *Human Rights Quarterly*, 139-140.

3 Lessons to Be Taken from the Examples

After having studied, *ratione temporis*, the above-mentioned 'precedents', it can be concluded that the adoption and the entry into force of the 1961 Vienna Convention did not significantly change the attitude of States *vis-à-vis* diplomatic asylum and diplomatic shelter. This approach can be summarised as follows:

1. Contrary to the common assumptions, no major difference can be felt between the approaches of the States of South America and of other continents.[97]
2. Territorial (or receiving) States do not accept that a person persecuted has a subjective right of free emigration (safe conduct) on the basis that they have successfully entered the diplomatic premises of a (sending) State.[98]
3. Territorial (or receiving) States generally consider the admittance of a person into a diplomatic building to be illegal. They nevertheless tolerate the situation and refrain from exercising reprisals and—importantly—from entering and capturing *manu militari* the 'refugees'.[99] Different forms of reprisals or retorsions can be and sometimes are effectively exercised.[100]
4. Sending States are conscious of the formal illegality and inadequacy of the available justifications for the given situation from the point of view of diplomatic law.
5. Nevertheless, urgency and humanitarian considerations, state of necessity or at least moral obligations are (and can be) often invoked for the justification of sheltering.[101]
6. Common criminals do not get refuge in embassies. The diplomatic missions usually hand them to the territorial (receiving) States.[102]
7. In case of foreign military intervention, occupation, civil war or coup d'état, humanitarian considerations and urgency are expressed with acuity. In case of foreign military occupation, the State of the occupying forces will be in a similar situation as the territorial (receiving) State. Because of the illegality of the foreign military intervention and the manifest and per se unconstitutionality of

[97]On the general position see eg.: Neale Ronning, *Law and Politics in Inter-American Diplomacy* (John Wiley & Sons, Inc 1963) 95; John Benjamin Roberts (n 78) 244. On the differences within Latin America see e.g. Angela M. Rossitt, 'Diplomatic Asylum in the United States and Latin America: A Comparative Analysis' (1987) 13 *Brooklyn Journal of International Law* 131.

[98]See e.g.: Sir Ivor Roberts, (n 38, s 8.25; Duxbury (n 83); Neale Ronning, ibid, 95; John Benjamin Roberts (n 78) 241.

[99]See e.g.: Sir Ivor Roberts, (n 38) s 8.25, Neale Ronning, ibid.

[100]See e.g. John Benjamin Roberts (n 78) 237.

[101]Convention on Diplomatic Asylum (Caracas Convention), 28 March 1954, art 3; See also e.g.: Suzanne Riveles, 'Diplomatic Asylum as a Human Right: The Case of the Durban Six' (1989) *Human Rights Quarterly* 142, 158.

[102]See e.g.: Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn Routledge 1997), 126, Neale Ronning (n 97) 90 and 96.

the coup d'état, the new powers generally also feel the importance of showing tolerance vis-à-vis diplomatic shelters.[103]

8. The typical context of diplomatic shelter is bilateral. (The sending State's mission grants shelter to a citizen of a receiving State.) Nevertheless, triangular, quadrangular or even more complex situations are not at all rare. For example, a third country occupies the receiving State whose citizen gets refuge (e.g., Kállay, Mindszenty, Nagy, etc.). Another form of a triangular situation is when the foreign citizen would like to emigrate to a third country but mistrusts the territorial State and is afraid of being refouled to his country of origin (e.g., the 1988–1989 Central-European cases). The quadrangular or maybe pentangular version is symbolised by the Assange case, where the Australian citizen asked for shelter at the Ecuadorian mission out of fear that he would be extradited to the United States or surrendered first to Sweden and from there extradited to the United States. The bilateral, triangular, etc. version can go through metamorphosis during the time. (In the Mindszenty case, at the beginning, the USSR and the Soviet Army could be considered as the third angle, but at the end, this was the Holy See.)
9. Numerous authors consider that the philosophy behind or the actual letter of certain human rights laws should also be taken into consideration.[104] The most cited relevant rules are the 1951 Refugee Convention (and especially the non-refoulement principle[105]), the European Convention on Human Rights (concerning the responsibility of the extraditing State for the death or other harm occurring in the requesting State and the jurisprudence on arts. 2 and 3 of the ECHR), the International Covenant on Civil and Political Rights, the Inter-American Convention on Human Rights, etc.
10. It depends on States whether the head of the mission is entitled to take the decision on admission or whether this remains in the capacity of the Ministry of Foreign Affairs of the sending State. Apparently, most sending States are confident that the head of the mission is in such a position as to better evaluate the local situation and take the decision.[106] On the other hand, the head of the mission is entitled only to offer a very short, provisory shelter.

[103] See: Neale Ronning, ibid 90.

[104] See e.g.: Robert Kogod Goldman and Scott M Martin, 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law' (1983) 5 *Human Rights Quarterly* 3, 302, 309; M Heijer, Europe and Extraterritorial Asylum (Hart Publishing 2002) (Chapter 4, Extraterritorial Asylum under International Law, https://openaccess.leidenuniv.nl/bitstream/handle/1887/16699/000-Heijer-07-03-2011.pdf,)145; John Benjamin Roberts, (n 78) 239 and note 141 at 251; Suzanne Riveles (n 101), 142; Anthea J Jeffery, 'Diplomatic Asylum: Its Problems and Potential as a Means of Protecting Human Rights' (1985) 1 *South African Journal of Human Rights* 10, 23; Arturo E Balbastro, 'The Right of Diplomatic Asylum', (1959) 34 *Philippine Law Journal* 343, 344,350, 367.

[105] See e.g.: M. Heijer, ibid 130; Suzanne Riveles, (n 104) 152.

[106] See e.g.: John Benjamin Roberts (n 78) for the actual application in the Saulo case see Arturo E Balbastro (n 104) 352.

11. Generally, sending States approve the decision to grant refuge on the spot.[107] It is, however, shocking that in situations where refuge was most evidently a morally justified situation, for example, the shelters offered to persecuted Jews in 1944, local diplomats were criticised or even sanctioned by their sending States because of acting ultra vires or because of their alleged financial irresponsibility(!). This happened, inter alia, with Carl Lutz[108] (see Sect. 2.3.2.4), blamed after his return in 1945 but rehabilitated in 1958. Giorgio Perlasca's activity was recognised only after 1987, and Raoul Wallenberg was captured by the Soviet Army and probably died in 1947 in Liublianka. Thus, the merits of these heroes of Yad Vashem were recognised by history only at the end of their lives or even later.
12. Sending States do not want to complicate their relations *vis-à-vis* receiving States (and generally want even less to intervene in domestic matters). This is why (1) they try to reduce the duration of sojourn to the strict minimum possible; (2) if feasible, they try to convince or influence the asylee to leave the diplomatic premises upon his own free will; and (3*)* they isolate their guests from active contacts.[109]
13. This isolation can be very useful also for the territorial State: especially in case of a lengthy sojourn, a *modus vivendi* that is very comfortable for the territorial State can be developed. The given politician is neither punished nor martyrised nor allowed to return to the domestic political life.
14. A receiving State can tolerate the given situation for a long time and, even without a legal obligation to do so, will often be inclined to enter negotiations and offer de facto safe conduct in order to get a reasonable counter-agreement.
15. Most of the historical and contemporary examples discussed above can be considered ex post facto as justified, with only a few exceptions, e.g. the admittance of the Hungarian Nazis during the preparations of the plot of 15 October 1944. Indeed, receiving States involved often changed their attitudes: first, they considered the refuge illegal but later (due to a change of regime and of paradigm) considered it justified (e.g., Hungary's approach toward the Mindszenty affair during and after the communist rule). Taking into consideration the context, a refusal will sometimes also generate political and academic criticisms (see the Durban Six Affair).
16. The maintenance of the current legal situation seems to be more beneficial than to create a treaty-based international regulation, be it either a separate treaty or a modification to the 1961 Vienna Convention.[110]

[107] See e.g.: Neale Ronning (n 97) 92.

[108] Kein Dank aus der Schweiz für Carl Lutz, http://www.raoul-wallenberg.de/Retter/Carl_Lutz/carl_lutz.html, accessed 22 May.

[109] Arturo E Balbastro, (n 104*)* 352; Neale Ronning (n 97) 91.

[110] See e.g.: Angela M. Rossitto (n 97) 135. For a rare position on the contrary see Peter Porcino, 'Toward Codification of Diplomatic Asylum' (1975 - 1976) 8 *New York University Journal of International Law and Politics* 435.

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International Law and Daunting Contemporary Crises to Human Security and the Rule of Law

Patricia O'Brien

In the wake of World War I, we failed to build the rules and institutions that the world needed to guarantee peace. We largely succeeded in doing so after World War II. But—again—crises have overtaken our institutions and their capacity to regulate major threats to our world. It is falling upon communities such as the international legal community to marshal the imagination, determination, relationships and political savvy to address these issues and to galvanise and evolve our global institutions and laws if we are to meet the daunting crises of this century.

The past years have been filled with threats to our security and the rule of law. Just as states are more interconnected, so are the challenges. States certainly cannot take on today's conflicts and catastrophes alone. Work in the UN, the Human Rights Council, the WTO and other international organisations shows that state authorities are at least professing to espouse the rule of law as the prism through which to face those challenges.

We are seeing tectonic shifts in global power. We see distrust and disappointment in institutions be they public or private: a sense that the playing field is tilted in favour of entrenched interests and elites. We see widespread violations of human rights, not least the suppression of civil and political rights such as freedoms of expression, association and peaceful assembly. We see escalating tensions between the interests of security and human rights. The space for dissent in many countries is shrinking under the weight of either poorly thought-out, or indeed exploitative, counterterrorist strategies.

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Global economic turmoil, climate change, environmental disasters, rising joblessness and growing inequality between the rich and the poor are now the realities we face. With all this, and more, we face extraordinary challenges, and we have an even greater obligation to understand and face these challenges from the perspective and through the prism of the rule of law.

So why is it now the time for international law?

To reiterate what we are all assumed to know well and, as defined by the United Nations—the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and that are consistent with international human rights norms and standards.

Strengthening and building the rule of law and its institutions are critical for establishing and sustaining peace. The absence of good governance, human rights and the rule of law are so often the root cause and effect of violent conflict and of the perpetration of atrocity crimes. This chain of events is all too common. Often, institutions that are meant to ensure justice and security are absent, or those institutions are fundamentally flawed or lack the capacity to uphold their basic sovereign responsibilities. Corruption, cronyism and criminal networks exploit their weaknesses. Citizens begin to feel less safe and have nowhere to turn when their rights are violated. It is not just that impunity prevails. Investment dries up. Public services diminish. Jobs vanish, especially among young people. Distinct or outright hostility against the state grows. We are seeing extremists harness these sentiments, inviting marginalised groups and restless youth to challenge the established order through violent means. Societies fragment under the stresses of increasing lawlessness. This is not just theory. The global implications of these dynamics are self-evident. We are witnessing the breakdown of the rule of law every day.

It is clear, simply put, that the rule of law is fundamental and important for a number of reasons: (1) prevention of conflict, (2) achievement of durable peace in the aftermath of conflict, (3) effective protection of human rights and (4) of course, sustainable economic progress and development.

Following the Nuremberg trials, the project of international criminal justice seemed to be a futile exercise. A draft statute for an international criminal court prepared by the ILC in the 1950s seemed headed for the dustbins, a casualty of the Cold War. But in July 2012, the International Criminal Court, the ICC, marked its 10-year anniversary. The ICTY and ICTR have marked 20 years. Despite the recent paralysis of the Security Council in addressing egregious violations of international law, the international community has taken huge strides in the sphere of international justice.

There is no doubt that international justice faces many challenges. We have had to deal with accusations of victor's justice, double standards, bad prosecutorial policy and case management and also of potentially jeopardising fragile peace in post-conflict situations. Nevertheless, we have changed the global landscape by pursuing perpetrators of atrocity crimes and putting them on trial where they meet the hands of justice and the eyes of their victims. In recent years, many of those most responsible for atrocities in the former Yugoslavia, Rwanda, Sierra Leone, the DRC and Cambodia have been convicted of their crimes.

We must remember, however, the primary role of states and the principle of complementarity. It is the duty of states first and foremost to prosecute international crimes. Only where national judicial systems are unable or unwilling to investigate or prosecute should international courts be involved. This principle is of crucial importance for the future of international criminal justice and the quest to end impunity for grave violations of IHL and human rights law.

Where are we now with international criminal justice? A number of brief observations can be made:

1. While significant challenges remain, the old era of impunity is over. We now live in an age of accountability.
2. The clarion calls for justice and accountability which we are hearing on a daily basis are having an effect. These calls clearly do not always operate as an effective deterrent, but they do at least feature in the minds of leaders to a greater or lesser extent.
3. Nobody is above the law. Heads of state are accountable.
4. Sovereignty is no longer a barricade against justice.
5. There is no peace without justice. Justice, peace and democracy are not mutually exclusive objectives but rather mutually reinforcing imperatives. They must be paramount in post-conflict strategies. There should be no amnesty for those most responsible for atrocity crimes.

Regarding the concept of Responsibility to Protect (R_2P), at the heart of which lies the rule of law. It aims to prevent atrocity crimes and to ensure that people facing such crimes are not alone where their own state cannot or will not protect them. It calls upon the international community of states to cooperate with each other to prevent and, where necessary, to act to stop the commission of genocide, war crimes, crimes against humanity and ethnic cleansing. R_2P does not create additional new legal norms but does underline the responsibility and indeed the moral obligation of states, both individually and collectively, to act to address atrocity crimes.

R_2P is an important political acknowledgement that sovereignty entails responsibility and that the international community **has** a responsibility to act to assist states to protect their populations. It includes the obligation to end impunity for atrocity crimes. We, as international lawyers, indeed as any kind of lawyer, should prefer early engagement to later intervention. This is a fundamental responsibility. International lawyers have an important role to play, not only in ensuring accountability for atrocity crimes but also in the **prevention** of these crimes in the first place. We have to try to help states, including by legal capacity building, to succeed, in preference to addressing responses when they fail.

The rule of law weaves its way through each of the three pillars of R_2P. The First Pillar provides for the responsibility of states to protect their own populations. The presence of a strong culture of the rule of law in a society may prevent or minimise the risk of deterioration into a situation of atrocity crimes. But today, leaders are all too often deliberately choosing to flagrantly violate those laws. International human rights law represents a distillation of humanity's experience of atrocities and the remedies to prevent them. There is a need for states to become parties to relevant international

instruments on human rights, international humanitarian law and refugee law and to become parties to the Rome Statute. The core international standards need to be faithfully embodied in national legislation. States the world over accepted them and now alas, all too frequently, ignore them in practice. The pressure needs to be maintained on this issue.

With regard to the Second Pillar, which provides for the responsibility of the international community to assist states to protect their populations—there is a need for assistance programmes to build specific capacities within societies that would make them less likely to travel the path to these crimes.

We need to help societies to successfully manage transitions. As lawyers, we can help to build the foundations based on the rule of law that are needed in order to ensure that the gains achieved post-conflict are irreversible and the peace attained is sustainable.

Over the years, a considerable body of United Nations standards and norms related to crime prevention and criminal justice has emerged, covering a wide variety of issues such as treatment of persons in custody, role of lawyers, access to legal aid, treatment of offenders, international cooperation, good governance, victim protection and violence against women.

These standards and norms have provided a collective vision of how criminal justice systems should be structured, and they help to significantly promote more effective and fair criminal justice structures in three ways. Firstly, they can be utilized at national level by fostering in-depth assessments leading to the adoption of necessary criminal justice reforms; secondly, they can help countries to develop sub-regional and regional strategies; and thirdly, globally and internationally, the standards and norms represent 'best practices' that can be adapted by states to meet national needs. This capacity-building assistance is critical.

The Third Pillar of R_2P provides that where states are manifestly failing to protect their population, the international community should take collective action to protect that population using all the available tools provided under the UN Charter, notably in Chapters VI, VII and VIII. It is important to emphasise that we are not talking about a third exception to the Charter prohibition on the threat or use of force against the territorial integrity or political independence of any state, the only two exceptions being self-defence and actions authorised by the Security Council. R_2P does not create a new legal basis for the use of force and is not—as popularly misconstrued—another way of talking about 'humanitarian intervention'.

To conclude, some of the persistent questions we currently face are as follows: where and how is international law relevant where civilians remain under threat? Is R_2P a meaningless concept that has lost strength before it has even developed its baby teeth? What is the United Nations doing here? Why is the Security Council not acting there? While very persuasive arguments are often made about the weaknesses of the UN system as evidenced by the occasional but critical paralysis within the Security Council, we should, in my view, resist temptations at this pressurised time to lose hope in the UN or to compromise the rule of law at the international level for the cause of political expediency.

Interrogating Colonialism: *Bakassi*, the Colonial Question and the Imperative of Exorcising the Ghost of Eurocentric International Law

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Contents

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1 Introduction

> Without question ... the ... judgment is a travesty and a cunning if brutal re-enactment of colonial injustices. It is a sad reminder that the case arose in the first instance as a direct consequence of the buccaneer activities of the imperial powers of Europe who, having earlier traded in African virile peoples, sought at the close of the 19th Century to balkanise the continent in the infamous scramble for Africa that was capped by the Berlin Conference of 1884–1885.[1]

On 10 October 2002, the International Court of Justice at The Hague delivered judgment in the contentious case between Cameroon and Nigeria (Equatorial Guinea intervening)[2] to the effect, *inter alia*, that 'sovereignty over the Bakassi Peninsula lies with the Republic of Cameroon'.[3] The Court further decided that 'the Federal Republic of Nigeria is under an obligation expeditiously and without condition to withdraw its administration and its military and police forces from the territories which fall within the sovereignty of the Republic of Cameroon'.[4]

On the face of it, this was simply an interstate territorial dispute involving two African States. This article argues, however, that in the circumstances of the case, colonialism was on trial. Properly analysed, and within the broad framework of colonial responsibility, at the heart of the case is British responsibility to the people of Bakassi and, by extension, Nigeria. Regrettably, the majority of the Court evaded this central issue and chose, instead, to engage in a spurious analysis whose end result was the transformation of a regime engendered by a treaty that, by its very provisions, established a protectorate into a colony or a so-called colonial protectorate! In the circumstances, the article underscores the imperative of critical legal scholarship that interrogates the colonial enterprise, with a view to purging international law of its colonial vestiges.

[1] The Guardian (Nigeria) editorial of 22 October 2002, at 22.

[2] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*, Judgement of 10 October 2002, [2002] I.C.J. Reports.

[3] ibid at para 325 (III) (B).

[4] ibid para 325 (V) (A).

2 The Bakassi Case: A Brief Statement of the Issues

The 10 October 2002 decision of the International Court of Justice was the culmination of eight years of a legal tussle that began as far back as 1994, when Cameroon sought the Court's intervention in a dispute between it and Nigeria over the Bakassi Peninsula (and later, parts of the Lake Chad area). Cameroon predicated its sovereignty claims over the Bakassi Peninsula on, *inter alia*, a 1913 Anglo-German Agreement (the '1913 Agreement') under which Great Britain purportedly ceded the Bakassi Peninsula to the Germans. It is noteworthy, in this respect, that

(1) On 10 September 1884, Great Britain and the Kings and Chiefs of Old Calabar concluded a Treaty of Protection (the '1884 Treaty'), under which Great Britain undertook to extend its protection to these Kings and Chiefs who, in turn, agreed, *inter alia*, to refrain from entering into any agreements or treaties with foreign nations or powers without the prior approval of the British Government. In specific terms, the 1884 Treaty provides as follows:

> Article 1. Her Majesty the Queen of Great Britain and Ireland, &c, in compliance with the request of the Kings, Chiefs, and people of Old Calabar, hereby undertakes to extend to them, and to *the territory under their authority and jurisdiction, her gracious favour and protection*.
>
> Article 2. The Kings and Chiefs of Old Calabar *agree and promise to refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Britannic Majesty's Government*.[5]

(2) At the end of the nineteenth and the beginning of the twentieth centuries, various agreements were concluded by Germany, France and Great Britain to delimit the boundaries of their respective colonial and protected territories.

(3) In the specific case of the boundary between Great Britain and Germany, this was first defined by the Agreement Between Great Britain and Germany Respecting Boundaries in Africa, signed at Berlin on 15 November 1893, and supplemented by a further Agreement of 19 March 1906 Respecting the Boundary Between British and German Territories from Yola to Lake Chad (the 'Anglo-German Agreement of 1906'). The southern part of the boundary was subsequently redefined by two agreements concluded between Great Britain and Germany in March and April 1913, under which Great Britain, apparently on the strength of the 1884 Treaty, purportedly ceded areas that encapsulate the Bakassi Peninsula to Germany.

(4) At the end of World War I, all the territories belonging to Germany in the region, extending from Lake Chad to the sea, were apportioned between France and Great Britain by the Treaty of Versailles and then placed under British or French mandate by agreement with the League of Nations (the predecessor of the United Nations).

[5]Counter-Memorial of Nigeria, Vol. 1, at 109 (Emphasis added).

(5) Following World War II, the British and French mandates over the Cameroons were replaced by United Nations trusteeship agreements. The trusteeship agreements for the British Cameroons and for the Cameroons under French administration were both approved by the General Assembly on 13 December 1946.
(6) At independence, Cameroon inherited the territories that were under French sovereignty in the colonial era. On the premise that the initial British cession of the Bakassi Peninsula to the Germans and thereafter renounced in favour of the French was valid, these inherited territories, Cameroon contended, included the Bakassi Peninsula.

Nigeria contested Cameroon's claims and, *inter alia*, questioned the competence of the British to cede the Bakassi Peninsula to the Germans, arguing that since the territories that were the subject of the 1884 Treaty were protectorates and not colonies, Great Britain was incompetent to effect the purported cession to Germany. In particular, Nigeria submitted that the title to sovereignty over Bakassi on which it relied was originally vested in the Kings and Chiefs of Old Calabar. It argued that in the pre-colonial era, the City States of the Calabar region constituted an acephalous federation consisting of independent entities with international legal personality. It contended that under the 1884 Treaty signed between Great Britain and the Kings and Chiefs of Old Calabar, the latter retained their separate international status and rights, including their power to enter into relationships with other international persons, although under the treaty that power could only be exercised with the knowledge and approval of the British Government. According to Nigeria, the treaty only conferred certain limited rights on Great Britain; in no way did it transfer sovereignty to Britain over the territories of the Kings and Chiefs of Old Calabar. Therefore, Nigeria further asserted that since Great Britain did not have sovereignty over those territories in 1913, it could not cede them to a third party. In the circumstances, Nigeria submitted that the limitations on Great Britain's powers under the 1884 Treaty, and in particular its lack of sovereignty over the Bakassi Peninsula and thus its lack of legal authority in international law to dispose of title to it, must have been known to Germany at the time the 1913 Agreement was concluded, or ought to have been on the assumption that Germany was conducting itself in a reasonably prudent way.

Although the disputants raised several other issues in their pleadings and in the course of oral arguments, the Court's decision is, in large measure, predicated on the 1913 Agreement (and other instruments, as well as factual developments, that trace their roots to the 1913 Agreement). Accordingly, this critique of the Court's decision is restricted to its determination of the validity of Great Britain's cession of the Bakassi Peninsula to Germany (thereafter renounced in favour of France and inherited by Cameroon at independence).

3 The Court's Jurisprudence on the Colonial Question and British Responsibility to the Bakassi People: A Critique

Properly analysed, and having regard to the terms of the 1884 Treaty between Great Britain and the Chiefs and Kings of Calabar, at the heart of this case is the validity of Great Britain's cession of the Bakassi Peninsula to Germany through the 1913 Agreement. On this fundamental issue, the majority of the Court stated that 'Great Britain had a clear understanding of the area ruled at different times by the Kings and Chiefs of Old Calabar, and of their standing'. This area, according to the majority of the Court, was 'one of a multitude in a region where the local Rulers were not regarded as States'. Accordingly, the Court proclaims, 'from the outset Britain regarded itself as administering the territories comprised in the 1884 Treaty, and not just protecting them', in which case the majority of the Court transformed a regime engendered by a treaty and turned a protectorate into a colony or a so-called colonial protectorate!

How could the majority of the Court take such a position even in the face of the fact that in 1885 the British Foreign Office unequivocally stated that a protectorate involves not the direct assumption of territorial sovereignty but is 'the recognition of the right of the aborigines, or other actual inhabitants to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties of the protecting power'?[6] How could the majority of the Court take such a position in the face of the fact that, in similar circumstances, a British court held, as far back as 1910, that a 'protectorate is under His Majesty's dominion in the sense of *power and jurisdiction*, but is not under his dominion in the sense of *territorial dominion*'?[7]

Indeed, as Judge Awn Al-Khasawneh points out, 'British colonial policy during the relevant period was marked by a consistent insistence on distinguishing between colonies and protectorates. Upholding such a distinction was a major aim of British diplomacy in the Berlin Conference, where it triumphed over imperialist latecomers intent upon achieving nothing less than the threshold of effective occupation.'[8]

Additionally, the latest edition of *Oppenheim's International Law*[9] makes it clear that a protectorate is '[a]n arrangement ... entered into whereby one state, while retaining to some extent its separate identity as a state, is subject to a kind of guardianship by another state. The circumstances in which this occurs and the consequences which result vary from case to case, and depend upon the particular provisions of the arrangement between the two states concerned.' Admitting that a

[6] Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (1986) 283, n 155.

[7] *R v Crewe* [1910] 2 KB 576, 603-4.

[8] *Cameroon v Nigeria* (n 2), Separate Opinion of Judge Awn Al-Khasawneh, para. 7(d).

[9] Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law*, Vol. I (9th edn., 1992), 267-269 (Emphasis added).

protectorate is 'a conception which lacks exact legal precision, as its real meaning depends very much upon the special case', the author unambiguously states that '[t]he position within the international community of a state under protection is defined *by the treaty of protection* which enumerates the reciprocal rights and duties of the protecting and the protected states'. While '[e]ach case must therefore be treated according to its own merit', the author further points out, 'it is characteristic of a protectorate that the protected state always has, and retains, for some purposes, a position of its own as an international person and a subject of international law'.

Remarkably, while the Court obsesses itself with what the British, in the Court's magical determination, thought of the 1884 Treaty, it regrettably fails to consider what the Kings and Chiefs of Old Calabar had in mind when they were entering into the treaty with the British. How could the majority of the Court ignore the unambiguous terms of the 1884 Treaty preferring, instead, to embark on a frolic of its own?

To make matters worse, while the majority of the Court considers treaties of protection entered into between Great Britain and certain North African entities as having been entered into with 'entities which retained thereunder a previously existing sovereignty under international law', it dismisses similar treaties with entities in sub-Saharan Africa as having been entered into 'not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory'.

The majority of the Court's position regrettably evokes memories of the condescending manner in which the colonialists perceived and treated their victims. For instance, John Westlake, writing in 1894, derided the 'uncivilized natives' and asserted that 'in Africa ... an importance has sometimes been attached to treaties with uncivilized tribes, and a development has sometimes been given to them, which are more calculated to excite laughter than argument'.[10]

Writing in the same vein, T. J. Lawrence,[11] unhesitatingly treated 'uncivilized regions' as objects, and not subjects, of international law, even though he gleefully accorded international legal status to chartered companies. Although he described the international legal status of such companies as being of 'a very imperfect and subordinate kind', entities or districts inhabited by 'the barbarous or semi-barbarous' did not even merit such status!

It was against the backdrop of this reality that in an earlier article denouncing the role of international law in the colonisation of Africa,[12] I asserted that '19th century international law ... bristles with contradictions and tantalizing mirages. To the extent that nineteenth century international law, given its Eurocentricity, failed to

[10]John Westlake, *Chapters on the Principles of International Law* (1894) 149.

[11]T. J. Lawrence, *The Principles of International Law* (7th edn, Percy H. Winfield eds 1923) 69. The first edition of the book appeared in 1895.

[12]Dakas C.J. Dakas, 'The Role of International Law in the Colonization of Africa: A Review in Light of Recent Calls for Re-Colonization' (1999) 7 African Yearbook of International Law 85. *See* also, Dakas C.J. Dakas, *International Law on Trial: Bakassi and the Eurocentricity of International Law* (2003).

reckon with [the legacy of Africa's authentic history], its claim to universality is undoubtedly suspect.'[13] In another passage, I emphatically proclaimed that 'thus, it is not a "heresy" to assert ... that international law properly so-called is a 20th century development. Anything prior to that was only a masquerade putting on the garb of international law'.[14] Given this reality, I cautioned that while 'one could be tempted to focus on the profound transformation that [international law] has undergone over the years and, basking in the euphoria that it has purged itself of its colonial vestiges, be complacent about its past role ... exposing the ignominious role of international law in the colonial project is an imperative exercise that brings with it the liberating realization that to speak of colonialism and its crippling effect in the past tense is to wallow in idle fantasy; thus underscoring the imperative of vigilance'.[15]

The urgency of such critical legal scholarship and/or interrogation of the colonial enterprise is the more evident when one recalls the fact that, as Professor Wole Soyinka points out, 'at the Berlin Conference the colonial powers ... met to divvy up their interests into states, lumping various peoples and tribes together in some places, or slicing them apart in others like some demented tailor who paid no attention to the fabric, color or pattern of the quilt he was patching together'.[16] Indeed, a senior British official's description of how the border between Nigeria and Cameroon was created speaks volumes: 'In those days we just took a blue pencil and a rule, and we put it down at Calabar, and drew [a] line to Yola ... I recollect thinking when I was sitting having an audience with the Emir [of Yola], surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.'[17] As a former British Prime Minister, Lord Salisbury, further acknowledged at a dinner in 1890, following the conclusion of an Anglo-French convention establishing British and French spheres of influence in West Africa, '[w]e have been engaged in drawing lines upon maps where no man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were'.[18]

What are the consequences of the arbitrary partition of Africa? The balkanisation of Africa by the colonial powers split persons belonging to the same ethnic group (and hitherto configured in various empires or kingdoms) into different colonial spheres of influence and, in most cases, later constituted the territorial basis for the grant of political independence to present-day African States. Several examples of the arbitrary manner in which ethnic groups were split or amalgamated with other ethnic groups abound: the Somali severed, at various times, into British Somaliland,

[13]ibid 118.

[14]ibid 117.

[15]ibid 87-8.

[16]The Sacramento Bee, Sunday, May 15, 1994, Forum 1.

[17]Quoted in J. C. Anene, *The International Boundaries of Nigeria, 1885-1960* (1970) 2-3.

[18]ibid 3.

French Somaliland, Italian Somaliland, the Northern Frontier District of Kenya and the Ogaden (Ogaadeen) region of Ethiopia; the Maasai, bifurcated by the Kenya–Tanzania border; the Bakongo across the Gabon-Congo, Congo-Democratic Republic of Congo (DRC) (formerly Zaire) and DRC-Angola boundaries; the Lunda separated by the DRC-Angola and DRC-Zambia boundaries; the Yoruba split into Nigeria, Benin (formerly Dahomey) and Togo; the Gourma, truncated into Burkina Faso (formerly Upper Volta), Togo and Benin; the Tibu, mutilated by the Libya-Chad and Chad-Niger boundaries; as well as the Ewe, dissected into British Togoland, French Togoland and Ghana (formerly Gold Coast).[19]

In the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*,[20] Judge Bola Ajibola decries this state of affairs and observes that 'since 1885 when it was partitioned, Africa has been ruefully nursing the wounds inflicted on it by its colonial past. Remnants of this unenviable colonial heritage intermittently erupt into discordant social, political and even economic upheavals.' Aspects of this heritage, he further observes, 'continue, like apparitions, to rear their heads, and haunt the entire continent in various jarring and sterile manifestations'. Questioning how one can 'forget unhealed wounds', he states that '[o]ne aspect of this unfortunate legacy is to be seen in the incessant boundary disputes between African States'.

Furthermore, in some cases, as exemplified by the plight of nomadic Somalis, the fragmentation cut off entire clans from their traditional sources of water and pasture for their herds. In one instance, the Mareehaan clan was sliced into three different parts: one part under the British in the Northern Frontier District of Kenya, another under the Italians in the South and a third in the Southwest under Ethiopia. The tragedy is that while those nomads in Italian Somaliland had access to water resources from the Shabeelle River, they lost valuable grazing land on the Ethiopian side. In similar fashion, their kinsmen on the Ethiopian side retained the pastures but were cut off the indispensable water resources on the coast.[21] In the *Western Sahara Case*, Mauritania describes a similar scenario: on account of the artificial frontiers created by the European powers, the same families and their properties could be found on either side of arbitrarily bisected frontiers; the same was true of wells, lands, burial grounds, watering places and palm oases.[22] In spite of this reality, the Court exhibits its insensitivity by choosing to re-enact the nightmares of the regime engendered by the Berlin Conference!

It is, however, refreshing that Judge Al-Khasawneh's separate opinion in the Bakassi case tasks the colonial question.[23] Judge Al-Khasawneh predicates his vote

[19] A. I. Asiwaju, 'The Conceptual Framework', in A. I. Asiwaju (ed), *Partitioned Africans: Ethnic Relations across Africa's International Boundaries, 1884-1984* (1985) 2. For an elaborate list, *see* Asiwaju, 'Partitioned Culture Areas: A Checklist', in Asiwaju, at 256-8.

[20] Judgment [1994] I.C.J. Reports. Separate Opinion of Judge Ajibola, at 52-4.

[21] Said S. Samatar, 'The Somali Dilemma: Nation in Search of a State', in Asiwaju (n 19) 155, at 176.

[22] *Advisory Opinion on the Status of Western Sahara* [1975] I.C.J. Reports 12, 59-60.

[23] *Cameroon v Nigeria* (n 2), (Separate Opinion of Judge Awn Al-Khasawneh (n 8)).

with the majority solely on the fact that, in his view, 'in the period leading to its independence ... and since then till the early 1990s, Nigeria, by its actions and omissions and through statements emanating from its officials and legal experts, left no room for doubt that it had acknowledged Cameroonian sovereignty in the Bakassi Peninsula'. Chiding his colleagues for 'unnecessarily' and 'unfortunately' belabouring the validity of the 1913 Agreement, Judge Al-Khasawneh could not fathom why they chose to immerse themselves in the distinction among colonies, protectorates and the so-called colonial protectorates, given that it is 'steeped in confusion both under international law and under the laws of the colonial Powers themselves'. Characterising the approach of the majority of the Court as one 'clearly rooted in an Eurocentric conception of international law based on notions of otherness, as evidenced by the fact that there were at the time in Europe protected principalities without anyone seriously entertaining the idea that they had lost their sovereignty to the protecting Power and could be disposed of at its will', he further demonstrated that 'the existence of a category of protectorates, the so-called "colonial protectorates", where the protecting Power was free to dispose of the protected territory at will, is a proposition that neither State practice nor judicial precedent supports and is, in all probability, no more than a fiction existing in the minds of some commentators who try to find *ex post facto* legitimization for unfathomable and illegal facts by the invention of sub-categories where normally applicable rules do not operate'. Even assuming, for the sake of argument, that the Berlin Conference did sanction such behaviour as evidenced by the State practice emanating from it, Judge Al-Khasawneh pointedly asks: 'Could this practice be invoked in an African dispute when no African State ... participated in the formation of such practice?' Finally, Judge Al-Khasawneh expresses the view that the Kings and Chiefs of Old Calabar 'had the capacity to enter into treaty relations and, unless we start from the false premise that one party to a treaty can unilaterally determine the international status of the other, we can also deduce that the treaty has international legal standing'. Accordingly, he faults the Court's distinction between the status of treaties of protection between Great Britain and some entities in North Africa juxtaposing similar treaties in respect of sub-Saharan Africa. According to him, 'in the case of Qatar and Bahrain these sheikhdoms were not independent States when Britain entered into treaty relations of protection with them but Ottoman dominions ruled under the suzerainty of the Ottoman Empire by local chiefs. The same is true of Tunisia'. Consequently, Judge Al-Khasawneh concludes, 'it would be ironic for the Court to decide that those who were under Ottoman suzerainty were in fact sovereign because it suited practical considerations of British policy that they should be so seen, and not those chiefs who were under no one's sovereignty or suzerainty when Great Britain entered into treaties of protection. Not only would this make colonial law and not international law the determining factor, it would also raise doubts regarding the broad consistency of the Court's decisions.'

In a similar vein, Judge Koroma, in his dissenting opinion,[24] observes that 'the conclusion reached by the Court with respect to the 1884 Treaty between Great Britain and the Kings and Chiefs of Old Calabar regarding the Bakassi Peninsula is tantamount to a recognition of political reality rather than to an application of the treaty and the relevant legal principles … [I]t is not the function of the Court to recognize or consecrate political reality but rather to apply the law in ruling on disputes before it.' Judge Koroma characterises the approach employed by the majority as 'fundamentally flawed', in consequence of which its finding on the validity of the 1884 Treaty 'amounts to a serious distraction from the legal issues at hand' and 'is not only illegal but unjust'. Summing up his position, Judge Koroma aptly remarks: 'by denying the legal validity of the 1884 Treaty whilst at the same time declaring valid the 1913 Agreement, the Court decided to recognize a political reality over the express provisions of the 1884 Treaty. The justification for this choice does not appear legal to me. It would not be justified for the Court, given its mission, if it were to be regarded as having consecrated an act which is evidently anti-legal. I regret this situation.'

In the circumstance, it is worth recalling the remarks of Sir Jennings, a former president of the International Court of Justice, in an address to the United Nations General Assembly in 1991, in which he made it clear that the mission of the Court is to declare and apply the law and that it would range outside that task at its peril and at the peril of international law.[25]

4 The Court and the Colonial Question: A Historical Perspective

4.1 Revisiting Eurocentric 'International' Law and the Colonial Question

The nineteenth century is, from a legal perspective, remarkable in several respects[26]: the decline of natural law and the concomitant triumph of legal positivism, as well as the construction and consolidation of sovereignty and statehood as the exclusive preserve of the 'civilized'. Additionally, and as a corollary of the foregoing, the nineteenth century has the dubious distinction of notoriety for its colonial legacy. As the spectre of recolonisation haunts Africa, it would be tantamount to labouring

[24]ibid (Dissenting Opinion of Judge Koroma.

[25]Sir Robert Jennings, 'The Role of the International Court of Justice' (1997) 68 British Yearbook of International Law 3.

[26]On the legacy of the 19th century, *see* generally, David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 Quinnipiac. L. Rev. 99; and Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harv. Int'l L.J. 1.

under a delusion to ignore the question as to whether, notwithstanding the profound transformation that international law has undergone over the years, the ghost of the nineteenth century still hovers over us.

Africa's contact with the West, the motivation behind colonialism and the rapacious plunder thereby occasioned on the continent are the subject of extensive research by historians, political scientists, geographers, sociologists, etc.[27] However, sufficient attention has not been directed at the striking manner in which nineteenth century 'international' law justified the colonial project. What is even more spectacular is the stupendous manner in which international legal scholars, with few exceptions, availed the colonial project of their intellectual armoury.[28] A notable case in point is John Westlake, who, at the material time, was, *inter alia*, the Whewell Professor of International Law in the University of Cambridge and reputed to be 'a jurist of world-wide reputation'.[29] Accordingly, the ensuing discourse essentially examines and critiques Westlake's views, which—with varying degrees of emphasis—are largely representative of the perspectives of his Western contemporaries,[30] on the questions of sovereignty and civilisation and, invariably, the colonial question.

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[27] *See* for instance, Walter Rodney, *How Europe Underdeveloped Africa* (1981); Daniel Offiong, *Imperialism and Dependency* (1980); Adu A. Boahen (ed), *General History of Africa: Africa Under Colonial Domination*, 1880-1935, Vol. VII (1985); Basil Davidson, *Africa in History* (1991b); Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (1992); Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*(1996); Crawford Young, 'The Heritage of Colonialism', in John W. Harbeson and Donald Rothchild (eds), *Africa in World Politics* (1991) 19.

[28] The extent, if any, to which the works of these publicists influenced or reflected the norms of international law (such as customary international law and treaties) at the material time will become evident in the course of the discourse.

[29] J. Fischer Williams, 'Introduction', in J. Fischer Williams (ed), *Memories of John Westlake* (1914) 1, 7.

[30] Shaw singles out Westlake as the "foremost among... theorists" who took the view that "the organized tribes of peoples of non-European lands had no sovereign rights over their territories and thus no sovereign title by means of effective occupation". Accordingly, the inhabitants were "factually and not legally in occupation of the territory, which could be treated as *terra nullius* and acquired by any State in accordance with the requirements of international law". Shaw further points out that the views of such theorists "appeared to dominate throughout the nineteenth century when Africa was being divided amongst the competing European powers": Shaw (n 6 at 32). Additionally, a survey of the views of "the leading writers" of the 19th century and the early years of the 20th century – Kent, Wheaton, Phillimore, Hall, Westlake, Oppenheim, Anzilloti, Fauchille, Holtzendorf, Nys, Bello, Rivier and F. de Martens – on international law and western civilization is provided in C. Wilfred Jenks, *The Common Law of Mankind* (1958) 69-74. Jenks describes these publicists as "so outstanding a company from nine different nations that no one can dismiss their views as unrepresentative or unimportant". He further submits that "their views differ only in degrees of emphasis". Wheaton, for instance, remarks: "Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilised and Christian people of Europe or to those of European origin": Henry Wheaton, *Elements of International Law* (6th edn., William Beach Lawrence ed., 1855) 16. Furthermore, Oppenheim notes that "only such territory can be the object

4.2 *Pre-colonial Africa as 'Uncivilised' and Devoid of Sovereignty*

John Westlake, proceeding from the premise that reflection on the principles of international law 'helps to determine the action of [one's] country by swelling the volume of its opinion',[31] sets out a pyramidal legal edifice in furtherance of the colonial project. This he does principally through his conception of the nature and acquisition of territorial sovereignty. Chapter IX of his text is strikingly captioned 'Territorial Sovereignty, Especially with Relation to Uncivilised Regions'.

In a sub-chapter titled 'The Title to Territorial Sovereignty', Westlake ducks the question as to how 'the old civilized world' acquired the title to territorial sovereignty as, according to him, the issue is not 'capable of discussion apart from the several dealings, as cession or conquest, which transfer it'.[32] However, he unhesitatingly delves into a consideration of the status of 'uncivilised natives' in international law.

Westlake submits that '[w]hen people of the European race come into contact with American or African tribes, the prime necessity is a government'. Such a government has to be capable of protecting the former in a manner that enables them to 'carry on the complex life to which they have been accustomed in their homes' and 'protect the natives in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers'. Questioning whether 'the natives [could] furnish such a government' or look up to the Europeans, he submits that 'in the answer to that question lies, for international law, the difference between civilisation and the want of it'. In his view, most of the populations with whom Europeans came into contact in America and Africa could not furnish the kind of government in question. Accordingly, international law 'has to treat such natives as uncivilised' and 'regulates, for the mutual benefit of civilised states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded'. In effect, the regions inhabited by such 'uncivilised natives' were not, on their own, sovereign. In the circumstance, he challenges the competence of the 'uncivilised natives' to effect a transfer of territory by cession: 'What is the authority – chief, elders, body of fighting men – if there is one . . . empowered to make the cession?'[33]

Westlake, by taking this position, boxes himself into a corner: if, as he claims, 'uncivilised natives' were incapable of effecting a transfer of territory through cession, what is the legal status of treaties that, to his knowledge, were entered into between various African chiefs and respective European powers?

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of occupation as belongs to no State, whether it is entirely uninhabited, for instance an island, or inhabited by natives whose community is not to be considered a State": L. Oppenheim, *International Law: A Treatise*, Vol. I (8th edn., H. Lauterpacht ed., 1955) 555.

[31] Westlake (n 10) V.

[32] ibid at 134.

[33] ibid at 139-143.

4.3 The Legal Status of Treaties with 'Uncivilised Natives/ Tribes'

> In Africa ... an importance has sometimes been attached to treaties with uncivilised tribes, and a development has sometimes been given to them, which are more calculated to excite laughter than argument.—John Westlake[34]

Westlake, in an effort to wriggle out of the dilemma occasioned by his condescending treatment of the status of the 'uncivilised natives' and its implications for their treaty-making competence, in effect, patronises them: '[N]o men are so savage as to be incapable of coming to some understanding with other men, and wherever contact has been established between men, some understanding, however incomplete it may be, is a better basis for their mutual relations than force.' On the specific status of treaties between European powers and 'uncivilised natives', he contends that the latter 'take no rights under international law', with the result that 'no document in which such natives are made to cede the sovereignty over any territory can be exhibited as an international title'. However, '[t]o whatever point natives may have advanced', cession by them in accordance with their customs 'may confer a moral title', and even then only with reference to 'property or power as they understand while they cede it'. Therefore, 'no form of cession by them can confer any title to what they do not understand'. Yet 'while the sovereignty of a European state over an uncivilised region must find its justification, as it easily will, not in treaties with natives but in the manner of the case and compliance with conditions recognised by the civilised world', Westlake further submits, 'it is possible that a right of property may be derived from treaties with natives, and this even before any European sovereignty has begun to exist over the spot'.[35]

This statement is, at best, ambiguous. The distinction that Westlake makes between sovereignty and 'a right of property' may well be tenable, but that does not explain how the 'natives', whose sovereignty he disputes, acquired the competence to alienate property *through treaties* with European States.[36] Additionally, the assertion that 'no form of cession by [uncivilised natives] can confer any title to what they do not understand', on the face of it, gives the impression that Westlake's position is informed by concern for the interests of the 'uncivilised natives'. However, this must be appreciated within the broader context of Westlake's mission and, in particular, his assertion denying the rights of the 'uncivilised natives'. This is further borne out by the manner in which he selects and contrasts two treaties with

[34] ibid V.

[35] ibid 144-5.

[36] Cf. M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926) 21: "[I]t is difficult to see why, if the natives are to be regarded as capable of possessing and transferring property, they should not also be considered competent to hold and transfer the sovereignty which they actually exercise".

'uncivilised' chiefs.[37] The first, exemplifying what a 'treaty ... with natives ought not to be', is that concluded between the British South Africa Company and King Umtasa in 1890. Westlake decries the fact that the treaty, to use his own words, 'dignifies' the latter as 'king or chief of Manika', preferring, instead, to describe him as a 'savage' and 'such a drunkard as to be subject to *delirium tremens*'. The treaty grants to the company the 'sole absolute and entire perpetual right and power' to do the acts specified therein 'over the whole or any portion of the territory' of the king. The company, in turn, agrees 'under the King's supervision and authority' to perform certain functions, including assisting 'in the establishment and propagation of the Christian religion and the education and civilisation of the native subjects of the King', as well as 'the extension and equipment of telegraphs and of regular services of postal and transport communications'.

Westlake finds fault with this treaty not because, as he claims, the king in question was a drunkard and could not possibly comprehend what he was doing—leaving one to wonder why this issue finds expression in the text in the first place. Instead, Westlake contends that, taken alone, the stipulations in the treaty might not have been beyond the understanding of the king, 'but when they were mixed with a farrago which must have been mere jargon to him, the whole must be dismissed as something which could not have received his intelligent consent'. It is apparently of no concern to Westlake that the treaty speaks of the 'territory' of the king and his 'supervision and authority', thus suggesting that the company was conscious of the existence of a government in the territory in question, one capable of providing the 'supervision and authority' that the treaty envisages.

In contrast, Westlake 'pleasant[ly]' offers as 'an example to be followed' an 1889 treaty between 'Her Majesty's acting Consul for Nyassa' and, according to him, 'the chiefs of a nation [Makololo] which for intelligence and character ranks very high among those which must still be called uncivilized'. The treaty, *inter alia*, makes a distinction, which is important, between the 'subjects of the queen of England' and 'our subjects' (the subjects of the chiefs), grants the former certain rights but exercisable 'according to the laws in force' in the territory of the chiefs, provides for the payment of 'duties or customs' to the chiefs and sets out a framework for dispute resolution. Additionally, there is a stipulation to the effect that the chiefs 'will at no time whatever cede any of [their] territory to any other power, or enter into any agreement treaty or arrangement with any foreign government except through and with the consent of the government of Her Majesty the queen of England, &c.'.

This treaty, according to Westlake, 'contains nothing beyond the comprehension of the Makololo chiefs'. However, he maintains that 'there is no cession of territorial integrity by them'. Be that as it may, there is no doubt that the treaty contains an undertaking by the chiefs not to cede any part of their territory to any 'other power'. Indeed, it is revealing that Westlake glosses over the obvious fact that the treaty reckons with the fact that, but for its provisions, the Makololo Chiefs would have been competent to effect a cession of their territory to a power of their choice. If,

[37] ibid 151-4.

contrary to the treaty provisions, the chiefs had ceded their territory or part of it to another power, one wonders whether the British would not have invoked the terms of the treaty and alleged that the chiefs were in breach of their treaty obligations. If, but for the terms of the treaty, the chiefs had ceded their territory or part of it to a power of their choice, one also wonders whether the British would have challenged the title of that other power on the ground of an alleged absence of sovereignty on the part of the chiefs.[38] Furthermore, it is poignant that the treaty evidences the existence of a government in Makololo, with laws to which the British, by the terms of the treaty, were subject.

Our point is not that the colonising powers acquired valid title over African lands through cession on the strength of the various treaties that were entered into with African chiefs. Instead, the determination of the validity or otherwise of such treaties depends on several factors. For instance, given the languages in which the treaties were couched, did the African chiefs really appreciate their import? Obviously, this has nothing to do with illiteracy. It is one thing to be literate, while it is quite another thing to comprehend the medium through which treaty stipulations are expressed. In such situations, the role of interpreters could be valuable. However, there has to be evidence to the effect that such interpreters are indeed knowledgeable and faithfully carry out their task. Additionally, the existence or otherwise of fraud, coercion, corruption and other vitiating or invalidating elements are relevant considerations. As a matter of fact, some of the terms of the treaties make a caricature of themselves by their very absurdity and call into question any claims to the effect that the African chiefs were willing parties. The 1861 treaty between King Docemo and the British concerning the Port and Island of Lagos is instructive:

> I, Docemo, do, with the consent and advice of my council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors forever ... full and absolute dominion and sovereignty of the said port, island, and premises ... freely, fully, entirely, and absolutely.[39]

Beyond the question of free choice and informed consent, it is of tremendous significance—given Westlake's claims—that the treaty speaks of 'sovereignty', which King Docemo, in the exercise thereof, 'grant[s] to the British'. In this sense, one finds a common analogy in commercial law: *Nemo dat quod non habet*. None the less, it is questionable whether the British, in spite of the explicit reference to sovereignty in the treaty, actually recognised the sovereignty of the African States. To the extent that they did, it was merely a self-serving—indeed disingenuous—

[38]If they did, that would have put their own title – to the extent that it was claimed to be predicated on the treaty – in jeopardy. Accordingly, it would not have been in the interest of the British, even if they would have ordinarily preferred otherwise, to challenge the sovereignty of the African States. It is against the backdrop of this reality that Shaw's example of how Britain deferred to Germany on the strength of an 1883 treaty between the latter and a "local chief" in respect of the "Cameroons territory", and his assertion that "[h]ad the area been regarded as *terra nullius*, the mere signing of a document would not have been sufficient and there would therefore have been scope for Britain to recoup the situation", should be appreciated: Shaw (n 6) 39.

[39]Quoted in U. O. Umozurike, *International Law and Colonialism in Africa* (1979) 40.

strategy to ward off rival European claimants. If they actually did, one would have expected them to accord the African States a treatment commensurate with this recognition in the process of treaty making and other relations.

In effect, such treaties had less to do with legal relations between the European powers and the African States than among the European powers themselves. Put another way, the European powers, spurred by their imperial ambitions, were constrained to accord the African States some semblance of sovereignty if so doing meant that—as among themselves—they could anchor their titles to territories in Africa on the so-called treaties of cession with African States. This is undoubtedly a manifest exhibition of the contradictions and foxy character of the colonial project.

In any event, even if the European powers intended—and this is questionable—that the African States could in fact invoke the treaties against them, the chances were slim because the treaty provisions were often heavily weighted against the latter. Besides, where would the African States have sought redress against the European powers? An international judicial or arbitral body was obviously out of the question. Before domestic African dispute resolution institutions? Apart from the question of sovereign immunity, would the European powers have submitted themselves to the jurisdiction of such institutions? Indeed, in the few instances where the treaties made provision for dispute resolution, the European powers were not even ready to allow differences between their 'subjects' and the African States to be adjudicated upon by African dispute resolution institutions. Neither were institutions created with the joint input of the European powers and the African States. Instead, the treaty between the British and the Makololo Chiefs, for instance, provided that should 'any difference' arise between 'British subjects' and the Chiefs as to the duties or customs payable to the latter or as to any other matter, 'the dispute shall be referred to a duly authorised representative of Her Majesty, whose decision in the matter shall be binding and final'.[40]

Furthermore, the reality is that in concluding or, better put, purporting to conclude treaties with African States, the primary concern of the colonising powers was not compliance with the rules of the game. This is borne out, for instance, by the revelations of a former British infantry commander, A. B. Thruston, who, recounting his personal experience, aptly describes the process of treaty making with Africans as 'an amiable farce' and a 'little comedy'.[41]

[40]Quoted in Westlake (n 10) at 153.

[41]In his own words, quoted, on account of its significance, *in extenso*:

> I had been instructed … to make a treaty with Kivalli by which he should place himself under British protection; in fact, I had a bundle of printed treaties which I was to make as many people sign as possible. This signing is an *amiable farce*, *the equivalent of an occupation*. The *modus operandi* is somewhat as follows: A ragged untidy European, who in any civilised country would be in danger of being taken up by the police as a vagrant, lands at a native village … [T]he chief comes and receives his presents, *the so-called interpreter pretends to explain the treaty to the chief. The chief does not understand a word of it* but he looks pleased as he receives another present of beads; a mark is made on a printed treaty by the chief and another by the interpreter, the vagrant, who professes to be the

It is clear, from the discourse thus far, that Westlake's conception of the nature and acquisition of territories in the context of colonialism is fraught with contradictions. His spirited attempts to get out of the quagmire only throw him from the frying pan into the fire. In the course of one such attempt, he resorts to 'constructing the Makololo chiefs and divining their consciousness' in a vain effort to 'give his scheme some semblance of coherence',[42] without articulating a credible basis for such recourse. Eventually, Westlake exhibits his true colours: 'The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied.'[43]

4.4 Terra Nullius *and the Acquisition of Territory by Europeans in Africa*

The denial of the sovereignty of pre-colonial African States and their competence to effect transfers by cession is far from academic. The inescapable conclusion—and this suited the colonial project—is that even where lands in Africa were factually inhabited by Africans, such lands were, from the point of view of law, treated as *terra nullius*. It was immaterial, insofar as colonialism was concerned, that Africans inhabited such lands for centuries before the Europeans set foot on African soil. Accordingly, they could be treated as having been newly discovered and liable to acquisition by occupation. Indeed, this is precisely the subtle import of Westlake's statement to the effect that his examination of the 'position of the uncivilised natives

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representative of a great empire, signs his name. The chief takes the paper but with some hesitation, as he regards the whole performance as a new and therefore dangerous piece of witchcraft. The boat sails away and the new ally and protégé of England or France immediately throws the treaty into the fire.

Kavalli was an important personage and it was desirable that he should perform this *little comedy* with us before he should do so with the Belgians.

A. B. Thruston, *African Incidents: Personal Experiences in Egypt and Unyoro* (1900) 170-1, quoted in Yilma Makonnen, *International Law and the New States of Africa: A Study of the International Legal Problems of State Succession in the Newly Independent States of Eastern Africa* (1983) 14-5. Emphasis added.

[42]Anghie, (n 26) 48.

[43]Westlake (n 10) 142-3. In the circumstance, Westlake submits that if a "fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out". Interestingly, in a tribute to Westlake, Symonds has this to say: "He hated injustice and oppression from his very soul, and none who ever heard him speak against them could forget the burning and impassioned words in which he arraigned the tyrant and pleaded for the victims of tyranny": Arthur G. Symonds, "The Balkan Committee", in J. Fischer Williams, (n 29) 115. Apparently, Westlake's crusade, as so described, did not encompass the plight of the "uncivilized".

. . . clears the way for a discussion of the titles to territorial sovereignty in uncivilised regions which states belonging to the society of international law invoke against one another',[44] followed by a discourse on discovery and occupation as international titles.

This point is further made explicit by Thomas J. Lawrence. Lawrence submits, evidently in agreement with John Austin,[45] that a sovereign State must have two characteristics: a government that receives habitual obedience from the bulk of the people and does not render habitual obedience to any earthly superior. For such a State to become a subject of international law, however, it must attain 'a certain, or rather an uncertain, amount of civilization' and possess a 'fixed territory'. Accordingly, a territory is *terra nullius* if it does not meet these criteria and is, therefore, an object (and not subject) of international law, without standing in the exclusive club of the 'family of nations'. Lawrence cites, as an example of the affected populations, a 'wandering tribe without a fixed territory', which might 'obey implicitly a chief who took no commands from other rulers', yet 'the necessary degree of civilization would be lacking'. Additionally, 'even if we could suppose a nomadic tribe to have attained the requisite degree of civilization, its lack of territorial organization would be amply sufficient to exclude it from the pale of international law'.[46]

It suffices to point out, at this juncture, that this position is at variance with the Advisory Opinion of the International Court of Justice in the *Western Sahara Case*.[47] The Court points out that 'Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them'. Determining that Western Sahara was not *terra nullius*, the Court observes that a contrary determination 'would be possible only if it were established that [at the time of its colonization by Spain] the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of "occupation"'.

In further elaboration of his point, however, Lawrence contends that occupation 'applies only to such territories as are no part of the possessions of any civilized state'. Accordingly, '[i]t is not necessary', he submits, 'that [such territories] should

[44]Westlake, (n 10) 155. Hyde further points out that by deeming the "uncivilized or extremely backward" inhabitants of a territory "to be incapable of possessing a right to sovereignty", a conqueror could "ignore their title and proceed to occupy [their] land as though it were vacant". In such cases, he further notes, "conquest refers merely to the military or physical effort by means of which occupation becomes possible": Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United State*s, Vol. I (2nd rev. edn., 1947) 357. Reliance on conquest, in the sense in which it is traditionally understood, would have entailed the establishment by the European Powers – at least in their relations with one another – of unprovoked aggression which is a key ingredient of conquest as a mode of territorial acquisition. Thus, the invocation of *terra nullius* had the dubious advantage of dispensing with this requirement. Besides, resort to war against African States would have invariably pitched rival European Powers against one another.

[45]John Austin, *The Province of Jurisprudence Determined* (David Campbell and Philip Thomas, eds., 1998) 101. The first edition of the book appeared in 1832.

[46]Lawrence (n 11) 50-1.

[47]*Western Sahara Case* (n 22) at 39 (1975).

be uninhabited' because '[t]racts roamed over by savage tribes have been again and again appropriated, and even the attainment by the original inhabitants of some slight degree of civilization and political coherence has not sufficed to bar the acquisition of their territory by occupancy'. Therefore, he concludes that 'international morality', and not international law, demands that the 'natives' be treated with consideration.[48]

It is striking that while Lawrence has no hesitation in treating the 'uncivilised regions' as objects of international law, he is willing to treat chartered companies—such as the British South Africa Company—which, as he points out, 'ha[d] been called into existence by some of the colonizing powers ... to open up enormous territories when first brought within the sphere of their influence', as 'international persons ... though of a very imperfect and subordinate kind'. He views such companies as 'sovereign in relation to the barbarous or semi-barbarous inhabitants of the districts in which they bear sway', even though they are not so treated by their own States. To reach the conclusion that the companies in question are sovereign in relation to the 'barbarous or semi-barbarous', he relies, without creditably indicating how he deciphers the workings of the inner minds of such people, on their perceptions of the authority of the companies.

Lawrence concludes that '[t]he subjects of international law are sovereign states and those other political bodies which, though lacking many of the attributes of sovereign states, possess some to such an extent as to make them real, but imperfect, international persons'. Such 'other political bodies' or 'part-sovereign states' he lists as 'client states'; 'confederations, together with the member-states that compose them'; 'civilized belligerent communities whose belligerency, but not whose independence, has been recognized'; as well as 'chartered companies' to whom vast governmental powers had been delegated.[49] Accordingly, entities or districts inhabited by 'the barbarous or semi-barbarous' could not even be elevated to the status of 'real, but imperfect, international persons'.

The implication of the denial of the sovereignty of African States, insofar as the mode of their acquisition by the colonising powers is concerned, offers an interesting contrast with the pre-nineteenth century state of international law. Lindley's succinct survey of the works of publicists in the pre-nineteenth century era—such as Vitoria, Soto, La Casas, Ayala, Gentilis, Selden, Grotius, etc.—leads him to the conclusion that although they expressed their positions 'in different ways, they [did] not differ materially among themselves' to the effect that 'wherever a country [was] inhabited by people who [were] connected by some political organization, however primitive and crude, such a country [was] not to be regarded as *territorium nullius* and open to acquisition by Occupation'.[50] This conclusion, he further attests, is also borne out by the State practice at the material time.[51]

[48]Lawrence (n 11) 148.

[49]ibid 66, 68-9.

[50]Lindley (n 36) 17.

[51]ibid 24, 43.

This is not to say, however, that such territories were beyond the reach of the European powers. As a general rule, the international law of the time excluded non-Christians from its fold, even though in the so-called Christian States the basic tenets of Christianity were not necessarily being faithfully observed. Accordingly, non-Christian States were at the mercy of the 'Christian Club' and could lose their territories through conquest or cession.[52] However, although Lindley painstakingly sets out the basic distinctions and premises for the acquisition of 'backward territory' through cession, conquest or occupation, at various historical epochs, he fails to state the obvious: irrespective of the mode of acquisition (including even the so-called cession), Africa—described in different texts as 'barbaric', 'savage', 'uncivilised', 'backward', etc.—bore, and continues to bear, the brunt of the onslaught of the European powers.

4.5 The Berlin Conference of 1884–1885 and the Question of the Sovereignty of Pre-colonial African States

> . . . [T]he Berlin conference, despite its significance for the subsequent history of Africa, was essentially a European affair: there was no African representation and African concerns were, if they mattered at all, completely marginal to the basic economic, strategic and political interests of the negotiating European powers.—A. I. Asiwaju[53]

The scramble for Africa and the intense rivalry[54] thereby occasioned, particularly among the European powers, led to the convening of the Berlin Conference of 1884–1885. If anyone was in doubt as to whether or not the European powers really reckoned with the sovereignty of African States—as a reality in its own right and not for their selfish interests—the Berlin Conference put the issue beyond dispute. The fact that African States were not represented at the Conference is pregnant with meaning. If the European powers considered the African States at the material time as sovereign entities, why were they not represented at the Conference,[55] even in the face of the obvious fact that Africa was the focal point of the Conference? How could

[52]ibid 26. As Shaw further points out, the essence of the pre-19th century attitude was that the acquisition of sovereignty over the lands of the peoples of such entities "depended upon the concept of conquest not occupation, and accordingly discussion centred on the notion of just war and the legality of hostilities against non-Christians": Shaw (n 6) 31.

[53]A. I. Asiwaju, 'The Conceptual Framework', in Asiwaju (n 19).

[54]Young describes the nature of the scramble thus: "Africa, in the rhetorical metaphor of imperial jingoism, was a ripe melon awaiting carving in the late nineteenth century. Those who scrambled fastest won the largest slices and the right to consume at their leisure the sweet, succulent flesh. Stragglers snatched only small servings or tasteless portions; Italians, for example, found only desserts on their plates": Young (n 27) 19.

[55]The Final Act of the Conference was signed by the plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Great Britain, Germany, Italy, Netherlands, Portugal, Russia, Spain, Sweden, Norway, Turkey and the United States. On the Berlin Conference generally, *see* S. E. Crowe, *The Berlin West Africa Conference* (1970).

a Conference whose 'chief purpose', in the words of Beer,[56] 'was to establish freedom of commerce' exclude Africans whose territory was the target? Is this not a reflection of the very nature of the colonial project and its perception of the status of entities and peoples earmarked for colonisation? Why were Africans not consulted prior to the convening of the conference? If African States were appreciated as sovereign entities in their own right, why were they not invited to the conference, at the end of which any treaty concluded, with their input and consistent with their interests, would constitute the basic legal framework for the 'freedom of commerce' envisaged?

What this demonstrates is the fact that the denial of the sovereignty of African States by the European powers—as a reality independent of the vagaries of the colonial enterprise—and the treatment of their territory as *terra nullius*, was not simply academic theorising which could be dismissed as the palaver of academics like Westlake who, in the comfort of their ivory towers, were oblivious of State practice and the underpinning intentions of the colonising powers. To that extent, this bears testimony, in effect, to a coterminous—at least in nineteenth century Europe[57]—academic opinion and customary law on account of either the influence of the former on the latter or the former as a restatement of the latter – in any event a mutual congruence.

Indeed, when Mr. Kasson, the plenipotentiary of the United States at the Berlin Conference, expressed the view that '[m]odern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory' and that the acquisition of territories in Africa should be premised on 'the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked . . . aggression',[58] Herr Busch, German Undersecretary of State for Foreign Affairs, who was presiding, responded that Mr. Kasson's views 'touched on delicate questions, upon which the

[56]George Louis Beer, *African Questions at the Paris Peace Conference* (Louis Herbert Gray ed., 1923) 195.

[57]Cf. The Separate Opinion of Judge Ammoun in the *Western Sahara Case*, (n 22) 85-7. Judge Ammoun refers to the "penetrating views" of Bayona-Ba-Meya (for Zaire, now Democratic Republic of Congo) and Mohammed Bedjaoui (for Algeria), on the issue of *terra nullius*, which he commends as:

> the reply which may be given to the participants in the Berlin Conference of 1885, who, during the fierce blaze of nineteenth-century colonialism, the success of which they sought to ensure by eliminating competition, regarded sub-Saharan Africa as an immense *terra nullius* available for the first occupier, whereas that continent had been inhabited since pre-historic times, and flourishing kingdoms had there been established – Ghana, Mali, Bornu – whose civilization survived until the colonial period, and only succumbed to the wounds inflicted by colonization and the slave trade. . .It was in the southern part of this continent and in Kenya that. . .ethnologists discovered the remains of the first hominoids.

Both Bayona-Ba-Meya and Bedjaoui, had challenged the use of *terra nullius* by the European Powers to deprive Africans of their lands. In essence, they (Bedjaoui in particular) questioned the universal application of a law, purporting to be international, in which Africans had no input.

[58]Quoted in Westlake, (n 10) 138.

conference hesitated to express an opinion'.[59] Thus, Westlake proclaims that 'it would be going much further, and to a length to which the conference declined to go, if we were to say that, except in the case of unprovoked aggression justifying conquest, an uncivilised population has rights which make its free consent necessary to the establishment over it of a government possessing international validity'.[60]

It is, therefore, no surprise that the conference proceedings and the Berlin Act are replete with references to occupation, a mode of acquisition of territory that is traditionally invoked in relation to *terra nullius*—a development suggestive of the confluence (at least in nineteenth century Europe) of academic opinion, customary law and treaty law. Whatever differences existed were, from a practical point of view, inconsequential. Clearly, Westlake and others similarly situated considered so-called treaties of cession between the European powers and the 'uncivilised' African States to be devoid of legal, as opposed to moral, significance. Accordingly, they preferred to anchor European titles to territories in Africa on modes of territorial acquisition other than cession (especially occupation). On the other hand, although the European powers accorded legal significance to such treaties, this was primarily insofar as their relations with one another were in issue. One recalls, in this respect, Thruston's account to the effect that it was desirable to perform a 'little comedy' (sign a treaty) with Chief Kivalli 'before he [Chief Kivalli] should do so with the Belgians'. As against the 'uncivilised' African States, however, the reality is that, in practice, cession—predicated on such treaties—differed from occupation in name only. Again, one cannot but recall Thruston's revelation that the treaty-making process was 'an amiable farce, the equivalent of an occupation'.

Lindley is, however, of the view that it is legitimate to say that although the method of acquiring territory in Africa was generally referred to as occupation at the Berlin Conference, the term was used with a broad meaning equivalent to acquisition or appropriation and was not confined to occupation in the strict sense of the word.[61] Lindley's view is informed by his attempt to show that the European powers recognised the sovereignty of African States and could only acquire territories in inhabited parts of Africa through means other than occupation. However, the fact that the European powers, at best, had mere pretensions to the sovereignty of African

[59]ibid 138.

[60]ibid 139.

[61]Lindley (n 36) 34. Shaw shares this view: Shaw (n 6), at 34-5. In the *Western Sahara Case*, the Court observed that "[o]n occasion . . .the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a 'terra nullius' in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*". There is no specific indication, however, that the Court had in mind the Berlin Conference and the Berlin Act. The Court further points out that it was not called upon to "pronounce upon the legal character or the legality of the titles which led to Spain becoming the administering Power of Western Sahara": *Western Sahara Case* (n 22) 39-40.

States—and disingenuously so—undermines his position.[62] Lindley himself acknowledges this fact, but, for him, it suffices that although 'in many cases ... treaties [with Africans] were obtained under compulsion ... forced treaties are not unrecognized in international affairs'.[63]

It therefore follows that the participants at the Berlin Conference could not have come to the conclusion that Africa was to be partitioned as though it was, so to say, a booty of war, without a prior approval, even if tacit, of the view that Africans, who had long inhabited their lands, were 'uncivilized' and devoid of sovereignty. Accordingly, as Anghie points out, '[c]onventional histories of the Conference make the powerful point that Africans were excluded from its deliberations. The story of the Conference may also be written, however, from another perspective that focuses on the complex way in which the identity of the African was an enduring problem that haunted the proceedings of the Conference.'[64]

What then is the import of our analysis for the validity of the so-called treaties of cession that were signed between European States and African States? Were such treaties invalid on account of the alleged absence of sovereignty on the part of the latter? Quite the contrary. The parties were sovereign and seised of treaty-making competence but not because, as is clear by now, the European powers—in substance and not merely in form—treated African States as such. However, as earlier pointed out, the validity of such treaties is a matter for determination with reference to the existence or otherwise of vitiating or invalidating elements.

[62]Cf. Diane F. Orentlicher, 'Separation Anxiety: International Responses to Ethno-Separatist Claims' (1998) 23 Yale J. Int'l L., 1, 28-9. Orentlicher points out that European States acquired sovereignty over some colonial territories through occupation of what was characterized as *terra nullius* and over other areas through conquest. However, in most cases, transfers of sovereignty from African to European governments were formally effected by bilateral treaties, including treaties of cession and treaties establishing protectorates. Such treaties implicitly recognized the African rulers who signed them as possessing "the attributes of sovereignty", while the treaty form "implied a legal equality" between the signatories. Orentlicher, however, makes it clear that, in practice, during the 19th century, "African rulers often executed these treaties under considerable duress". Additionally, the treaties were legally relevant less as a mode of transferring rights between the two parties than as a means by which European Powers could, as against each other, demonstrate their title to a particular territory in Africa: ibid.

[63]Lindley (n 36) 44.

[64]Anghie, (n 26) 61. Further criticisms of the Berlin Conference in particular and the colonial project in general, are provided in Makau Wa Mutua, 'Why Redraw the Map of Africa: A Legal and Moral Inquiry' (1995b) 16 Mich. J. Int'l L., 1113; Makau Wa Mutua, 'Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State' (1995a) 21 Brook. J. Int'l L. 505.

5 Revisiting the Sovereignty and Civilisation Questions: The Reconstruction of the Legacy of Africa's Pre-colonial History

5.1 The Legacy of History and the Reality of the Sovereignty of Pre-colonial African States

> Africa has, for generations now, been viewed through a web of myth so pervasive and so glib that understanding it becomes a two-fold task: the task of clarifying the myth and the separate task of examining whatever reality has been hidden behind it . . . Only if the myth is stripped away can the reality of Africa emerge.—Paul Bohannan[65]

African history has been so distorted, especially by Eurocentric scholars, that for a long time the conventional 'wisdom' was that Africa had no history prior to its contact with the West. As Machel puts it: '[Africa was] excluded from history, forgotten in geography [and] only existed with reference to a colonial point of reference.'[66] Thus, Hegel, a German philosopher, went so far as to proclaim that Africa is 'no historical part of the world; it has no movement or development to exhibit'.[67] Indeed, the task of reconstructing Africa's authentic history is so monumental that it continues to engage the attention of African and non-African scholars who have undertaken the historic mission of setting the records straight. While this task continues, numerous studies so far abound that counter the stereotypic labelling of pre-colonial Africa as 'uncivilised', 'savage', 'barbaric', etc. Walter Rodney's

[65] *Africa and the Africans* (1964) 1. Questioning the myths surrounding the history of Africa, Okoye asserts:

> Africa has a long and enduring history behind it, longer than any historian has described it. Africa has had its own rich sweep of events which European conquest and settlement have failed to reckon with. Yet, no civilization of the world can be divorced from the continent. The depth of its antiquity, the immensity of its treasure and the resilience of its people form a fascinating study which no single intellect can comprehend, no single volume describe.

Mokwogo Okoye, *African Responses* (1964) 389.

[66] Samora Machel, quoted in Patrick Wilmot, *Ideology and National Consciousness* (1980) 189.

[67] Georg Hegel, *The Philosophy of History*, quoted in Joseph E. Harris, *Africans and Their History*, (2nd rev. edn., 1998) 9. Harris' text addresses critical issues such as "A tradition of Myths and Stereotypes [about Africa]" (Chapter 1), "The Evolution of Early African Societies" (Chapter 2), "Early Kingdoms and City-States" (Chapter 3), "The Scramble and Partition" (Chapter 11), "African Diplomacy, Resistance and Rebellion" (Chapter 12), and "The European Colonizers: Policies and Practices" (Chapter 13). Unfortunately, as Harris observes, "[r]ace in general, and myths and stereotypes surrounding physical features and skin color in particular, have been so pervasive and basic in black-white relations and in accounts of those interactions that in spite of a stream of scientific evidence to the contrary, the concept of black inferiority continues to thrive in many minds": ibid. On the question of race in the United States, for instance, *see* Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (rev. edn., 1995).

'How Europe Underdeveloped Africa'[68] and the works of a host of other scholars[69] are replete with evidence—including the testimonies of some of the early European explorers[70]—to the effect that the popular portrayals of Africa in Europe were clearly misconceived and that, far from enabling or facilitating the development of Africa, Europe's contact with Africa—since the days of the ignominious slave trade—ushered in the underdevelopment of the continent.

Furthermore, Elias, a former Chief Justice of Nigeria and former President of the International Court of Justice, in his Africa and the Development of International Law, provides an insightful summary, predicated on historical facts—which need no repetition here—on the organisation and international relations, *with obvious legal connotations*, of 'indigenous African States' such as ancient Ghana (reputed to have lasted from 300 to 1087 A.D.), Mali Kingdom, Songhai Kingdom, Yoruba empires/kingdoms, etc.[71]

The fact is that the Europeans who characterised pre-colonial Africa as 'uncivilised' and devoid of sovereignty either exhibited their ignorance of African history or conveniently chose to see Africa and its people through a distinctly European prism. That explains Westlake's earlier conception of a government—his test of civilisation—as one that must be capable of protecting 'people of the European race' in a manner that enables them to 'carry on the complex life to which they have been accustomed in their homes'. Without a scintilla of doubt, such construction is myopic and, concomitantly, flawed.

One must, of course, avoid the risk of revelling in idle fantasy by painting a romantic portrait of Africa that is at variance with the material evidence. None the less, it is undoubtedly the case that Westlake and others similarly situated are either not students of African history or have approached Africa and its peoples from a skewed perspective.

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[68]Rodney (n 27).

[69]*See* generally, Basil Davidson, *Black Mother: Africa – The Years of Trial* (1970); W. N. Huggins and J. G. Jackson, *An Introduction to African Civilizations* (1973); Joseph C. Miller (ed), *The African Past Speaks* (1980); L. A. Thompson and J Ferguson (eds), *Africa in Classical Antiquity* (1969); Okoye, (n 65); H. M. Schieffelin (ed), *The People of Africa* (1974).

[70]For instance, Blyden is reported to have remarked that an exhibition by Africans opened his eyes to "capacities and susceptibilities altogether inconsistent with the theory that dooms such a people to a state of perpetual barbarism or of essential inferiority to the more favoured races": E. W. Blyden, *Report on the Falaba Expedition* (1872), quoted in Schieffelin (ibid at XI). After witnessing the wonders of Egypt, Volney, a French Oriental traveler, exclaimed: "To think that this black race, today enslaved by us and the object of our disdain, is the same to which we owe our arts and sciences and even our speech": Quoted in Okoye, (n 65) 92.

[71]T. O. Elias, *Africa and the Development of International Law* (2nd rev. edn., Richard Akinjide eds 1988) 6-17. See also, U. O. Umozurike, *Introduction to International Law* (1993) 7-8; Basil Davidson, *African Civilization Revisited* (1991a); A. K. Mensah-Brown, 'Notes on International Law and Pre-Colonial Legal History of Modern Ghana', in Mensah-Brown (ed), *African International Legal History* (1975), at 107; T. O. Elias, 'International Relations in Africa: A Historical Survey', in Mensah-Brown, ibid at 87; Godwin-Collins K. N. Onyeledo, "'International Law' Among the Yoruba-Benin and the Hausa-Fulani", in Mensah-Brown, ibid at 153; Basil Davidson, *Africa in History* (1991b); J. F. Ade Ajayi (ed) *Africa in the Nineteenth Century Until the 1880s* (1989).

5.2 *The Locus of the Sovereignty of Pre-colonial African States in the Colonial Era*

Having regard to the reality of Africa's pre-colonial history, the fact that colonialism—in collusion with Eurocentric 'international' law—denied the sovereignty of African States or, at best, paid lip service to it is a sad commentary on the legacy of nineteenth-century international law. The capacity of law, international or otherwise, to develop in advance of dominant social relations is obviously limited. However, law can, in however limited a sphere, play a liberating role.

Given that, as we have maintained, pre-colonial African States were sovereign, what became of such sovereignties while colonialism held sway in Africa? Were such sovereignties extinguished? Elias is of the view that '[o]nce the various [European] Powers had parcelled out the continent and consolidated their boundaries by international treaties, the existing sovereignties of the old kingdoms and city states became submerged under the new sovereignties of the "metropolitan" Powers'.[72] Such sovereignties were certainly not extinguished. It is submitted, although the colonial powers in their relations with one another were not so disposed, that while colonialism lasted, the colonial powers were *de facto* sovereigns, while *de jure* sovereignty continued to repose in the respective African States. Thus, the sovereignty of African States was, at the very least, in abeyance during the reign of colonialism in Africa. Consequently, on the assumption that the European powers obtained valid titles to territories in Africa on the strength of the so-called treaties of cession, such treaties were, as the International Court of Justice observed in the *Western Sahara Case*, 'derivative roots of title, and not original titles obtained by occupation of *terrae nullius*'.

6 Conclusion: Reinforcing the Imperative of Critical Legal Scholarship with a View to Purging International Law of Its Colonial Vestiges

On the face of it, *Cameroon v Nigeria* was simply a territorial dispute between two African States. In reality, however, and as borne out by the preceding discourse, colonialism was on trial. Regrettably, the Court, with due respect, abdicated its responsibility. As Judge Al-Khasawneh rightly observes:

> [I]f the Judgment is to constitute a legally and morally defensible scheme, it cannot merely content itself with a formalistic appraisal of the issues involved. Such issues include the true scope of intertemporal law and the extent to which it should be judged by contemporary

[72]Elias (n 71) at 19.

values that the Court ought to foster; an ascertainment of State practice at the relevant time and the role of the Berlin Conference on West Africa of 1885; the question, whether that practice —assuming it permitted the acquisition of title in the so-called colonial protectorates — could be invoked in an African case when no African State had participated in the formation of such alleged practice; the relevance of the fundamental rule *pacta sunt servanda* on the passing of title and the normative value to be attached to the consistent practice of the colonial Power in question (Great Britain) of distinguishing between colonies on the one hand and protectorates on the other. Only when a serious attempt has been made to analyse this host of relevant and interrelated considerations can it be said that the question repeatedly and forcefully posed by Sir Arthur Watts as counsel for Nigeria – Who gave Great Britain the right to give away Bakassi? And when? And how? — would be answered. To my mind, the Judgment, by taking for granted such premises as the existence of a category of protectorates indistinguishable from colonies, or the right of colonial Powers to deal with African potentates on the basis that the fundamental rule *pacta sunt servanda* does not exist, has failed to answer that question... these are central issues in this case and have implications that go beyond it...[73]

As Judge Rezek further asserts, and rightly so:

It is rare to find in classic international law propositions as flimsy - and as inadmissibly so in moral terms - as those which would have it that agreements entered into in the past between colonial Powers and indigenous communities - organized communities which had been masters of their territories for centuries and were subject to a recognized authority - are not treaties, because "native chiefs and tribes are neither States nor International Organizations; and thus possess no treaty-making capacity."

...

In the present case, the Bakassi Peninsula was part of the territory of Old Calabar, subject to the original rule of its *Kings and Chiefs.* The Applicant itself, paradoxically required by the circumstances to espouse some particularly unacceptable propositions of colonialist discourse, has sought to cast doubt on the existence and independence of that rule by recourse to considerations which, rather, confirm them. Moreover, only the 1884 Treaty, concluded with that form of local rule, could have justified the functions assumed by Great Britain when it became the protecting State of those territories, for, if the Kings and Chiefs of Old Calabar did not have capacity to enter into an international agreement, if the 1884 Treaty was not a treaty and had no legal force whatsoever, it must be asked what was the basis for Great

[73] Al-Khasawneh, (n 8) para. 3. It is against the backdrop of this reality that Nigeria's outburst should be appreciated: In its official reaction to the verdict, the Nigerian Government 23 October 2002, asserted that "for purely political reasons, the Court, headed by a French President, upheld a legal position which is contrary to all known laws and conventions, thus legitimising and promoting the interests of former colonial powers at our expense." Alleging bias, the Nigerian Government maintained that "[t]he French President of the Court and the English and German judges should have disqualified themselves since the countries which they represent are, in essence, parties to the action or have substantial stakes." "These judges, as citizens of the colonial powers whose action had come under scrutiny," Nigeria further asserted, "acted as judges in their own cause..." *New Nigerian* 25 October 2002, at 3.

> Britain to assert its authority over these territories, by what mysterious divine right did it set itself up as the protecting State of these areas of Africa.[74]

In spite of the failure of the majority of the Court to critically engage the colonial question, we must not despair. We must strive to complete the task that was so wondrously begun in the *Nauru Case*.[75] International law has undoubtedly undergone a remarkable transformation over the years and no longer portrays itself, at least not explicitly, as the exclusive preserve of the 'civilized'.[76] None the less, as evident from the position of the majority of the Court in *Cameroon v Nigeria*, the ghost of Eurocentric 'international' law still haunts us. *Bakassi* challenges us to purge international law of its colonial vestiges. This is a historic task that does not admit of the 'luxury' of procrastination!

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[74] *Cameroon v Nigeria* (n 2), Declaration of Judge Rezek.

[75] *Case Concerning Certain Phosphate Lands in Nauru (Preliminary Objections) Judgment (Nauru v. Australia)*, Judgment of 26 June 1992 [1992] I.C.J. Reports.

[76] However, Article 38(1) (c) of the Statute of the International Court of Justice still speaks of "the general principles of law recognized by civilized nations", without enunciating what the test of civilization is: 26 June 1945, 59 Stat. 1055, T. S. No. 993, 3 Bevans 1179.

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The International Law of Secession and the Protection of the Human Rights of Oppressed Substate Groups: Yesterday, Today and Tomorrow

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1 Introduction

This paper focuses on significant patterns/features in the historical development of the international law of secession and its contribution over time (or the lack thereof) to the struggle to afford greater protection to oppressed substate groups the world over. It was Crawford Young who once observed that "the state as an analytical quarry is an elusive and complex prey."[1] With the necessary modifications, this observation applies with almost equal force to the international law of secession. Complexity and confusion looms too large in this area of international law. For example, there is, at best, little clarity in the literature of the discipline of international law and in related fields of study regarding the existence or otherwise of an international legal entitlement to secession in favor of even the most highly oppressed and subjugated substate groups.[2]

[1] Crawford Young, *The African Colonial State in Comparative Perspective* (Yale University Press 1994) 13.

[2] For examples of the range of opinion in the relevant literature, see: James Crawford, *The Creation of States in International Law* (Clarendon Press 1979); Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995); Obiora Chinedu Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (Martinus Nijhoff 2000); Obiora Chinedu Okafor, 'Entitlement, Process and Legitimacy in the International Law of Secession' (2002) 9 Intl J on Minority and Group Rights 41; Hurst Hannum, 'Rethinking Self-Determination' (1993) 34 Va J Intl L 1; John Dugard, 'Secession: Is the Case of Yugoslavia a Precedent for Africa' (1992) 5 Afr J Intl Comp L 163; Gregory H Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus' (1995) 16 Mich J Intl L 733; J Oloka-Onyango, 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millenium' (1999) 15 Am U Intl L R 151; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995); Ian Brownlie, *Principles of Public International Law* (Clarendon Press 1990); Fredric L Kirgis Jr, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88(2) AJIL 304; Robert McCorquodale, 'Self-Determination Beyond the Colonial Context and its Potential Impact on Africa' (1992) 4 Afr J Intl Comp L 592; Stephen J Toope, 'Re Reference by Governor in Council Concerning Certain Questions Relating to Secession of Quebec from Canada' (1999) 93 AJIL 519; and Thomas M Franck, 'Post-Modern Tribalism and the Right to Secession' in Catherine Brolman, Rene Lefeber, and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff 1993).

Given this unsatisfactory state of the literature on a subject of such great importance not only to the stability of the Westphalian state system but also to the human rights, lives and even the very survival of the multitudes of subaltern substate groups that suffer under highly oppressive state formations across the globe, it is meet that yet another systematic look be taken at "the state of the art" on this aspect of "the art of the state."[3] This is what this paper attempts to do, albeit only by way of providing a bird's-eye view of the relevant international socio-legal terrain. The paper analyzes the relevant international legal texts and practices with a view to deciphering broad patterns in the historical development of the international law of secession, especially with regard to understanding its historic (in)capacity to serve as a normative resource in the hands of those who have struggled for the liberation of all-too-many oppressed "peoples" from their parent states.

The substantive arguments of the paper are developed in its three main sections, which are collectively sandwiched by an introduction and a conclusion. The substantive analysis conducted in the main sections of the paper is organized in a historical way, in the sense that the state of affairs in the area of the international law of secession in the era before the current period (what is referred to in this paper as "yesterday") is discussed in Sect. 2 of the paper and that this is done as a background to the analysis provided in Sect. 3 on the position of that legal regime over the last four decades or so (what we have styled "today"). Following these discussions, Sect. 4 is then devoted to an analytical projection into the future of the international law of secession (i.e., into its "tomorrow"). Section 5 concludes the paper.

2 Yesterday

In the century or so before the United Nations (UN) era (i.e., in the epoch before the adoption of the UN Charter, the two principal international human rights covenants, and the so-called *Declaration on Friendly Relations*),[4] the international law on the secession of substate groups from already established states was more or less characterized by the following features/attitudes: little—if any—treaty or negotiated soft law norms, near-total dominance of customary international law norms, almost total dominance of the doctrine that effectiveness confers legitimacy, little—if any—human rights discourse or its application, little—if any—adjudicative or even democratic political process, a very strong tendency among states to selectively

[3] Friedrich Kratochwil and John Gerard Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 Intl Org 753.

[4] *Charter of the United Nations*, 26 June 1945, 3 Bevans 1153; the *International Covenant on Economic, Social and Cultural Rights*, (1967) 6 ILM 368; *International Covenant on Civil and Political Rights*, (1967) 6 ILM 368; *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, UNGA Res A/RES/25/2625.

invoke pro- or anti-secession principles, a concept of legitimate statehood that tended to accept and reflect social power/injustice rather than tackle or resist it, and a consequent normative orientation that severely disadvantaged, if not repressed, all too many of the discrete "peoples" who together constituted the established states of that era. Each of these broad patterns will now be discussed one after the other.

2.1 *Little—if Any—Treaties or Negotiated Soft Law Norms*

An important feature of the international law of secession in this pre-UN period, in yesterday's era, was the almost total absence of global or even regional level treaty law on the subject. The field was almost completely dominated by customary international norms, many of which were and remain of uncertain meaning and scope. As between custom and treaties, the latter had the potential of much more rapidly transforming the law in this area in a much more progressive human-rights-centered direction. Given the manner in which custom develops and emerges in international law, a similar customary international law process would have, of necessity, been much slower and more fraught with uncertainty and confusion. The fact remains, however, that it was in custom and not treaty international law that the traditional international law of secession was to be found.

2.2 *Near-Total Dominance of the Effectiveness Doctrine*

Regarding the near-total dominance in the traditional international law of secession of the doctrine that effectiveness confers legitimacy, it is best to begin by explaining—albeit in brief—the meaning and essence of this doctrine. As ably restated by James Crawford, the doctrine asserts that where a state actually exists, the law must take favorable account of the new situation despite its illegality or illegitimacy, and where a state does not in fact exist, norms or rules requiring that it exist can only be pointless, a denial of reality.[5] And so when once an act of state formation or secession has been effectively done, it is lawful and legitimate precisely because it is effective.[6] And so for substate groups that were part of established (noncolonial) states, the path to liberation from oppressive state formations was in this era almost exclusively violent,[7] for rarely would or did an established state look favorably on the secessionist agitations of such groups—and this was so regardless of the extent of the oppression visited on the relevant substate group by the state at

[5]Crawford (n 2).
[6]ibid.
[7]Okafor, *Re-Defining* (n 2) 92-125.

issue.[8] This meant that such groups were almost invariably forced to take up arms against their parent states if they were to have any chance at all of liberating themselves from such oppression by seceding from these states.[9] If their effort was successful, they benefited from the doctrine that effectiveness confers legitimacy, but if they failed, the near-total dominance of the effectiveness doctrine in the era under review meant that the normative legitimacy of their struggle to be free of the violation of their human rights by their states counted for very little, if anything at all, in traditional international law.

2.3 A Politics with Little Rights

This point leads quite logically to another characteristic of the international law of secession in the pre-UN era: the fact that during this period the international politics of state formation and substate group secession was—more or less—a politics with little rights and a high politics that was almost totally devoid of normative constraint. Thus, during this period, a people could suffer from or be threatened by genocide, mass murder, apartheid, crimes against humanity, or the like, yet if they were not actually effective in militarily battling their way out of the control of the relevant state, they could not in almost all cases protect themselves from such grave threats by seceding from the impugned state. Indeed, the very question of their entitlement or right to secede from such deadly or highly oppressive circumstances was a virtually irrelevant one in the traditional international legal order. According to many scholars, the position under the traditional international law of the time was, at best, that the law neither favored nor outlawed secession,[10] a normative position that still reeks of the injustice of Anatole Frances' law that would "equally" prevent the rich and the poor from sleeping under bridges! Yet more accurately, the position in this epoch was that the application of the norm of self-determination to established (noncolonial) states was generally disfavored if it was expected to lead to the breakup of the relevant state.[11] Thus, in the pre-UN era, the regulation of secession—if it is even possible to refer to it as such—was essentially a function of the play of a form of high international politics that was deeply connected to and almost automatically reflective of the developments on the ground and that identified very

[8] ibid.

[9] ibid. For example, during this pre-1945 era, the legitimacy or otherwise of the creation or (re) emergence of a new state from another one was almost entirely a matter of the political/military effectiveness of that emergent entity, as is witnessed for example by the forcible separation of many states (such as Albania, Serbia, Romania and Montenegro) from the Ottoman Empire during the late 19th and early 20th centuries. See Richard Hall, *The Balkan Wars* (Routledge 2000); and CIA, *World Fact Book: Albania*, <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/al.html> accessed 9 June 2016.

[10] For example: Franck, 'Postmodern Secession' (n 2) 159; Hannum (n 2) 42; and Dugard (n 2) 165.

[11] Fox (n 2)733-735.

closely and heavily with those who held actual power in the relevant country. Accordingly, it was almost entirely devoid of the kinds of normative considerations and constraints that ought to arise from the demands of human rights in the circumstances.

2.4 *Little—if Any—Democratic or Adjudicative Process*

Not surprisingly, therefore, the international law of secession of this era was also almost entirely unconstrained by democratic, what more adjudicative, process. As we have seen, far from establishing a democratic process that took account of the wishes of the oppressed and/or aggrieved peoples who desired to secede from the parent state, traditional international law in fact did the exact opposite. By insisting on the "effectiveness confers legitimacy" doctrine, it explicitly and in effect legitimized a usually violent process of secession, one that recognized new states that had been formed by militarily successful substate groups that had rebelled against their parent states but tended to delegitimize the militarily unsuccessful attempts to secede of even those substate groups whose bids for secession was justifiably grounded in the egregious and massive violation of their human rights by the relevant state.[12]

What is more, in this era, when the legitimacy of a secessionist bid was assessed under traditional international law, it was not the "infra-review" (i.e., self-assessment) of the members of the relevant substate group that counted.[13] It was rather the "peer review" of the established states in the international community that almost invariably determined whether or not the secessionist bid was considered legitimate or otherwise under traditional international law.[14] Against this background, it is easy to appreciate why the notion of a process of third party *adjudicative* review of the legality and legitimacy of a secessionist bid by a substate group was almost completely absent in the living international law of yesterday's era.[15] As remarkably, this absence or gap was not inconsequential for the protection of the human rights of substate groups around the world. The reality that it was success on the battlefield that tended to confer legitimacy on a new secessionist state and the absence of third party adjudicative fora of the triadic type that would have been widely considered legitimate by all sides to the secessionist disputes of that era together contributed very significantly to the generation and augmentation of high levels of intrastate (and even interstate) violence the world over. The signal that was sent to restive substate groups was, in effect, "seek ye the kingdom of war and all

[12]Okafor, *Re-Defining* (n 2) 104-106.

[13]ibid 54-65, 109-111.

[14]ibid.

[15]Okafor, 'Entitlement' (n 2) 56-70.

other things shall be added unto you." And apart from being a human rights violation in itself, the ensuing violence all too often led in turn to massive violations of the human rights of the affected substate groups.

2.5 An Excessively High Level of Unjustifiable Selectivity

Equally important is the fact that this pre-UN era witnessed a very strong tendency among states to selectively invoke pro- or anti-secession principles. This is connected to the points that have already been made about the traditional international law of secession being governed by the effectiveness confers legitimacy doctrine, having been characterized by a politics with little rights, and being generally lacking of a democratic, what more adjudicative, process by which the merits/legality/legitimacy (or otherwise) of secessionist bids were to be evaluated. Without the significant (albeit limited) constraints of normative legitimism, with high politics almost completely displacing human rights standards, and without the benefit of democratic or adjudicative process, little in this era stood in the way of gross selectivity and inconsistency in the application of the principles of international law in this area. For example, in the late nineteenth and early twentieth centuries, the then existing European states supported or opposed the emergence of Albania, Serbia, Romania, Montenegro, and so on from the Ottoman Empire depending very much on their alignments in regard to the Balkan and other wars of that era.

2.6 A Largely Oppressive Concept of Legitimate Statehood

Equally interesting, but not surprising, is that the dominant conception of legitimate statehood in this pre-UN epoch was basically pro-status quo and tended to uncritically accept and reflect social-political power/injustice rather than tackle or resist it. The interests of established states, no matter how oppressive they were to one or more of the substate groups that constituted them, tended to dominate over the well-being and even the very survival of the relevant oppressed peoples. Thus, in this era, doctrines/principles, such as those on the maintenance of the territorial integrity of states and *uti possidetis*, almost completely displaced any considerations as to the need to protect substate groups from grave and/or systematic violations of their human rights.[16]

[16]ibid 72.

2.7 The Consequent Production of Severe Disadvantage for Oppressed Substate Groups

Needless to say, therefore, the consequent normative orientation of the traditional international law of this period was one that severely disadvantaged, if not repressed, all too many of the discrete "peoples" who together constituted the established states of that era. The international law of secession of this era clearly placed subaltern peoples at a far more disadvantage than established states. The signal that it sent to established states was that they could repress their substate groups as much as they wanted, and as long as they were effective in maintaining their power over their territory and citizens, international law and praxis would almost never delegitimize or delegalize their statehood. This in turn signaled to the relevant substate groups that they should either endure the repression or take up arms and rid themselves of the control that their state exerted over them. In either case, trouble loomed for the oppressed peoples, for the human rights of their members would almost invariably be grossly abused whichever way they chose to act. Remarkably, this tendency to place substate groups at a significant disadvantage was—in general—not moderated in any way in traditional international law even when the relevant substate group had suffered egregious violations of their human rights.

3 Today

It is important to begin by noting that a longer view of "today" is taken here—one that began a relatively long time ago and stretches into the very present. And so the today that is referred to here began in 1945, when the UN was born following the devastation of what is popularly referred to as World War II, and ends in our own present.

In the current post-1945 UN era (partly characterized as it has been by the adoption of the UN Charter in1945, the operation of the law established by that Charter, the adoption of the two major international human rights covenants in 1966, the coming into force of the latter treaties in 1976, and the adoption by a strong and widespread consensus of the Declaration on Friendly Relations in 1970),[17] the international law of secession has veered quite significantly to the opposite direction from its traditional orientation and trajectory. And so while a lot of progress remains to be made if this regime is to ever become sufficiently transformed into a regime that would be much more protective of the human rights of substate groups, appreciable progress has nevertheless been made. The challenge is to map the changes that have occurred as accurately as possible and account for them as precisely as we can. Careful analysis of the available material suggests that the

[17]For fuller descriptions of these documents, see note 4 above.

international law of secession today is characterized by significantly more treaty and negotiated soft law norms than was previously the case, a concomitantly diminished role for customary international law norms, a waning of the dominance of the doctrine that effectiveness confers legitimacy, considerably more human rights discourse and its application than was hitherto the case, a greater (if still insufficient) tendency to turn to adjudicative or democratic political process, substantial continuity in the very strong tendency among states to selectively invoke pro- or anti-secession principles, a concept of legitimate statehood that no longer automatically accepts and reflects social power/injustice, and a consequent normative orientation that holds a greater potential to ameliorate the undue disadvantage, if not repression, that has been the historic lot of all-too-many substate groups. These patterns will now be discussed in the order in which they have been outlined here.

3.1 A Much Greater Resort to Treaties and Negotiated Soft Law Instruments

The first two (related) points about the greater role played by treaties and negotiated soft law documents in today's international law of secession and the consequently lesser space available for customary international law norms to fill in this area are easily made. The key point here is that before the UN era, the international law of secession was far less governed by treaty negotiated soft law norms than it is today. The UN Charter itself proclaims in Article 1 (purposes) and Article 55 (respect for human rights) that friendly relations among nations, which it desired to become the norm, is based in part on respect for equal rights and self-determination of peoples, but it does not specify if this principle of self-determination is to be limited to the colonial context. Nevertheless, the broad academic consensus is that the understanding of self-determination at that time was in fact limited to the colonial context.[18] However, sometime within the long duration of today's era, probably in the 1970s and 1980s, this understanding began to gradually shift toward one that accommodated self-determination *in some form or the other* in the context of established noncolonial states.[19] This last point will be explored more fully later on in this section. The point here, however, is that this gradual shift (which is mostly a good thing) was largely due to the emergence of treaty-based and negotiated soft-law-based norms. These include the common Article 1 of the *International Covenant on Economic, Social and Cultural Rights* (hereinafter the ESC Rights Covenant) and the *International Covenant on Civil and Political Rights* (hereinafter the CP Rights Covenant) and paragraph 7 of the section of the *Declaration on Friendly Relations* that dealt with the principle of equal rights and self-determination of peoples. It is

[18]For example: Oloka-Onyango (n 2) 162-163; Cassese (n 2) 328; Brownlie (n 2) 595-598; and Kirgis (n 2) 305.

[19]For example: Fox (n 2) 743-745; McCorquodale (n 2) 593; and Toope (n 2) 524-525.

considered that these developments were a good thing because treaties and negotiated soft law instruments have a much greater potential than custom (which develops very slowly and in fits and starts) to more rapidly and robustly transform the law in this area, hopefully in the more pro-substate group way already indicated. Decisions have of course emerged from at least one domestic court, the African regional human rights system, and the International Court of Justice (ICJ), which have—to varying degrees—fed off and reinforced this trend, but the point remains that the trend was set off by the emergence of treaty law and the consequent diminishment (however slightly) of the role of customary law in this regard. The relevant cases will be discussed later on in this section of the paper.

3.2 The Waning of the Effectiveness Doctrine

The point about today's international law of secession being characterized by the waning of the dominance of the doctrine that effectiveness confers legitimacy is also easy to make. This is so largely because this view is strongly supported in the literature.[20] While the effectiveness doctrine remains the *dominant* criterion for the evaluation and acceptance of statehood, it no longer confers legitimacy *automatically*.[21] A good example of this diminishment in the power of the effectiveness doctrine in the international law of secession is that as far back as the 1990s, European states codified this turn in a soft law document that exhibited great power in real political life in Europe, the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*.[22] This document does not even refer to the effectives of the newly seceded candidate states as a basis for their recognition by other European states.[23] Instead, it contains "a long list of normative requirements to be met by the aspirant states before legitimacy could be conferred on them by their would-be peers".[24] What is more, as Crawford has correctly noted, since 1945, a significantly large number of separate and independent entities have emerged that have, universally, been agreed not to be states (for example, Taiwan, Rhodesia, Somaliland, and the breakaway regions of Georgia), and moreover, many noneffective entities have also been generally regarded as being, or continuing to be, states (for example, Kuwait while under Iraqi occupation, Bosnia under Serbian occupation).[25] It should be reemphasized though that the fact that the power of the

[20]For example: Franck, 'Postmodern Secession' (n 2) 7; Nii Lante Wallace-Bruce, *Claims to Statehood in International Law* (Carlton Press 1994) 67; Crawford (n 2) 77; and Martti Koskenniemi, 'The Future of Statehood' (1991) 32 Harv Intl L J 397.

[21]Okafor, *Re-Defining* (n 2) 67.

[22]*Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 16 December 1991, reprinted in (1993) 9 Eur J Intl L 46 annex at 72.

[23]Okafor, *Re-Defining* (n 2) 67.

[24]ibid.

[25]Crawford (n 2) 77.

effectiveness doctrine in this area has waned significantly does not mean that it has completely dissipated. Far from it, for as Milena Sterio has correctly argued, even in contemporary international law, it all too often appears as if the right to secession accrues in reality for substate groups if and when the great powers decide to support their causes.[26] The example of the effective secession of Kosovo from Serbia with strong EU, US, and Western support can be offered. In this regard, it should be noted that (as we will soon see) although an excellent case can be made that Kosovo, as an exceptional case, was entitled to secede as a remedy for its highly oppressive treatment by Serbia, the decision of the ICJ on the Kosovo secession matter neither supports nor undermines the case made by the representatives of the people of Kosovo for secession from Serbia. The Court basically refused to deal with this core question, which was at issue in the case.

3.3 A Politics with Much More Rights-Based Praxis

It is interesting to note that the major reason for this waning of the effectiveness doctrine in the area of the international law of secession is that a distinct, if incomplete, turn to the application of normative criteria has begun, one that has been largely grounded in the application of human rights standards and a kind of human rights mentality. Before adumbrating on this shift, it should be made clear at the outset that even contemporary international law (be it treaty or custom based) does not recognize a *generalized* right to unilateral secession for all substate groups simply because they so choose or are uncomfortable within their parent state.[27] The operation of important norms of international law such as the maintenance of the principle in favor of the territorial integrity of established states has meant that the general norm in international law has dictated that the right to self-determination must, in the vast majority of cases, be enjoyed within the confines of the parent state (for example, via local autonomy or self-government).[28] The literature is so crystal clear on this particular point that developing it further need not detain us unduly here. Suffice it to note that the general attitude among states and international institutions and in the literature to the existence of such a generalized entitlement remains as hostile as ever.[29] Indeed, at a January 2007 debate of the Third Committee of the UN

[26]Milena Sterio, 'On the Right to External Self-Determination: 'Selfistans', Secession and the Great Powers' Rule' (2010) 19 Minn J Intl L 137.

[27]Cassese (n 2)37-140; Dugard (n 2) 165; Christian Tomuschat, 'Self-Determination in a Post-Colonial World' in Christian Tomuschat (eds), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 7; and Okafor, 'Entitlement' (n 2) 47.

[28]Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart 2013) 50, 202-232, 244-245.

[29]Sakina Kabir B and Obinna James Edeh, 'An Evaluation of the EU and International Law: Responses to the Right of Secession in Crimea' (2014) 26 Mich Intl Lawyer 4, 6 (noting the European Union's hostility to the prospect of Scottish Secession).

General Assembly, on the right to self-determination, almost all the representatives of states present (and there were very many of them) kept silent on the existence or otherwise of the right to secession even as they discussed the right to self-determination in more general terms.[30] This is emblematic of the marginalization of any form of secession talk among states even within general self-determination discourse.[31] Indeed, India's representative at that debate summed up this dominantly hostile attitude thus: "the right to self-determination could not be abused to encourage secessionism and undermine pluralistic, democratic States. . .Such a view would only aid the forces of ethnic, religious and racial exclusivity."[32] Yet it is important to acknowledge that this dominant hostility to secession is not total. As the representative of Armenia said during the same debate, in part in response to the Indian representative, "many of the current unresolved conflicts [around the world] resulted from the suppression of peoples' aspirations for self-determination."[33]

Nevertheless, the far more interesting question today is whether such suppressed peoples, the kind of substate groups whose protection is at issue in this paper, now enjoy a narrower, conditional, right or entitlement under treaty and/or customary international law to unilateral secession from parent states that have treated them with a high enough degree of oppression or discrimination, i.e. when there are "exceptional circumstances" or "unique cases." The argument that is developed here is that they now enjoy this right, in part as a result of the turn to normative (largely human-rights-based) criteria in the international law of secession. The first firm indication of the congealing of this limited and conditional right to secession in exceptional cases only, within customary international law, was offered by the decision of the African Commission on Human and Peoples' Rights in the so-called *Katanga case*. In that case, the Commission (which was at the time the only authoritative interpreter of the *African Charter on Human and Peoples' Rights*)[34] felt able to boldly declare:

> *In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire [now the Democratic Republic of the Congo] should be called into question* and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[35]

What is most interesting here is not the specificity of the refusal to declare that Katanga was, on the facts supplied in this particular case, entitled to secede from the

[30]Third Committee, UNGA, 61st Session, Summary record of the 40th Meeting on 7 November 2006, 5 January 2007, UN Doc A/C.3/61/SR.40.

[31]Oloka-Onyango (n 2) 196-204.

[32]Third Committee (n 30) para 51.

[33]ibid para 52.

[34]*African Charter on Human and Peoples' Rights* (Nairobi, Kenya, 27 June 1981) 21 ILM 59.

[35]*Katangese Peoples' Congress v. Zaire*, Communication No. 75/92; reproduced in (1996) 3 Intl Human Rights Rep 136. Emphasis supplied.

then Zaire. It is rather the fact that the Commission found that had Katanga shown that its oppression by the then state of Zaire had met a certain threshold, i.e. if it had shown exceptional circumstances, then it would have held it to be entitled to secede. Therein lay the key normative import of the opinion. The similarity of this logic with the contents and thrust of the relevant provisions in the Declaration on Friendly Relations is remarkable. This soft law instrument (which has probably passed into customary international law at this point) provides, inter alia, in its section on self-determination that a state is entitled to continued integral existence only as long as its government continues to represent the entire population of the state without discrimination. It is also instructive that this opinion was issued by a Commission that has among its ranks one of the leading global all-time authorities on self-determination, the late Professor Oji Umozurike. It should, however, be pointed out that since the Commission was interpreting a regional treaty, i.e. the African Charter, the decision in the *Katanga case* and the logic within it only applies to establish regional treaty international law and help create an equivalent principle of regional custom.

Similarly, in the *Quebec Reference case* (a case decided by the Supreme Court of Canada), the remedial principle was affirmed as one of the ways in which unilateral secession could lawfully occur in international law, albeit in exceptional circumstances.[36] According to the Court:

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination [i.e. secession]. . .where a people are oppressed, as for example under foreign military occupation; or *where a definable group [read sub-state group] is denied meaningful access to government to pursue their political, economic, social and cultural development*. . .Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.[37]

In reaching its decision, the Court carefully canvassed international law treaties, soft law instruments, and the writings of prominent scholars, which more or less supported its logic and conclusions. Here again, the Court's logic was remarkably similar to the contents and thrust of the relevant provisions in the Declaration on Friendly Relations. This is highly instructive as to the widespread and weighty influence of this Declaration (from Africa to North America). The combined effect of the *Katanga* and *Quebec Reference* cases and of the material on which these decisions rested (especially the Declaration on Friendly Relations) is weighty indeed as one accounts for the contents of global customary international law in the area of secession. As a whole, these indicators suggest that the remedial principle of a limited and conditional entitlement to secession in exceptional circumstances is on the verge of gaining widespread acceptance.

In any case, the more recent state practice related to the secession of Kosovo from Serbia lends very strong support to the conclusion that such a customary international law right has indeed emerged. Indeed, a close reading of the debates that

[36] *Reference Re Secession of Quebec,* [1998] 2 SCR 217.

[37] ibid 287. Emphasis supplied.

occurred in the UN Security Council (UNSC) and the UN General Assembly (UNGA) before and after the *Advisory Opinion of the International Court of Justice (ICJ) on the Unilateral Secession of Kosovo from Serbia* leaves little room for reasonable doubt that the "exceptional circumstances" or "unique case" principle of secession (otherwise referred to as remedial secession) that was affirmed in the *Katanga* and *Quebec Reference* cases is now widely accepted by states.[38] Indeed, in these debates, a widespread and larger number of states explicitly justified Kosovo's secession on the basis that it was an "exceptional case" or "special case."[39] This widespread (if incomplete) agreement on Kosovo would mean that there is sufficiently widespread state practice coincident with *opinio juris* to warrant international lawyers (who are the accountants of the international lawmaking process) to conclude that a unilateral right to secede from a parent state in exceptional cases of high levels of oppression has now emerged in global customary international law. Indeed, while speaking in the UNSC in strong opposition to the unilateral declaration of secession by Kosovo, Serbia managed to capture the mood of today's international law when it warned that

> . . . [before the Kosovo affair] never in the history of the United Nations has a territory achieved statehood by seceding from a parent State that did not give its consent at the end of the process. It is up to us [the states gathered at the UN] to decide whether the time has come for that to happen for the first time in history. Serbia believes that this is not the case.[40]

Given the thrust of the sentiment expressed in that and other relevant debates, and the relatively large number of states that have recognized Kosovo's secession,[41] we must take it that the time had indeed come to change history, to solidify the remaking of the international law of secession—a process that, as we have seen, had begun decades before. In the circumstances, the only reasonable conclusion that can be reached is that the customary law position has changed and that it now favors a conditional and limited right to unilateral secession in exceptional circumstances.

And this is so despite the fact that in offering its advisory opinion to the UNGA in the *Kosovo case*, the ICJ basically dodged the question of remedial secession (which was ironically the very basis on which Kosovo claimed an entitlement to secede from

[38]For example: UNGA, 63rd Session, 22nd Plenary meeting of 8 October 2008, UN Doc A/63/PV.22; and UNSC, 65th year, 6347th meeting of 3 August 2010, UN Doc S/PV.6367.

[39]ibid.

[40]UNSC, 65th year (n 38) 24.

[41]Kosovo's Ministry of Foreign Affairs reports that 111 states had recognized Kosovo's independence as at 12th September 2016: Republic of Kosovo, Ministry of Foreign Affairs, "Countries that have recognized the Republic of Kosova" http://www.mfa-ks.net/?page=2,224 accessed 12 September 2016. However, another website reports this figure to be 112 as at the same date: "Kosovo Thanks You" http://www.kosovothanksyou.com accessed 12 September 2016. Kosovo's independence has thus been recognized by about half of the member states of the United Nations (UN). It is, however, unlikely to become a member anytime soon because it is not recognized by Russia and China.

Serbia) and did not in fact say that Kosovo was so entitled.[42] Rather unfortunately, Judge Cançade Trindade's robust, human rights-based, and deeply philosophical defense of remedial secession in his separate opinion, including his excellent logic that "states exist for human beings and not vice-versa," cannot be taken to constitute the judgment of the ICJ in this matter.[43] Nevertheless, it was an important step in the right direction.

The fact that most states in the world and most members of the UNGA or UNSC have not to date supported the secession of Crimea from Ukraine and its (re)union with Russia[44] does not detract at all from the argument that the weight of the state practice/*opinio juris* suggests that customary international law now recognizes a conditional and limited right to unilateral secession in exceptional circumstances.

The point remains that the weight of the other evidence now supports the existence on the global level of an entitlement to secede in exceptional circumstances, when there has been a high degree of state oppression of the relevant substate group. As such, scholars like Vidmar, who maintained as recently as 2013 that "unilateral secession is thus never a right or an entitlement under international law, not even where 'remedial arguments could plausibly be advanced," are wrong on this score.[45] Among other mistakes, they tend to conflate the positions under customary and treaty international law and equate the transgression of law with its normative content.

What remains rather unclear, though, are the criteria by which an exceptional circumstance" or a "unique case" is to be identified. Other than relying on the play of high politics to tell us the answer to this question, leading to the (overly selective) overdetermination of the question by the great powers, how are we to know when an exceptional circumstance or a unique case presents itself? And who is to decide if a case is exceptional/unique or not? Neither the *Katanga case* nor the *Quebec Reference case* is helpful in answering these more detailed, nitty-gritty questions.

And so, to reiterate, there is considerably more human rights discourse and significantly more application of normative criteria in today's international law of

[42] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, (Advisory Opinion) (2010) ICJ Reports 403 (Kosovo case). Also see Robert L Howse and Ruti Teitel, 'Humanity Bounded and Unbounded: The Regulation of External Self-Determination under International Law' (2013) 7 L and Ethics of Human Rights 155; Theodore Cristakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' (2011) 24 Leiden J Intl L 73; Ioana Cismas, 'Secession in Theory and Practice: The Case of Kosovo and Beyond' (2010) 2 Gottingen J Intl L 531; and Ralph Wilde, 'Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion' (2011) 24 Leiden J Intl L 149. For a more supportive reading of the Kosovo Opinion, see also Marc Weller, 'Modesty can be a Virtue: Judicial Economy in the ICJ Kosovo Opinion' (2011) 24 Leiden J Intl L 127.

[43] *Separate Opinion of Judge Cançade Trindade* in the Kosovo case, at paragraphs 14-20 and paragraph 24.

[44] For example: UNGA, 68th session, 1 April 2014, UN Doc A/RES/68/262; UNSC, 69th year, 7134th meeting (13 March 2014), UN Doc S/PV.7134; and Simon Chesterman, 'Crimean War 2.0: Ukraine and International Law' (March 2014) The Straits Times 1.

[45] Vidmar, *Democratic Statehood* (n 28) 245.

secession than was hitherto the case. Beginning with the adoption of the international human rights documents and congealing in the Declaration on Friendly Relations, the normative trend (however imperfect) has been to apply normative criteria to the question of the acceptability or otherwise of secession from an established state. The withholding of recognition from the defunct South African homelands (effective as they were in their existence) by almost every single state in the world in existence at the time, based on largely normative grounds, affirmed the growing turn to the "righting" of the international law of state formation and secession,[46] the move toward the use of normative criteria for state emergence/creation, and the principle that "an entity will. . .not become a state where it would emerge in breach of certain fundamental norms of international law, in particular those of a jus cogens character [such as the anti-apartheid, anti-racism, and anti-genocide norms]."[47] What the discussion about the state practice regarding the secession of Kosovo from Serbia also clearly establishes is that the converse is true as well, that is, that in our own time, in today's international law of secession, a state will not also remain integral where its conduct toward one of its constituent entities constitutes a serious enough breach of certain fundamental norms of international law. This is the principle of "remedial secession," which, in my own view, has now emerged into customary international law[48] and which must also positively condition our interpretation of the relevant international treaty law provisions.

Clearly, this emergent position is far more conducive to the protection of the human rights of substate groups around the world from oppressive political and socioeconomic conditions. It pays far greater attention to their respective needs and sends a stronger signal than was previously the case to parent states that if they wish to remain integral and retain the substate group within them, then they must not treat these groups with such a high level of oppression that the objectively verifiable social conditions thereby produced meet the threshold for trumping the territorial integrity of a state.

3.4 A Much Greater Tendency to Turn to Democratic Political or Adjudicative Process

Unlike the position in the pre-UN Charter era, the international law of secession of our time is becoming significantly more constrained by both domestic and international democratic and adjudicative processes. No longer is success on the battlefield

[46]I borrow this concept of "righting from Karen Knop's work: Karen Knop, 'The Righting of Recognition: Recognition of States in Eastern Europe and the Soviet Union' (1992) Canadian Council of International Law Proceedings 36.

[47]Vidmar, *Democratic Statehood* (n 28) 61.

[48]For an opposing view, see ibid and Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6 St. Anthony's Intl Rev 37.

the only viable route to secession. The "infra-review" (i.e., self-assessment, opinions, and indeed self-determination) of the members of the relevant substate group now counts (albeit only to some degree) when the legitimacy and legality of a secessionist bid is assessed by other states and by international institutions. Aside from the other evidence in support of this position, this much is crystal clear from the review of the debates in the UNSC and UNGA concerning Kosovo's secession from Serbia.[49] While the "peer review" of the already established states in the international community still matters a whole lot, it no longer exclusively determines whether or not a secessionist bid is considered legitimate/legal, or not, under contemporary international law.[50]

The emerging turn to democratic political process in the internal and international legal practice of states reinforces this conclusion. Such democratic process gleans the orientation of the bulk of opinion among the population of the relevant substate group as to the secessionist bid at issue. The recent democratic referenda in South Sudan and Scotland,[51] the inclusion of a conditional right to secession subject to a kind of democratic process in the Ethiopian Constitution,[52] the conclusion of the Supreme Court of Canada that Canada is divisible according to a certain democratic process and the enactment of a federal Canadian statute clarifying that process,[53] the conduct of other similar referenda around the world, and the obvious willingness of most in the international community to honor the outcomes of such domestic democratic processes suffice to exemplify this emerging turn. This is not to say that these are the earliest indications of the utilization around the world of democratic political process in the area of secession. The point is that the concentration and heightening to some extent of these developments in the last two decades or so signify a trend that appears to be firming in our time. The example of the referendum in Crimea may not be helpful here as it has not been met with widespread approval around the World, largely because it was thought to have been conducted at a time that Russia—a foreign power—was in effective military control of that area.[54] It should also be noted that China's so-called *Anti-Secession Law* seems to represent a countercurrent in this regard.[55]

[49]For example: UNGA, 63rd Session (n 38); and UNSC, 65th year (n 38).

[50]ibid.

[51]Obehi S Okojie, 'Between Secession and Federalism: The Independence of South Sudan and the Need for a Reconsidered Nigeria' (2013) 26 Glob Bus Dev L J 415; and Angela K Bourne, 'Europeanization and Secession: The Cases of Catalonia and Scotland' (2014) 13 J Ethnopolitics and Minority Language Issues 94.

[52]Lovise Aalen, 'Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: The Case of Ethiopia' (2006) 13 Intl J of Minority and Group Rights 243.

[53]Okafor, 'Entitlement' (n 2) 48, 62-64.

[54]William W Burke-White, 'Crimea and the International Legal Order' (2014) 56 Survival: Global Politics and Strategy 65; and Chesterman (n 44).

[55]Letter from a Group of state allies of Taiwan to the President of the UNGA, 20 July 2005, UN Doc A/59/877; Letter from the Permanent Representative of China to the UN to the President of the UNGA 25 July 2005, UN Doc A/59/879; Letter from the Permanent Representative of China to the UN to the Secretary-General of the UN, 15 August 2005, UN Doc A/60/255.

Further reinforcement for the view that the contemporary international law of secession is experiencing an emerging turn to process is provided by evidence of its turn in certain cases to adjudicative review of the legality and legitimacy of particular secessionist bids.[56] After the *Katanga case* (litigated at, and decided by, the African Commission on Human and Peoples' Rights), the *Quebec Reference case* (a decision of the Supreme Court of Canada), and the *Advisory Opinion on the Unilateral Declaration of Independence by Kosovo* (decided by the ICJ), it is no longer open to reasonable doubt that the secession of a substate group from an established state is a matter that is fit for adjudicative and quasi-adjudicative processes (such as in international human rights institutions, domestic courts, and international courts/tribunals). The already discussed debates in the UNGA and the UNSC regarding the Kosovo secession affair, including on the propriety of referring Kosovo's unilateral declaration of independence to the ICJ, show overwhelming support in more recent state practice for this conclusion.[57] Indeed, these debates even go as far as suggesting that secessionist disputes *ought* normally to be subjected to third party, adjudicative, review.

However, as I have long argued in another forum, triadic (i.e., third party) adjudication is far more suitable than its dyadic or bilateral/interparty variant for secessionist dispute resolution.[58] While some new states have emerged or could emerge through dyadic dispute resolution processes (political or adjudicative), i.e. through a process of domestic consensus building within the parent state,[59] in the highly charged, suspicion-ridden, and asymmetrical power contexts in which most secessionist disputes emerge and are maintained, a dyadic process—even one that involves adjudication by a domestic court—in which the substate group's fate is essentially left in the hands of an estate of the domestic realm or an organ and arm of the very parent state that the members of the usually far less powerful group have revolted against, has a far lesser chance of resolving the dispute "in a way that fosters and sustains the confidence of the parties thereto in the legitimacy of the processes involved and the outcomes that are entailed."[60] As Alec Stone Sweet has correctly noted, the triad—two contracting parties and a dispute resolver—constitutes a primal social institution," and for a good reason too.[61] Against this background, the point here is that, for the reasons already offered, the need for the triadic kind of dispute resolution model is even more acute in the area of secession. For this reason, the triadic ICJ/African Commission models of secessionist dispute resolution are more readily generalizable around the world than the more dyadic Supreme Court of Canada model. This is not to say that a dyadic model of secessionist dispute

[56]Okafor, 'Entitlement' (n 2) 56-70.

[57]For example: UNGA, 63rd Session (n 38); and UNSC, 65th year (n 38).

[58]Okafor, 'Entitlement' (n 2) 56-70.

[59]Vidmar, *Democratic Statehood* (n 28) 65-77.

[60]Okafor, 'Entitlement' (n 2) 56.

[61]Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comp Political Studies 147, 148-149.

resolution will in all cases lead to serious doubts among the target audience regarding the fairness and legitimacy of the judicial process. For, after all, some domestic judiciaries are more independent and respected by the local population than others. The point though is that as secession is a question that taxes to extremes the emotional strength of all sides to the dispute,[62] the triadic model is to be preferred in the vast majority of cases. The cries among all-too-many Quebecois about even the highly independent and respected Supreme Court of Canada, which is constituted by a fair percentage of Quebec judges, behaving like the "leaning tower of Pisa" that only leans in one direction on matters concerning Quebec secession, are instructive in this respect.[63]

It is important to end this subsection by noting that this emerging turn to democratic political and adjudicative processes is not inconsequential for the protection of the human rights of substate groups. To the extent that the old regime in which such processes did not play nearly as large a role contributed to the generation and augmentation of high levels of secession-related violence, the contemporary shift has a strong potential to reduce such violence. By channeling secessionist agitation to clearly more peaceable process, it thereby reduces the massive violations of human rights that secessionist-related violence has historically fostered around the word. In this way, it will also contribute to the fulfillment of the lofty ideals that framed the UN Charter and the attempt to construct a much more peaceful post-1945 world order.

3.5 The Continuation of High Levels of Selectivity in the Invocation of Pro- or Anti-secession Principles

Unfortunately, as every keen student of our global (dis)order and international law should realize, the high politics of international relations has tended to significantly affect the orientation and effect of international law. One does not need to subscribe to realist international relations theory to appreciate this. Along these lines, there has been substantial continuity in the strong tendency among states (especially the great powers) to selectively invoke pro- or anti-secession principles.[64] This tendency has, thus far, not waned all that much. For example, Russia opposed Kosovo's secession from its allied state, Serbia, while at the same time arguing strongly in favor of the secession of Crimea from Ukraine, a drama that it is widely accused of helping author.[65] Russia, which has also tended to take a strong anti-secessionist posture in

[62]Sujit Choudhry and Robert L Howse, 'Constitutional Theory and the Quebec Secession Reference' (2000) 13 Can J L Jur 143, 145.

[63]Robert A Young, 'A Most Politic Judgment' (1998) 10 Constit Forum 14, 15.

[64]Sterio (n 26).

[65]Theodore Christakis, 'Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea' (2015) 75 Heidelberg J Intl L (forthcoming).

the past, seemed to have changed its mind with regard to South Ossetia and Abkhazia.[66] And the very Western powers that authored Kosovo's secession can be heard strongly opposing a clear desire on the part of the vast majority of the ethnic Russian-dominated population in Crimea to secede from a now Western-leaning Ukraine.[67] These are but two recent examples of the ways in which high politics still manages—quite unsurprisingly—to shape state practice in this area, the very state practice that contributes to the formation of customary international law.

3.6 A Significantly Less Oppressive Concept of Legitimate Statehood

As a consequence of the shifts discussed in the preceding subsections, the concept of legitimate statehood in contemporary international law has been significantly redefined, though not completely transformed. From one in which states were almost totally free to coercively retain even a highly oppressed substate group, it is in the process of being reconfigured to one in which the human rights of such groups have become an important (albeit still nondominant) part of the discussion and calculus as to the legitimacy of the statehood of the state at issue. Thus, the prevailing concept of legitimate statehood in our time no longer automatically accepts and legitimizes sociopolitical power/injustice. It is no longer more or less a pro-status quo concept. The interest of established states in remaining integral, no matter how oppressive they have been to one or more of their substate groups, no longer takes as much precedence as it used to over the well-being and even the very survival of the relevant oppressed peoples.

3.7 A Consequently Better Environment for the Protection of Substate Groups

The broad consequence of the shift in the normative orientation of international law and praxis that has been discussed here is that the undue disadvantage, if not repression, that has been the historic lot of all-too-many substate groups is being ameliorated in the result. The international law of secession now possesses a greater potential to serve as a resource in the hands of those who seek to protect vulnerable or oppressed substate groups from their parent states. Although most oppressed peoples will, in practice, remain unable to totally shake off their shackling to their parent state, and only a very few exceptional circumstances can meet the very high

[66] ibid.

[67] Christian Marxsen, 'The Crimea Crisis – An International Law Perspective' (2015) 72 Heidelberg J Intl L 367.

threshold that has been set for entitlement to unilateral secession, the very fact that such an entitlement exists (however conditionally and exceptionally) is itself remarkable, given the historically deep hostility of established states to secession. The fact remains that the repertoire of normative resources available to be deployed by such substate groups in their political struggles to free themselves of their oppression by a parent state has now been expanded.

4 Tomorrow

The task at hand in this section is to envision the future of the international law of secession over the next half-century or so, taking into account developments in its pre-1945 past and its post-UN Charter era present and considering the trajectory that it appears to have been following. In the future of this aspect of international law, what will the treaty of international law on secession look like? In what direction is the relevant customary international law likely to develop? Will the "effectiveness confers legitimacy" doctrine continue to wane, remain constant in its current character, or even restrengthen? Will the ongoing "righting" of secession continue—i.e., the increasing subjection of secessionist high politics to human rights and normative discourse and analysis? Will democratic political and/or adjudicative process play a greater, similar, or lesser role than it currently does? Will excessive selectivity continue to characterize the invocation by states and civil societies alike of pro- and anti-secession principles? Will the ongoing redefinition of the concept of legitimate statehood (away from its excessively pro-status quo past) strengthen, plateau, or even wane? And will the international law of secession become more or less able to contribute to protect substate groups from oppressive parent states?

An analysis of the historical trajectory of international legal praxis, the general mood among states, and their actual praxis, appears to suggest that, as human rights discourse and praxis (very broadly conceived) continue their modest "conquests" atop the "high moral plateau" they now sit[68] and solidify their grip on the imagination of the world's peoples and their states, the relevant customary international law norms on remedial secession will solidify further over the next half-century or so, albeit only in their current narrow formulation. This hardening of the emergent customary law rule will also signify an increased role for the relevant treaty law. This will occur via the solidification of the ongoing trend in the case law to interpret the existing treaty provisions on the right to self-determination (mainly the common Article 1 of the two principal human rights covenants) in line with the emergent customary international law position on remedial secession and the indisputable African regional international law favoring the same. However, this interpretive

[68] I owe this term to Makau Mutua's fecund imagination: Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002) 40.

process will be most effective on the global level if it largely occurs within the auspices of the ICJ.

Almost concomitantly, the waning of the impact of the effectiveness doctrine on this aspect of international law is likely to continue, though only up to a point. It will be unlikely over the next half-century that international legal praxis will become so transformed in the opposite direction that the mere expression of the will of an oppressed substate group to secede as a result of an objectively verifiable and high enough level of oppression by its parent state will—without more—lead to the realization of its consequent entitlement to secede under the emergent doctrine of remedial secession. As some have argued, the real-life effectiveness of their secessionist bid will continue to play some role into the future in the realization of the secessionist ambition of such a substate group (whether this effectiveness is the result of that bid being backed by the great powers or stems from the substate group's military success against their parent state). Some have even gone as far as arguing that although the effective control doctrine is "unappealing at its core," there may in fact be no intelligible (complete) substitute for it.[69] The point here, however, is that the extent of the role that the doctrine of effectiveness plays in this area of the law will likely diminish over the next half-century or so. One important recent indication that this will come to pass is the fact that a great power such as Russia still felt the strong need to conduct a referendum in Crimea in order to provide normative justification to the world for its hiving off of Crimea from Ukraine, even when it had clearly established completely effective control of that territory.[70]

The flip side of the coin of the waning of the effectiveness doctrine is therefore that normative legitimism is on the rise in the international law of secession and that—even more importantly—the emergent, conditional, and admittedly narrow right of substate groups to secede in exceptional circumstances, when a high enough level of oppression by the relevant parent state occurs, is solidifying in international law, however slowly. A note of caution must, however, be entered at this point. This is that this process of norm solidification is extremely unlikely to result in the generation of a *general* pro-secession norm. The emergent, narrow, and conditional entitlement to secession in exceptional cases is highly unlikely to be expanded beyond its current, highly restrictive, confines. The undisputed *jus cogens* status of the norm in favor of the maintenance of the territorial integrity of established states, the violence and suffering that can result from secessionist bids, and the general tendency of affected states to seek to forcibly crush such bids combine to ensure that this will be the case well into the future.[71] What is more, the heightened antiterrorism consciousness around the world "further complicates the picture" to the point that "it seems now inconceivable that any autonomy/secessionist human rights oriented

[69]Brad R Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 Melbourne J Intl L 393.

[70]Marxsen (n 67).

[71]Okafor, 'Entitlement' (n 2) 55; Rein Mullerson, *International Law, Rights and Politics* (Routledge 1994) 85.

movement may escape the condemned auspices" of the terrorist.[72] This will clearly reduce the appetite among substate groups to launch secessionist struggles, as well as discourage the majority of other states from supporting these bids.

One important consequence of the ongoing "righting" of secession is that resort to adjudicative process designed to assess whether or not the relevant substate group has met the threshold for remedial secession (in the mold of the disputes in the *Katanga*, *Quebec Reference* and *Kosovo* cases) will become more and more common in the future of international law. Also important is that resort to democratic political process in the mold of the Scotland and South Sudan affairs will also gain even more currency, for if a substate group could, under certain circumstances, be entitled to secede from its parent state, then some kind of process to gauge its mood and discern its opinions is an irreducible minimum necessity.

As importantly, it is to such adjudicative and democratic processes that we must, of necessity, refer the important tasks—highlighted earlier on in this paper—of answering the more detailed, nitty-gritty, questions entailed by the "righting" of secession. If the international law of secession allows substate groups to secede from their current states only in "unique" or "exceptional circumstances," how are we to know when an exceptional circumstance or a unique case presents itself? And who is to decide if a case is exceptional/unique or not? No detailed, conclusive, *a priori* formula can be offered that would meet all cases that will arise in the future of international law and relations. However, it is possible to offer certain indices or guides to such future adjudicative or democratic action. For example, in assessing a given situation to determine whether it is exceptional enough to justify remedial secession, the extent to which the parent state has committed the most heinous international crimes against the relevant substate group (such as genocide, war crimes, and crimes against humanity), the extent to which the relevant substate group has suffered consistently gross discrimination (of an economic, social, and/or political nature) at the hands of the institutions of government of the parent state, and the chances of the parent state immediately ceasing and desisting from, and atoning/compensating fully for, committing such heinous crimes or gross discrimination against the relevant substate group should be considered. This list is not, of course, exhaustive.

This is not to say that the deployment of such norms, processes, and indicators in the future will, in practice, always lead to the secession of the relevant substate group, for high levels of selectivity will very likely continue to characterize this area of international relations and law as this is an area of the law that is as driven by high politics as any other. After all, nothing less than the continued integral existence and even survival of states (the most powerful international actors) is at stake. For example, while international law was drawn upon and invoked by all sides to the dispute over the secession of Crimea from Ukraine, high politics still dominated the behavior of the most relevant states, as well as much analysis of the ensuing drama.[73] And even in regard to Kosovo, Ralph Wilde has correctly observed:

[72]Upendra Baxi, *The Future of Human Rights* (OUP 2006) 79.

[73]Marxsen (n 67).

> Where other sub-state groups who aspire to independence should focus their attention. . .is not so much on what the international law position is on the legality of declarations of independence, but rather, on their prospects of enjoying the support of at least the kind of critical mass of other states that will make their claim practically viable.[74]

This attests to the continuing dominance of high politics in the international law and praxis of secession, despite the slow shift to normative legitimism that is occurring. Worse still, the high politics that, as we have just seen, matters a whole lot in this area is not as principled as it could be. It is still characterized by an excessively high level of selectivity.

Nevertheless, the weight of the ongoing shift toward normative legitimism and away from the effectiveness doctrine, however partial this may be, will ensure that the concept of legitimate statehood will continue to be redefined in the opposing direction from its generally pro-status quo, might is right, orientation over the last few centuries. The legitimacy of statehood will in the future of international law be judged according to a variety of criteria, among which will be the extent to which the established state at issue has oppressed one or more of its constituent substate groups. The converse would be that the legitimacy of a state would also depend more on the extent to which the relevant state has protected the rights of all its substate groups than is the case today. The effectiveness of established states will continue to matter much in the state legitimacy and legitimization calculus, but it will no longer matter as much as it does today.

In the result, to the extent that they are enjoyed at all, the protections enjoyed in law and fact by substate groups from oppressive political and socioeconomic conditions within their parent states will be augmented. The more the shift in international law and praxis that has been analyzed in this paper solidifies and continues, the more the human rights of substate groups will enjoy both normative and real-life protection.

5 Conclusion

It has been argued in this paper that the international law of secession is, in general, moving steadily but slowly away from its historical tendency to automatically legitimize the status quo, however oppressive that reality may have been, and that this shift is likely to continue in the next half-century or so of the future of international law. The waning of the dominance of the doctrine that effectiveness confers legitimacy, resorts to considerably more human rights discourse and its application than has hitherto been the case, and a greater tendency to turn to adjudicative or democratic political process have all ensured that the concept of legitimate statehood in international law no longer automatically accepts and reflects

[74]Ralph Wilde, 'Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion' (2011) 24 Leiden J Intl L 149.

sociopolitical power/injustice. This has in turn led to the ongoing emergence of a normative orientation within the international law of secession that holds a greater potential to contribute to the protection of all-too-often vulnerable groups from all-too-many rapacious and repressive parent states.

The overall hope, therefore, is that the international law of secession will in this way become much more reconciled to international human rights law and that, in the result, for most of the all-too-many substate groups that suffer under oppressive state formations, their tomorrow will be much brighter than their today, even as their today is already much better than their yesterday.

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Part III
Criminal Law

International Crimes: A Hybrid Future?

David Re

Contents

International criminal law, which creates state obligations, lies within public international law—the law of the political system of nation states. International criminal law covers acts criminalised by treaty, custom or a combination of the two and creates treaty obligations binding States to treat breaches as criminal, namely, *aut dedere aut judicare*, the duty to extradite or prosecute.

International crimes include the core crimes listed in the 1998 Rome Statute of the International Criminal Court ('ICC' or the 'Court') of genocide, crimes against humanity and war crimes; the crime of aggression has not yet entered into force.[1] International crimes may occur in either international or non-international armed conflicts or in peacetime for genocide and crimes against humanity. They may be dealt with internationally or, preferably, nationally. Since the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993,[2] a highly sophisticated system of international criminal law institutions has emerged and developed.

International criminal courts and tribunals, and some 'hybrid' versions, have been created to investigate and to try international crimes committed in nation states, irrespective of the conflict's classification as internal or international. These institutions are created either by treaty—bilateral or multilateral—or by the United Nations

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[1]Rome Statute of the International Criminal Court, 17 July 1998, Article 5.

[2]UN Security Council, S.C. Res. 827, U.N. Doc. S/Res/827 (1993).

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Security Council, acting pursuant to its powers under Chapter VII of the Charter of the United Nations. Some are purely international, like the ICTY, the International Criminal Tribunal for Rwanda (ICTR)[3] and the ICC. A variation on this is a hybrid institution combining national and international elements yet operating outside of the national system—again created by treaty or the Security Council—like the Special Tribunal for Lebanon (STL)[4] and the Special Court for Sierra Leone (SCSL).[5] Another option is a national court with international features, such as judges, prosecutors and other court personnel, who may be permanent or temporary fixtures, for example, the War Crimes Chamber in the Court of Bosnia and Herzegovina[6] and the Extraordinary African Chambers in the Senegalese Courts.[7] Each model has its own advantages and shortcomings.

Classifying criminal conduct as a specific international crime is contingent on the legal elements of the crime. Using murder as an example, the act, depending upon the facts and the perpetrator's *mens rea*, could be classified as a war crime or a crime against humanity or as extermination or even genocide. But most criminal conduct that meets the elements of international crimes, even if committed in an armed conflict, need not be classified as an 'international' crime. International law does not impose this obligation. Concretely, although classifying criminal conduct as an international crime inescapably affords a higher symbolic value to punishing the conduct, it may also present evidentiary obstacles in proving the international elements.

Nations thus face a choice when criminal conduct, which by virtue of its legal elements amounts to an international crime, occurs on their territory. The choice is both classifying the criminal conduct and finding (or having chosen for the particular nation) a forum in which to punish it. Ideally, this should be done at home.

All States have international obligations to suppress and punish breaches of international crimes forming part of customary international law, such as breaches of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the four 1949 Geneva Conventions and their two 1977 Additional Protocols; the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and certain breaches of international humanitarian law proscribed under customary international law. The 123 States Parties to the 1998 Rome Statute of the ICC must likewise—by virtue of their treaty obligations—investigate and punish breaches of three crimes currently criminalised. No single

[3]UN Security Council, S.C. Res. 955, U.N. Doc. S/Res/955 (1994).

[4]UN Security Council, S.C. Res. 1757, U.N. Doc. S/Res/1757 (2007).

[5]'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone', 16 January 2002.

[6]UN Security Council Press Release, 'Security Council briefed on establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina', 8 October 2003 (SC/7888); ICTY Press Release, 'Statement of Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Delivered at the Inauguration of the War Crimes Chamber of the State Court of Bosnia And Herzegovina', 9 March 2005 (TM/MOW/945 e).

[7]'Accord entre le gouvernement de la republique du senegal et l'union africaine sur la creation de chambres africaines extraordinaires au sein des juridictions senegalaises', 22 August 2012.

treaty regulates the treatment of crimes against humanity, although the International Law Commission in 2015 commenced drafting articles for a potential convention defining and regulating the crime.[8]

The intersection of the two—trying State nationals in internationalised courts and tribunals for committing international crimes—is controversial and fascinating. The choice of forum depends on numerous geopolitical concerns, including the most basic considerations of resources and political will. Diplomatic negotiations by concerned governments and intergovernmental bodies, and political lobbying by non-government organisations (NGOs), may influence or determine what happens.

Allowing or, due to international law, having an international body try crimes committed on national territory involves a loss or devolution of sovereignty. Under a treaty—or by self-referral of a situation to the ICC—this is voluntary; by Security Council Resolution, it may not be. Some nations, such as Rwanda when Security Council Resolution 955 (1994) set up the ICTR, have resisted this disturbance to their national sovereignty. The resulting tribunal had its seat in Arusha in neighbouring Tanzania. The Federal Republic of Yugoslavia likewise resisted establishing the ICTY, and its seat was in The Hague, in the Netherlands.

More recently, the Government of Sri Lanka also refused to cooperate with a human rights investigation, conducted by the Office of the United Nations High Commissioner for Human Rights, into breaches of human rights and humanitarian law committed during the civil war in Sri Lanka. The High Commissioner's report, issued in 2015, recommended establishing a hybrid special court in Sri Lanka.[9]

An attempt in the Security Council in 2014 to refer the situation in Syria to the ICC was strongly resisted by the Syrian Government and blocked by two permanent Security Council members.[10] And in July 2015, the Russian Federation vetoed a Security Council Resolution that would have established, under Chapter VII of the UN Charter, an 'International Criminal Tribunal for Malaysia Airlines flight MH17' in relation to the flight shot down over the Donetsk oblast in Ukraine in July 2014.[11]

On the other hand—and fully cognizant of the devolution of their sovereignty over certain criminal justice situations—some State members, and non-State ICC members using the mechanism under Article 14 of the Rome Statute, have referred situations on their own territory to the ICC. These include Mali, the Democratic Republic of the Congo, Uganda, the Central African Republic, Palestine and Ukraine. Côte d'Ivoire made a declaration pursuant to Article 12 of the Rome Statute

[8]Sean D. Murphy, Special Rapporteur, International Law Commission, 'First Report on Crimes Against Humanity', 17 February 2015 (A/CH.4/680). In August 2017 the ILC adapted the Third Report (A/CN.4/704) containing draft articles including a definition of crimes against humanity, and decided to submit it to the UN secretary-general.

[9]'Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka', 28 September 2015 (A/HRC/30/61) 1, 16, 18.

[10]UN Security Council Press Release, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Report', 22 May 2014 (SC/11407).

[11]UN Security Council Press Release, 'Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims', 29 July 2015 (SC/11990).

accepting the ICC's jurisdiction prior to becoming a party to the Statute.[12] Some referrals could be overtly political or to move a problem 'offshore', others a more straightforward recognition of a lack of institutional capacity to deal with the issues.

Under Article 17 of the Rome Statute, on admissibility and jurisdiction, the ICC may investigate and prosecute its core international crimes only when national jurisdictions are genuinely unable or unwilling to do so. This notion of 'complementarity' is the keystone of the Rome Statute and the ICC's operation and, absent the establishment of multiple UN-imposed courts or hybrid tribunals, must be the future of international criminal law. The self-referrals and declarations referred to above illustrate this.

As the only permanent standing international criminal court or tribunal, the ICC now stands at the pinnacle of the system of international criminal law. But its status, and indeed that of the institutions of international criminal law, is a relatively recent phenomena, going back only to 1993 with the ICTY's establishment—with this event ending the hiatus for international trials that followed the judgment of the International Military Tribunal for the Far East (IMTFE) in Tokyo in 1948.

The ICC model, however, cannot work as the solution, or even a general model, for dealing with all international crimes—either as a referral mechanism for their investigation or as a trial court for their prosecution. It was never established for this purpose, and consequently, its resources are limited and its budget is set around its existing and projected activities, including preliminary examinations, investigations and trials. Importantly, it also devotes much effort to fostering complementarity and keeping cases *away* from the Court by actively working with governments to ensure that cases are addressed domestically.

As an illustration, the ICC Prosecutor's 2015 'Report on Preliminary Examination Activities' reveals how the Court's preliminary investigations in Guinea and Colombia have resulted in domestic action. The Colombian situation has been under preliminary investigation at the ICC since June 2004. National courts are now hearing cases relating to crimes committed during the 50 years of violent confrontation between government and rebel forces, and in 2015, 46 national judgments were referred to the ICC for its assessment.[13] In the same year, the government and FARC-EP rebel forces agreed to establish 'Chambers of Justice and a Tribunal for Peace', with jurisdiction over those committing crimes during the internal armed conflict. The Chambers may impose penal sanctions in two categories: for those who recognise responsibility for their actions (between 5 and 8 years) and for those who do not (up to 20 years).[14]

In Guinea, under preliminary investigation at the ICC since October 2009, a specially appointed panel of three investigative judges issued 14 indictments against

[12]ICC, Côte d'Ivoire, https://www.icc-cpi.int/cdi.

[13]Office of the Prosecutor (International Criminal Court), 'Report on Preliminary Examination Activities,' 12 November 2015, para 156.

[14]'Joint Communiqué # 60 Regarding the Agreement for the Creation of a Special Jurisdiction for Peace', Havana, Cuba, 23 September 2015, para 7.

high-level civilian and military officials—including Guinea's former president, Moussa Dadis Camara—in relation to a massacre at a stadium in Conraky on Independence Day 2009 and crimes committed in its aftermath.[15]

An ICC preliminary examination of the situation in Nigeria, mainly in relation to the activities of Boko Haram, was made public in October 2010. The ICC Prosecutor reported in November 2015 in her 'Report on Preliminary Examination Activities' that a reasonable basis existed to conclude that war crimes and crimes against humanity had been committed.[16] The next step is to analyse the allegations of crimes, assess the admissibility of the potential cases and decide whether an investigation should be opened.[17]

The ICC's investigation procedures are complicated by their international nature and the Court's limited enforcement powers; its trials are long, with drawn-out pre-trial and confirmation proceedings. Its rules of procedure and evidence are a hybrid blend negotiated between 1998 and 2000 in gigantic international negotiating sessions and are expressly designed for international trials. The seat of the Court is in the Netherlands, a long way from every situation, preliminary investigation and referral to date. In this sense, the ICC, as a model, is *sui generis*.

Referral of a 'situation' to the ICC is also exceptional. Given the number of international crimes committed annually—and even within the borders of ICC member States—the chances that an individual crime, however grave, will be investigated, much less prosecuted before that court, are almost infinitesimal. A 'situation' in the ICC generally involves a country or the events occurring in a region over a defined period. This is, of itself, widely defined, and the Court must investigate all sides to any conflict within the situation, thus greatly (generally) limiting the number of crimes and perpetrators that the Court can, with its limited resources, feasibly investigate and bring to trial.

The experience of the ICTY also illustrates the remoteness of the prospect that any individual crime may attract the attention of international prosecutors and their investigators and then of a court's judges—either to confirm charging documents (i.e., indictments) or to conduct a trial. The ICTY's jurisdiction, under Article 9 of its Statute, annexed to Security Council Resolution 827 (1993), is 'to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia committed in the territory of the former Yugoslavia since 1 January 1991'. This is open-ended but potentially huge.

Each international crime has at least one perpetrator. The crime could be as devastating to an individual as a rape committed as a war crime, or a crime against humanity committed by a single person, or even in an isolated incident. Or it could amount to a crime of an enormous magnitude, such as the multiple massacres collectively comprising the Srebrenica genocide, in which up to 8000 Muslim men and youth were murdered in just over a week in July 1995 (the International

[15]Report on Preliminary Examination Activities (n 13) paras 168, 175, 177.

[16]Report on Preliminary Examination Activities (n 13), para 195.

[17]ibid, para 221.

Commission for Missing Persons reports that 6930 have thus been identified, mainly by DNA).[18] At least hundreds of soldiers and civilian officials were involved in those massacres. Many thousands of crimes were committed in the wars in the former Yugoslavia between 1991 and 1995 and 1998 and 1999, yet the ICTY, between 1994 and 2004, indicted just 161 individuals.[19] The ICTY's international status, however, allowed it to indict senior civilian and military officials, including heads of state (Slobodan Milošović), leaders of breakaway republics and some of the most senior military, intelligence and civilian chiefs in the former Yugoslavia.

Dedicated chambers in the Court of Bosnia and Herzegovina and courts in Serbia and Croatia and also some regional entity courts in Bosnia and Herzegovina have prosecuted many of those accused of committing international crimes in those conflicts—but, to date, only a handful who were in senior military or civilian positions. Some cases were transferred to these State courts by the ICTY. Montenegro has also conducted some war crime trials, and Kosovo has had some limited success with national war crime trials using national and international judges and prosecutors, firstly under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK), established by Security Council Resolution 1244 (1999) and then, after its declaration of independence in 2008, in the European Union Rule of Law Mission in Kosovo (EULEX), a European Union judicial body whose presence was ratified by the Kosovar Parliament.[20]

As a UN *ad hoc* court, the ICTR's example is similar to the ICTY's. After a genocide committed by many thousands of perpetrators, who murdered some 800,000 of their fellow citizens in the weeks following 6 April 1994, it indicted only 93 individuals.[21] Most of these, however, were in civilian and military leadership roles and included a prime minister, Jean Kambanda, and government ministers. Neither the ICTR nor the national justice system in the post-genocide Rwanda could investigate and indict every crime and punish every perpetrator. The national solution chosen in the immediate post-genocide period was to set up less formal gacaca courts. Using formal national court sittings for the number of accused persons—such as those of the Rwandan national courts or of a UN tribunal like the ICTR—would have been physically impossible and, it is argued, also economically devastating.

Also woven into all of this is the role of fact-finding bodies, such as the UN Human Rights Council and other UN Special Rapporteurs, UN peacekeeping missions, and multilateral institutions like the African Union, the European Union or the Council of Europe. NGOs can also be very influential; the International Committee

[18]International Commission on Missing Persons, 'Facts and Figures on Srebrenica', 31 July 2015 <http://www.icmp.int/news/facts-and-figures-on-srebrenica/>.

[19]ICTY, 'Achievements' <http://www.icty.org/en/about/tribunal/achievements>.

[20]Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, Official Journal of the European Union, L 42/92, 16 February 2008.

[21]UN Mechanism for International Criminal Tribunals, 'The ICTR in Brief' <http://unictr.unmict.org/en/tribunal>.

of the Red Cross (ICRC), Human Rights Watch, International Crisis Group and Amnesty International are prominent examples. The fruits of their fact-finding activities, such as reporting possible international crimes and breaches of international human rights law, may influence the national and international institutional responses to what has occurred.

Evidence in their reports of a national inaction in relation to breaches of international criminal law—due to an inability or unwillingness to act or even high-level complicity—may provoke international political action, even at the Security Council level. Three ICTY trial judgments, *Prosecutor v Perišić*[22], *Prosecutor v Đorđević*,[23] and *Prosecutor v Boškoski*[24] have even used this evidence to prove that these commanders had notice that their subordinates were committing international crimes in, respectively, Sarajevo, Kosovo and Macedonia.

Numerous Security Council resolutions have called for the cessation of hostilities, condemned breaches of international criminal law and international humanitarian law and urged the relevant UN member States to take measures to punish them, and often over a lengthy period in relation to the same conflict or situation. Some official fact-finding reports have recommended creating new internationalised or hybrid courts to investigate and punish these international crimes.

These two *ad hoc* tribunals, the ICTY and ICTR, and the ICC as the permanent court represent the purely international criminal model. The hybrid model with UN involvement is another contemporary example. In 2008, the UN Office of the High Commissioner for Human Rights defined hybrid courts as those[25]

> of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred. This rule-of-law policy tool aims to serve two purposes: first, to explore the potential positive impact hybrid courts may have on the domestic justice system of post-conflict States so as to ensure a lasting legacy for the rule of law and respect for human rights; second, to examine how hybrid courts can receive the mandates and necessary political support required to be more effective in terms of legacy and capacity-building.

This is a useful working definition. In the African context, the SCSL illustrates this model, while the Extraordinary Chambers in the Courts of Cambodia (ECCC) provides an Asian example.[26] The ECCC, however, can also be classified as a national model involving international personnel and funding—judges, prosecutors, investigators, defence counsel, etc.

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[22]Judgment, 6 September 2011, Case No. IT-04-81-T. Paras 1451–1454, 1465–1473, 1480, 1487, 1496, 1500–1501, 1514, 1518, 1634–1636.

[23]Judgment, 23 February 2011, Case No. IT-05-87/1-T. Paras 339, 1900, 1996–1999, 2003.

[24]Judgment, 10 July 2008, Case No IT-04-82-T para 451. And see generally, David Re 'Fact-Finding in the Former Yugoslavia: What the Courts Did' in Quality Control in Fact-Finding, Morten Bergsmo (ed) Torkel Opsahl Academic EPublisher, Florence, 2013.

[25]Office of the UN High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States, Maximizing the Legacy of Hybrid Courts', 2008 (HR/PUB/08/2) 1.

[26]'Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea', 6 June 2003.

The Court of Bosnia and Herzegovina, War Crimes Chamber, presents a possible 'third-way' model of a national hybrid. The Court was established in 2000 by the resident United Nations' High Representative, acting pursuant to his vested powers under Chapter VII of the Charter of the United Nations.[27] Its war crime and organised crime chambers had a time-mandated international presence of judges and prosecutors before it was to 'transition' to a purely national model. The War Crimes Chamber was established within the that court in 2005, and the international presence lasted until 2011.[28]

International donors paid for the court and its infrastructure, including building prison facilities meeting international standards, and for the international presence, and invested heavily in training and technical assistance. Witness protection programmes, previously lacking, were also established. New criminal procedures were also, but more controversially, introduced.

This model permits national 'ownership' of the end product, namely, a new permanent national court, supporting criminal justice infrastructure, technical expertise and international support. This court, or at least its internationalised chambers, can be viewed as a nationalised type of hybrid or, more accurately, temporary internationalised chambers operating within a national court system. The Bosnian model's in-built flexibility also makes it adaptable to numerous national situations.

Multilateral hybrid courts or chambers in courts, established by agreement or treaty, have also been established, both in transitional justice environments and where practical political difficulties have prevented investigation and prosecution of crimes where they occurred. The best example in the African context is the Extraordinary African Chambers in the Senegalese Courts, established pursuant to an agreement between the AU and Senegal in 2013 to try those responsible for committing international crimes—genocide, crimes against humanity, war crimes and torture—committed in neighbouring Chad between 1982 and 1990, coinciding with the rule of President Hissène Habré.[29] The agreement cited the Convention Against Torture in its preamble. In 2015, trials commenced using the Senegalese Code of Criminal Procedure. The process concluded in April 2017 with the court's appeals chamber upholding Habré's convictions and sentence of life imprisonment. The court received funding from the African Union, Chad, Senegal, the European Union, individual European nations and the United States, and the ICRC has given some technical assistance.

Again in the African framework, recommendations of various fact-finding missions (national and international) in Sudan, Burundi, Liberia, Kenya and the DRC have recommended establishing hybridised courts, some similar to the Bosnian model. None, however, has yet to come to fruition. In 2005, UN Secretary General Kofi Annan, after receiving a report of a UN Assessment Mission in Burundi, recommended establishing special chambers within the Burundi justice system

[27]Law on the court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 49/09.
[28]War Crimes Chamber Press Releases (n 6).
[29]Accord entre le gouvernement de la republique du senegal et l'union africaine (n 7).

(as in a 'Special Tribunal for Burundi') to try crimes committed between 1972 and 1993.[30] This was modelled on the Court of Bosnia and Herzegovina, but with the addition of a truth and reconciliation commission—still sadly lacking in the post-war former Yugoslavia.

Sudan provides another example. In 2009, the AU's High-Level Panel on Darfur, chaired by the former South African president, Thabo Mbeki, recommended establishing hybrid courts composed of national and international judges and prosecutors appointed by the AU.[31] The same year, the Security Council welcomed the report of the AU's High-Level Implementation Panel on Darfur,[32] and the AU Peace and Security Council endorsed this plan.[33] In August 2015 the Government of South Sudan agreed that the African Union Commission would establish a Hybrid court for South Sudan with jurisdiction over international crimes committed from 15 December 2013 to the end of a transitional period.[34] The 2009 Truth and Reconciliation Commission in Liberia also recommended establishing an internationalised court in Freetown (styled 'The Extraordinary Criminal Court for Liberia') to deal with crimes committed during the 14-year civil war.[35]

In 2008, in Kenya, the Waki Commission of Inquiry into the Post-Election Violence, occurring in 2007, recommended establishing a 'Special Tribunal for Kenya' within the Kenyan court system and with an international prosecutor and some international judges.[36] Its intended lifespan was an initial three years, and its jurisdiction was confined to crimes committed in late 2007 to early 2008. The Kenyan Parliament, however, rejected the enabling legislation that would have required a constitutional amendment. The former ICC Prosecutor, Luis Moreno Ocampo, responded by opening a preliminary investigation and, thereafter, indicting some senior Kenyan officials.[37]

In 2010, the UN Office of the High Commissioner for Human Rights recommended establishing Specialised Chambers within the DRC's justice system

[30]UN Secretary General, 'Letter dated 11 March 2005 from the Secretary-General addressed to the President of the Security Council', 11 March 2005 (S/2005/158).

[31]African Union, 'Report of the African Union: High Level Panel on Darfur (AUPD)', 29 October 2009 (PSC/AHG/2(CCVII)) para 320(b).

[32]UN Security Council Press Release, 'Security Council Press Statement on Sudan', 21 December 2009 (SC/9831-AFR/1925).

[33]African Union, 'Communiqué of the 207th Meeting of the Peace and Security Council', 29 October 2009 (PSC/AHG/COMM.1(CCVII)).

[34]Intergovernmental Authority on Development, Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, Ethiopia, 17 August 2015, Chapter V(3).

[35]Liberia Truth and Reconciliation Commission, 'Consolidated Final Report', 30 June 2009, 349, 426-59.

[36]The Commission of Inquiry on Post Election Violence (CIPEV), Report, 15 October 2008 <http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf>.

[37]Request for authorisation of an investigation pursuant to Article 15, 26 November 2009, ICC-01/09-3.

to try crimes committed between 1993 and 2003.[38] A DRC 2011 draft law proposed, but did not guarantee, the presence of international judges and prosecutors. The DRC has since undertaken its own war crime prosecutions in the east of that country, but using only national personnel.

In Asia, in East Timor, but within the interim United Nations Transitional Administration in East Timor (UNTAET), and until their suspension in 2005, 'Serious Crimes Panels' of mixed and international composition heard trials for war crimes committed in 1999.[39]

Some national examples feature international technical assistance but without a standing international presence in that court system. In Iraq, in 2003, the Coalition Provisional Authority established the Iraqi Special Tribunal to try international crimes, more or less as is defined in the ICC Statute.[40] In 2005, it became the Iraqi High Tribunal, as part of the Iraqi justice system trying, most notoriously, its former President Saddam Hussein. Another is Bangladesh, which in 2010 established its own national 'International Crimes Tribunal' within its court system for international crimes committed in its secession war in 1971. The legislation for that court was actually drafted in 1973, with international assistance.[41]

Since 2008, Uganda's High Court has had an International Crimes Division with jurisdiction over war crimes, crimes against humanity, genocide, terrorism, human trafficking, and piracy and other international crimes.[42] In 2015, the Ugandan Supreme Court ruled the legislation constitutional, thereby allowing trials relating to the armed conflict involving the Lord's Resistance Army to proceed.[43] Kenya may yet take the same route of having an international crime division in its High Court.

War crime trials continue in Kosovo, but with limited success, under EULEX's umbrella. Parallel to this, the Council of Europe Parliamentary Assembly published a report in 2010 on the 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo'.[44] The European Union (EU) consequently instituted a Special Investigative Task Force to inquire into the allegations in the report. Because certain allegations were against senior Kosovar officials, the Task Force had only international personnel. In Europe, in 2015, the EU and Kosovo agreed to establish a specialist chambers and a specialist prosecutor's office within the Kosovo court

[38]Office of the UN High Commissioner for Human Rights, 'Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003', August 2010, paras 1035-55.

[39]Regulation No. 2000/15, 6 June 2000 (UNTAET/REG/2000/15).

[40]Coalition Provisional Authority Order Number 48, 'Delegation of Authority Regarding an Iraqi Special Tribunal', 10 December 2003 (CPA/ORD/9 Dec 2003/48).

[41]International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973).

[42]The High Court (International Crimes Division) Practice Directions, Legal Notice No. 10 of 2011, s 6.

[43]*Uganda v Kwoyelo* (Constitutional Appeal No. 01 of 2012) [2015] UGSC 5 (8 April 2015).

[44]AS/Jur (2010) 46.

system, staffed by international personnel, to try cases of organised crime and war crimes committed in Kosovo. Its seat is in The Hague.[45]

The STL, established in 2009, is the first internationalised court—hybrid or national—in the Middle East. Its jurisdiction is not over international crimes but rather over an attack on 14 February 2005 that killed Lebanon's former prime minister and any connected attacks committed in Lebanon between October 2004 and December 2005. It was created by Security Council Resolution 1757 (2007), to which its statute is annexed. During its drafting, consideration was given, but rejected, to giving the tribunal jurisdiction over international crimes, such as crimes against humanity. On a practical level, the STL exists under an agreement between the Government of the Lebanese Republic and the UN.

Another possibility is '*ad hoc* solutions', as opposed to the UN's two *ad hoc* tribunals. For example, the so-called Lockerbie trial, relating to the bombing of Pan Am flight 103 over Scotland in December 1988, was held in the Netherlands between 2000 and 2002 pursuant to an agreement between the UK, the US, the Netherlands, Libya and the UN.[46] The court applied Scottish law and was termed 'The Scottish Court in the Netherlands'. Another is related to piracy; Security Council Resolution 1976 (2011) contemplated establishing specialised Somali courts to try pirates in Somalia and the region, including an extraterritorial Somalia Specialised Anti-Piracy Court. This, to date, still amounts only to a proposal.

From this it is evident that more 'solutions' in the form of courts and tribunals have been proposed than actually realised. But despite this, some non-realised proposals, such as for the DRC, appear to have at least sparked some national action, and investigations and prosecutions have occurred.

In ideal circumstances, evidently, investigations and trials of international crimes would be purely national. But international assistance is often required to make this work. The form of that assistance will determine the model of justice—for example, whether the assistance is limited to funding, resources and technical assistance or if it is part of the court's structure, such as mandating the presence of international personnel in key posts, like prosecutors or judges.

The advantages and disadvantages of the differing internationalised models must be balanced against each other.[47]

No model offers a complete solution. Like the STL, several, such as the Bosnian and Cambodian examples, feature international judges, prosecutors, defence lawyers and other personnel working with national counterparts. The Senegalese model has international and national trial and appeal judges and national investigating judges.

[45]see Article 162 of the Kosovo Constitution and the Law on Specialist Chambers and Specialist Prosecutor's office, 3 August 2015, Law No. 05/L-053. 'Agreement between the Kingdom of the Netherlands and the Republic of Kosovo Concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands', 15 February 2016.

[46]UN Security Council, S.C. Res. 1192, U.N. Doc. S/RES/1192 (1998).

[47]see generally Sarah Williams, Hybrid and internationalised criminal tribunals. Selected jurisdictional issues. Hart Publishing Oxford and Portland, Oregon, 2012.

An independent international prosecutor, who also investigates, is common to all international courts and tribunals. The ECCC has co-prosecutors, one national and one international, and a majority of national judges, but an international judge must vote for an acquittal or a conviction. The STL has an international prosecutor, appointed by the UN Secretary General (as are its judges, after consultation with the Lebanese Government) and a Lebanese Deputy Prosecutor, who works from Beirut. In Senegal, although appointed by the African Union, the Prosecutor and his three deputies are Senegalese.

International trials should only occur where a national system cannot or will not take action relating to international crimes. In these circumstances, and in only examining purely international trials, it is evident that the advantages of 'going international' are many. One of the most obvious is that of resources and funding. Internationally funded investigations and trials provide expertise that national systems may otherwise lack, particularly in post-conflict or transitional justice conditions. International institutions also attract international experts who can bring international best practice. The international standards may be higher across the board.

Lacking ties to the country in question, international judges and prosecutors should have no vested interest—such as in promotion or even professional or cultural survival—in who are the targets of investigation or prosecution or in the results of trials. They may therefore be more neutral than their national equivalents, thus bringing a different perspective to case selection, prosecution and adjudication.

International trials also have a high symbolic value. Their complexity may be more suited to international expertise, thus allowing the courts to concentrate on the highest-level perpetrators. Between them, the ICTY, ICTR and ICC have indicted presidents, prime ministers, military and intelligence chiefs, government ministers, rebel commanders and other assorted senior military and civilian officials. The SCSL and ECCC, with their international personnel, have also convicted figures of comparable seniority, including at the SCSL, former Liberian President Charles Taylor, and at the ECCC, Nuon Chea, Pol Pot's chief deputy, and Khieu Samphan, the President of Democratic Kampuchea.

By employing legal, military and political experts, these courts and tribunals also allow a multidisciplinary approach to investigation, prosecution and adjudication. They can also contribute to international jurisprudence and international best practice. International trials and the surrounding supporting infrastructure may provide—even for the first time—witness support and protection in circumstances where the State does not or cannot offer the same service. The presence of international personnel also militates against corruption. The international presence can offer higher standards of investigation and forensic work.

Purely international trials, on the other hand, have their limitations. One of the most significant is the distance from the crimes, which in turn may pose problems with the investigation. The trials, as mentioned above, are inevitably selective. Case selection policy may not be fixed or transparent. International trials are also very expensive; for example, the ICTR's budget in 2010–2011 was US$257 million

gross, and the ICTY's was $327 million gross;[48] in 2010, the ICTY had 869 staff from 76 nations. In the ICTY's closing-down phase, its budget shrunk in 2012–2013 to $250 million net and in 2014–2015 to $179 million net.[49] The 2014–2015 budget for the (still) temporary successor to the two, the International Residual Mechanism for Criminal Tribunals (MICT), with branches in The Hague and Arusha, was $110 million gross.[50] Added to the expense is that these original UN tribunals had their own field offices and had to fund outreach activities and a victims and witnesses service and administer a legal aid programme for indigent accused persons.

International courts and tribunals also lack the most basic feature of national justice systems, namely their own coercive powers, and must rely upon international cooperation—either by agreement or Security Council resolution or sheer goodwill or political interest. The most elementary justice function of executing arrest warrants and apprehending accused persons presents its own problems—especially if the wanted person has powerful friends. Obtaining evidence by subpoena—the normal process in national trials—may be impossible. Investigations in another country, using international personnel unfamiliar with national culture, practices and even the language, also pose unique challenges. Almost all witnesses must undertake international travel if they testify live in the courtroom; this is inconvenient and costly.

International trials also present major language challenges for the staff and judges as much has to be done with the assistance of interpreters. Court proceedings will be conducted in the working language of the court or the case itself, which in most cases entails the extensive use of court interpreters and, for documentary evidence, translators. The interpreters and translators must be properly certified and paid at international rates. This adds to the cost and makes the proceedings very, very expensive.

The judicial chambers are composed of mixed-nationality three-member trial chambers and five-member appeal chambers, sometimes with the addition of non-voting reserve or alternate judges. The challenges inherent in these combinations are enormous. Each judge brings to the table his or her own legal, cultural and linguistic experience. The benches may contain judges from different legal traditions (the so-called common law/civil law divide) who share no common language or culture. Moreover, judges may be elected or appointed, and the quality of judicial nomination varies. An excellent mixed international bench may result, or perhaps not.

Distance can also lead to bureaucracy and delay. Practically, the late cancellation of a witness' travel, and hence his or her court appearance, can result in lost court time. Similarly, site visits by a court to a crime scene—or by its investigators and lawyers—will be expensive and may be impractical or unsafe to undertake.

The non-involvement of national judges, in some international courts, is also problematic as it can increase the sense of distance from the region where the crimes

[48]UN General Assembly, Fifth Committee (Administrative and Budgetary), 22nd Meeting, 13 December 2011 (GA/AB/4018).

[49]ICTY, 'The Cost of Justice' <www.icty.org/en/about/tribunal/the-cost-of-justice>.

[50]UN General Assembly, 'Budget for the International Residual Mechanism for Criminal Tribunals for the biennium 2014-2015', 27 September 2013 (A/68/491).

were committed and for whose benefit the court exists. International hybrid criminal law procedures—alien to national lawyers and accused persons—may be used. Conviction and sentence will typically feature detention in a third country, usually far from the scene of the crime and the home of perpetrators and their families. The distance may also make witnesses reluctant to travel—although video conference link testimony may alleviate this.

Finally, and significantly, the justice value of a purely international trial may be merely symbolic, even with the best outreach efforts in the affected area. Long after the event, victims—and especially those coming from the location of the crimes—may feel abandoned by the system. Promised reparations that should follow a conviction may be less than symbolic, especially if a convicted accused is indigent.

International courts and tribunals also tend, over time, to become self-sustaining entities, developing 'lives of their own'. The larger one grows and the longer it lingers, the more it risks isolation from the crime scene and losing relevance in national eyes. This raises the question of whether the symbolism is worth the cost or, importantly, the opportunity cost of deploying the resources and international goodwill into that particular project, as opposed to using it to strengthen national justice systems.

Hybrid tribunals, though, have their own special advantages. They can be tailored to specific crimes or events. They can be attractive to international donors. They permit a unique mixture of international and national personnel, including judges. Their infrastructure and technical expertise—being internationally funded—provides 'knowledge transfer' to national institutions. They can offer excellent witness support and protection. They can provide valuable assistance to troubled national justice institutions. And, as mentioned above, the SCSL and ECCC show how very senior officials can be indicted and convicted.

Some national progress in a hybrid institution is easily measurable. For example, as a result of having worked closely with international personnel in 2005 and 2006—from the United Nations International Independent Investigation Commission and also with international experts from countries that offered specific forensic expertise—the Lebanese Internal Security Forces have modernised and adapted their forensic investigation procedures.[51]

On their limitations, a time-limited mandate for a hybrid institution may cause investigatory and procedural shortcuts and actually reduce standards below what their creation was intended to achieve. Their funding may be voluntary and be tied to the limited mandate. Invariably, the trials will be selective and may not represent the total criminality. Their establishment may result from much—even exhaustive—international negotiation resulting in compromise and jurisdictional limitation. The constricted ECCC jurisdiction illustrates this; it is restricted to trying crimes committed by the Khmer Rouge in Democratic Kampuchea between 1975 and 1979, thus mirroring some of the limitations of the Nuremberg International Military

[51]David Re, 'The Special Tribunal for Lebanon and National Reconciliation' (FICHL Policy Brief Series No. 32 2015) <http://www.legal-tools.org/doc/5e0e0d/>.

Tribunal, which confined its jurisdiction to the trial of major war criminals of the defeated Axis powers for crimes committed in Europe between 1939 and 1945. The Tokyo IMTFE had a similarly restrained jurisdiction, limited to crimes perpetrated by the conquered Japanese between 1928 and 1945.

Unless the international judges and staff have similar legal backgrounds and speak the same language as their national counterparts, hybrid institutions may also face language and legal cultural challenges comparable to those in purely international tribunals. The Extraordinary African Chambers in Senegal are an exception; the international judges come from neighbouring countries with similar legal systems, and they speak and work in French.

A limited mandate has its own inherent problems in both start-up and completion; an obvious problem is in recruiting and retaining qualified staff when each is acutely aware of their limited employment future. And, as each institution has similar administrative and infrastructure requirements, the start-up costs are little different to those of the permanent and *ad hoc* institutions. In other words, a lot of international money is expended on the establishment cost of a short-term institution. Could it be better spent injecting expertise into national criminal justice systems?

The last example, of national trials with international assistance, either of funding or international presence, also has its own strengths and drawbacks. The advantages include the provision of international technical assistance, coupled with the availability of international funding. This model also permits a timely transition from an international to a purely national institution. This may help to raise to international standards the national level of investigating, prosecuting, defending and judging both international and national crimes. Moreover, the international presence assists in preventing corruption, as international personnel tend to be well-paid, and in lowering ethnic or religious bias in post-conflict or ethnically driven situations. In that sense, the international presence provides a form of a 'watching brief', helping to 'keep the system honest'. The international presence may also help to bolster the public image of the institution. It also allows exchanges of criminal justice system personnel with similar institutions outside of the country.

Resource wise, the national infrastructure, however, may require drastic overhauling before anything can happen. Court facilities and investigations may be rudimentary. Existing witness protection facilities, for example, may be limited and the standard of forensic science modest. Security issues may be prevalent, especially in a post-conflict environment. Immediate logistical problems could include situations requiring sophisticated modern forensic techniques such as the exhumation of bodies from mass graves and their preservation and identification. The institution may need to develop separate, and unfamiliar, rules of procedure and evidence and a range of other measures, such as host agreements, cooperation agreements and detention agreements. These things take time.

Even considering these potential obstacles, this model has other limitations; these include the high turnover of international personnel and the possible language problems identified above of international personnel not speaking national or local languages. Experience has revealed that some international personnel may have lesser qualifications, yet receive better remuneration, than national personnel, thus

engendering domestic resentment. An entrenched internal resistance to international presence could exist; this could be for political, professional or personal reasons or a mixture.

The investigations and trials in this model, like the others, may be highly selective, and the case selection is susceptible of criticism for being one-sided. And an international presence does not of itself guarantee curing any reluctance by national personnel to pursue high-level perpetrators—especially of those who may be connected to political or military figures, or even themselves in power. National personnel are acutely aware that the international presence is transitory. The non-prosecution of these officials can simply await the departure of the international personnel and safely continue. Thus, even during the international period, only a truly courageous prosecutor or judge would assist the internationals to, respectively, investigate or convict such a figure. But after the international departure, more than mere courage is required. The result could be trials featuring the selective prosecution of only one side to a conflict—during or after the international presence—thereby actually lowering confidence in the integrity of the institution. In other words, ironically, the international presence can legitimise *not* taking action against those in power or connected to it.

Another limitation of national trials with an international presence is the quality of international personnel. Attracting suitably qualified judges and prosecutors to undertake short-term assignments of uncertain duration is difficult. Very few national systems have judges who are experienced in international crimes, and seconding unqualified, albeit enthusiastic, municipal judges to hybridised courts—however well intentioned the country or the judge—may hinder rather than help the process. The result may be the 'blind leading the blind' with judgments and decisions of poor legal reasoning and quality. This too does nothing to engender confidence in the institution. The same considerations also apply to investigators, prosecutors and defence lawyers.

By analogy, with the tiny docket of the International Court of Justice, the ICC will only ever have the capacity or resources to deal with a miniscule percentage of potential crimes within situations capable of referral to its jurisdiction. Hence, international crimes will have to be investigated and prosecuted elsewhere, if anywhere. This is complementarity by default or, to express it more positively if actively pursued, in action.

Criminal justice systems in post-conflict situations, however, may lack the capacity—which may include the resolve—to deal with the aftermath of international crimes. But international crimes must be dealt with. In many circumstances, and especially those featuring the impossible task of bringing to justice everyone against whom there could be evidence of committing an international crime, hard choices have to be made as to whether truth and reconciliation mechanisms can supplant trials. That is to say, following the model of South Africa and its Truth and Reconciliation Commission and no trials, instead of the reverse Bosnian situation of all trials and no truth and reconciliation mechanism.

No one-size-fits-all model or solution can exist. Solutions may include truth and reconciliation mechanisms, amnesties or policies of non-investigation or

prosecution, investigations and prosecutions or these in combination. This leads to the question of whether the hybrid *is* the way forward.

The best hybrid model allows an international presence to work with and for the national interest. It is the most flexible and most adaptable of all models. To supplement the ICC, at the peak of international criminal law, the hybrid, or a national court with an international presence, may provide the best working model to date. This is notwithstanding their identified limitations.

Recent experience has shown that the immediate future of international criminal law in 'internationalised' institutions (namely, courts and tribunals) will be a combination of the permanent international criminal court, hybrid courts and tribunals and, importantly, national courts with internationalised elements. The most attractive and flexible model may be either a hybrid or a national court with internationalised features. This can work in almost any context, on any continent and for any international crimes. But it ultimately depends on the circumstances; in some situations, unfortunately, only a purely international court or tribunal will work.

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The ICC and the African Court and the Extended Notion of Complementarity of International Criminal Jurisdictions

Chile Eboe-Osuji

Contents

1 Development Economics and the Rule of Law

The main frame of this essay is a discussion about complementary jurisdictions between two international courts: the International Criminal Court and the African Court of Justice and Human Rights (the 'African Court' or the 'AC'). But, for added value beyond purely juristic considerations, I feel compelled to traverse the discourse through the prism of economic development in Africa. And that raises the question: what does an essay on complementarity of jurisdictions between two international courts have to do with the socio-economic development of Africa? Answer: plenty.

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Modern-day political economists have had to accept the critical role of the rule of law even in development economics. Notably, a group of 25 economists from the economically developed and the economically developing countries met in Barcelona on 24 and 25 September 2004 'to consider the prospects for growth and development around the world'.[1] They discussed the effects of economic reforms adopted by many economically developing nations over the previous two decades, the lessons for economic policymaking that emerged from that experience and the performance of the international economic system into which poor and middle-income countries are increasingly integrated.[2] Their 'discussion was primarily focused on policy lessons and the need for changes in both rich and poor nations'.[3] In the end, they reached 'broad agreement on seven sets of lessons, which in turn serve as priorities for reform'.[4] Quite significantly, the first point of agreement included not only the critical role of the rule of law but also that the institutions that actualise it really matter. That point of the agreement has been reported as follows: 'both basic economic reasoning and international experience suggest that institutional quality, such as *respect for the rule of law* and property rights, plus a market orientation with an appropriate balance between market and state, and attention to the distribution of income, are at the root of successful development strategies. *Moreover, the institutions that put these abstract principles into reality matter*.'[5]

The theme that now places the rule of law and rightly so—at the nerve centre of the economic growth and development agenda has since been amply captured by international organisations. In their report entitled *Making the Law Work for Everyone*, an international Commission on Legal Empowerment of the Poor observed as follows (an observation partly quoted earlier but which bears repeating now in its fuller form): '[T]he rule of law is not a mere adornment to development; it is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish, and prosperity can be built. ... The law is the platform on which rest the vital institutions of society. No modern market economy can function without law, and to be legitimate, power itself must submit to the law.'[6] The Commission was co-chaired by Ms Madeleine Albright (former United States Secretary of State), and numbered among its members were some very eminent persons.[7]

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[1] See 'The Barcelona Development Agenda' in Narcís Serra and Joseph E Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (OUP 2008) 57.

[2] ibid.

[3] ibid, p 58.

[4] ibid.

[5] ibid, 58, emphasis added.

[6] UN Commission on Legal Empowerment of the Poor and United Nations Development Programme, *Making the Law Work for Everyone* (2008) 3.

[7] The Commission's members included Mr Lloyd Axworthy (a former Foreign Affairs Minister of Canada), Mr Fernando Henrique Cardoso (a former President of Brazil), Ms Hilde Frafjord Johnson (a former Minister of International Development of Norway), Justice Anthony Kennedy (a Justice

The United Nations itself has repeatedly acknowledged the central role of the rule of law to economic growth and development. In *The Future We Want*, the outcome document of the United Nations Conference on Sustainable Development (also known as 'Rio + 20 Conference'), UN delegates 'acknowledge[d] that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger'.[8]

And at the High-Level Meeting of the UN General Assembly, in 2012, on the Rule of Law at the National and International Levels, the attendees expressed their conviction, among other things, 'that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger . . .'.[9]

In the European Union, the critical role of justice systems in the wealth of nations has also been noted. In a report prepared for the European Commission (Directorate of Justice), the following was noted:

> In contemporary democracies, *Justice systems occupy a central position among public institutions* as autonomous and independent branches of the governments. The reason is that an independent and effective justice system not only provides a safeguard for human rights, but also for example regarding a number of other aspects of life in society that are crucial to the well-being of individuals and organisations, such as health, work, industrial relations, social security, family relations, civil rights, environmental rights, consumer rights, property rights, the enforcement of contracts.
>
> From a business perspective, judicial institutions have to insure respect for property rights and guarantee contract enforcement . . .. In so doing, efficient judicial institutions reduce the risks and uncertainty, on the one hand, of starting and conducting business, which leads individuals to invest, and on the other hand, of consumers and service users, which reduces transaction costs and strengthens the market.

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of the US Supreme Court), Mr Allan Larsson (a former Finance Minister of Sweden), Justice Clotilde Aniouvi Médégan Nougbodé (former President of the High Court of Benin), Mr Benjamin Mkapa (former President of Tanzania), Mr Mike Moore (former Prime Minister of New Zealand and a former Director-General of the World Trade Organization), Ms Mary Robinson (former President of Ireland and a former United Nations High Commissioner for Human Rights), Ms Lindiwe Sisulu (former Minister of Housing of South Africa), Mr Lawrence H Summers (former President of Harvard University and a former United States Secretary of the Treasury), Ms Erna Witoelar (a former Minister of Human Settlements of Indonesia), and Mr Ernesto Zedillo (former President of Mexico).

[8]United Nations, Report of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20–22 June 2012, Doc No A/CONF.216/16, para 10.

[9]United Nations General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, Doc No A/RES/67/1 of 30 November 2012, para 7.

> By promoting investment, good judicial institutions can contribute to economic growth and development.[10]

With particular regard to the work of the administration of international criminal justice, 'the link [of] security, stability and development has clearly been established, as has the negative impact of the absence of rule of law on growth. Civil wars are particularly devastating to development, and other forms of widespread crime and violence divert the provision of public goods, destroy private property and infrastructure ….'[11] The evidence of the linkage appears adequately described in the World Bank Development Report (2011) entitled *Conflict, Security and Development*.[12] In that report, it is noted that the devastating effects of insecurity and widespread violence not only impede the economies of the countries in which those events occur but also have negative effects on the neighbouring countries and even globally. In the words of the report:

> Repeated and interlinked, these conflicts have regional and global repercussions. The death, destruction, and delayed development due to conflict are bad for the conflict affected countries, and their impacts spill over both regionally and globally. A country making development advances, such as Tanzania, loses an estimated 0.7 per cent of GDP every year for each neighbor in conflict. Refugees and internally displaced persons have increased threefold in the last 30 years. Nearly 75 per cent of the world's refugees are hosted by neighboring countries.[13]

It is against that background that it must be noted that, in creating the ICC, the hope of the international community was to help curb such conflicts and the atrocities they breed, for they 'threaten the peace, security and well-being of the world'.[14] Indeed, the determination of the world, which the ICC symbolises, is 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.[15] The role of the ICC in fostering economic development was noted as follows in a judicial opinion at the ICC:[16]

> It is not necessary to overwork any proposition that the ICC is an aid to economic development. Dr Zuma [the African Union Commission Chairperson] had adequately framed the proposition when she opened her remarks with the following observation:

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[10]European Commission for the Efficiency of Justice, 'The functioning of judicial systems and the situation of the economy in the European Union Member States' — Report prepared for the European Commission (Directorate General JUSTICE) (2013) 6.

[11]Louis-Alexandre Berg and Deval Desai, 'Background Paper: Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda' (2013) 12.

[12]International Bank for Reconstruction and Development/World Bank, *Conflict, Security and Development*: World Bank Development Report (2011).

[13]ibid, 5.

[14]See the preamble to the Rome Statute.

[15]ibid.

[16]*Prosecutor v Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)*, ICC-01/09-02/11-830, 18 October 2013, Separate Further Opinion of Judge Eboe-Osuji, para [24].

> 'When the Assembly adopted the Constitutive Act in 2002, it was mindful of the fact that the scourge of conflicts constitutes a major impediment to the socio-economic development of the continent.'[17] It is indeed a matter of eminent common sense that one of the ICC's main stocks in troubled places lies in the dividends of peace in society. It stands to promote the stability that allows children to go to school, good health and freedom to their parents to pursue productive activities, and the resultant economic growth that enables political leaders to exult in improvements, in the human development index and the achievement of millennium development goals.[18] Valuable resources channelled toward the needs of raging armed conflicts are valuable resources denied to projects that assist national development. From that point of view, the ICC is to be embraced as a veritable gift of development for Africa. It is not to be held in suspicion as a Trojan horse of ill-purpose for the continent and its leaders.

It is encouraging that international organisations and latter-day economists do now recognise the key role of the *rule of law* in the growth and development of economies and that the institutions that put that abstract principle into reality really do matter. But those were lessons that Adam Smith, the reputed father of the discipline of political economy, had specifically taught well over two centuries ago. As modern-day political economists have done, Adam Smith had conducted the first known 'Inquiry into the Nature and Causes of the Wealth of Nations' and had communicated his conclusions in his classic book of that title, known for short as *The Wealth of Nations* (published in 1776). He, too, had recognised many of the usual factors identified by economists of today as generating wealth for nations. '[B]ut, above all', he acknowledged, 'that equal and impartial administration of justice, which renders the rights of the meanest ... subject respectable to the greatest, and which, by securing to every man the fruits of his own industry, gives the greatest and most effectual encouragement to every sort of industry'.[19] It is thus apparent that courts of law are critical institutions for the proper administration and maintenance of the law.

At the international level, the role of the ICC has been noted in this regard—as indicated earlier. But another international court whose potential role may also be noted is the African Court of Justice and Human Rights, in the contemplation of criminal jurisdiction for it. This paper will examine the possibility of a complementarity of roles between these two courts in relation to their work in Africa.

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[17] African Union, 'Welcome Remarks of the African Union Commission Chairperson, H E Dr Nkosazana Dlamini Zuma to the Extraordinary Session of the Assembly of Heads of State and Government', Addis Ababa, 12 October 2013 http://www.au.int/en/sites/default/files/speeches/25347-sp-welcomeextordasembly12oct2013_final.pdf, 3.

[18] Young African men and women should not be perishing at sea, time after time, off the coast of Lampedusa, while engaged in 'perilous journeys, leaving [African] shores in search of illusive green pastures' while running away from poverty or conflict and often both, see ibid, 8.

[19] Adam Smith, *The Wealth of Nations,* vol 2bk IV (9th edn, Strahan & Cadell 1799), 434.

2 Complementarity of Jurisdictions in International Criminal Law

Complementarity is a concept that is synonymous with the jurisdiction of the ICC. The ensuing discussion will explore the amenability of the concept to an expanded meaning—as a question of law—beyond the binary system that contemplates the jurisdiction of the State (with either territorial link to the crime or civic relationship with the accused) relative to the jurisdiction of the ICC. The case study for the discussion will be the Protocol that the African Union adopted on 27 June 2014, expanding the jurisdiction of the African Court—in the direction of international criminal jurisdiction. For present purposes, I shall review (along the way but not at length) the scope of the ICC jurisdiction as it concerns the doctrine of complementarity as ordinarily understood in relation to the ICC, including from the perspective of admissibility of cases. It is assumed that the reader is familiar with those. I shall, on the other hand, outline, as necessary, the key aspects of the AC's criminal jurisdiction before comparing the application of the Rome Statute relative to the Statute of the AC as amended for that subject-matter jurisdiction.

3 The Fundamental Premises of ICC's Complementary Jurisdiction

By way of subject matter, the crimes over which the ICC has jurisdiction, as summarised in article 5 of the Rome Statute, are genocide, crimes against humanity, war crimes and crime of aggression (once the conditions for the exercise of aggression crime jurisdiction are satisfied). The doctrine of complementarity plays a crucial role in both underlying and circumscribing the Court's exercise of jurisdiction over these crimes.

The Rome Statute envisages an international legal order that reinforces the jural coin on either side of which is engraved the primary responsibility and the fundamental prerogative, respectively, of States to investigate and prosecute international crimes that are more naturally connected to the given State—particularly in light of the State's territorial link to the crime or its civic relationship with the suspect.

That international legal order is certainly motivated by the central place of the principle of sovereignty of States and the related general rule of non-intervention in the internal affairs of States. It may be stressed, indeed, that a proper understanding of the notion of complementarity under the Rome Statute requires, in turn, an understanding of its fundamental premise. That premise comprises primarily the aforementioned principle of sovereignty of States and the cognate principle of non-intervention in the internal affairs of States. Those principles form a central

pillar of international law.[20] But those principles compose only a general rule and not an absolute one. There are exceptions. And one of those is engaged when the UN Security Council takes action under Chapter VII of the UN Charter for purposes of preventing, maintaining or addressing international peace and security.[21] There, it does not matter that the State(s) concerned are not members of the UN.[22]

Another exception is when by treaty States agree as to the occasions when international action may be taken in relation to what may ordinarily be considered to be an internal affair of a State, notwithstanding considerations of sovereignty of any State concerned. The ICC's complementary jurisdiction is in the manner of this order of exception to the general rule against intervention in internal affairs of States. And its careful calibration must be noted. This is in the sense that States Parties to the Rome Statute have agreed in its terms that the jurisdiction of the ICC is anchored only by the conclusion that the State with the sovereign jurisdiction over the crime or the accused has been unwilling or unable to carry out genuine investigation or prosecution of the case over which the ICC enjoys complementary jurisdiction.

The ICC's *raison d'être* within this international legal order established by the Rome Statute is thus to ensure—as a court of last resort—that the most serious crimes of international concern do not go unpunished.

A contrast may here be drawn with the Statutes of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia, through which the UN Security Council, acting pursuant to its special powers under Chapter VII of the UN Charter, exceptionally gave those tribunals primacy of jurisdiction relative to national courts. Those are two instances of the Security Council's exceptional exercise of its power to maintain or restore international peace and security, regardless of considerations of the sovereignty of the States concerned (the first exception noted earlier). By contrast, the Rome Statute takes things back to first principles, which underscore for States the right of first refusal of both responsibility and prerogative to prosecute international crimes naturally exigent upon their jurisdiction. The position is the default one. And it is so in light of its consistency with the principles of international law, which cardinally require respect for sovereignty and territorial integrity of States and restraint against interference in their internal affairs.

It is noted in this regard that paragraph 4 of the Preamble to the Rome Statute affirms that 'effective prosecution of the perpetrators of crimes of concern to the international community must be ensured by taking measures at the national level'. And paragraph 6 of the Preamble recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

Hence, paragraph 10 of the Preamble emphasises that 'the International Criminal Court ... shall be complementary to national criminal jurisdictions', and article

[20]See article 2(1), (4) and (7) of the UN Charter. See also the seventh and eighth clauses in the preamble to the Rome Statute.

[21]See article 2(7) of the UN Charter.

[22]See article 2(5) and (6) of the UN Charter.

1 establishes an International Criminal Court that 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complementary to national criminal jurisdictions'. That is the basic outline of the doctrine of complementarity under the Rome Statute.

4 Admissibility Under the Rome Statute

At the ICC, the doctrine of complementarity is palpably given an active play at the threshold of cases. This the Rome Statute guarantees by requiring a judicial determination to be made as to the admissibility of every case, as an initial legal hurdle to be cleared by the Prosecutor. According to article 17, a case is inadmissible before the Court—and the Court will lack the power to proceed—where a State that has jurisdictional priority over a crime is either investigating or prosecuting the case or has investigated or prosecuted the case. The ICC's jurisdiction engages, when it is shown that there has been lack of genuineness in the national investigation or prosecution, due to unwillingness or inability, having regard to generally accepted international standards.

5 The AU Protocol and the Amended Statute of the African Court of Justice and Human Rights

The criminal jurisdiction of the African Court may now be considered. The African Union adopted the 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' on 27 June 2014. To the Protocol is annexed an Amended Statute of the AC.

Article 28(c) of the Amended Statute of the AC contemplates 14 crimes over which the Court may exercise jurisdiction. They are as follows:

1. genocide,
2. crimes against humanity,
3. war crimes,
4. the crime of aggression,
5. treasonous usurpation of political power or 'unconstitutional change of government' (this proscribes the commission or ordering of certain acts aimed at illegally accessing or maintaining power),
6. piracy,
7. terrorism,
8. mercenary activities (prohibiting the recruitment, use, financing or training of mercenaries),
9. corruption (in both the public and private sectors),
10. money laundering,

11. human trafficking,
12. drug trafficking,
13. trafficking in hazardous wastes, and
14. illicit exploitation of natural resources.

Regarding the modalities of criminal responsibility, like the Rome Statute, the Amended Statute of the AC provides for individual criminal responsibility.[23] But, unlike the ICC, the AC also has jurisdiction over juristic persons that are not States, thus expressly permitting the exercise of criminal jurisdiction in respect of corporate criminal liability.[24]

6 Competing Jurisdictions?

The conferment of a criminal jurisdiction upon the AC inevitably engages the question whether the AC is a complementary or a competing court, relative to the ICC.

Indeed, some of the crimes over which the AU Protocol contemplates criminal jurisdiction for the AC do overlap with all of those over which jurisdiction has been denominated for the ICC—namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Some fear may thus exist in the minds of strong supporters of the ICC—to the effect that the extended jurisdiction of the AC may pose a threat to the continued value of the ICC on the African continent, which is the largest constituency of States Parties to the Rome Statute and the continent that has thus far (as of the time of writing) exclusively generated all of the work of the Court in terms of actual cases.

Indeed, given the often truculent views that some (though not all) African leaders and the AU leadership have been known to direct against the ICC in recent times—and the arguments employed to justify those views—the fear is entirely understandable. Yet, on a purely objective appreciation of the circumstances, and strictly as a matter of law, the fear is apparently unnecessary.[25] Purely as a matter of preliminary assessment in the realms of scholarly discussion,[26] it is easy to see why.

First, given the limitation of the ICC's resources to discharge its global mandate, it may be accepted that the ICC is ill-equipped to conduct all the trials of those who may be suspected of committing offences within any given situation in which the Court is exercising jurisdiction. In light of this, the Prosecutor has adopted the policy position—and this is only a matter of policy and not of law—to investigate and

[23]The Amended Statute of the AC, article 46B.

[24]ibid, article 46(c).

[25]For a recent judicial discussion of aspects of these concerns and fears see *Prosecutor v Ruto and Sang* (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11-2027-Red-Corr (5 April 2016), Reasons of Judge Eboe-Osuji, 140 *et seq.*

[26]It remains to be seen whether an actual case may suggest otherwise – and that is entirely possible.

prosecute the most responsible in any given situation. In the result, it is surely a welcome development to have at the international level another judicial mechanism (though sub-regional in orientation) to ensure that more trials can be conducted, for the sake of accountability, where the State with the closest connection to the case is unable or unwilling to investigate and prosecute the cases genuinely.

Second, there is, for the most part, an identity of definitions even for the crimes over which both courts enjoy jurisdiction—notably the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Nevertheless, there are occasional variances: some of those crimes as defined in the AU instrument encompass slightly wider ambit.[27]

Third—and perhaps more importantly for purposes of synergy between the ICC and the AC—the Rome Statute does not give to the ICC jurisdiction in the majority of the crimes over which the AC will have jurisdiction when the Amended Statute enters into force. Notably, out of the 14 crimes over which the AC may exercise international criminal jurisdiction, only four are contained in the Rome Statute. As such, there is no potential conflict with the jurisdiction of the Court in relation to ten of the crimes proscribed under the AU Protocol.

Upon a fair, objective view, it may be possible to consider that the conferment of criminal jurisdiction upon the AC in respect of these additional crimes is an attempt to address special concerns that African leaders are probably entitled to have—wholly as a matter of good faith. And to the extent that the wider international community has not addressed these crimes in the context of the Rome Statute, no criticism may fairly lie against African leaders in their determination to tackle these crimes collectively on their own, through conferment of appropriate jurisdiction upon the AC.

A conduct of note in this regard is that of treasonous usurpation of political power in subversion of democracy, generically criminalised in the AU Protocol as 'unconstitutional change of government'. The crime is defined as follows under Article 28E (1): 'For the purposes of this Statute, "unconstitutional change of government" means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

(a) A putsch or coup d'état against a democratically elected government;
(b) An intervention by mercenaries to replace a democratically elected government;
(c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;

[27]The following instances of wider definition and scope of crimes may be noted. The crime of genocide in the Amended Statute of the AC includes 'acts of rape or any other form of sexual violence' (article 28B(f)). War crimes include intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or excessive damage to civilian objects (article 28D(v)). War crimes also include using nuclear weapons or other weapons of mass destruction (pursuant to article 28D(g)). The crime of aggression includes acts by a person in a position effectively to exercise control over or to direct the political or military action of an organisation as well as a State, pursuant to article 28M of the Amended Statute.

(d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
(e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
(f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.'

It may indeed be noted that most of the foregoing crimes, depending on the manner of their commission, may fall within the laws of treason, proscribed in the criminal laws of most democratic States around the world. It is thus arguable that the proscription of treasonous usurpation of political power may qualify as a general principle of law recognised by nations, pursuant to article 38(1)(c) of the Statute of the International Court of Justice.

Another crime of note proscribed in the AU instrument, but not the Rome Statute, is corruption (or kleptocracy). It is a hydra-headed scourge to Africa and the economically developing world, notwithstanding that the wider world is not beyond its tentacles. There is the view to the effect that the ravages of corruption can be just as devastating in the long run as is the human toll of armed conflict[28]—and it may be that the devastation cripples Africa and the developing world even more.[29]

That point is probably encapsulated in the following words of Kofi Annan, as UN Secretary General, in a foreword he wrote in 2004 to a publication on the UN Convention Against Corruption; he went even further, saying:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

[28]See generally, Chile Eboe-Osuji, 'Kleptocracy: a Desired Subject of International Criminal Law that is in Dire Need of Prosecution by Universal Jurisdiction,' in Evelyn A Ankumah and Edward K Kwakwa (eds), *African Perspectives on International Criminal Justice* (Africa Legal Aid 2005) p 121.

[29]The devastating potential of unchecked corruption to even economies as developed and robust as the US economy may be noted in the motivations for the US federal statute famously known by its acronym of RICO (which stands for Racketeer Influenced and Corrupt Organizations Act) 18 US Code §§ 1961-1968. Notably, in Congress's Statement of Findings and Purpose for RICO, Congress made the findings that 'organized crime in the United States is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America's economy'. Also, 'organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten domestic security, and undermine the general welfare of the Nation and its citizens. . . . It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.' See US Senate, 91st Congress, 1st Session, 'Organized Crime Control Act of 1969, Report of the Committee on the Judiciary, United States Senate together with Individual and Additional Views (1969) pp 1—2.

> This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[30]

As with treasonous usurpation of political power, it may be noted that most States proscribe corruption within their domestic criminal laws. And, as such, its proscription at the international level does enjoy validity under article 38(1)(c) of the ICJ Statute, as a matter of general principles of law recognised by nations. And in giving a regional international court, the jurisdiction to try the crime, the African continent—organised under the AU—has made what must be acknowledged as a valuable contribution to the development of international (criminal) law.

Some may also see nothing wrong with the idea of *corporate criminal liability* that the AU Protocol recognises for the AC, even when the Rome Statute has not recognised it for the ICC. It may be noted in this connection that many multilateral treaties, such as the UN Convention Against Corruption,[31] and some antiterrorism treaties[32] do recognise the idea of corporate criminal responsibility. Surely, then, if these international conventions over corruption and terrorism do recognise corporate criminal responsibility, and the AU has given the AC jurisdiction over these crimes, it will be difficult to fault that manner of jurisdiction as something contrary to the international legal order.[33]

As concerns corporate criminal responsibility pursuant to the Rome Statute, it may be noted that while corporate criminal liability did not make it into the Rome Statute (and some have suggested the reason to be because the negotiation '[t]ime

[30]United Nations, Office of Drugs and Crime, *United Nations Convention against Corruption* (2004) p iii.

[31]United Nations Convention against Corruption (2004), article 26.

[32]See, for instance, the International Convention for the Suppression of the Financing of Terrorism (1999), article 5.

[33]See Chile Eboe-Osuji, 'The High Commissioner for Human Rights on the Legal Obligation of Corporations to Respect International Human Rights Norms', in Suzannah Linton, Gerry Simpson and William Schabas, *For the Sake of Present and Future Generations* (Brill 2015) 153 at 161 *et seq*.

was running out'[34]), some States (notably Australia,[35] Canada[36] and France[37]) do recognise it even in their national laws that have domesticated the Rome Statute.

7 An Expanded Conception of Complementarity

We now return to those four crimes over which the ICC and the AC share jurisdiction, especially given the generally identical wording of the definitions of the crimes in question. A view of conflict of jurisdictions is probably not inevitable, upon an expanded conception of the ICC doctrine of complementarity.

As noted earlier, the ICC was established as a court of last resort. From that perspective, the conferment of criminal jurisdiction upon the AC need not change that legal order. It is possible to see salutary value to the development in which organised leadership of the African continent has taken a step in the direction of building the continent's judicial capacity to prosecute those international crimes that are a matter of concern to the wider world that includes the continent. Indeed, the presumption of good faith requires that view. On the other hand, the proviso of good faith and the rule of law require in turn consistency in that development with the

[34]See Per Saland, 'International Criminal law Principles' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (Kluwer Law International 1999) 189—215, 199.

[35]In Australia, the *Criminal Code* 'applies to bodies corporate in the same way as it applies to individuals' with 'modifications ... made necessary by the fact that criminal liability is being imposed on bodies corporate,' according to s 12.1(1) of the Criminal Code Act 1995 of the Commonwealth of Australia (revised to 2005). Section 12.1(2) provides that a corporation may be found guilty of any offence including an offence punishable by imprisonment. Division 268 of the Australian *Criminal Code* proscribes 'genocide, crimes against humanity, war crimes and crimes against administration of the justice of the International Criminal Court.' It may be of some significance that division 268.120 provides that '[t]his Division is not intended to exclude or limit any other law of the Commonwealth or any law of a State or Territory'.

[36]In Canada, section 2 of the *Criminal Code* and section 1 of *Criminal Code (criminal liability of organizations) Amendment Act* (2003) equate human beings and corporate bodies in the meaning of 'persons'. These definitions are incorporated into the *Crimes against Humanity and War Crimes Act* (enabling the operation in Canada of the norms contained in the ICC Statute), by virtue of section 2 (2) which provides: 'Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.' And in the proscriptive part the *Crimes against Humanity and War Crimes Act* chiefly provides: 'Every *person* is guilty of an indictable offence who commits: (*a*) genocide; (*b*) a crime against humanity; or (*c*) a war crime.'

[37]Under article 213-3 of the French Penal Code, corporations and other private legal persons can be prosecuted for genocide and crimes against humanity. If held liable, they can be dissolved, barred from exercising their functions for a certain period, fined, and, in addition, ordered to make reparation and have part or all of their assets confiscated in accordance with articles 131-38, 131-39 and article 213-3 of French Penal Code. Article 689-11 of the French Code of Penal Procedure, as amended in 2010 to implement the ICC Statute, also gives French courts jurisdiction over crimes against humanity and genocide committed abroad by French nationals (corporations and human beings).

principle of complementarity of national criminal jurisdictions in relation to the ICC. It is to be recalled, in this connection, that the accepted understanding of complementarity contemplates States as the sovereign proprietors of the jurisdiction at the national level for purposes of combatting impunity in respect of the most serious international crimes. But this need not exclude States acting together to do the same thing at the (sub-)regional level. Hence, the effect of the Amended Statute of the AC may be seen merely as inserting an intermediate judicial system into the established international order—i.e., regional mechanism or opportunity for administration of criminal justice—between an African State and the ICC. It may be difficult to challenge such an arrangement as wrongheaded as a matter of international law or commendable policy.[38] Indeed, the policy of 'positive complementarity', as promoted by the Office of the Prosecutor of the ICC, may even prove inconvenient to any opposition to the idea of enabling the AC to (genuinely) investigate and prosecute even the same crimes over which the ICC has jurisdiction.[39]

Purely as a matter of general international law, it may be noted that even article 52 of the United Nations Charter suggests that international law does not preclude regional arrangements for purposes of achieving the same end that is the primary purpose of a more global international legal arrangement.

Notably, article 1(1) of the UN Charter indicates that the first purpose of the United Nations is '[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.

[38]There is, of course, the legitimate query whether, purely as a matter of interpretation of the Rome Statute, a notion of complementarity that is constructed on the understanding that the ICC jurisdiction is immediately to be engaged upon the jurisdictional failure of States (to investigate or prosecute genuinely) can readily accommodate an intermediate regional jurisdiction not directly contemplated in the Statute. The query is a legitimate one. But does its answer entirely depend upon whether or not that intermediate regional arrangement was directly contemplated in the Rome Statute? Is it legitimate to take into account broader considerations of international law (of which the Rome Statute forms a part)? Does the broader international law contemplate the ability of States to enter regional arrangements in a good faith way that does not unfairly undermine existing multilateral arrangements? It may also be considered whether there is a role for the concept of double jeopardy, where a person has been investigated and prosecuted genuinely by a properly constitute court. Does it matter that in providing against double jeopardy at the ICC, the Rome Statute merely said that no person tried 'by another court' may be tried again for the same conduct that constitutes an offence at the ICC (article 20(3) of the Rome Statute)? Is there a requirement that the other court must be a national court?

[39]See Office of the Prosecutor (International Criminal Court), 'Prosecutorial Strategy 2009 to 2012' (1 February 2010), 4—6. In this paper, the Office of the Prosecutor states that it 'will only step in when States fail to conduct genuine investigations and prosecutions' and describes positive complementarity as a 'proactive policy of cooperation aimed at promoting national proceedings', including the sharing of information collected by the Office of the Prosecutor with national judiciaries pursuant to article 93(10) of the Statute, see ibid paras 16-17.

Yet article 52 instructs that nothing in the Charter precludes the existence of regional arrangements or agencies as are appropriate for dealing with international peace and security at the regional level, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations, whose primary object is to foster international peace and security. That article also indicates that regional arrangements do not necessarily impair the ability of the Security Council to investigate any dispute or any situation that might lead to international friction. Nor does it impair the ability of a State to bring any dispute or any situation to the attention of the Security Council or of the General Assembly.

There is, notably, no provision within the Rome Statute known to suggest a principle relative to the ICC that is different from the message that article 52 of the UN Charter conveys in relation to the UN.

8 Pooling Sovereignty

Perhaps, the axiom may be recalled, at this juncture, that jurisdiction is an aspect of sovereignty. And sovereignty is, perhaps, one of the most precious properties of a State as such. The idea of sovereignty itself entails, in its amplitude, the right of the State to contribute to the pooling of sovereignties with like-minded States for the achievement of common regional or multilateral objectives. If any such arrangement proves unsatisfactory for any reason, the concerned State should be able to explore alternative arrangements that may please it more; as long as it respects its duty of good faith towards its existing international obligations—as a matter of its membership or participation in other international arrangements. Questions of good faith will inevitably arise when a State enters into a subsequent international arrangement that involves the risk of undermining an earlier one. And that problem becomes more acute if the two arrangements are necessarily or apparently incompatible by design or intendment.

In this vein, it is noteworthy that the principles espoused in the Amended Statute of the AC are not necessarily or apparently incompatible—in design—with those in the Rome Statute. It is recognised in the Preamble to the Rome Statute—at paragraphs 3, 4 and 5—that grave crimes threaten the peace, security and well-being of the world. It is also recognised that such crimes are a concern to the international community and that they may not go unpunished. The Preamble to the Protocol adopting the Amended Statute reiterates—at paragraphs 5 and 13—the African Union's commitment to promoting peace, security and stability on the continent and acknowledges the role to be played by the AC in this regard. Paragraphs 11 and 12 of the Preamble to the Protocol reiterate the African Union's condemnation and rejection of impunity and the commitment to fighting it. The Amended Statute thus has a desirable potential to bridge the gap between national justice systems and international justice—for purposes of ensuring better that violations of norms of international criminal law do not go unpunished. The essential compatibility of both

instruments—the Rome Statute and the Amended Statute of the AC—is thus evident.

But the lingering scepticism rests more upon the immediate impetus and urgency for the conferment of the criminal jurisdiction to the AC. And this is the concern that the jurisdiction resulted from a rift between the African Union and the Rome Statute institutions (i.e., the ICC and its Assembly of States Parties). Yet, as an argument, this is probably more of an emotive argument against the AC's criminal jurisdiction than an objective one, for to stand on that argument to reject all values that the AC's criminal jurisdiction may portend for the African continent would be tantamount to rejecting a baby whose circumstances of birth had not been ideal.

To be sure, much of the arguments attributed to the African Union as the reasons for their displeasure with the ICC are misconceived.[40] For instance, the oft-heard speculation that the Court has been put to use as an instrument of neocolonialism to target African leaders is a most unfortunate argument to be made. It lacks any basis in fact, in spite of its constant repetition in the political sphere. But even that consideration is probably wholly irrelevant in light of the salutary potentials of the criminal jurisdiction of the AC.

Also unimpressive is the complaint that all of the Court's cases so far are from the African continent. The argument rings palpably self-serving out of the mouths of persons other than victims. And it is not known that African victims have ever complained about the ICC seemingly giving their plight disproportionate active attention, in comparison to the active attention that the ICC has given to victims of atrocities from other parts of the world.

In the final analysis, the ideal should be an absence of a rift between the AU and the Rome Statute institutions. To the extent that such a rift has been a reality, it would be undesirable—foolish even—to reject any by-product of such a rift without closer examination of the question whether such a by-product has the potential to complement the objectives of the Rome Statute and not undermine them.

9 Deferral of Investigation and Prosecution

The more difficult question of compatibility between the ICC regime and the AC regime relates to questions of deferral of investigation and prosecution. There is, indeed, an appreciable tension—and a legitimate concern—in that respect.

It is important to appreciate that the concern here is not, strictly speaking, about 'immunity' of public officials.[41] Neither the Rome Statute nor the Amended Statute of

[40]See *Prosecutor v Ruto and Sang* (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11-2027-Red-Corr (5 April 2016), Reasons of Judge Eboe-Osuji, 140 *et seq.*

[41]See Human Rights Watch, 'Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights', 13 November 2014, <https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and> ['The protocol . . . also gives immunity to sitting heads of state and government, and to

the AC permits immunity as such. The Rome Statute applies equally to all persons irrespective of official capacity. It expressly provides, in article 27(1)—entitled '[i]rrelevance of official capacity'—that 'official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence'.

It further provides in article 27(2) that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

For its part, the Amended Statute of the AC, in article 46B(2), also states that 'the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment'.

But that is not the end of the matter, for there is an appreciable tension between the two instruments. That tension lies in their respective provisions on deferral of investigation and prosecution. First, article 46A*bis* of the Amended Statute of the AC contemplates an automatic deferral of the case 'against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions'. It does so by providing that 'no charges shall be commenced or continued before the Court against' them 'during their tenure of office'.

To begin with, the counter-intuitive nature of this provision deserves attention. This is in the manner of the evident paradox that article 46A*bis* has a potential to defeat the very purpose of the AU criminalisation of treasonous usurpation of political power in article 28E(1). In the absence of any clear norm that excludes from the meaning of 'any serving AU Head of State or Government'[42] persons implicated in an alleged crime of treasonous usurpation of political power, there lies the potential for the curious outcome whereby anyone who accesses power through treasonous means will be protected by article 46A*bis*—giving him refuge to engage in further violations of the sub-regional norm against treasonous maintenance of power until he chooses to leave or is ousted. It is thus immediately clear that article 46A*bis* constitutes a serious contradiction to an important regional norm of the AU.

Perhaps more normatively troubling is the erroneous legal premise for article 46A*bis*—that premise being the all but articulated supposition that the anti-immunity norm codified in article 27 of the Rome Statute might have been part of the overarching plot to target African leaders for contemporary subjugation in a new order of Western imperialism, using the Court as instrument. As has been made clear recently, the anti-immunity norm codified in article 27 of the Rome Statute is really

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other senior officials based on their function, before the African Court']. Concerns such as this are wholly understandable, given that the drafters of the worrying provision (article 46A*bis* in the AU protocol) had entitled it 'Immunities'.

[42]The proposition is readily verified in practice by the roll call of AU Heads of State and Government at key AU summits at any given time.

the old norm of international law known as the Third Nuremberg Principle. Its conception, gestation and birth had nothing at all to do with African leaders. Rather, the original impetus was the need to prosecute leaders of the most powerful countries in Europe and Asia during the First and the Second World Wars.[43]

But let us assume, for the sake of argument, that article 46A*bis* was really motivated by the legitimate objective of preventing the disruption to the daily or regular functioning of a national government by virtue of the criminal prosecution of its senior officials who occupy critical positions in the life of the State. The objective is legitimate as recognised in ICC jurisprudence and legal texts, as seen below. But that aim did not require achievement by the blanket manner of automatic deferral of prosecution, as article 46A*bis* was drafted. The better approach is the more measured way in which the ICC instruments have gone about the same objective, particularly through article 16 of the Rome Statute and rule 134*quater* of the Rules of Procedure and Evidence.

First, the notion of deferral is recognised in the Rome Statute's article 16. But this is not in an automatic way. It is rather by annual grants at the UN Security Council, renewable only by fresh resolutions upon expiration after 12 months.

Barring deferral of investigation and prosecution pursuant to article 16 of the Rome Statute, rule 134*quater* takes into account the need to minimise the disruption of national governance that ICC prosecution may occasion when senior public officials are on trial at the ICC. Rule 134*quater* provides that an accused who is mandated to fulfil extraordinary public duties at the highest national level may be excused from continuous presence at trial and be represented by counsel—but the trial goes on uninterrupted. This is a judicial determination that may be made if alternative measures are inadequate, if it is in the interests of justice and if the rights of the accused are fully ensured.

This provision has already been applied by Trial Chamber V(A) in *Prosecutor v Ruto and Sang*, where Mr Ruto, the Deputy President of Kenya, was granted conditional excusal from continuous presence at trial on the basis of rule 134*quater*. In brief, the Chamber found that Mr Ruto exercised extraordinary public duties at the highest national level, given the structure of the Kenyan government. Key considerations included that only one person at a time is constitutionally authorised to perform the functions of the Deputy President of Kenya, which include acting as the principal assistant of the President, deputising for the President and assuming office as president for the remainder of the term of the President in the event that the office of President is vacated. Mr Ruto was thus conditionally excused from attending trial—the conditions being a requirement upon him to be present periodically and for particular hearings, such as closing statements, presentation of the views of victims

[43] See *Prosecutor v Ruto and Sang* (Decision on Defence Applications for Judgments of Acquittal), ICC-01/09-01/11-2027-Red-Corr (5 April 2016), Reasons of Judge Eboe-Osuji, 140 *et seq.*

and the delivery of judgment—as well as any other hearing that the Chamber required him to attend.[44]

Rule 134*quater* is a 'special procedural rule' designed for the benefit of persons mandated to fulfil extraordinary duties at the highest national level. But it does not confer immunity from the jurisdiction of the Court.[45] Nor does it permit automatic deferrals during office, which may well ultimately amount to effective immunity if the office holder chooses to die in office rather than step down and face prosecution while witnesses and evidence respectively remain alive and fresh. To the contrary, the aim of rule 134*quater* is to ensure that accused persons mandated to fulfil extraordinary duties at the highest national level will remain within the jurisdiction of the Court, with their trials conducted with minimum interruption as a result of the legitimate demands of their public office.[46]

10 Conclusion

The African Union's conferment of criminal jurisdiction upon the AC might have provoked much anxiety, especially given the appearance of things—or indeed the probable reality—that the development occurred during a sustained period of hostile political wind, blown from Addis Ababa toward the ICC. But, beyond the politics, cold legal analysis reveals that there is much value in the development—barring the idea of automatic deferral of cases of senior State officials at the AC.

Proper analysis will reveal that the conferment of criminal jurisdiction to the AC is, as a general proposition, consistent with the idea of complementarity of jurisdictions between the ICC and States. The AC's jurisdiction would still fall within that general compass of complementarity—and should override any danger of impunity even on the part of senior State officials. And beyond the question of automatic deferral of prosecution of senior State officials, the AC's exercise of criminal jurisdiction affords an intermediate level of adjudication, which will process more of the cases that the ICC may lack the resources to tackle. Furthermore, the jurisdiction of the AC covers other areas of concern about serious criminal conducts in relation to which African leaders are entitled, in all good faith, to explore rule of law solutions. For instance, the Rome Statute does not cover treasonous usurpation of political power, corruption, mercenary activities and more over which the AC has now been conferred criminal jurisdiction. All these are criminal conducts that contribute to the retardation of economic development and quality of life on the African continent.

[44]Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, ICC-01/09-01/11-1186 (18 February 2014).

[45]ICC-01/09-01/11-1186-Anx, para 58.

[46]ICC-01/09-01/11-1186-Anx, para 58.

But the AC's jurisdiction suffers from the legitimate criticism that it confers automatic deferral of cases against senior State officials. Then again, the idea of deferral of such cases is not unknown in the Rome Statute system. What is more problematic is the automaticity of the deferral at the AC. The better approach to realism is the calibrated manner in which the Rome Statute system sought to solve the problem of pursuit of accountability while still accommodating the need to avoid undue disruption of the governance of the State whose leaders are indicted at the ICC. This sticking point in the foreseeable complementarity of relationships between the ICC and the AC will, no doubt, be resolved in favour of the ICC regime, which is more consistent with international law on the matter. However, this difficulty (though highly regrettable) must not be permitted to overshadow all benefits that the extension of criminal jurisdiction to the AC promises to the continent and the broader international community in the fight against impunity.

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Fragmentation or Stabilisation? Recent Case Law on the Crime of Genocide in Light of the 2007 Judgment of the International Court of Justice

William Schabas

Contents

1 Introduction

The Convention on the Prevention and Punishment of the Crime of Genocide was the first human rights treaty to be adopted by the General Assembly of the United Nations. By a unanimous resolution on 9 December 1948, the Assembly approved the text that had been negotiated over the previous 2 years, opening the Convention for signature. On the same day, it also adopted a companion resolution mandating the creation of an international criminal court, giving effect to the reference to such an institution in Article 6 of the Convention itself. But within a few years, international criminal law had gone into virtual hibernation from which it was not to emerge for more than four decades.

The year 1998 witnessed the glorious achievement of the Rome Statute of the International Criminal Court. As for the Genocide Convention, its 50th anniversary that same year was barely noticed. Yet in the decade that followed, important

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judgments were issued by the *ad hoc* tribunals that applied and interpreted the provisions of the Convention. There was a virtual explosion of academic writing on this hitherto neglected instrument. This was all crowned by a seminal ruling of the International Court of Justice in February 2007, in the case of *Bosnia and Herzegovina v Serbia*.[1]

Since the 2007 judgment, other international courts and tribunals have reacted to its holdings. There have been important rulings of the *ad hoc* tribunals, notably the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, and also judgments of the International Criminal Court and the European Court of Human Rights dealing with the interpretation and application of provisions of the Convention. In February 2015, the International Court of Justice issued a second important judgment dealing with the application of the Genocide Convention to the Balkan wars of the 1990s, in the case of *Croatia v Serbia*.[2] The international case law dealing with genocide that was issued over the 8 years between the two judgments of the International Court of Justice is the subject matter of this essay.

1.1 The European Court of Human Rights

The European Court of Human Rights was the first international judicial body to consider the 2007 judgment of the International Court of Justice. The case, *Jorgić v Germany*, involved the application of Article 7 of the European Convention on Human Rights. Article 7 enshrines the principle of legality and is very similar to provisions in other international instruments, such as Article 11(2) of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Civil and Political Rights. Jorgić had been prosecuted in Germany under German law for crimes perpetrated in Bosnia and Herzegovina during the 1992–1995 war, including genocide. He was convicted of acts of 'ethnic cleansing' pursuant to what the European Court described as a 'wide interpretation of the "intent to destroy"', as set out in Article 2 of the Genocide Convention.[3] Before the European Court, Jorgić argued that the German courts did not respect the principle of legality.

In reviewing the relevant legal sources, something that is a typical feature of its judgments, the Court cited an excerpt from paragraph 190 of the judgment of the International Court of Justice, where the notion of 'ethnic cleansing' is discussed. According to the International Court of Justice: 'This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007.

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment, 3 February 2015.

[3] *Jorgic v Germany,* no. 74613/01, § 112, ECHR 2007-III.

life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (dolus specialis), that is to say with a view to the destruction of the group...'[4]

The European Court of Human Rights noted that the case law of the International Criminal Tribunal for the former Yugoslavia supported a narrow interpretation whereby genocide 'as defined in public international law, comprised only acts aimed at the physical or biological destruction of a protected group'.[5] But it said that because the Tribunal's interpretation of the scope of genocide, as well as other decisions taken by national and international courts, 'in particular the International Court of Justice', had been delivered subsequent to the commission of his offences, 'the applicant could not rely on this interpretation being taken by the German courts in respect of German law at the material time, that is, when he committed his offences'.[6] Thus, in the *Jorgić* case, the European Court held that a conviction by German courts based upon a broader construction of the scope of genocide than that espoused by the International Criminal Tribunal for the former Yugoslavia, as well as by the International Court of Justice in the February 2007 judgment, did not violate the principle of legality.

There is also a lengthy reference to the 2007 judgment of the International Court of Justice in an admissibility decision of the European Court of Human Rights issued in July 2013. The application was submitted by an association of survivors of the Srebrenica massacre. It was directed against the Netherlands and concerned conduct attributed to the Dutch units of United Nations peacekeeping troops. A seven-judge Chamber of the European Court of Human Rights reviewed a range of legal materials concerning Srebrenica, including relevant judgments of various courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia and the Human Rights Chamber of Bosnia and Herzegovina. The admissibility decision contains a five-paragraph overview of the February 2007 judgment of the International Court of Justice.[7] The Court declared the case inadmissible based upon the immunities of the United Nations. Aside from a summary of the judgment of the International Court of Justice in the *Bosnia* case, presented as background, the European Court was strongly influenced by rulings of the International Court of Justice respecting immunities, notably the recent decision in the *Jurisdictional Immunities of the State* case.[8]

There are also some summary references to the 2007 judgment by a Chamber of the European Court in a case directed against Switzerland concerning genocide

[4] ibid 45.

[5] ibid 112.

[6] ibid.

[7] *Stichting Mothers of Srebrenica and Others v the Netherlands* (dec.), no. 65542/12, §§ 49-53, 11 June 2013.

[8] Cited at *Stichting Mothers of Srebrenica and Others v the Netherlands*.

denial legislation.[9] The 2007 judgment of the International Court of Justice was also cited by the European Court of Human Rights with respect to its statements on State responsibility, attribution and the 'direct control' criterion.[10] In addition, the 1996 interlocutory ruling in the same case was also cited by a judge of the European Court of Human Rights in a separate opinion as authority for the proposition that human rights obligations are not by nature reciprocal.[11]

Two Grand Chamber decisions of the European Court of Human Rights dealing with genocide were delivered in October 2015, after the February 2015 decision of the International Court of Justice, and are therefore outside the scope of this study.[12]

2 International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda has issued many decisions concerning genocide, at both the trial and the appeal stages, but as a general rule these have contributed only modestly to the interpretation of Articles 2 and 3 of the Genocide Convention. In several of the Appeals Chamber judgments decided since February 2007, the defence raised very broad and often unsubstantiated allegations that the Trial Chamber had misapplied the law on genocide.[13] In others, issues relating to the definition of genocide have not arisen at all.[14] Similarly, there is little of interest in terms of legal development in the Trial Chamber judgments issued in recent years.[15] These decisions do not generally address any new issues concerning

[9] *Perinçek v Switzerland*, no. 27510/08, §§ 23, 83, 116, 17 December 2013.

[10] *Catan and Others v the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, §§ 76, 96, 115, 19 October 2012.

[11] *Vallianatos and Others v Greece* [GC], nos. 29381/09 and 32684/09, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, 7 November 2013.

[12] *Perinçek v Switzerland* [GC], no. 27510/08, 15 October 2015; *Vasiliauskas v Lithuania*, [GC], no. 35343/05, 20 November 2015.

[13] *Simba v Prosecutor* (ICTR-01-76-A), Judgment, 27 November 2007, paras. 256-270; *Bagosora and Nsengiyumva v Prosecutor* (ICTR-98-41-A), Judgment, 14 December 2011, paras. 382-386.

[14] *Karera v Prosecutor* (ICTR-01-74-A), Judgment, 2 February 2009; *Bikindi v Prosecutor* (ICTR-01-72-A), Judgment, 18 March 2010; *Prosecutor v Rukundo* (ICTR-2001-70-A), Judgment, 20 October 2010; *Zigiranyirazo v Prosecutor* (ICTR-01-73-A), Judgment, 18 December 2010; *Muvunyi v Prosecutor* (ICTR-2000-55A-A), Judgment, 1 April 2011; *Mugenzi and Mugiraneza v Prosecutor* (ICTR-99-50-A), Judgment, 4 February 2013.

[15] *Prosecutor v François Karera* (ICTR-01-74-T), Judgment and Sentence, 7 December 2007, paras. 533-549; *Prosecutor v Nchamihigo* (ICTR-01-63-T), Judgment and Sentence, 12 November 2008, paras. 329-336; *Prosecutor v Bikindi* (ICTR-01-72-T), Judgment, 2 December 2008, paras. 404-426; *Prosecutor v Théoneste Bagosora* et al. (ICTR-98-41-T), Judgment and Sentence, 18 December 2008, paras. 2084-2163; *Prosecutor v Zigiranyirazo* (ICTR-01-73-T), Judgment, 18 December 2008, paras. 396-428; *Prosecutor v Renzaho* (ICTR-97-31-T), Judgment and Sentence, 14 July 2009, paras. 760-780; *Prosecutor v Nsengimana (*ICTR-01-69-T), Judgment, 17 November 2009, paras. 831-841; *Prosecutor v Rukundo (*ICTR-2001-70-T), Judgment, 27 February 2009, paras. 555-576; *Prosecutor v Ndindiliyimana* et al. (ICTR-00-56-T), Judgment

the interpretation of the definition of genocide. Typically, they consist of relatively perfunctory recitals of the case law. For that reason, they do not deserve any particular attention here.

It may seem astonishing that this Tribunal, whose work has been devoted very largely to the implementation of the 1948 Genocide Convention, does not appear to have ever made reference to the 2007 judgment of the International Court of Justice. Indeed, it has virtually never referred to the case law of the Court at all.[16] There is one obscure mention of the 1996 Preliminary Objections ruling in the *Bosnia* case, on the *erga omnes* nature of the obligations in the 1948 Convention, but that is only because one of the parties cited it, prompting the Court to acknowledge the reference in its summary of the positions taken by the parties.[17]

The fact that there is little of interest in the post-February 2007 decisions of the International Criminal Tribunal for Rwanda may only reflect the fact that its case law, at least as the definition of the crime of genocide is concerned, had already become quite developed and detailed, leaving little room for dispute or challenge. Many of the issues and controversies that were so important to the context of the former Yugoslavia, such as the demarcation between genocide and ethnic cleansing and the significance of forcible displacement, never seriously arose in the Rwandan context. The major contribution by the Rwanda Tribunal to the development of the law of the Genocide Convention addressed the crime of direct and public incitement,[18] a matter that is not of any great relevance to the present proceedings.

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and Sentence, 17 May 2011, paras. 2044-2085; *Prosecutor v Nyiramasuhuko et al*. (ICTR-98-42-T), Judgment and Sentence, 24 June 2011, paras. 5653-6038; *Prosecutor v Bizimungu et al.* (ICTR-99-50-T), Judgment and Sentence, 30 September 2011, paras. 1954-1987; *Prosecutor v Karemera et al.* (ICTR-98-44-T), Judgment and Sentence, 2 February 2012, paras. 1575-1672.

[16] *Prosecutor v Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007, para. 23, fn. 32, citing *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, I.C.J. Reports 1989, p. 177, para. 47; *Prosecutor v Rwamakuba* (ICTR-98-44C-I), Decision on Appropriate Remedy, 31 January 2007, para. 48, fn. 71, citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, p. 73 and *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion*, I.C.J. Reports 1949, p. 174; *Prosecutor v Karemera* et al. (ICTR-98-44-T), Decision on Nzirorera's Preliminary Motion to Dismiss the Indictment for Lack of Jurisdiction: Chapter VII of the United Nations Charter, 29 March 2004, para. 10, fn. 4, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 16; *Prosecutor v Karemera et al.* (ICTR-98-44-PT), Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004, para. 22, fn. 22, citing *Case concerning the Northern Cameroons (Cameroon v United Kingdom), Preliminary Objections, Judgment of 2 December 1963*, I.C.J. Reports 1963, p. 15 and *Nuclear Tests (Australia v France), Judgment*, I.C.J. Reports 1974, p. 253.

[17] *Prosecutor v Bagaragaza* (ICTR-2005-86-11bis), Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007, para. 23, fn. 33.

[18] *Nahimana et al. v Prosecutor* (ICTR-99-52-A), Judgment, 28 November 2007.

One judgment of the Appeals Chamber of the International Criminal Tribunal for Rwanda, issued in March 2008, is of importance for its discussion of the *actus reus* of the second act of genocide, that is, causing serious bodily and mental harm to members of the group. The Chamber said that, in its previous judgments, it had not 'squarely addressed the definition of such harm'.[19] It said that 'quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs'.[20] The Appeals Chamber said that serious mental harm includes 'more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat'.[21] Noting that nearly all convictions for genocide on the basis of causing serious bodily or mental harm had involved killing or rape, the Chamber said that '[t]o support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part'.[22] In a footnote to this remark, the Chamber noted that in a decision concerning a charge of crimes against humanity, a Trial Chamber has said it was 'not satisfied that [the removal of a church roof depriving Tutsis of an effective hiding place] amount[ed] to an act of similar seriousness to other enumerated acts in the Article'.[23] The Appeals Chamber also cited the commentary on the Code of Crimes in the 1996 report of the International Law Commission.[24]

The Appeals Chamber of the Rwanda Tribunal referred to statements in the Trial Chamber that the accused, who was a Catholic priest, had refused to allow Tutsi refugees to get food from a banana plantation, something that contributed to their physical weakening and that 'his order prohibiting refugees from getting food from the banana plantation, his refusal to celebrate mass in Nyange church, and his decision to expel employees and Tutsi refugees' had facilitated the victims 'living in a constant state of anxiety'.[25] The Appeals Chamber mentioned the 'parsimonious statements' of the Trial Chamber about the acts allegedly comprising the serious bodily and mental harm, concluding that it could not 'equate nebulous invocations of "weakening" and "anxiety" with the heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture'.[26] These words were endorsed in a

[19] *Prosecutor v Seromba* (ICTR-2001-66-A), Judgment, 12 March 2008, para. 46.

[20] ibid.

[21] ibid.

[22] ibid.

[23] ibid 117, citing *Prosecutor v Ntakirutimana* et al. (ICTR-96-10-A and ICTR-96-17-A), Judgment, 13 December 2004, para. 855.

[24] The reference in *Seromba* is to the Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May-26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 91, UN Doc. A/51/10 (1996). However the precise reference appears to be erroneous; the statement to which the Appeals Chamber seems to have been referring appears on p. 46.

[25] *Prosecutor v Seromba* (ICTR-2001-66-A), Judgment, 12 March 2008, para. 47.

[26] ibid para. 48.

July 2013 ruling of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.[27]

In another decision, the issue of proof of genocidal intent prompted the Appeals Chamber of the International Criminal Tribunal for Rwanda to recall that in the absence of direct evidence, 'a perpetrator's intent to commit genocide may be inferred from relevant facts and circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts'.[28] The Chamber noted that even facts and events that arose subsequent to the perpetration of the crime itself could be considered as part of the context for this purpose.[29]

In *Prosecutor v Gatete*, issued in October 2012, the Appeals Chamber confirmed that the rule against cumulative convictions is not breached when convictions for both genocide *per se* and conspiracy to commit genocide are entered. The Chamber reasoned that conspiracy does not involve commission of the crime as such. It held that the two crimes, genocide and conspiracy, were distinct and that 'the crime of genocide has a materially distinct *actus reus* from the crime of conspiracy to commit genocide and both crimes are based on different underlying conduct'. According to the Appeals Chamber, '[t]he crime of genocide requires the commission of one of the enumerated acts in Article 2(2) of the Statute, while the crime of conspiracy to commit genocide requires the act of entering into an agreement to commit genocide'.[30] It overturned the Trial Chamber's holding to convict the accused of genocide but not to enter a conviction for conspiracy because 'by convicting Gatete only of genocide while he was also found criminally responsible for conspiracy to commit genocide, the Trial Chamber failed to hold him responsible for the totality of his criminal conduct, which included entering into the unlawful agreement to commit genocide'.[31]

The Appeals Chamber also explained that by recognising conspiracy to commit genocide as an inchoate crime, the Genocide Convention 'aims to prevent the commission of genocide'. However, it said that 'another reason for criminalising conspiracy to commit genocide is to punish the collaboration of a group of individuals resolved to commit genocide. The danger represented by such collaboration itself justifies the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide has been committed.'[32]

One member of the Appeals Chamber, Judge Agius, dissented on this point. Judge Agius had been the presiding judge in the *Popović* trial before the International

[27] *Prosecutor v Karadžić* (IT-95-5/18-AR98bis.l), Judgment, 11 July 2013, para. 32, 83.

[28] *Hategekimana v Prosecutor* (ICTR-00-55B-A), Judgment, 8 May 2012, para. 133.

[29] ibid.

[30] *Prosecutor v Gatete* (ICTR-00-61-A), Judgment, 9 October 2012, para. 260.

[31] ibid para. 261.

[32] ibid para. 262 (reference omitted).

Criminal Tribunal for the former Yugoslavia, which is discussed below. In his dissenting opinion in *Gatete*, Judge Agius said that he did not disagree with the majority's statement of the legal principles concerning the distinct nature of the crime of conspiracy to commit genocide. However, he considered that entering a conviction for conspiracy in addition to one for genocide raised problems of fairness to the accused.[33] He said he disagreed with the majority's holding that the danger represented by the impugned collaboration itself justified the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide has been committed.[34] He repeated the reasoning he had advanced in *Popović* that once a person is convicted for genocide, the rationale for adding a conviction for conspiracy becomes 'less compelling', especially when the criminal responsibility is based upon participation in a joint criminal enterprise.[35]

3 International Criminal Court

At the International Criminal Court, there is a pending charge of genocide in the proceedings directed against the President of Sudan, Omar Al Bashir. Because the Court has been unable to obtain custody over the accused, there have been no developments with respect to interpretation of the crime of genocide since the issuance of the arrest warrant in 2010. Nevertheless, the decisions concerning the issuance of the arrest warrant contain a very rich discussion of aspects of the law of genocide, including significant references to the 2007 ruling of the International Court of Justice in the *Bosnia* case.

Pre-Trial Chamber I, to which the case was initially assigned, concurred with the Prosecutor's application with respect to war crimes and crimes against humanity, but it declined to authorise a charge of genocide when it issued the arrest warrant in this case.[36] The decision was later overturned, the Appeals Chamber considering that the standard that the Pre-Trial Chamber had set for determining the charges it would authorise was too demanding at this stage of proceedings.[37] The Pre-Trial Chamber subsequently added the genocide charge to the Al Bashir arrest warrant.[38] Much of the initial ruling on the issuance of the arrest warrant consisted of a discussion of the

[33] ibid per Judge Agius, para. 3.

[34] ibid para. 4.

[35] ibid para. 5. For the discussion to which Judge Agius refers, see: *Prosecutor v Popović et al.* (IT IT-05-88-T), Judgment, 10 June 2010, paras. 2111-2127.

[36] *Prosecutor v Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009.

[37] *Prosecutor v Bashir* (ICC-02/05-01/09), Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010.

[38] *Prosecutor v Bashir* (ICC-02/05-01/09), Second Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 12 July 2010.

definition of genocide. There was also a substantial dissenting opinion about the majority's exclusion of the crime of genocide from the warrant. The two subsequent decisions, of the Appeals Chamber and the Pre-Trial Chamber, do not really contribute anything of interest with respect to the interpretation of the definition of genocide.

The Pre-Trial Chamber invoked the 2007 judgment of the International Court of Justice on more than 20 occasions. At no point did it suggest that it disagreed with any aspect of the decision of the Court.[39]

An important feature of the International Criminal Court's interpretation of the scope of the crime is its consideration of an additional source of law, the Elements of Crimes. This is a secondary instrument adopted by the Assembly of States Parties whose purpose, according to Article 9(1) of the Rome Statute, is to 'assist the Court in the interpretation and application' of the definitions of crimes contained in Articles 6, 7, 8 and 8*bis*. They are required to be 'consistent' with the Rome Statute[40] and are listed in Article 2 as the sources of law to be applied 'in the first place',[41] along with the Statute and the Rules of Procedure and Evidence.

The Elements largely echo the text of Article 6 of the Statute, which is essentially identical to Article 2 of the 1948 Genocide Convention. However, they also contain some language that is not part of that text. In the *Bashir* arrest warrant decision, the majority said that, in this way, the Elements of Crimes 'elaborate on the definition of genocide provided for in Article 6 of the Statute'.[42] First, they require that the victims belong to the targeted group. Second, they require that the punishable acts—killings, serious bodily or mental harm, imposition of conditions of life—take place 'in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'. Third, they specify that the perpetrator act with the intent to destroy in whole or in part the targeted group. The first and third of these elements do not raise any particular difficulties. They find much support in the case law of the *ad hoc* tribunals, the *travaux préparatoires* and the scholarly literature. The second element is more controversial.

It appears that the second of these elements, namely the requirement that genocidal acts took place 'in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction', was not included in the original drafts of the Elements of Crimes debated by the Preparatory

[39] *Prosecutor v Bashir* (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 114, fn. 133, para. 135, fns. 148, 149 and 150, para. 137, fn. 152, para. 138, fn. 153, para. 139, fn. 154, para. 140, fn. 155, para. 142, fn. 156, para. 143, fn. 157, para. 144, fns. 158, 159 and 160, para. 146, fns. 161, 162 and 163, para. 167, fn. 188, para. 182, fns. 202, 203, 204, 205 and 206, para. 183, fns. 207 and 208, para. 194, fn. 221.

[40] Rome Statute of the International Criminal Court, (2002) 187 UNTS 90, art. 9(3).

[41] ibid, art. 21(1) (a).

[42] *Bashir* (n 36), para. 113.

Commission of the International Criminal Court during its 1999 sessions.[43] This Element was added to the draft at the beginning of 2000,[44] apparently in reaction to the first judgment of the Yugoslavia Tribunal that dealt with the merits of a genocide charge.[45] In that ruling, a Trial Chamber of the Tribunal held that genocide could be committed by an individual acting alone, even in the absence of evidence that this was part of some larger policy, plan or campaign involving others, and without any requirement that the intentions of the individual perpetrator had any reasonable chance of being achieved. Those who drafted the Elements of Crimes appear to have added the requirements of a manifest pattern of similar conduct or conduct that could itself effect such destruction in order to prevent the International Criminal Court from adopting a similar interpretation to that of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia of the scope of the crime of genocide.

The contextual element set out in the Elements of Crimes was invoked by Pre-Trial Chamber I in its decision on the *Bashir* arrest warrant. The Chamber recognised that the definition in the Genocide Convention itself 'does not expressly require any contextual element'.[46] It then considered the case law of the *ad hoc* tribunals, which have not insisted upon a plan or policy as an element of the crime of genocide.[47] It must be said that all of the judgments of the *ad hoc* tribunals are rather hypothetical when it comes to this question. To use the common law expression, they represent *obiter dicta.* At the Rwanda Tribunal, there has never really been any doubt that the killings of several hundred thousand Tutsi in 1994 were the product of a plan or policy. The judgments of the Yugoslavia Tribunal are even more abstract, given the fact that the only convictions for genocide concern the Srebrenica massacre, where the existence of a plan or policy is not seriously questioned, and it is not suggested that this was the act of a single individual.

In the *Jelisić* case, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia dismissed a charge of aiding and abetting genocide because of insufficient evidence that the crime was being perpetrated by persons other than the accused. It then went on to rule that a conviction for genocide was in any event 'theoretically possible' because an individual, acting alone, could perpetrate the crime.[48] The Trial Chamber concluded that Jelisić was such a mentally unstable individual that he was not capable of forming a genocidal intent, and he was acquitted of the charge. But the conclusion in *Jelisić* that genocide could be

[43]See, e.g., PCNICC/1999/L.5/Rev.1/Add.2, pp. 5-7, issued 22 December 1999. The initial proposal for the Elements of Crimes, submitted by the United States, borrowed the 'widespread or systematic' language from the Rome Statute's definition of crimes against humanity: Proposal Submitted by the United States of America, Draft elements of crimes, PCNICC/1999/DP.4.

[44]PCNICC/2000/L.1/Rev.1/Add.2, pp. 6-8 (issued 7 April 2000).

[45]*Prosecutor v Jelisić* (IT-95-10-T), Judgment, 14 December 1999.

[46]Bashir (n 36), para. 117.

[47]ibid para. 119, citing: *Prosecutor v Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 400 (an error; the correct reference is to para. 100); *Prosecutor v Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, paras. 520, 523.

[48]*Prosecutor v Jelisić* (IT-95-10-T), Judgment, 14 December 1999, para. 100; affirmed: *Prosecutor v Jelisić* (IT-95-10-A), Judgment, 5 July 2001.

committed by an individual perpetrator, acting alone, and in the absence of a broader plan or policy remains the law of the Yugoslavia Tribunal.

In *Bashir*, Pre-Trial Chamber I compared the Elements of Crimes and the case law of the *ad hoc* tribunals, observing that

> the crime of genocide is completed by, inter alia, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs. As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.[49]

Pre-Trial Chamber I said that following this interpretative approach, the crime of genocide depends upon proof that the accused had the intent to destroy the protected group and that '[a]s soon as this intent exists and materializes in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group'.[50]

Noting 'a certain controversy' as to whether the contextual element in the Elements of Crimes should be applied,[51] Pre-Trial Chamber I quite clearly distanced itself from the case law of the *ad hoc* tribunals. It highlighted the importance of the contextual element set out expressly in the Elements of Crimes:

> In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide – as an *ultima ratio* mechanism to preserve the highest values of the international community – is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.[52]

Dissenting, Judge Ušacka insisted that the role of the Elements of Crimes was only to 'assist' the Court and hinted at the view that in the *Bashir* case, they were inconsistent with Article 6 of the Statute, a point she said did not need to be determined in the case at bar.[53]

The Pre-Trial Chamber might well have justified the difference in its approach and that of the *ad hoc* tribunals by relying exclusively on the requirements imposed by the Elements of Crimes, thereby avoiding any implication of disapproval of the interpretation of the Yugoslavia Tribunal in *Jelisić*. However, it went on to state that

[49]Bashir (n 36) para. 119 (references omitted). *Contra*: *Bashir* (ICC-02/05-01/09), Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 19, fn. 26.

[50]ibid para. 120.

[51]ibid para. 125.

[52]ibid para. 124.

[53]Bashir (n 36), para. 20. Separate and Partly Dissenting Opinion of Judge Anita Ušacka.

it did not see any 'irreconcilable contradiction' between the definition of genocide in Article 6 of the Rome Statute and the criterion of a contextual element set out in the Elements[54]:

Quite the contrary, the Majority considered that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or a part thereof, is (i) not per se contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22(2) of the Statute that the definition of the crimes 'shall be strictly construed and shall not be extended by analogy' and '[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the 'crime of the crimes'.[55]

The decision represents therefore an important development in the jurisprudence of the International Criminal Court. It departs from established case law of the *ad hoc* tribunals on a significant substantive legal issue. The debate is about whether the contextual element contained in the Elements of Crimes represents a clarification of the scope of the definition of genocide taken from Article 2 of the Convention or whether it is a limitation or restriction imposed by States in the particular context of the adoption of a supplementary instrument to the Rome Statute. Those who see it as a narrowing of the Convention definition argue that the Elements of Crimes are 'jurisdictional' in nature. Their contention, which is often driven by a visceral resistance to anything that appears to narrow or limit definitions of crimes at the international level, is essentially based upon a literal reading of the text of the Convention. They assert that because the contextual element is not set out explicitly in the definition of the crime taken from Article 2 of the Genocide Convention, it therefore represents a change or alteration.

The position that the Elements of Crimes merely clarify the content of Article 2 of the Convention finds support in general rules of treaty law. The Elements may be considered as 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' or 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', well-known concepts set out in Article 31(3) of the Vienna Convention on the Law of Treaties. There cannot be much doubt that the drafters of the Rome Statute, at the 1998 diplomatic conference and before, treated Article 2 of the 1948 Convention as somewhat of a sacred text that was not to be modified at all. It is striking that Article 6 of the Rome Statute faithfully respects the text of Article 2 of the 1948 Convention, whereas the definitions of the other categories of crime that were adopted at the Rome Conference vary significantly from earlier models. In effect, they dramatically develop the codifications of both crimes against humanity and war crimes. However, when the Rome Conference turned to the crime of genocide, there was resistance to any change whatsoever in the 1948 text. There was only one hint that it might be changed, a casual proposal by Cuba for the inclusion of political and social

[54]Bashir (n 36) para. 132.

[55]ibid para. 133.

groups that was never even submitted as a formal amendment.[56] Many States took the floor to insist upon fidelity to the 1948 version.[57]

It seems implausible therefore that in June and July 1998, at the Rome Conference, States more or less unanimously expressed their allegiance to the 1948 definition of genocide but that 2 years later, when the Preparatory Commission was drafting the Elements of Crimes, they intended to depart from that definition with a so-called jurisdictional limitation on the scope of genocide. Pursuant to the Final Act of the Rome Conference, the Preparatory Commission had the same composition as the Rome Conference, so it cannot be argued that it was not as representative or that its membership differed. Nevertheless, the fact that the intent of the Preparatory Commission was to elucidate the scope of the 1948 definition does not necessarily lead to the conclusion that it did not, as a matter of law, effect what amounts to an amendment rather than an interpretative clarification.

In the *Bashir* arrest warrant decision, the Pre-Trial Chamber recognised the development by scholars of what has been identified as a 'knowledge-based' approach to genocide.[58] The Pre-Trial Chamber described the approach as facilitating the criminal responsibility of 'direct perpetrators and mid-level commanders ... even if they act without the dolus specialis/specific intent to destroy in whole or in part the targeted group'. It said that according to the knowledge-based approach, 'as long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite dolus specialis/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy in whole or in part the targeted group'. The Pre-Trial Chamber insisted that the so-called knowledge-based approach is not different from the traditional approach in relation to those senior political and military leaders who plan and set into motion a genocidal campaign, who must act with the genocidal intent described in Article 2 of the Convention. Given that in the *Bashir* case the issue was not the involvement of a mid-level commander or direct perpetrator but rather an individual at the highest leadership level, the Pre-Trial Chamber said the knowledge-based approach was irrelevant to its determination.

This may have been underselling the principles of the 'knowledge-based approach', bearing in mind that it has been developed by scholars who do not entirely agree among themselves. One feature of the approach is its emphasis not on the

[56]UN Doc. A/CONF.183/C.1/SR.3, para. 100.

[57]See particularly the debates at UN Doc. A/CONF.183/C.1/SR.3, paras. 20-179.

[58]Bashir (n 36) para. 139, fn. 154, referring to: Claus Kreβ, 'The Darfur Report and Genocidal Intent', (2005) 3 Journal of International Criminal Justice 562, 565-572; William Schabas, *Genocide in International Law, The Crime of Crimes* (2nd edn Cambridge University Press, 2009) 241-264.

specific intent of individual perpetrators but rather on the plan or policy behind the genocidal campaign itself. It is consistent with the controversial element in the Elements of Crimes because it tends to dismiss the thesis of the lone perpetrator, requiring that the destruction of the group be a feasible outcome of the ensemble of acts of genocide. For all practical purposes, the knowledge-based approach excludes the possibility that genocide is the work of isolated individuals. Genocide results from a plan or policy that is the creation of a State or State-like entity. A focus on the *mens rea* of individuals should only then arise with respect to the knowledge of such individuals of the plan or policy. If they know of the plan or policy and contribute to its implementation, then they have the requisite *mens rea*. In other words, the starting point for the analysis should be the existence of a plan or policy of a body with the capacity to destroy a protected group in whole or in part. To the extent that individual criminal responsibility is at issue, the analysis then proceeds to consider the knowledge of the plan by the individual and whether or not he or she could avail of an excuse or justification that might counteract the apparent mental element.

The focus on individual intent that features in international criminal law cannot be automatically transposed to the debate about State responsibility for international crime. In practice, as the International Court of Justice recognised in the 2007 judgment in the *Bosnia* case, the word 'intent' and even 'specific intent' is used in the context of an analysis of policy. Whether or not one of the individual perpetrators in the Srebrenica massacre manifested the specific intent to commit genocide is really quite secondary to whether the events were the product of a coordinated plan perpetrated by an entity rather than the perverse product of a single mind.

4 International Criminal Tribunal for the Former Yugoslavia

Only a relatively small number of cases at the International Criminal Tribunal for the former Yugoslavia have dealt with charges of genocide. It is therefore not unusual that it was only in mid-2010 that the Tribunal considered the judgment of the International Court of Justice. The *Popović et al*. case concerned seven accused, four of whom were charged with genocide or, in the alternative, aiding and abetting genocide as participants in the Srebrenica massacre. Two of the accused, Vujadin Popović and Ljubiša Beara, were convicted of genocide, while a third, Drago Nikolić, was convicted of aiding and abetting genocide. Ludomir Borovčanin was acquitted of the genocide charge but convicted of aiding and abetting the crime against humanity of extermination. The Prosecutor did not appeal the acquittal of Borovčanin for genocide.

The *Popović* Trial Chamber considered the legal elements of the crime of genocide in some detail, reviewing the case law on the subject. It cited the *Bosnia*

decision of the International Court of Justice on several occasions.[59] In almost all of these references, the Trial Chamber also referred to rulings of the *ad hoc* institutions, confirming the consistency of the international case law and the agreement of the International Court of Justice with the legal findings of the *ad hoc* tribunals. Of particular interest was its consideration of the punishable acts, especially that of causing serious bodily or mental harm. The Trial Chamber approved of the statement by the Appeals Chamber of the International Criminal Tribunal for Rwanda in *Seromba* that '[t]o support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part'.[60] It provided as examples of the act 'torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group',[61] citing in support paragraph 319 of the judgment of the International Court of Justice in the *Bosnia* case. The Trial Chamber also noted the holding of the Appeals Chamber that forcible transfer 'does not constitute in and of itself a genocidal act'.[62] The footnote to this statement said: 'The International Court of Justice has held that neither the intent to render an area ethnically homogenous nor operations to implement the policy "can *as such* be designated as genocide: the intent that characterizes genocide is to 'destroy, in whole or in part,' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group".'[63]

Referring to the punishable acts of genocide that are listed in the five paragraphs of Article 2 of the Genocide Convention, the Trial Chamber said that the methods of destruction covered in the third act—'Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'—are 'those seeking a group's physical or biological destruction'.[64] Here it referred in support to paragraph 344 of the International Court of Justice's 2007 judgment, citing the statement that 'the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group'. The Trial Chamber also considered briefly the fourth act of genocide—'Imposing measures intended to prevent births within the group'—in concluding that '[t]o amount to a genocidal act,

[59] *Prosecutor v Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 807, fns. 2910 and 2911, para. 808, fn. 2913, para. 809, fn. 2916, para. 812, fn. 2925, para. 813, fn. 2926, para. 814, fn. 2929, para. 817, fn. 2934, para. 819, fn. 2937, para. 821, fn. 2940, para. 822, fns. 2943 and 2944, para. 827, fn. 2958, para. 831, fn. 2968.

[60] ibid para. 811.

[61] ibid para. 812.

[62] ibid para. 813.

[63] ibid para. 813, fn. 2926, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment*, *I.C.J. Reports 2007*, p. 43, para. 190 (emphasis in the original).

[64] ibid para. 814.

the evidence must establish that the acts were carried out with intent to prevent births within the group and ultimately to destroy the group as such, in whole or in part'.[65] It provided as authority two paragraphs from the International Court of Justice's 2007 judgment.[66]

The Trial Chamber also devoted significant attention to the contention by one of the defendants that the crime of genocide comprised an element of State policy. The Trial Chamber rejected this argument, stating that jurisprudence of the *ad hoc* tribunals had 'made it clear that a plan or policy is not a statutory element of the crime of genocide'.[67] The Trial Chamber referred to the Elements of Crimes of the International Criminal Court, holding that Article 6 of the Rome Statute, which consists of the definition of genocide drawn from the 1948 Convention, 'does not prescribe the requirement of "manifest pattern" introduced in the ICC Elements of Crimes'.[68] The Trial Chamber said that 'the language of the ICC Elements of Crimes, in requiring that acts of genocide must be committed in the context of a manifest pattern of similar conduct, implicitly excludes random or isolated acts of genocide'.[69] It said that the Appeals Chamber of the Yugoslavia Tribunal in the *Krstić* case had already said that 'reliance on the definition of genocide given in the ICC's Elements of Crimes is inapposite'.[70] Although the passage was not cited by the Trial Chamber in *Popović*, the Appeals Chamber in *Krstić* had gone on to say that because 'the definition adopted by the Elements of Crimes did not reflect customary law as it existed at the time Krstić committed his crimes, it cannot be used to support the Trial Chamber's conclusion'.[71] The *Popović* Trial Chamber concluded 'that a plan or policy is not a legal ingredient of the crime of genocide. . . However, the Trial Chamber considers the existence of a plan or policy can be an important factor in inferring genocidal intent.'[72] The *Popović* Trial Chamber did not mention or otherwise consider the ruling of the Pre-Trial Chamber of the International Criminal Court issued 15 months earlier on the *Bashir* arrest warrant. Here then there is a very significant contrast in the interpretation of Article 2 of the Convention by chambers of the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia.

The Appeals Chamber delivered its judgment in *Popović et al.* only three days before the judgment of the International Court of Justice in *Croatia* v *Serbia.* There were only two rather perfunctory references to the 2007 judgment of the Court in the *Bosnia and Herzegovina* v *Serbia* case. One of the defendants had invoked the

[65] ibid para. 819.

[66] ibid para. 819, fn. 2937, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, para. 355.

[67] ibid para. 829.

[68] ibid.

[69] ibid.

[70] ibid.

[71] *Prosecutor v Krstić* (IT-98-33-A), Judgment, 19 April 2004, para. 224.

[72] *Prosecutor v Popović et al.* (IT-05-88-T), Judgment, 10 June 2010, para. 830.

decision in support of the contention that there is an implicit requirement in the definition of genocide that it be perpetrated pursuant to a plan or policy. The Appeals Chamber did not find that the International Court of Justice provided support for this argument.[73]

The trial of Radovan Karadžić, who was the senior civilian official of the Bosnian Serbs for the period from 1992 to 1995, began in October 2009. The Prosecutor has alleged that Karadžić, as the highest civilian and military authority in the Republika Srpska, participated in an 'overarching joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in BiH'.[74] This objective 'was primarily achieved through a campaign of persecutions as alleged in this indictment. In some municipalities, between 31 March 1992 and 31 December 1992 this campaign of persecutions included or escalated to include conduct that manifested an intent to destroy in part the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such. In such municipalities, a significant section of the Bosnian Muslim and/or Bosnian Croat groups, namely their leaderships, as well as a substantial number of members of these groups were targeted for destruction.'[75] The genocidal acts that are alleged correspond to the first three paragraphs of Article 2 of the Genocide Convention, namely, killing, causing serious bodily or mental harm and deliberately inflicting upon detainees conditions of life calculated to bring about their physical destruction.

On 28 June 2012, after the Prosecutor had concluded the presentation of the case against the accused, the Trial Chamber granted in part the motion to acquit presented pursuant to Rule 98*bis* of the Rules of Procedure and Evidence and removed the charge of genocide with respect to activities of Bosnian Serb forces in the municipalities. It retained the charge of genocide concerning Srebrenica.[76] The Trial Chamber issued its ruling orally, as has been the practice at the Yugoslavia Tribunal for more than a decade.

With respect to the charge of genocide perpetrated in the municipalities over the course of the war as a whole, the Trial Chamber began by stating that it was not bound either by earlier findings during trials before the Tribunal or by the judgment of the International Court of Justice of February 2007.[77] The Chamber said that the evidence submitted to the Tribunal by the Prosecutor indicated 'that a large number of Bosnian Muslims and/or Bosnian Croats were killed by Bosnian Serb forces in the municipalities during and after their alleged take-over and while in detention'.[78] It said this evidence was 'capable of supporting a conclusion that Bosnian Muslims

[73] *Prosecutor v Popović et al.* (IT-05-88-A), Judgment, 30 January 2015, paras. 438-439.

[74] *Prosecutor v Karadžić* (IT-95-5/18), Prosecution's Marked-Up Indictment, 19 October 2009, para. 8.

[75] ibid para. 38.

[76] *Karadžić* (n 74) Transcript, 28 June 2012, p. 28751, lines 23-25, p. 28752, line 1, p. 28757, line 25, p. 28758, lines 1-10.

[77] ibid p. 28763, lines 20-24.

[78] ibid p. 28764, lines 22-25.

and/or Bosnian Croats were killed on a large scale with the intent to kill with persecutory intent'.[79] Furthermore:

> the determination of whether there is evidence capable of supporting a conviction for genocide does not involve a numerical assessment of the number of people killed and does not have a numeric threshold. However, the evidence the Chamber received in relation to the municipalities, even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such.[80]

Turning to the punishable acts of genocide that are enumerated in the five paragraphs of Article 2 of the Genocide Convention, the Trial Chamber said that 'serious bodily harm must go beyond temporary unhappiness, embarrassment or humiliation, and result in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life, but it need not be permanent and irremediable'.[81] But it added that 'in order to support a conviction for genocide, the bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part'.[82] Referring to the jurisprudence of the Tribunal, and specifically the Appeals Chamber ruling in *Prosecutor v Krstić* and the Trial Chamber judgment in *Prosecutor v Popović* et al., the Trial Chamber said this established 'that forcible transfer does not constitute in and of itself a genocidal act, but where attended by such circumstances as to lead to the death of the whole or part of the displaced population, it may be considered an underlying offence that causes serious bodily or mental harm'.[83] It said the Chamber had not 'heard evidence which rises to the level which could sustain a conclusion that the serious bodily or mental harm suffered by those forcibly transferred in the municipalities was attended by such circumstances as to lead to the death of the whole or part of the displaced population for the purposes of the actus reus for genocide'.[84]

With respect to the third punishable act listed in Article 2 of the Convention, the Trial Chamber said that in assessing 'whether conditions of life imposed on the targeted group were calculated to bring about its physical destruction, the Chamber has to focus on the objective probability of these conditions leading to the physical destruction of the group in part and must assess factors like the nature of the conditions imposed, the length of time that members of the group were subjected

[79] ibid p. 28765, lines 1-4.
[80] ibid p. 28765, lines 4-13.
[81] ibid p. 28765, lines 19-22.
[82] ibid p. 28766, lines 3-6.
[83] ibid p. 28766, lines 12-18.
[84] ibid p. 28766, lines 23-25, p. 28767, lines 1-3.

to that, and characteristics of the targeted group such as vulnerability'.[85] It said that proof that the result was actually achieved was not required in order to sustain a conviction.[86]

Speaking of the issue of genocidal intent, the Trial Chamber said:

> [I]n the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence.[87]

The Trial Chamber concluded that 'there is no evidence that these actions reached a level from which a reasonable trier of fact could draw an inference that they were committed with an intent to destroy in whole or in part the Bosnian Muslims and/or Bosnian Croats as such'.[88] It noted in this respect evidence produced by the prosecution of statements and speeches by the accused and others that allegedly contained 'rhetorical warning of the disappearance, elimination, annihilation or extinction of Bosnian Muslims in the event that war broke out'.[89] It did not consider that such evidence could change its assessment in any respect.

The Prosecutor appealed the acquittal on the charge of genocide, and on 11 July 2013, the Appeals Chamber ordered that it be reinstated.[90] In other words, the defence had a case to answer on the point. The Appeals Chamber considered the Trial Chamber decision by first examining the findings with respect to evidence of the three punishable acts of genocide that were at issue. Like the Trial Chamber, it insisted that it was not bound by the factual findings and evidentiary assessments in earlier decisions of the Tribunal or by the ruling of the International Court of Justice.[91] The Appeals Chamber noted that the Trial Chamber had concluded that there was evidence that the actus reus of the genocidal act of killing had been perpetrated.[92] Turning to the punishable act of causing serious bodily and mental

[85] ibid p. 28767, lines 11-17.

[86] ibid p. 28767, line 22.

[87] ibid p. 28768, lines 5-15.

[88] ibid p. 28769, lines 3-6.

[89] ibid p. 28769, lines 10-12.

[90] *Karadžić* (n 74).

[91] ibid para. 94.

[92] ibid para. 25. This is probably a misreading of the Trial Chamber's position. Like the Appeals Chamber, the Trial Chamber methodically examined the relevance of each of the three punishable acts of genocide. Before turning to causing serious bodily and mental harm (beginning at p. 28765, line 14), it discussed killing in the previous paragraph (beginning at p. 28764, line 19). There it concluded, in language similar to what it used for the other two acts of genocide further on in the ruling, that 'even if taken at its highest, does not reach the level from which a reasonable trier of fact could infer that a significant section of the Bosnian Muslim and/or Bosnian Croat groups and a

harm, it referred to evidence of beatings and other forms of physical abuse, as well as rapes.[93] The Appeals Chamber said that '[w]hile the commission of individual paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, including evidence of sexual violence and of beatings causing serious physical injuries, could have concluded that it was insufficient to establish the *actus reus* of genocide in the context of Rule 98*bis* of the Rules'.[94] The Appeals Chamber reached a similar conclusion with respect to the third act of genocide, citing evidence of deprivation of food and other harsh conditions of detention.[95]

Having concluded that there was evidence of the three physical acts of genocide charged in the indictment, the Appeals Chamber then turned to the issue of evidence of genocidal intent. Citing an earlier ruling of the Appeals Chamber, in which it had upheld the dismissal of a genocide charge with respect to the municipalities,[96] the Appeals Chamber noted the Prosecutor's criticism of the Trial Chamber ruling for having 'compartmentalised' the analysis but dismissed this ground after considering the reasoning of the Trial Chamber.[97] The Appeals Chamber said that 'in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry'.[98] It said that instead of 'considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state'.[99]

Under the heading 'The substantiality of the Groups', the Appeals Chamber considered the pronouncement by the Trial Chamber that the evidence, taken at its highest, '[did] not reach the level from which a reasonable trier of fact could infer that *a significant section of the Bosnian Muslim and/or Bosnian Croat groups* and *a substantial number of members of these groups* were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such'.[100] The Appeals Chamber dismissed the objection to this statement made by the Prosecutor.[101] It also considered issues relating to the relationship of the accused to the alleged joint criminal enterprise. There is no need here to develop its reasoning

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substantial number of members of these groups were targeted for destruction so as to have an impact on the existence of the Bosnian Muslims and/or Bosnian Croats as such' (p. 28764, lines 8-13).

[93] ibid paras. 34-36.

[94] ibid para. 37 (reference omitted).

[95] ibid paras. 47-48.

[96] *Prosecutor v Stakić* (IT-97-24-A), Judgment, 22 March 2006, para. 55.

[97] *Karadžić* (n 74) paras. 59-60.

[98] ibid para. 56.

[99] ibid para. 56.

[100] ibid para. 61, citing *Prosecutor v Karadžić* (IT-95-5/18), Transcript, 28 June 2012, p. 28765, lines 9-13 (emphasis added by the Appeals Chamber).

[101] ibid para. 68.

because this concerns the matter of individual liability strictly and does not bear on State responsibility at all. In any case, the Tribunal did not find that there was reviewable error by the Trial Chamber in this respect.[102]

The Appeals Chamber also considered the discussion of public statements attributed to the accused and others as evidence of genocidal intent. It found the consideration of this matter by the Trial Chamber to be satisfactory.[103] Nevertheless, it found 'convincing' the Prosecutor's argument that genocidal intent might be shown by evidence of meetings with the accused.[104] The Appeals Chamber said that specific intent could be inferred from 'a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts'.[105]

The Appeals Chamber concluded that 'the evidence on the record, taken at its highest, could indicate that Karadžić possessed genocidal intent. Other evidence on the record indicates that other alleged members of the [joint criminal enterprise] also possessed such intent'.[106] The Appeals Chamber granted the appeal of the Prosecutor on the genocide charge relating to the municipalities.

The significance of this decision could easily be exaggerated, and it was certainly misunderstood by many observers of the proceedings. The test that is to be applied for such motions formulated during the trial and before the defence has presented its case is 'whether there is evidence (if accepted) upon which a reasonable [trier] of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question and not whether an accused's guilt has been established beyond reasonable doubt'.[107]

In December 2012, a Trial Chamber of the Yugoslavia Tribunal convicted Zdravko Tolimir of genocide with respect to crimes perpetrated in Srebrenica in mid-July 1995. It referred to the February 2007 judgment of the International Court of Justice as authority for the proposition that '[a] perpetrator's specific intent to destroy can be distinguished from the intent required for persecutions as a crime against humanity on the basis that a perpetrator who possesses genocidal intent has formed more than an intent to harm a group by virtue of his discriminatory acts; he

[102] ibid paras. 79-83.

[103] ibid paras. 84, 95.

[104] ibid para. 97.

[105] ibid para. 99, citing *Prosecutor v Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para 47; *Prosecutor v Krstić* (IT-98-33-A), Judgment, 19 April 2004, para 34; *Hategekimana v Prosecutor* (ITCR-00-55B-A), Judgment, 8 May 2012, para 133; *Gacumbitsi v Prosecutor* (ICTR-2001-64-A), Judgment, 7 July 2006, paras. 40-41.

[106] ibid para. 100.

[107] *Prosecutor v Delalić et al.* (IT-96-21-A), Judgment, 20 February 2001, para. 434 (emphasis in original). See also: *Prosecutor v Jelisić* (IT-95-10-A), Judgment, 5 July 2001, para. 37.

actually intends to *destroy* the group itself'.[108] To an extent, the Trial Chamber departed from earlier precedent by taking the view that 'forcible transfer' could be 'an additional means by which to ensure the physical destruction of a group'.[109] It endorsed the words of an earlier Trial Chamber decision in *Blagojević and Jokić*, where it was held 'that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members'.[110] The *Tolimir* Trial Chamber said it was 'particularly guided' by this finding of the Trial Chamber in *Blagojević and Jokić*.[111] What it does not say is that this aspect of the *Blagojević and Jokić* Trial Judgment was reversed on appeal. The *Tolimir* Trial Chamber only states that it is 'cognizant' of the holding by the Appeals Chamber that displacement of a people is not equivalent to destruction and that forcible transfer in and of itself is not a genocidal act.[112] One of the five members of the Appeals Chamber in the *Blagojević and Jokić* ruling was in dissent. Judge Shahabbuddeen would have upheld a conviction of complicity in genocide, following a broader approach to the definition of the crime than his four colleagues.[113] As is often the case with a dissenting opinion, it sharpens the debate and clarifies any possible ambiguity about the intent of the majority judgment. Just as there can be no question that the Appeals Chamber in *Blagojević and Jokić* did not confirm the broad and liberal approach to genocide that had been adopted by the Trial Chamber, there can also be little doubt that the Trial Chamber in *Tolimir* was promoting a similar broad and liberal approach to genocide, thereby inviting the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia to reconsider its position. It is also striking that the Trial Chamber in *Tolimir* did not refer to the pronouncement of the International Court of Justice on this subject, which was of course completely inconsistent with its holding.

The majority of the Trial Chamber in *Tolimir* held that the only 'reasonable inference to draw from the evidence' was that 'the conditions resulting from the acts of Bosnian Serb Forces, as part of the combined effect of the forcible transfer and killing operations were deliberately inflicted, and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern BiH'.[114] With respect to

[108] *Prosecutor v Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 746 (emphasis in the original), citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 187.

[109] ibid para. 765.

[110] ibid para 764, citing *Prosecutor v Blagojević and Jokić* (IT-02-60-T), Judgment, 17 January 2005.

[111] ibid.

[112] *Prosecutor v Blagojević and Jokić* (IT-02-60-A), Judgment, 9 May 2007, para. 123. Note that this judgment was issued several weeks after the February 2007 judgment of the International Court of Justice. The judgment is listed as an authority at the end of the Appeals Chamber's judgment but it is not in fact cited anywhere in the reasons of the Appeals Chamber.

[113] *Blagojević and Jokić* (n 112) Partly Dissenting Opinion of Judge Shahabuddeen.

[114] *Prosecutor v Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 766.

the *mens rea*, the Trial Chamber said that it 'ha[d] no doubt that the Bosnian Serb Forces who committed the underlying acts set out in Article 4(2)(a)–(c) [of the Statute of the ICTY] intended the physical destruction of the Bosnian Muslim population of Eastern BiH'.[115]

The *Tolimir* case concerned not only Srebrenica but also the attacks in Žepa, which followed in late July 1995. It seems that mass killings, like those in Srebrenica, did not occur in Žepa. Nevertheless, three community leaders were murdered by Bosnian Serb forces. Holding that there was genocidal intent associated with the attacks on Žepa, the majority of the Trial Chamber said that 'to ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient—in the case of Žepa—to remove its civilian population, destroy their homes and their mosque, and murder its most prominent leaders'.[116] In this respect, it endorsed an interpretative approach whereby the words 'in whole or in part' in Article 2 of the Convention refer not only to a 'substantial part' but also to a 'significant part'. It concluded: 'The Majority has no doubt that the murder of Hajrić, Palić and Imamović was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such. On the basis of the above, the Majority, Judge Nyambe dissenting, is satisfied beyond reasonable doubt that Bosnian Serb Forces killed the three leaders named in the indictment with the specific genocidal intent of destroying part of the Bosnian Muslim population as such.'[117] The legal finding by the Trial Chamber on this point is both innovative and questionable. The inference that the murder of three community leaders constitutes both the mens rea and the actus reus of genocide because of the alleged impact this may have on the survival of the group is a rather large interpretative step that broadens enormously the scope of the crime.

In *Tolimir*, there were also allegations concerning prevention of births within the group. The Prosecutor had argued that this act of genocide resulted from 'the lack of similarly-aged men, the loss of a husband's pension upon remarriage, the social stigma of remarriage and feelings of guilt'. The Trial Chamber did not consider that 'this consequence of the forcible transfer operation qualifies as a "measure" imposed by the Bosnian Serb Forces "intended to prevent births within the group"'.[118] There is also discussion of the act of 'conspiracy to commit genocide' in *Tolimir*.[119]

The *Tolimir* conviction was upheld on appeal, in a judgment issued on 8 April 2015. The Appeals Chamber reversed several but not all of the genocide counts but did not alter the sentence of life imprisonment. It did not endorse the innovative developments of the majority of the Trial Chamber. A detailed discussion of that judgment is beyond the scope of this essay. There were several references to the

[115] ibid para 773.

[116] *Prosecutor v Tolimir* (IT-05-88/2-T), Judgment, 12 December 2012, para. 781.

[117] ibid para 782.

[118] ibid para 766.

[119] ibid paras. 787-791.

February 2015 judgment in *Croatia v Serbia*. The Chamber described the International Court of Justice as 'the principal organ of the United Nations and the competent organ to resolve disputes relating to the interpretation of the Genocide Convention'.[120]

5 Concluding Observations

In the 2007 judgment in the *Bosnia and Herzegovina v Serbia* case, the International Court of Justice built upon the case law of the *ad hoc* tribunals, especially the International Criminal Tribunal for the former Yugoslavia. One of the very commendable features of the 2007 ruling was its effort at reconciling the interpretation of international legal provisions by international tribunals, thereby addressing the problem of fragmentation and encouraging the development of a holistic system despite the absence of structural unity in the hierarchical sense of domestic legal systems. This attitude towards the case law of specialised international tribunals was made more explicit a few years later in the *Diallo* case. There, the International Court of Justice held that while it was 'in no way obliged, in the exercise of its judicial functions, to model its own interpretation' of the International Covenant on Civil and Political Rights on that of the United Nations Human Rights Committee, it said it 'should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'. The Court said this would help 'to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled'.[121]

There is a slight difference in this respect between the International Covenant on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. The former establishes a 'treaty body' in provisions that indicate the scope of its singular role. The latter contemplates not one but two tribunals with authority for its interpretation without indicating a preference as to the one that is more authoritative: an 'international penal tribunal', in Article 6, and the International Court of Justice, in Article 9.

In the *Bosnia* case, the International Court of Justice held that the Yugoslavia Tribunal was an 'international penal tribunal' contemplated by Article 6 of the Genocide Convention. Although it did not speak directly to the point in that judgment, it is obvious that the International Criminal Court is also a tribunal within the meaning of Article 6 of the Genocide Convention. In other words, the situation is

[120] *Tolimir* (n 116) para 226. For other references to *the Croatia v Serbia judgment*, see: paras. 203 (fn. 580), 230, 231, 233 (fns. 670, 671, 673, 675), 234 (fn. 678), 246 (fn. 724), 247 (fn. 729), 754 (fn. 751).

[121] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, 30 November 2010, para. 66.

slightly more complicated than it was in the *Diallo* case because of the multiplicity of international tribunals with responsibility for the interpretation of the Convention or of provisions derived from it. Moreover, although the drafters of the Convention clearly envisaged the distinct role of two different international tribunals, they do not seem to have imagined that there would actually be more than one 'international penal tribunal' capable of meeting the description in Article 6. There seem to be four international tribunals that are covered by that definition: the two *ad hoc* tribunals, the mechanism that succeeds them and the International Criminal Court. What is to be done when there are conflicts in the interpretations proposed by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, as is the case with the 'lone *génocidaire*' and the 'manifest pattern' issue? Nor can the issues be neatly parcelled out, letting the international criminal tribunals deal with matters of individual criminal liability while reserving State responsibility for the International Court of Justice. The issue of the mental element of the crime of genocide may look somewhat different depending upon whether it is approached from the angle of individual intent, as has been the tendency at the *ad hoc* tribunals, or State policy, as may be the correct vision when examined from the perspective of State responsibility. The 'knowledge-based' approach is of some assistance in solving the problem, thereby promoting the unification of international law, an objective that the International Court of Justice endorsed in the *Diallo* case.

The judgment of the International Court of Justice in the *Bosnia* case met with considerable disappointment in some circles where a broad and expansive definition of genocide had been advocated. For decades, basically from the time of the adoption of the Convention in 1948, frustration with the narrow terms of Article 2 had frequently been expressed. Yet it is a fact that the Genocide Convention was only intended to cover a narrow range of violations. It was a pioneering document, imposing new and unprecedented obligations upon States. At the time, it was impossible to achieve any broader consensus within the United Nations General Assembly on the punishment of international atrocity crimes. Anxiety about an extensive reach of international criminal justice had prompted the four powers at the London Conference, in 1945, to limit the scope of crimes against humanity to those with a nexus to armed conflict. The Genocide Convention represented huge progress over the Charter of the International Military Tribunal because it addressed the crime 'whether committed in time of peace or in time of war'. But there was a price to pay for this progressive development. The General Assembly defined genocide narrowly, limiting it to certain groups and requiring an intent to destroy, and it attempted to exclude such corollaries as the exercise of universal jurisdiction.

In the decades that followed, dismay with such restrictions manifested itself in calls for the definition of genocide to be interpreted very broadly or, alternatively, to be amended. There was little in the way of similar initiatives concerning crimes against humanity because their repression was not yet governed by a prospective treaty of general application. When international criminal justice revived, in the 1990s, the impetus for expanding the scope of international atrocity crimes manifested itself in the enlargement of the definition of crimes against humanity and the extension of war crimes to situations of non-international armed conflict. The

Rome Statute of 1998 confirmed this very dramatic legal evolution. Perhaps revolution is a more accurate term. The impunity gap left by the initial codification of the 1940s was filled in the 1990s, but by a dramatic enlargement of the scope of crimes against humanity and war crimes rather than that of genocide. One consequence was to relieve pressure to expand the definition of genocide, either through amendment or by interpretation.

When the Rome Statute was concluded in 1998, 50 years after the adoption of the Genocide Convention, there had been very little judicial interpretation of the crime of genocide by international courts and tribunals. The International Court of Justice had discussed the substance of the crime but only in the most general terms in the 1951 Advisory Opinion.[122] There was also some limited consideration in the preliminary rulings in the *Bosnia* case. The *ad hoc* tribunals had yet to complete a trial where genocide was charged. However, since 1998, there has been a huge body of legal interpretation. This essay has only dealt with the most recent highlights, confining itself to decisions and judgments since the February 2007 ruling.

The judgment of the International Court of Justice in the *Bosnia* case of February 2007 had the effect of consolidating a process of stabilisation of the definition of genocide that had been underway for several years at the *ad hoc* tribunals. When the *ad hoc* tribunals began issuing judgments on the interpretation of the definition of genocide, there was initially no clarity about the direction this would take. For decades, there had been controversy resulting from the narrow scope of the definition in Article 2 of the 1948 Convention. For proponents of a broad construction of the crime, there may have been some hope that this would be achieved through the work of the *ad hoc* tribunals. But this did not prove to be the case. The leading decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in *Krstić* in April 2004, left no question about the direction that was being taken. A rear-guard effort by one Trial Chamber, in *Blagojević and Jokić*, to reverse the trend towards a relatively narrow and strict interpretation was quickly corrected by the Appeals Chamber. Although debates remain about some issues, the broad principles set out in the February 2007 judgment of the International Court of Justice made a great contribution to the consolidation of a body of law that is now relatively clear and, above all, foreseeable and predictable in its application and consequences. There were, to be sure, no surprises in the February 2015 ruling in *Croatia v Serbia*. It confirmed and further enhanced the process of consolidation and stabilisation in the judicial interpretation and application of the crime of genocide.

[122] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

The Special Court for Sierra Leone and the Question of Head of State Immunity in International Law: Revisiting the Decision in *Prosecutor v Charles Ghankay Taylor*

Udoka Owie

Contents

1 Introduction

On 26 April 2012, Charles Ghankay Taylor was convicted by Trial Chamber II of the Special Court for Sierra Leone for war crimes and crimes against humanity committed in the territory of Sierra Leone between 30 November 1996 and 18 January 2002. Charles Taylor was charged with and found guilty of crimes against humanity, including murder, rape, sexual slavery, inhumane acts, enslavement and war crimes, including acts of terror; murder; violence to life, health and physical or mental well-being of persons; outrages upon personal dignity; cruel treatment; pillage; and conscripting or enlisting children under the age of 15 (fifteen) years into armed forces or groups and using them for active participation in hostilities.

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On 30 May 2012, the Trial Chamber sentenced Mr Taylor to a 50 (fifty)-year imprisonment term. The Trial Chamber rejected the mitigating circumstances presented on behalf of Taylor in its sentencing.

The focus of this article is not on the merits of the substantive case in *Prosecutor v Charles Ghankay Taylor*[1] but rather on the earlier decision of the Appeals Chamber of the Special Court for Sierra Leone on whether Taylor was entitled to immunity for his involvement in international crimes in the territory of Sierra Leone. Thus, the article will consider the concept of head of state immunity in international law with a view to ascertaining its place in contemporary international law and whether international law admits of head of state immunity for international crimes.

The article argues in the main that the treatment of the question whether Charles Taylor was entitled to immunity before the Special Court for Sierra Leone was rather simplistic owing to a theoretical misconception of immunities in international law, which resulted in its practical misapplication as evident in the decision of the Appeals Chamber.

2 The Special Court of Sierra Leone in Perspective

Sierra Leone had been embattled in a civil war since 1991 between the democratically elected government of President Ahmed Tejan Kabbah and the rebel movement known as the Revolutionary United Front (RUF) led by Foday Sankoh. The RUF was notorious for recruiting child soldiers, abductions, rape, forced labour, killing of innocent civilians, amputating limbs of male children, looting and burning villages, as well as other forms of outrage on human beings in the war torn region, in violation of international humanitarian law. Charles Taylor, as President of Liberia, was alleged to have been motivated by the aim to obtain part of the extensive mineral wealth in diamonds of Sierra Leone and thus gave financial and technical support by supplying arms, ammunitions and military training to the rebel movement of the RUF in its campaign of horror.

In June 2000, the President of Sierra Leone sought assistance from the UN to bring to justice those responsible for crimes against the people of Sierra Leone.[2] The government requested the UN to establish an international court to prosecute those responsible for war crimes committed in the course of the civil war.[3] The Security Council, on 14 August 2000, adopted Resolution 1315 requesting the UN Secretary-General to negotiate an agreement with the Government of Sierra Leone for the establishment of an independent criminal court in response to the crimes.[4]

[1] On this, see Triestino Marincello, 'Prosecutor v. Taylor' (2013) 107 American Journal of International Law 424.

[2] Letter from the President of Sierra Leone to the UN Secretary-General, Kofi Annan UNDocS/2000/786, Annex.

[3] For background, see Tom Perriello and Marieke Wierda, 'The Special Court for Sierra Leone Under Scrutiny' (2006) International Center for Transitional Justice; James L Miglin, 'From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone' (2007) 16 Dalhousie Journal of Legal Studies 21.

[4] S/RES/1315 (2000).

The Security Council in its recommendation for the establishment of the Special Court for Sierra Leone proposed that the personal jurisdiction of the Special Court should extend to 'leaders' and others who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under Sierra Leonean law committed in Sierra Leone.[5]

The Secretary-General recommended the establishment of the Special Court by an agreement between the Government of Sierra Leone and the UN, which would be 'a treaty-based *sui generis* court of mixed jurisdiction and composition'.[6] The Special Court was created following the conclusion of the 'Agreement on the Establishment of a Special Court for Sierra Leone between the UN and the Government of Sierra Leone'.[7]

In March 2003, the Special Court issued a 17-count indictment against Charles Taylor while he was still President of Liberia for his involvement in the commission of crimes against humanity and grave breaches of the Geneva Conventions in the territory of Sierra Leone.[8] In a bid to bring about peace in the embattled West African region, Charles Taylor was encouraged to step down as Head of State and was granted exile by the Nigerian Government in August 2003.[9] In December 2003, while on a visit to Ghana, which was hosting peace negotiations, an international arrest warrant was issued by the Special Court against Taylor, but the Ghanaian authorities did not effect the arrest warrant, and Taylor returned to his residence in Cross Rivers State in Nigeria.

Due to mounting international political pressure on Nigeria, particularly by the United States, and a request for Taylor's surrender by the Government of Liberia, Nigeria released him to Liberia despite the absence of a bilateral extradition agreement. He was arrested by the UN Mission in Liberia (UNMIL) and transferred to the Special Court in November 2006 to stand trial.

Having concluded all trials as per its mandate, the Special Court for Sierra Leone was closed in 2013, and the Residual Special Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone to monitor the continuing legal obligations of the Special Court, including witness protection, supervision of prison sentences and the management of the archives.[10]

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[5] ibid Operative Paragraph 3 [Hereinafter Special Court].

[6] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UNDoc.S/2000/915, especially paragraph 9.

[7] Appendix II to the 'Letter Dated 6 March 2002 from the Secretary-General addressed to the President of The Security Council'; text available at <www.rscsl.org> accessed 14 June 2016.

[8] *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01, Indictment, 3 March 2003, available at <www.rscsl.org> accessed 14 June 2016.

[9] Abdul Tejan Cole, 'A Big Man in a Small Cell' in Ellen L. Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (CUP 2009), 215.

[10] <www.rscsl.org> accessed 14 June 2016.

An analysis of the decision of the Appeals Chamber in the immunity proceedings has become imperative with the proliferation of international and internationalised (hybrid) courts, the fact of Taylor being the first sitting Head of State to be indicted by an international court since Nuremberg, as well as the current trial of Hissène Habré in Senegal and the indictment of President Omar Al-Bashir by the International Criminal Court. Although the doctrine of *stare decisis* is unknown to international law, decisions of courts are still relied upon unless the decisions are perverse.[11]

3 The Question of Head of State Immunity Before the Special Court

Article 6(2) of the Statute of the Special Court for Sierra Leone specifically provided:

> The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.[12]

It was on the basis of the provision that the Prosecutor of the Special Court issued the indictment against Charles Taylor. Taylor filed a motion under protest before the Trial Chamber to quash the indictment and to declare the arrest warrant issued against him as null and void. The motion was referred to the Appeals Chamber of the Court.[13]

Taylor challenged the jurisdiction of the Court on a number of grounds.[14] In the main, he contended, firstly, that he had absolute immunity from criminal prosecution based on the decision of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*[15] and his incumbency at the time of the indictment. Secondly, that rules derogating

[11] Article 59 Statute of the ICJ (Annexed to the United Nations Charter), 26 June 1945, 1 UNTS XVI. [United Nations hereinafter referred to as UN].

[12] Statute of the Special Court available at <www.rscsl.org> accessed 14 June 2016.

[13] Under Rule 72(E) of the Rules of Procedure of the Court, Preliminary motions made in the Trial Chamber which raise a serious issue relating to jurisdiction shall be referred to the Appeals Chamber, available at <www.rscsl.org > accessed 14 June 2016.

[14] *Prosecutor v Charles Ghankay Taylor* (Case No. SCSL-2003-01-1), Decision on Immunity from Jurisdiction, 31 March 2004, 6-8, 12 and [15], available at <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf> accessed 14 June 2016; [Hereinafter *Taylor* case].

[15] (2002) ICJ Reports, 3; [Hereinafter *Arrest Warrant* case] [International Court of Justice hereinafter referred to as ICJ].

from the international rule providing for immunities can only derive from other rules of international law such as Security Council Resolutions passed under Chapter VII of the Charter of the UN.[16] Thirdly, the Special Court not having the backing of Chapter VII of the Charter of the UN, its judicial orders are at par with those of national courts, and the indictment was invalid due to his personal immunity. Furthermore, the timing of the disclosure of the indictment and the arrest warrant was with a view to frustrating peace-making efforts and prejudiced his functions as Head of State.

In response to these contentions, the Prosecutor submitted that the *Arrest Warrant* case concerned the immunities of serving Heads of State from the jurisdiction of national courts of other states and that customary international law allows the indictment of serving heads of state by international criminal courts.[17] The Prosecutor further contended that the Special Court is an international criminal court established under international law and that the lack of powers under Chapter VII of the Charter of the UN does not affect the Court's jurisdiction over heads of state as illustrated by the International Criminal Court, which, though lacks the Chapter VII powers, expressly denies heads of state immunity from international crimes in its Statute.[18]

Essentially, the arguments of Charles Taylor and the Prosecution concerned the following:

(a) the effect of the decision of the ICJ in the *Arrest Warrant* case;
(b) the status of the Special Court for Sierra Leone; and
(c) the effect of Chapter VII of the Charter of the UN on the powers of a judicial body.

In considering the issues raised, it is imperative that the fundamental issue of whether heads of states are entitled to immunity for international crimes in international law is first considered.

3.1 Head of State Immunity in International Law

Immunity is not a free-standing principle of international law. The concept of immunity is anchored on the jurisdiction of states. By virtue of their sovereignty, states enjoy full competence over their prescriptive jurisdiction (i.e., power to prescribe laws), but in relation to their adjudicative and enforcement jurisdiction, states are curtailed by the sovereignty of other states as evidenced in the maxim *par in parem non habet imperium*.[19] Thus, head of state immunity is an exception to the jurisdictional competence of an adjudicatory body.

[16] 1 UNTS XVI.

[17] *Taylor* case (n 14) 9, 10, 13, 14.

[18] ibid.

[19] This means that an equal has no power over an equal, see Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, Thomson Reuters 2009), 1859.

The law relating to the position of heads of state is similar to that relating to state immunity and diplomatic immunity. According to O'Neill:

> . . .its substance has been both defined by and analogised to the doctrine of sovereign immunity and the more restrictive immunity granted to diplomats.[20]

The customary legal endorsement of the absolute nature of state immunity is ascribed to *The Schooner Exchange v McFaddon and Others.*[21] While the *Schooner Exchange* case may have expressed the absolute jurisdiction of states within their territories, the absolute nature of the immunity of states is established through state practice as illustrated by the *Parlement Belge*,[22] the *Porto Alexandre*[23] and the *Cristina* cases.[24] International law has since progressed from the hitherto absolute approach to state immunity, and this departure, evident in the 1952 Tate Letter,[25] came to the limelight in the celebrated decision of the House of Lords of the United Kingdom in the case of *Trendtex Trading Corporation v Central Bank of Nigeria*,[26] confirmed in *I Congresso Del Partido*,[27]and has been followed since then.[28]

By virtue of customary international law and the Vienna Convention on Diplomatic Relations 1961,[29] serving diplomats are entitled to immunity *ratione personae* (personal immunity) from foreign criminal jurisdiction and a more limited immunity *ratione materiae* (functional immunity) for official acts.[30]

Unlike state immunity and diplomatic immunity, the substance of head of state immunity is provided for not in treaty form but in international custom, and this has contributed to the uncertainty in this area of international law. The concept of head of state immunity in international law is a relic from the past when there was no

[20]Kerry Creque O'Neill, 'A New Customary Law of Head of State Immunity? Hirohito and Pinochet' (2002) 38 Stanford Journal of International Law 29.

[21]11 US 116 (1812).

[22]5 P.D. 197 (1880) For a review of other cases establishing the absolute nature of state immunity, see J W Garner, 'Immunities of State-Owned Ships Employed in Commerce' (1925) 6 British Yearbook of International Law 128.

[23][1920] *P.* 30; 1 ILR 149.

[24][1938] AC 485.

[25](1952) 26 Dept of State Bulletin 984.

[26](1977) 1 QB 529.

[27][1983] AC 244.

[28]State immunity legislations of various countries including the United States of America, United Kingdom, Australia, New Zealand, Canada, Singapore, South Africa etc have all codified this restrictive approach to state immunity. The European Convention on State Immunity 1972, 11 ILM 470, and the United Nations Convention on the Jurisdictional Immunities of States and Their Property 2004 (Adopted by the UN General Assembly in Resolution 59/38 of 16 December 2004, and yet to enter into force) also adopt a restrictive approach to state immunity.

[29]Article 31(1)500 UNTS 95.

[30]UK State Immunity Act 1978, s 20 extends the diplomatic immunities and privileges as provided in the Convention to Heads of State.

distinction between the personal sovereign and the state, seen in the statement of Louis XIV of France, *L'état c'est moi.*[31] The idea of statehood since the Treaties of Westphalia 1648 has diminished the lack of distinction between the personal sovereign and the state.[32] Likewise, monarchical sovereignty has been diminished by the rise of republicanism, anti-colonial nationalism and the emergence of democratic states. Yet the immunity of heads of states is, and remains, at the fore of international law.

The traditional absoluteness of the personal sovereign gave rise to the modern idea of head of state immunity. The sovereign enjoyed absolute immunity from legal proceedings before his own courts (which acted in the name of the sovereign and on his behalf) and also before the courts of foreign states as sovereign equals.

The absolute immunity of the personal sovereign was recognised by the Privy Council in *Chung Chi Cheung v The King*,[33] that neither the sovereign nor his envoy and properties (including public armed ship) are to be subject to legal process. This decision follows from earlier decisions in the nineteenth century in *De Haber v Queen of Portugal*[34] and *King of Hanover v Duke of Brunswick*,[35] that personal sovereigns were immune from any claim brought against them in the courts of other states.

Though the nature of the office as chief executive and the nature of government had changed, at least towards the end of the eighteenth century,[36] the idea of the absoluteness of the powers of the personal sovereign subsisted and resulted in the prevailing international custom that heads of state enjoy complete immunity even for private acts.[37]

Contemporary international law evident in state practice supports the grant of absolute immunity to serving heads of state and a limited immunity to former heads of state for acts committed while in office. In *Ex-King Farouk of Egypt v Christian Dior, S.A.R.L.*, the French Regional Court of Appeal found that had the King been a sitting one, he would have enjoyed immunity in the action for the cost of the clothes for his wife.[38] In *Lafontant v Aristide*,[39] proceedings were instituted against President Jean-Bertrand Aristide while in exile in the United States for the political assassination of the plaintiff's husband; despite the overthrow of Aristide's

[31]Meaning 'I am the State', see Ian Sinclair, 'The Law of Sovereign Immunity: Recent Developments' (1980) 167 II RdC 113,198.

[32]Text of treaty available at <http://avalon.law.yale.edu/17th_century/westphal.asp> accessed 14 June 2016.

[33][1939] AC 160, 175, per Lord Atkins.

[34][1851] 17 QB 171, 206-207.

[35][1844] 6 Beav. 1; (1848) 2 HLC 1.

[36]By the American Revolution (1775-1783) and the French Revolution (1789-1799).

[37]Udoka Owie, 'The Pinochet Case: Expounding or Expanding International Law?' (2015) 2 International Journal of International Law 158.

[38](1957) 24 ILR 228.

[39]844 F. Supp. 128 (E.D.N.Y. 1994); 103 ILR 581.

government, the United States recognised him as the Head of Haiti, and so he was held to be immune.

In *Estate of Domingo v Republic of Philippines*,[40] the US courts recognised the absolute immunity of President Ferdinand Marcos, and his wife, for the political assassination of opposition leaders. In *Tachiona v Mugabe*,[41] a class action was brought by the plaintiffs for themselves and on behalf of some deceased victims alleging torture and other acts of terror against President Robert Mugabe. The Court in dismissing the action upheld Mugabe's immunity, even for private acts.

Even for international crimes, heads of state are absolutely immune from the courts of other states. Colonel Gaddafi, as the Libyan Head of State, and other persons were tried *in absentia* by the Special Court of Assizes of Paris for the destruction of an aircraft and the murder of the 170 passengers and crew aboard.[42] Upon appeal, the Court of Cassation in terminating the proceedings held:

> International custom precluded Heads of state in office from being the subject of proceedings before the criminal courts of a foreign state. . .In the current state of international law, complicity in a terrorist attack, however serious such a crime might be, did not constitute one of the exceptions to the principle of the jurisdictional immunity of foreign Heads of state in office.[43]

The absolute nature of the immunity of heads of states was clearly established in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*.[44] Here, the Republic of Djibouti requested the ICJ to adjudge and declare that France, by sending witness summonses to the Head of State of Djibouti and to senior Djiboutian officials, had violated its obligations under general and customary international law not to attack, and to prevent attacks on, the immunity, honour and dignity of the Djiboutian President. The Ministry of Foreign Affairs of France had stated, in relation to the summons, that 'all incumbent Heads of State enjoy immunity from jurisdiction when travelling internationally' and that 'this is an established principle of international law and France intends to ensure that it is respected'.[45]

[40] 808 F.2d 1349 (9th Cir. 1987).

[41] 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

[42] The *Gaddafi* case, (2001) 125 ILR 490.

[43] ibid 493. This does not mean that contemporary international law admits of exceptions to the absolute immunity of Heads of State from foreign jurisdiction; an exception may exist with regard to 'certain' international courts where the constitutive instrument establishing the court effectively removes Head of State immunity by the applicability of the *pacta tertii* rule. Unlike State immunity and diplomatic immunity, there is no international convention on Head of State immunity and the question of Head of State immunity, or any exception, is determined by customary international law which grants absolute immunity to Heads of State from foreign jurisdiction even for international crimes, see *The Arrest Warrant Case*, (n 15) 57-60.

[44] (2008) ICJ Reports 177.

[45] ibid 31.

France, while arguing that the summons was not an attack on the Djiboutian President, recalled that it

> [F]ully recognises, without restriction, the absolute nature of the immunity from jurisdiction and even more so, from enforcement that is enjoyed by foreign Heads of state.[46]

The ICJ, on its part, stated:

> A Head of State enjoys in particular 'full immunity from criminal jurisdiction and inviolability' which protects him or her 'against any act of authority of another state which would hinder him or her in the performance of his or her official duties.[47]

Being an exception to the jurisdictional competence of a state, immunity is, however, a prerogative of states and vests in states. It does not belong to individuals; it is only extended to heads of state as the representatives *par excellence* of states. As such, the immunity of a head of state can be waived by his state.[48]

In *Prosecutor v Charles Ghankay Taylor*, it was not contended by the Prosecutor that Liberia waived the immunity to which Charles Taylor was entitled as Head of State of Liberia.[49] Rather, both the prosecution and defence made heavy weather about the applicability of head of state immunity in national courts and international courts. Thus, a proper analysis of the scope of head of state immunity becomes imperative to this article.

4 Head of State Immunity Before National Courts

It is a fundamental principle of international law that a state cannot exercise its jurisdiction outside its territory. This was affirmed by the Permanent Court of International Justice in the *Lotus* case.[50] To subordinate a head of state to a foreign jurisdiction flies in the face of the notion of sovereignty of states. In *Chuidian v Philippine National Bank*,[51] the Court was of the view that proceedings against state officials for acts committed in an official capacity would effectively amount to proceedings against the state itself.

There is a long line of judicial decisions to the effect that heads of state enjoy international immunities before national courts. In *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (*Pinochet* case), the

[46] ibid 166.

[47] ibid 170.

[48] As did the Philippines in the case against Ferdinand Marcos, see *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir.1987) and Haiti in the case against Prosper Avril, see *Paul v Avril*, 812 F. Supp.207 (S.D. Fla.1993).

[49] Waiver of immunity must be express, see *Democratic Republic of Congo v FG Hemisphere Associates LLC (No 1)* (2001) 147 ILR 376.

[50] Judgment No.9, 1927, PCIJ Rep, Series A, No. 10.

[51] 912 F.2d 1095 (9th Cir. 1990).

House of Lords were of the view that a serving head of state enjoys absolute and complete immunity from the criminal jurisdiction of other states, and this has its origin in history.[52] However, the express terms of the UN Convention Against Torture 1984[53] were such that the states parties (including Chile and the United Kingdom) could not claim or uphold the immunity *ratione materiae* of public officials, including former heads of state, for acts of torture. To have done otherwise would have been inconsistent with the obligations of the parties under the Convention.[54]

In the *Arrest Warrant* case, the ICJ by a substantial majority found that the issuance and international circulation of an arrest warrant for grave breaches of the Geneva Conventions 1949[55] and for crimes against humanity constituted a violation of the immunity *ratione personae* of senior state officials.[56] The Court found that under international law, there is no exception to the rule providing for immunity of senior government officials from criminal jurisdiction where crimes against humanity are alleged to have been committed with regard to national courts.[57] The ICJ in deciding that the issuance and circulation of the arrest warrant was illegal based this on the fact that the alleged acts occurred during incumbency of office.[58]

In *Certain Criminal Proceedings in France (Republic of Congo v France)*,[59] the Congo challenged the investigatory proceedings by France against its President, Minister of the Interior and other senior government officials alleging a violation of its sovereignty, international immunities of the head of state and Article 2(1) of the UN Charter. However, the ICJ declined the provisional measures requested by the Congo not on the merits of the claims of Congo but for the reason that there were no grounds to show irreparable damage necessitating the measures.

In *Lafontant v Aristide*,[60] the Court held that serving heads of state enjoy immunity for public and private acts and that former heads do not enjoy immunity in respect of acts of a private nature performed while in office.[61]

The Cour de Cassation of France in the case against *Ghaddafi* asserted that in international law, terrorist acts, however serious, do not admit exceptions to the international immunities enjoyed by foreign heads of state.[62]

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[52][1999] 2 AER. 97,111.

[53]10 December 1984, 1465 UNTS 85.

[54]*Pinochet* case (n 52), per Lord Saville of Newidgate, 168-169, and Lord Hope, 146-151. See Udoka Owie, (n 37).

[55]12 August 1949, 75 UNTS 31, 85,135 and 287.

[56]*Arrest Warrant* case (n 15).

[57]ibid 58.

[58]Joint Separate Opinions of Higgins *et al, Arrest Warrant* Case 89.

[59]Provisional Measures Order of 17 June 2003 (2003) ICJ Reports 102.

[60]*Lafontant* case (n 39).

[61]See also *Jimenez v Aristeguieta* (1962) 33 ILR 353.

[62]Arret no 1414, 13 March 2001; see also Antonio Remiro Brotons, 'International Law after the Pinochet Case' in Madeleine Davis (ed) *The Pinochet Case: Origins, Progress and Implications* (Institute of Latin American Studies 2003), 241.

In *Re Honecker*, the Federal Supreme Court of Germany held that as Head of State, the Chairman of the Council of State enjoyed immunity in accordance with the general rules of customary international law by virtue of his office, and so no criminal proceedings could be instituted against him.[63]

Arguing to the contrary, Professor Gaeta has asserted that in the light of state practice as evidenced by the non-recognition of official status of heads of state in the Nuremberg and Far East Military Tribunal Charters, Control Council Law No.10 of 1945, Genocide Convention of 1948, Nuremberg Principles adopted by the General Assembly in 1950, Apartheid Convention 1973 and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the celebrated *Pinochet* case:

> the contention can be made that a customary rule has evolved in the international community to the effect that all state officials, including those at the highest level, are not entitled to functional immunities in criminal proceedings – *either of a national or international nature* – if charged with such offences as war crimes and crimes against humanity.[64]

It is submitted that state practice does not support such contention. With regard to the Charters of the Nuremberg and Far East Tribunals, Control Council Law, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the Genocide and Apartheid Conventions, there is the general rule of international law that a treaty cannot create rights or obligations for third states without their consent (*pacta tertiis nec nocent nec prosunt*) resulting in the non-applicability of head of state immunity before those international tribunals and under those conventions.[65] Furthermore, the decision of the House of Lords in *Pinochet (No. 3)* was based on the Torture Convention, which Chile and the United Kingdom had ratified (the *pacta tertiis* principle), and the requirement of double criminality in English law rather than on any customary international rule rejecting immunity before national courts.[66]

If anything, there is clear state practice recognising immunity for heads of states before national courts for international crimes. The position before national courts therefore is that serving heads of state enjoy immunity *ratione personae* for both official and private acts, while former heads of states enjoy immunity *ratione materiae* only for their official acts. Indeed, some of the judges of the House of Lords were of the view that had Pinochet been a serving Head of State at the time of the proceedings, he would have enjoyed immunity from the proceedings.[67]

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[63](1984) 80 ILR 365.

[64]Paolo Gaeta, 'Official Capacity and Immunities' in Antonio Cassese, Paolo Gaeta and John R.W. D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002), 982 (Emphasis supplied).

[65]See Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 34. This argument will be pursued further in the next section of the article.

[66]Owie (n 37).

[67]See Lords Phillips and Hutton in *Pinochet No. 3*, (n 52).

Thus, there exists no state practice in support of the view that before national courts, there can be no immunity under customary international law when international crimes are committed. The reluctance of the House of Lords to rely on such an argument, which rather based its decision in the Pinochet case not on customary international law but on treaty, shows the weakness of the view.

5 Head of State Immunity Before International Courts

The ICJ after analysing state practice, in the *Arrest Warrant* case, held that serving senior officials like heads of states enjoy absolute immunity from criminal proceedings.[68] However, the ICJ qualified its position by enumerating instances where immunities may not avail senior state officials, including heads of states.[69] In the enumeration of the exceptions, the ICJ included 'certain international courts where they have jurisdiction'.[70] It is patently manifest from the phrase that the ICJ did not envisage that any international criminal court could override immunities of heads of states, only *certain* kinds of international court where they have jurisdiction. Unfortunately, the ICJ did not elaborate on what makes an international court come within the contemplation of its decision.

The international nature of a court is not enough to disentitle a head of state from immunity available under customary international law. States cannot, by their aggregation, achieve what they lack the individual capacity to do, i.e. remove a right that a third state possesses without the consent of the third state in violation of the *pacta tertiis* principle.[71] It becomes imperative to consider what makes an international court come within the decision of the ICJ in the *Arrest Warrant* case, i.e. what makes an international court one of the 'certain' contemplated by the ICJ?

Historically, the idea of establishing international tribunals to try serious violations of international law arose for the first time after the First World War. The Treaties of Sévres and Versailles provided for the prosecution of Turkish and German war criminals before international courts but which, unfortunately, were not established.[72] Instead, the Germans, accused of violations of the laws and customs of war, were prosecuted before the German Supreme Court sitting at Leipzig.[73]

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[68](2002) ICJ Reports 3, 58.

[69](2002) ICJ Reports 3, 60.

[70]ibid 61.

[71]Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 American Journal of International Law 407, 417-418.

[72]Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers 1995) 2.

[73]M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court' (1997) 10 Harvard Human Rights Journal 11.

Subsequent to the Treaty of Versailles, the end of World War II saw the establishment of international courts in Nuremberg and the Far East (Tokyo) to try violations of international law and peace. Article 7 of the Charter of the Nuremberg Tribunal provides:

> The official position of defendants, whether Heads of State or responsible officials in government departments, shall not be... considered as freeing them from responsibility or mitigating punishment.[74]

Article 6 of the Statute of the Tokyo Tribunal also provides:

> Neither the position, at any time, of an...accused, nor the fact that an accused acted pursuant to order of his government or a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged...[75]

In *Re Goering*, the International Military Tribunal at Nuremberg affirmed the international criminal responsibility of state representatives and rejected the argument that those carrying out acts of state do not incur personal responsibility because of the sovereignty of the state as not being applicable to acts condemned as criminal in international law.[76]

The non-applicability of head of state immunity before the Nuremberg and Tokyo Tribunals under their Charters arose from the consent of Germany and Japan. Whereas the consent of Japan is express in the Instrument of Surrender signed by Japan,[77] the consent of Germany is implicit in the unconditional surrender of Germany and the fact of occupation by the Allies. Any misgivings about the jurisdiction of the IMT over the German Head of State is diminished by the fact that the Allied Powers had warned that German officers and Nazi Party members responsible for atrocities committed would be judged and punished.[78] By surrendering unconditionally, Germany implicitly consented to the possibility of judging and punishing its state officials, including its Head of State, by the International Military Tribunal. In its judgment, the Nuremberg Tribunal stated that the Charter of the Tribunal being the source of its authority was

> ...the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world.[79]

Fox also opines that

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[74] 82 UNTS 279.

[75] 19 January 1946, T.I.A.S. No. 1589, 4 Bevans 20.

[76] (1946)13 ILR 203.

[77] Neil Boister, 'The Tokyo Trial' in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011), 17,18.

[78] See Inter-Allied Declaration of 13 January 1942 reprinted in Inter-Allied Information Committee, *Punishment for War Crimes: The Inter-Allied Declaration Signed at St. James's Palace London on 13 January 1942: and Relative Documents*, (HMSO, 1942); Moscow Declaration, available at <http://avalon.law.yale.edu/wwii/moscow.asp> accessed 14 June 2016.

[79] *Goering* (n 76) 207.

> . . .with respect to the International Military Tribunal at Nuremberg, the consent of Germany would seem to dispense with the need for such a plea, for the Tribunal was established by the occupying powers exercising territorial jurisdiction, as the German Reich (as the former territorial state) had unconditionally surrendered.[80]

The irrelevance of official position to criminal responsibility as established under the Nuremberg Tribunal was enshrined in the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal and adopted in 1950 by the International Law Commission[81] and approved by the UN General Assembly.[82]

In the absence of a permanent international criminal court and acting with renewed impetus at the end of the Cold War, the UN Security Council established *ad hoc* international tribunals in the 1990s. In May 1993, the Council established the International Criminal Tribunal for the former Yugoslavia to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Council upon the restoration of peace.[83] In the following year, the Council decided, after receiving the request of the Government of Rwanda, to establish the International Criminal Tribunal for Rwanda to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for similar acts between 1 January 1994 and 31 December 1994.[84]

The Council in deciding to establish the ICTY and ICTR acted under Chapter VII of the UN Charter after it determined that the situations in the Balkans and in Rwanda constituted a threat to international peace and security.[85]

The Statutes of the ICTY and the ICTR provide:

> The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.[86]

The ICTY and ICTR Statutes must be interpreted against the backdrop of the decision of the Security Council to establish the Tribunals under Chapter VII of the Charter as a measure to restore international peace and security in the concerned regions.[87]

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[80]Hazel Fox, *The Law of State Immunity* (OUP 2002), 431-432; Henry T. King, Jr., 'Without Nuremberg – What?'(2007) 6 Washington University Global Studies Law Review 653.

[81]Yearbook of the International Law Commission Volume II (1950).

[82]Resolution 488, 12 December 1950, Principle III.

[83]S/RES/827 (1993), paragraph 2 [Hereinafter referred to as ICTY].

[84]S/RES/955 (1994) [Hereinafter referred to as ICTR].

[85]See Articles 24 and 39 of the Charter of the UN (n 16).

[86]Article 7(2) of the ICTY Statute reprinted in (1993) 32 ILM 1192; Article 6(2) of the ICTR Statute, reprinted in (1994) 33 ILM 1602.

[87]S/RES/827 (1993) and S/RES/955 (1994).

The Security Council is vested with primary responsibility for international peace and stability.[88] Acting under Chapter VII of the Charter, the Council may take a range of non-military and military actions after it has made the necessary determination that there is a threat to international peace, breach of the peace or an act of aggression.[89] The list of actions specified under Chapter VII is not closed, and UN members are bound by the decisions of the Council, having agreed to accept and carry out the decisions of the Security Council.[90] By the instrumentality of Article 25 of the UN Charter, members consent to submit their sovereign prerogatives to the decisions of the Security Council taken under Chapter VII. Having so consented, members recognise that their obligations under the Charter prevail over other international obligations.[91]

Thus, by the combined effect of Articles 25 and 103 of the UN Charter, the obligation of states towards the Council supersedes the obligation of states under customary international law to respect the immunities of heads of state, as well as the prerogative to assert these immunities before the international tribunals established by the Council under Chapter VII.[92]

With the adoption of the Rome Statute in 1998, the International Criminal Court was established as a permanent international criminal institution that is complementary to national criminal jurisdictions.[93] Like the Statutes of the Nuremberg and Tokyo Tribunals, ICTY and ICTR, it is provided that the Rome Statute

> . . .shall apply to all persons without any distinction based on official capacity. In particular, official capacity as a Head of state or government, a member government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[94]

Article 27(1) of the Rome Statute, making official capacity irrelevant to the question of criminal responsibility, without more, cannot remove head of state

[88]UN (n 16) Article 24.

[89]ibid Articles 39-42.

[90]ibid Article 25.

[91]ibid Article 103 provides:

> In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

[92]See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993, [23] where it was recognised that a decision to establish the ICTY under Chapter VII would mean that '. . .all states would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII'.

[93]Rome Statute, 2187 UNTS 90, Article 1 [Hereinafter referred to as the Rome Statute].

[94]ibid Article 27(1).

immunity under customary international law,[95] likewise the express inclusion by the ICJ in the *Arrest Warrant* case, of the ICC as an example of 'certain' international tribunals before which international immunities are not applicable. By virtue of the *pacta tertiis* principle, only the immunity of heads of states parties to the Rome Statute, or where there has been a referral of a situation by the Security Council to the ICC,[96] is removed by Article 27(1). The immunity of heads of states not party to the Rome Statute remains unaffected. In recognition of this, the Rome Statute provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity.[97]

Thus, an international court can only come under the contemplation of the decision of the ICJ in the *Arrest Warrant* case by the applicability of the *pacta tertiis* principle, whereby states are bound by the instrument vesting the court with jurisdiction and that expressly or impliedly removes jurisdictional immunities.[98]

Contrary to Taylor's assertion, the Special Court is not a national court. Neither is it an international court similar to the ICTY and ICTR, as the Prosecutor argued. The status of the Special Court was to be determined primarily by its constitutive instrument and secondarily by its features, as well as in comparison with other international criminal courts.

6 Status of the Special Court for Sierra Leone and the Immunity of Charles Taylor

The treaty-based nature of the Special Court, as an Agreement between the UN and the Government of Sierra Leone, set the path of enquiry into the status of the Court within an international context. Other important indices as to the international nature of the Special Court include the international funding of the Court,[99] its separate

[95]This does not mean that a treaty cannot vary custom for parties, see the *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, (1969) ICJ Reports 3, [25].

[96]Rome Statute (n 93) Article 13. As was done by the United Nations Security Council with regard to the situation in Darfur and Libya which involved Omar Bashir and Mouammar Gaddafi, see S/RES/1593 (31 March 2005) and S/RES/1970 (26 February 2011).

[97]ibid 93, Article 98. See Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn OUP 2013), 555; David J. Scheffer, 'Developments in International Law: Foreword' (1999) 93 American Journal of International Law 1, 18-20; Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2001) 64 Law and Contemporary Problems 13, 13-14; Dapo Akande, 'The Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618-650.

[98]Akande (n 71) 417.

[99]Agreement to Establish the Special Court of Sierra Leone, (n 9) Article 6.

legal personality and its capacity to enter into agreements with states,[100] immunity and privileges as provided in the Vienna Convention on Diplomatic Relations of 1961 enjoyed by officials of the Court,[101] the application of the Rules of Evidence and Procedure of the ICTR to the Court's proceedings,[102] provision for recourse to the sentencing practice of the ICTR,[103] the enforcement of its sentences in penitential institutions of foreign states[104] and the requirement of submission of an annual report by the President of the Court to the UN Secretary-General.[105]

Furthermore, by Section 11(2) of the Special Court Agreement (Ratification) Act 2002, the Court was to be part of the judiciary of Sierra Leone.[106] The Court was staffed by international judges, a prosecutor and a registrar, with the Secretary-General and the Sierra Leonean government sharing responsibility for their appointment.[107]

Thus, the Special Court was an international court. It also had a national dimension. The Secretary-General, in his Report to the Council, had proposed that the Special Court would be a 'treaty-based *sui generis* court of mixed jurisdiction and composition'.[108]

The treatment of the status of the Court by the parties and the Appeals Chamber was simplistic. On the one hand, it was considered that not being wholly under the judiciary of Sierra Leone made the Court an international one with the implication that head of state immunity was inapplicable before its proceedings. On the other hand, the defence contended that nothing in the Agreement or the Ratification Act suggests that the Court was an international court, and as such it could not arrogate to itself the powers of an international tribunal. There was no consideration of the *pacta tertiis* principle and whether states were bound by the constitutive instrument of the Special Court.

The Appeals Chamber's overemphasis on the involvement of the Security Council in the establishment of the Special Court is also evident in other decisions of the Court.[109] The misconception of the extent of the role of the Security Council by the Appeals Chamber furthermore resulted in its flawed reasoning in the immunity

[100] ibid Article 11.

[101] ibid Article 12.

[102] Statute of the Special Court, (n 12) Article 14.

[103] ibid Article 19.

[104] ibid Article 22.

[105] ibid Article 25.

[106] <www.rscsl.org > accessed 14 June 2016.

[107] Statute of the Special Court (n 12) Articles 12, 15 and 16.

[108] Report of the Secretary-General on the establishment of the Special Court for Sierra Leone, (n 8) Paragraph 9.

[109] See *Prosecutor v Augustine Gbao* (Case No. SCSL-2004-15-AR72(E)), Decision on Preliminary Motion on the Invalidity of the Agreement between the UN and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004, Paragraph 5 and also *Prosecutor v Moinina Fofana* (Case No. SCSL-2004-14-AR72 (E)), Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, 25 May 2004, Paragraphs 23 and 27.

proceedings in the *Taylor* case.[110] The Chamber asserted that the preamble to Security Council Resolution 1315 recommending the establishment of the Special Court shows that the Court was established to fulfil an international mandate as part of the machinery of international justice and therefore was an international court.[111] The Chamber relied on Resolution 1315 and the powers of the Council in Articles 39 and 41 of the UN Charter in its conclusions on the status of the Special Court.[112]

The preamble of an international instrument is merely exhortatory and is not legally binding. The Chamber's attempt to link the establishment of the Special Court to the Security Council, however remotely, was desperate and unnecessary. Arguably, the awareness of the limitations of the bilateral nature of the constitutive instrument of the Special Court and its non-obligatory nature towards third states compelled the Appeals Chamber to desperation.

Although the establishment of a special court was envisaged by the Security Council in Resolution 1315, the Council clearly did not establish the Special Court for Sierra Leone.[113] The Council expressly requested the Secretary-General to negotiate an agreement for the establishment of a special court.[114] The legal basis of the Court is the Agreement on the Establishment of a Special Court for Sierra Leone. As such, the Agreement is applicable only between Sierra Leone and the UN as an entity.

The Appeals Chamber had asserted:

> The Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community.[115]

Though attractive, this view is extreme. Such an interpretation is at variance with the sovereignty of states and violates the *pacta tertiis* principle. States are at liberty to choose whether or not to participate in treaties—this is the hallmark of sovereignty. The conclusion of a treaty under the auspices of the UN does not make all UN member states parties to the treaty. It is difficult to reconcile the view of the Appeals Chamber with the fact that many UN conventions, to the extent that they have not become customary international law, are binding only on members who have chosen to ratify those treaties. An apt illustration of the extremity of the view of the Appeals Chamber would be arguing that the US, which is not a party to the Rome Statute of the ICC, is bound by the Rome Statute because the Statute was adopted under the auspices of the UN.

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[110] *Taylor* case (n 14) 37-39.

[111] ibid 39 and 42.

[112] ibid 37-39.

[113] A distinction must be made between the involvement of the Council and the establishment of the Special Court.

[114] S/RES/1315 (2000), Operative Paragraph 1.

[115] *Taylor* case, (n 14) 38.

The Special Court has the definitive features of international institutions, and its international status is irrespective of Resolution 1315.[116] Although the Court shares certain features of the mainstream international courts, it is fundamentally different from the ICTY and the ICTR with regard to the non-applicability of head of state immunity to those Tribunals.

The Special Court cannot arrogate to itself the powers of an international tribunal like the ICTY or the ICTR, powers that even the ICC lacks. The ICTY and ICTR are subsidiary organs established by the Security Council.[117] As stated earlier, the constitutive instruments of the ICTY and the ICTR (including the provisions removing head of state immunity) are binding upon all member states of the UN by the combined effect of Articles 25 and 103 of the Charter of the UN. The ICC, on the other hand, has its legal basis in a treaty, and its constitutive instrument (including the provision removing head of state immunity) is binding only upon parties to the treaty.[118] Being a treaty-based institution, the Special Court was like the ICC in this regard.

In coming to its decision, the Appeals Chamber sought counsel in the submissions of *amici curiae*. In summarising the submission of Professor Philippe Sands, QC, the Court stated thus:

> ...In respect of international courts, international practice and academic commentary supports the view that jurisdiction may be exercised over a serving Head of state in respect of international crimes. Particular reference may be had to the Pinochet cases and the Yerodia case.[119]

Also, the Court summarised the submissions of Professor Diane Orentlicher thus:

> For the purposes of the distinction between prosecutions before national and international criminal courts recognised by the ICJ and other authorities, the Special Court is an international court and may exercise jurisdiction over incumbent and former Heads of state in accordance with its statute.[120]

As earlier submitted, the international status of the Special Court, by itself, is not decisive of the issue of head of state immunity before the Court. The *amici curiae* briefs did not consider the *pacta tertiis* principle in their analysis of the question

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[116]Charles Chernor Jalloh argues that the conclusion of the Special Court is undermined by the methodology adopted in arriving at the conclusion as well as the 'weak justifications' given in support, see 'The Contribution of the Special Court for Sierra Leone to the Development of International Law', (2007) 15 African Journal of International and Comparative Law 165, 192, 197-198.

[117]See UN Charter (n 16) Articles 7 and 29.

[118]Or where the Security Council, acting under Chapter VII of the Charter, refers a matter to the ICC, see Rome Statute (n 93) Article 13.

[119]ibid 17(a). Sands argued that the Special Court was an international court with similar competence and jurisdiction to the ICTY, ICTR and the ICC and that it had '...the characteristics associated with classical international organisations'. Brief available at <http://www.icc-cpi.int/NR/rdonlyres/27928AD2-4ECB-4611-95B7-F9F0AE2DBF24/0/Sands.pdf> accessed 14 June 2016.

[120]ibid 18(a).

whether Charles Taylor was entitled to immunity before the Special Court at the time of his indictment as a serving Head of State.

The Appeals Chamber, in dismissing the application on behalf of Charles Taylor, relied on the *Arrest Warrant* case, as well as the fact that Article 6(2) of its Statute was materially the same as the relevant provisions of the Statutes of the ICTY, ICTR, ICC and even the Nuremberg Tribunal removing head of state immunity.[121] It also relied on the view of Lord Slynn of Hadley in *Pinochet* that there is a trend towards the non-recognition of immunity for certain crimes before international tribunals.[122] The Court found that since Article 6(2) of its Statute was not in conflict with any peremptory norm of general international law, it must be given effect.[123]

It is submitted that the decision of the Appeals Chamber is flawed. The similarity between the provisions of the Statute of the Special Court and those of the ICTY, ICTR, ICC and International Military Tribunals does not change the nature of the constitutive instrument of the Special Court and the extent to which states are bound by it, which is fundamental to the question of immunity of Charles Taylor. Moreover, the scope of the decision of the ICJ in the *Arrest Warrant* case and the House of Lords in the *Pinochet* case has been established in this article and is not authority for an argument that any international court may exercise jurisdiction over incumbent heads of state. The Special Court does not come within the contemplation of the ICJ of 'certain international courts' before which there can be no immunity.[124] The non-recognition of immunity for international crimes before *certain* international tribunals does not establish the non-applicability of immunities for heads of states for international crimes before *any* international tribunal.

The Appeals Chamber adopted a 'one-size fits all' approach in its treatment of the issues of the status of the Special Court and the immunity of Charles Taylor resulting in the flawed analysis and conclusions. In his Dissenting Opinion in *Prosecutor v Radislav Krstic* before the ICTY, Judge Shahabudeen asserted that

> . . .there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts. If that is the result, it does not come about, as it were, through some simple repulsion of opposed juridical forces; a recognisable legal principle would have to be shown to be at work, such as an agreement to waive the immunity. International criminal courts are established by states acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of states members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court states signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise.[125]

[121] ibid 44-47, 50.

[122] ibid 52.

[123] ibid 53.

[124] *Arrest Warrant* Case (n 15) 61.

[125] Case IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, [11-12], available at <www.icty.org> accessed 14 June 2016.

In *Prosecutor v Charles Ghankay Taylor*,[126] much was made about the lack of Chapter VII of the UN Charter in the establishment of the Court—an argument relied on by Taylor in asserting that because the Special Court was not established by the Security Council acting under Chapter VII, the Court could not therefore be said to be an international tribunal like the ICTY and ICTR. As a result, the Special Court is a national court and must respect the immunities of states. This view is drastic. Denying the Special Court an international status, which it possessed in all important aspects, simply because it was not established like the ICTY and ICTR is tantamount to 'throwing the baby out with the bath water'.

Even more drastic is the view of the Appeals Chamber, making irrelevant Chapter VII powers despite the treaty-based nature of the Court, in its assertion that the Court having been established by an Agreement between the UN and Sierra Leone, all UN members must be deemed to have entered into the Agreement with Sierra Leone and cannot avoid obligations arising under the Agreement.

In view of the treaty-based nature of the Special Court, the Court cannot remove the immunities of third states and their officials. Thus, the Special Court could not remove the immunity *ratione personae* of Charles Taylor established under customary international law in the absence of an express waiver of immunity by Liberia in violation of the *pacta tertiis* principle.

The Special Court did not possess a nature that enabled it to issue an indictment against Taylor while in office in violation of his immunity *ratione personae* as Head of State. However, Taylor's personal immunity was limited to the period of his incumbency as President of Liberia. Having vacated office, Taylor was no longer entitled to immunity *ratione personae* but rather was subject to the jurisdiction of the Special Court for criminal acts in the territory of Sierra Leone but was only entitled to immunity *ratione materiae* for official acts. Acts of the kind with which Taylor was charged were pursued in his personal capacity. Thus, the Special Court should have cancelled the indictment and arrest warrant against Charles Taylor, as Belgium was directed to do by the ICJ in the *Arrest Warrant* case, and issued a new indictment and arrest warrant against him.

The Appeals Chamber in its decision entertained, albeit in passing, the possibility of issuing a fresh indictment but only had Taylor's application challenging the jurisdiction of the Court succeeded.[127] In view of the fact that the Chamber noted in its decision that Taylor no longer being the Head of State and the immunity *ratione personae* he enjoyed no longer attached to him, one fails to see why the Court did not cancel the existing indictment and order the issuance of a new indictment.[128] The invalidity of the indictment is not just a mere procedural error; it is a fundamental error that goes to jurisdiction of the Special Court and the entire proceedings.

[126] *Taylor* case (n 14).

[127] *Taylor* case (n 14) 59.

[128] ibid.

Legal proceedings are not self-correcting, especially criminal proceedings.[129] Being a jurisdictional issue that even the Appeals Chamber had the competence to raise *suo motu*, the decision of the Appeals Chamber is disappointing. Jurisdiction is fundamental to any legal proceedings. Without jurisdiction, a judgment, however legally sound, is liable to be upturned upon appeal.

Although the indictment was amended in May 2007, it is submitted that the amendment did not cure the original defect. A fresh indictment was necessary to vest the Special Court with jurisdiction to have proceeded to the merits of the case, which resulted in Taylor's conviction and 50-year imprisonment term. A fresh indictment would not have affected the expediency of the trial since he was no longer Head of State. In its desperation to ensure that Charles Taylor is made accountable for his involvement in international crimes, the Special Court for Sierra Leone subverted international law.

There is a need to balance accountability for international crimes with principles of international law. This is highlighted in the decision of the European Court of Human Rights in *Al-Adsani v United Kingdom*, which expressed the view that international crimes, even *jus cogens* norms like torture, must be construed as coexisting with other recognised principles of international law.[130] This is especially so where there is no conflict. As stated by the ICJ in the *Arrest Warrant* case, immunity does not mean impunity.[131] Immunity is a procedural rule and does not negate the substantive provisions of international norms or criminal responsibility 'but merely diverts any breach of it to a different method of settlement'.[132] To this end:

> . . .immunities are conferred to prevent foreign states from unduly interfering in the affairs of other states and from exercising judicial jurisdiction over another state in circumstances where it has not consented. It makes little difference whether the foreign state seeks to exercise this judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to. To suggest that immunity is non-existent before an international tribunal that has not been consented to by the relevant state is to allow subversion of the policy underpinning international law immunities.[133]

7 Judicial Assistance and Cooperation with the Special Court for Sierra Leone: Chapter VII *ex Post Facto*?

Unlike the ICTY and ICTR, which have primacy over states and their constitutive instruments effectively imposing obligations of cooperation and assistance on states, the Special Court is devoid of such powers. The Agreement establishing the Special Court is not binding on other states, for example, Nigeria, Ghana or Liberia. States

[129]That is the whole essence of amendment of charges in criminal law.

[130](2002) 34 EHRR 11.

[131]*Arrest Warrant* case (n 15) 60.

[132]Fox (n 80) 525.

[133]Akande (n 71).

cannot lawfully come to an agreement to deprive another state of its sovereign right. The number of parties to such an agreement is irrelevant so long as the state whose right is in issue has not given its consent to the deprivation.[134] *A priori*, the Special Court having its legal basis in an agreement between the UN and the Government of Sierra Leone, it cannot assert primacy over third states and compel them to try accused persons in their territory or to surrender them to the Court or even subpoena witnesses or documents.[135] As such, Ghana was not under obligation to cooperate with the Court when it sought Taylor's arrest in 2003.[136] Likewise, Nigeria could not have been legally compelled to surrender Taylor to the Special Court. The only option that was open to the Special Court was to enter into agreements for cooperation and assistance with states, like the ICC.[137] The argument, therefore, that UN members are bound by the Agreement between the Secretary-General on behalf of the UN and the Government of Sierra Leone is too remote to create obligations for states to cooperate with the Special Court. The Secretary-General cannot make decisions or take actions binding on the individual members of the UN.[138] The involvement of the UN in the establishment of the Court cannot justify a reliance on Article 103 of the UN Charter to the effect that the obligations of members to cooperate with the Special Court precede their obligations to respect head of state immunity. Article 103 is clearly inapplicable to the situation since there is no conflict of obligations of states.

On 16 June 2006, following the arrest of Taylor by UNMIL forces and his transfer to the Special Court, the Security Council passed Resolution 1688.[139] The Council, in Resolution 1688, voiced concern that although Taylor had been brought before the Special Court in Freetown, his continued presence in the West African sub-region would impede stability and be a threat to the peace of Liberia and Sierra Leone and to international peace and security in the region. Importantly, and for the first time since its decision requesting the establishment of the Special Court, the

[134] ibid 417.

[135] See *Blaskic (Subpoena) case*, (1997) 110 *ILR* 607.

[136] In fact, Ghana would have violated its customary law obligation to respect the immunity of Liberia and its Head of State had it arrested Taylor in 2003 when he was still a serving Head of State upon his visit to Ghana for peace talks.

[137] Rome Statute (n 93) Article 87(5).

[138] However, the acts of the Secretary-General are not without legal effect. This is because his involvement in the creation of the Special Court arose from a Security Council recommendation and while these recommendations may not have a binding effect, they may produce effects of legality if taken up by states. However, this alone cannot confer on the Special Court a power it does not lawfully have.

[139] S/RES/1688 (2006). In S/RES/1638 (2005), the Council determined that Taylor's return to Liberia, i.e. without his standing trial before the Special Court, would constitute an impediment to stability and a threat to the peace of Liberia and to international peace and security in the region. As a result, the Council extended the mandate of UNMIL to include Taylor's arrest and transfer to Sierra Leone for prosecution by the Special Court. See Alexander Orakhelashvili, 'The Power of the UN Security Council to Determine the Existence of a Threat to the Peace' (2006) 1 Irish Yearbook of International Law 61, 83.

Council imposed obligations on states to cooperate with the Court. Operative Paragraph 4 of Resolution 1688 provides:

> [The Security Council Acting under Chapter VII of the Charter of the United Nations], requests all states to co-operate to this end, in particular to ensure the appearance of former President Taylor in the Netherlands for purposes of his trial by the Special Court, and encourages all states as well to ensure that any evidence or witnesses are, upon the request of the Special Court, promptly made available to the Special Court for this purpose.

In the absence of a contrary intention by the Security Council, Resolution 1688 is not retroactive and does not cure the fundamental defect of the indictment of Charles Taylor by the Special Court while he was still Head of State.[140] More importantly, Paragraph 4 of Resolution 1688 in its imposition of a binding obligation on states is limited to rendering judicial assistance and cooperation by ensuring Taylor's appearance in the Netherlands to stand trial and to ensure that the Special Court was availed of evidence and witnesses in Taylor's trial. Having stepped down as Head of State of Liberia three years before the passing of Resolution 1688, and so no longer entitled to immunity *ratione personae*, it is submitted that it would have been unnecessary for the Council to employ its Chapter VII powers to remove Taylor's personal immunity.

Contrary to the position of the Special Court, the Security Council never intended the Special Court to have jurisdiction over Mr Taylor while he was still the President of Liberia. If it did, then it is wondered why the Council did not establish the Special Court under Chapter VII like the ICTY and the ICTR, knowing fully the implications of such an action, rather than making a 'recommendation' to the Secretary-General. In corroboration, it was not until 2006 after Taylor had left office that the Council decided in passing Resolution 1688 to ensure judicial assistance and cooperation in securing the attendance of Taylor and witnesses at his trial.

The application of the principle of non-retroactivity to Resolution 1688 would mean that the issue of obligation of states to cooperate with and assist the Special Court must be considered in two phases: firstly, the period between the entry into force of the Agreement establishing the Special Court (25 April 2002) and the adoption of Resolution 1688 and, secondly, from 16 June 2006. The Agreement establishing the Special Court and the Statute of the Court make no provision for third states to cooperate with or judicially assist the Court. To do so would violate the *pacta tertiis* principle and Article 34 of the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations 1986.[141] Furthermore, prior to 2006, the Council did not invoke its Chapter VII powers in its exhortation of states to cooperate with the Special

[140] On non-retroactivity of Security Council Resolutions, see *Lockerbie Case*, Preliminary Objection (1998) ICJ Reports 9, [44]; Marko Divac Öberg, 'The Legal Effect of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 European Journal of International Law 879, 893.

[141] (1986) 25 ILM 543. The Convention is not yet in force but its provisions are reflective of customary international law. Article 34 of the Convention is *in pari materia* with Article 34 Vienna Convention on the Law of Treaties 1969, (n 65).

Court.[142] Even in resolutions under Chapter VII, the Council ensured that the exhortations did not come under the sections passed under Chapter VII.[143]

Prior to Resolution 1688, the Special Court did not enjoy primacy over third states and could not compel cooperation and assistance by these states. The orders of the Court were at par with those of national courts—they could not be enforced in another state without the consent of that state established in a legal agreement.

However, effective from 16 June 2006, states were obliged to cooperate with and assist the Special Court by ensuring the appearance of Charles Taylor at his trial in the Netherlands and promptly making available to the Court any evidence or witnesses requested by the Court for the trial. This is because of the decision of the Security Council to invoke its Chapter VII powers in the imposition upon states of the obligation of cooperation with the Special Court in Resolution 1688. By Article 25 of the UN Charter, states are bound by the decision of the Security Council expressed in Resolution 1688. The source of the obligation of cooperation proceeds from the Charter, and by virtue of Article 103, the obligation of states to cooperate with the Special Court, since 16 June 2006, prevails over any other international obligation. The use of the terms 'requests' and 'encourages' in the language of Resolution 1688 does not affect the binding nature of the obligation.[144]

8 Conclusion

International law has moved from its classical positivist state-centric approach to an approach that recognises the increasing importance of individuals, thus embracing its natural law traditions particularly in the field of human rights. The dynamism of law is more evident in international law than in other areas of law due to the uniqueness of international law and its rule-making processes, as well as the marked absence of a law-making body and an adjudicatory body with comprehensive and compulsory jurisdiction.

While accountability for human rights violations is a welcome development in international law, it is not to be achieved at the expense of the very foundation of international law—sovereignty. Although a court possesses *kompetenz-kompetenz* to determine whether it has jurisdiction over proceedings, the decision of the Appeals Chamber was a desperate attempt to assert jurisdiction over the proceedings. Being an international or internationalised court was not enough to give the Special Court for Sierra Leone jurisdiction to have issued the indictment over Charles Taylor at the time he was still Head of State in violation of international law recognising his personal inviolability and the *pacta tertiis* principle in the absence of any other rule

[142] See S/RES/1315 (2000), S/RES 1620 (2005).

[143] See S/RES/1562 (2004); S/RES/1610 (2005).

[144] See *(South West Africa) Advisory Opinion,* (1971) ICJ Reports 16, 114.

of international law binding Liberia to the jurisdiction of the Special Court or in the absence of Liberia's waiver of Taylor's immunity.

Immunity applies as an exception to the adjudicatory jurisdiction of states. It does not imply an absence of legal liability but merely implies an absence of jurisdiction, i.e. adjudication is circumscribed by rules on immunity.[145] Immunity does not negate criminal responsibility, and having averted its mind to the possibility of quashing the indictment and reissuing another indictment. The Special Court had an opportunity to remedy its jurisdiction over Charles Taylor, and the importance of the case to the development of international law, globally and regionally, was such that the Special Court should have made the most of the opportunity.

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[145]Lord Hewart, C.J in *Dickinson v Del Solar; Mobile and General Insurance Co. Ltd (3rd Party)*, 5 *ILR* 299. See also *Arrest Warrant case,* (n 15) 60; Yoram Dinstein, 'Diplomatic Immunity from Jurisdiction *Ratione Materiae*' (1966) 15 International and Comparative Law Quarterly 76, 81.

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Part IV
Natural Resources/Environmental Law

Mainstreaming Environmental Justice in Developing Countries: Thinking Beyond Constitutional Environmental Rights

Rhuks Ako

Contents

1 Introduction

Human rights provisions, particularly constitutional environmental rights, are essential to promoting environmental justice. They provide the basis upon which citizens may challenge and thereby limit government's potential to abuse its powers to deny the citizenry's fundamental freedoms, which in the contemporary world we live in

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includes environmental rights. While an increasing number of national constitutions now recognize the importance of integrating environmental concerns, many do not adopt a rights-based approach. The paper argues that although constitutional recognition is important, there are other factors that may promote or limit environmental justice (particularly in developing countries) such as the reliance on resource revenues for national income, sociopolitical history, judicial activism, and ethnic considerations. These arguments are highlighted by the experiences drawn from four case study countries—Nigeria, South Africa, India, and Papua New Guinea. Although these countries share common political history, hence certain shared values, including respect for human rights, they recognize environmental rights at different levels, arguably as a result of the factors listed above. Adopting a comparative analysis of relevant constitutional provisions that form the basis for the recognition of environmental rights in these four countries, the paper highlights how these provisions contribute to the attainment of environmental (in)justice. While adopting the position and concluding that constitutional (environmental) human rights provisions are important to the promotion and attainment of environmental justice in developing countries, the paper posits that it is essential to draw specific attention to other issues that influence the dynamics of environmental justice in such countries.

1.1 Conceptual Issues

Human rights are widely considered to be those fundamental moral rights of a person that are necessary for a life with human dignity.

In other words, human rights are grounded in human dignity as expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR).[1] Human rights, however inalienable they are to humans, are recognized by the legal system to make them identifiable, hence capable of being protected and enforceable.[2] While this statement is true for all generations of rights, it is arguable that fundamental human rights, or first generation rights, have secured an "enforceable status" within legal frameworks, mostly the constitutions. This position is less so for third generation rights that environmental rights fall within. These rights, still considered to be evolving, are caught up in the "proliferation of rights" debate.[3] While these rights, specifically (constitutional) environmental rights

[1]Koen De Feyter, 'Sites of Rights Resistance' in Koen De Feyter, Stephan Parmentier, Christiane Timmerman and George Ulrich (eds), *The Local Relevance of Human Rights* (CUP 2011) 11-39.

[2]Jack Donnelly, 'The Social Construction of international Human Rights' in Tim Dunne and Nicholas Wheeler (eds), *Human Rights in Global Politics* (CUP 1999).

[3]Seigfried Van Duffel, 'Moral Philosophy' in Dinah Shelton (eds), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 32-53.

that this piece is more concerned with, have increasingly gained recognition on the international level, the story is rather haphazard on national fronts.

For the purpose of this discussion, constitutional environmental rights refer to substantive rights, which, independently of extant protected rights, bestow, advance, and/or protect citizens' rights to derive and enjoy the benefits of a healthy environment. The crucial point to note is that to qualify as a constitutional environmental right, the provision has to expressly make the enforceability of environmental protection/standards its main concern, thereby creating a "right." Indeed, as subsequent discussions will reveal, there are other constitutional provisions that refer to environmental protection but do not aim to bestow a "right" on their citizens. While these do not fall within the description of constitutional environmental rights *strictu sensu*, some of such provisions have been interpreted broadly in some jurisdictions and may be referred to as inchoate constitutional environmental rights. These "inchoate" rights, when enforced, produce the results that the substantive rights aim to achieve and, in this sense, equally promote the protection/attainment of environmental justice.

Defining environmental justice is not a straightforward task as it means different things to different people. Generally, "the overall motive of the concept is to promote and protect equality and fairness in the distribution of environmental adversities."[4] However, the fact that it is applied to a widening spectrum of serious social concerns, particularly those related to communities that suffer from social inequity attributed to environmental inequalities, makes a pragmatic approach to defining it alluring.[5] Thus, the societal context within which discussions of environmental (in)justice are ongoing is central to the definition, as well as understanding and application of the paradigm with political, economic, social, cultural, and historical considerations being the core influential factors.[6] For instance, while the definition offered by the United States' Environmental Protection Agency (USEPA) highlights racial factors, the socioeconomic disparity between the North and South is the focal challenge for the United Kingdom.[7] In developing countries, especially in Africa and the Asia-Pacific regions wherefrom the case studies of this paper are derived, the main challenge is with regard to access to environmental resources.[8]

Despite the differences in the main focus of environmental justice across territories, there is consistency in the core ideals of the paradigm. The core ideals include the reference to disadvantaged groups that should be protected from being denied equal opportunities in the fair distribution of environmental resources and their

[4]Dan Tarlock, 'City versus Countryside: Environmental Equity in Context' (1994) 21 (4) Fordham Urb L J 461-494.

[5]Charles Lee, 'Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities' (1995) 14 (4) Va Envtl L J 571-578.

[6]Rhuks Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and the Asia-Pacific* (Routledge 2013).

[7]ibid.

[8]ibid.

involvement in environmental decision making. These recurrent themes consist of distributive, procedural, and recognition elements referred to as the "three concepts of justice."[9] These three concepts form the theoretical underpinnings of the environmental justice debate. For instance, while the work of Rawls whose conception of justice as "fairness" focuses primarily on the distributive elements of justice,[10] Miller[11] and Paavola[12] argue that the legitimacy of environmental decisions must rest in part on procedural justice. Philosophers, including Young[13] and Fraser,[14] critique Rawls' distributive standpoint in their argument for a bivalent environmental justice theory that includes the "recognition" spectrum.

There are benefits in adopting this (recognition) spectrum that has since become the landmark analysis in discussions about contemporary identity-based struggles.[15] First, it recognizes that although economic class and social status are two analytically distinct issues, they are in fact intertwined bases for injustice, whose remedy is always some combination of redistribution and recognition.[16] Second, as Ong noted, the bivalent viewpoint "has significant implications for multicultural policy and in relation to social integration into multicultural and trans-national political communities."[17] The latter observation is particularly important given that the current discussion includes an analysis of environmental justice in countries with multicultural societies.

Another important factor to explore is the role of law in according "recognition," which is defined as the existence of democratic institutions that convey a communal acknowledgement of equal individual worth.[18] Despite the resistance to the

[9]Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge 2012) 10.

[10]John Rawls, 'Justice as Fairness' (1958) 67 (2) Philosophical Review 164-194.

[11]Miller D, *Principles of Social Justice* (CUP 1999).

[12]Jouni Paavola, 'Environmental Conflicts and Institutions as Conceptual Cornerstones of Environmental Governance Research' (Centre for Social and Economic Research on the Global Environment (CSERGE) Working Paper EDM 05-01 (2005)).

[13]Iris Young, *Justice and the Politics of Difference* (PUP 1990).

[14]Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Nancy Fraser and Axel Honneth (eds), *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003) 7-109.

[15]Geoff Boucher, 'The Struggle for Recognition' (Lecture delivered at the Hegel and Ethical Politics Summer School (2004)).

[16]Ako (2013) (n 6) 6.

[17]Aihwa Ong, *Flexible Citizenship: The Cultural Logic of Transnationality* (DUP 1999) quoted in Boucher (n 12).

[18]William Shutkin, 'The Concept of Environmental Justice and a Reconception of Democracy' (1995) 14 (4) Va Envtl L J 579-588.

argument for recognition as an element of justice,[19] it has developed from the status of generalized empirical findings to the level of a normatively substantive social theory.[20] Honneth opines that the conceptual framework of recognition is of central importance today because it has proven to be an appropriate tool for categorically unlocking social experiences of injustice as a whole and not simply because it expresses the objectives of a new type of social movement.[21] The law plays a central role in according recognition both normatively and in practice.[22] As noted elsewhere, the experience of social suffering has a normative core because the experience of injustice happens when an institutional rule regulating asymmetrical recognition cannot be rationally justified.[23] Honneth similarly notes the importance of law in according recognition in his argument that the legal framework now permeates economics and culture and the main conflict dynamic of modern society is the interpretation of the scope and application of the principle of equality.[24]

Furthermore, Romm notes that the unjust distribution of environmental benefits and burdens is caused by the interaction of environmental policies based on the territorial protection of resources and race-based limitations on social opportunities.[25] There are a couple of noteworthy implications from the above observation. First is that the legal framework prescribes and determines the allocation of environmental benefits and burdens. The benefits necessarily include "rights," whether constitutional or otherwise, which enable parties to protect and/or enforce their "allotted" benefits. Second, the ownership structure of natural resources will influence the allocation of environmental benefits (including "rights") and burdens with fewer rights allotted where the State is in full control of resources. Finally, race (or ethnic) considerations also influence the legal framework with consequences for access to environmental rights, among other benefits. These issues form the crux of the subsequent discussions based on the experiences of the four case study countries—Nigeria, South Africa, India, and Papua New Guinea.

[19]David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13 (3) Environ Polit 517–540.

[20]Axel Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser' in Fraser Nancy and Honneth Axel (eds), *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003) 110-197.

[21]ibid.

[22]Schlosberg (n 19).

[23]Ako (2013) (n 6) 7.

[24]Honneth (n 20).

[25]Jeff Romm, 'The Coincidental Order of Environmental Justice' in Kathryn Mutz, Gary Bryner and Douglas Kenney (eds), *Justice and Natural Resource* (Island Press 2002).

2 The Case Studies

The previous section has laid in a nutshell the theoretical foundation to the claim that environmental justice is determined to a large extent by societal laws and policies.[26] This section aims to highlight the four case study countries with the earlier part providing some justification for selecting them and the latter part highlighting the countries' profiles. The basic common factor is that all four countries share a similar political history of British colonial heritage; hence, they are all members of the Commonwealth of Nations. Consequently, they share the common values, including the elimination of all forms of discrimination, the protection of human rights, human development, equitable international society, and peaceful coexistence among nations.[27] Also, the four countries are constitutional democracies, a fundamental issue to consider when discussing issues of human rights. Under alternate forms of governments such as dictatorships, human rights issues are not considered a priority. Another important aspect arising from their political history is that they all have similar legal and judicial legacies. Finally, the selected countries are multiethnic, multicultural, and multilingual societies. This point is particularly noteworthy because, as discussed previously, the complexities of ethnic (and/or racial) considerations are important to determine recognition, both theoretically and practically.

2.1 Country Profiles

Nigeria, situated in the west of Africa is the continent's most populous country with approximately 173 million comprised of about 250 ethnic groups with three—Yoruba, Ibo, and Hausa-Fulani—being the dominant (or major) groups. Nigeria gained independence from the British in 1960 and became a republic in 1963. Following a military *coup d'etat* in 1966, the country was governed by several military dictatorships between then and 1999 with brief elected democratic governance between 1979 and 1983. Since 1999, Nigeria has maintained its democratic status as a federal State with a presidential system. The judiciary operates as a separate arm of government and is more independent now than the past few decades that the country was under military rule. Economically, the country relies almost exclusively on oil, with revenues from the resource contributing about 85% of government revenues and approximately 95% of total exports. Following the rebasing of the economy in 2014, the country is Africa's largest economy.

[26] See Luke Cole, 'Expanding Civil Rights Protections in Contested Terrain: Using Title VI of the Civil Rights Act of 1964' in Kathryn Mutz, Gary Bryner and Douglas Kenney (eds), *Justice and Natural Resource* (Island Press 2002) 187-208; Luke Cole and Sheila Foster, *From the Ground up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press 2001).

[27] Ako (2013) (n 6) 10.

South Africa: with the South Africa Act (1909), four colonies and republics (Cape Colony, Natal, Transvaal, and Orange Free State) were united as the Union of South Africa in 1910. The country became a republic on 31 May 1961, with nominal independence having been granted in 1909 (through the South Africa Act). The country's first true democratic government was elected in 1994 following the abolishment of apartheid that was an official government policy from 1948. The country's economy, the second largest in Africa, relies extensively on its mining industry valued at approximately US$2.5tn and contributing about 60% of the country's export revenues.[28] The judiciary operates independently of the executive and is globally renowned as "green."

India: the British East India Company defined India's modern political history. The company administered the region from the early eighteenth century until the mid-nineteenth century when the British government took direct control. India became independent in 1947 and is the world's largest democracy with a population of about 1.2 billion. India has witnessed giant strides and is expected to become the second-largest manufacturing country in the world in the next 5 years. Nonetheless, agriculture remains an important aspect of the economy with more than half the population engaged in it. The judiciary is independent and is well known to promote the ideals of contemporary environmental law and sustainable development.

Papua New Guinea (PNG) is made up of the eastern island of New Guinea and over 600 smaller islands and atolls with a total landmass of approximately 463,000 km^2. The country gained independence on 16 September 1975 and is one of the most diverse countries in the world in terms of its geographic, biological, linguistic, and cultural wealth.[29] The majority, about 87%, of PNG's population of 6.5 million people live traditionally—inhabiting rural areas and practicing their cultures.[30] Most of these rural areas are difficult to access due to the difficult terrain, and most places are accessible only by air or foot.[31] The economy is dominated by a large, labor-intensive agricultural sector that provides subsistence livelihood for 85% of the people,[32] forestry that contributes about 40% of GDP, and an oil and minerals sector that accounts for nearly two thirds of export earnings and over a third of government tax revenue.[33] The judiciary is now deemed to be generally independent having sustained political pressure from the executive in the past.

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[28]Peter Leon, 'Whither the South African Mining Industry?' (2012) 30 (1) J En & Nat Res L 5-27.

[29]Justin Rose, 'Country Report: Papua New Guinea' (2011) 1 (1) IUCN Academy of Environmental Law e-Journal 171-181.

[30]Freda Talao, 'Papua New Guinea: Country Report on Human Rights' (2010) 40 (1) Victoria U Wellington L R 1-24.

[31]ibid.

[32]Ebrima Faal, 'Growth and Productivity in Papua New Guinea' (IMF Working Paper WP/06/113 2006), http://www.imf.org/external/pubs/ft/wp/2006/wp06113.pdf accessed 24 May 2016.

[33]See Australian Centre for International Agricultural Research and PNG Chamber of Mines and Petroleum, 'Ownership of Extractive Resources in PNG: Position Paper - February 2012' (2012) http://pngchamberminpet.com.pg/wordpress/wp-content/uploads/We12-05-ChamberPositionPaperOnResourceOwnershipFeb2012.pdf accessed 24 May 2016.

3 The Substantive Provisions

This section critically discusses provisions that expressly or implicitly promote the right to healthy environment in the case study countries. The discussion aims to tease out the differences between situations where there are express substantive provisions (constitutional environmental rights) and otherwise. The position in the case study countries are then critically analyzed against the background of their political, socioeconomic, and cultural situations to determine if, and to what extent, these factors influence the existence of express rights and/or the recognition of the right otherwise.

3.1 Nigeria

Nigeria does not recognize constitutional environmental rights. In other words, the Constitution does not expressly provide for the right to a healthy environment. However, the State is under a duty to "protect and improve the environment and safeguard the water, air, and land, forest and wildlife of Nigeria."[34] The provision is not a "right" as it is contained in Chapter II of the Constitution of the Federal Republic of Nigeria (CFRN) titled "Fundamental Objectives and Directive Principles of State Policy," not Chapter IV, which lists the fundamental human rights of citizens. While Chapter II lists objectives that the State should strive achieving, it is declared unenforceable by section 6(6)(c) of the Constitution, which provides: "The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution." Nonetheless, the judiciary has been challenged to interpret the section proactively by imposing an enforceable duty on the State, specifically to cater for Nigeria's peculiar pluralistic society.[35]

[34]Constitution of the Federal Republic of Nigeria 1999, section 20.

[35]See Margaret Fubara-Okorodudu, 'Commentary on the Enduring Democracy and Federalism in a Democratic Nigeria' (Paper delivered by Hon. Justice Kayode Eso, at the commemoration of Chief F.R.A Williams, CFR, SAN: 60th Year in Active Legal Practice, February 2004; Olubayo Oluduro, *Oil Exploitation and Human Rights Violations In Nigeria's Oil Producing Communities* (Intersentia 2014).

However, the right to environment is recognized via the African Charter on Human and Peoples' Rights, which expressly provides for the right under Article 24. The African Charter was adopted into the country's legal framework by an enabling act in accordance with section 12 of the Constitution.[36] The Act's long title and the provisions of section 1 expressly indicate that the objective of the Act is to give effect to the African Charter locally.[37] The enforceability of the law was an issue in *General Sani Abacha and Others v Chief Gani Fawehinmi*,[38] where the defendant challenged his arrest and detention by the military government as illegal and unconstitutional on the basis that it contravened (among other constitutional provisions) Articles 4, 5, 6, and 12 of the African Charter (Ratification and Enforcement) Act. The Supreme Court of Nigeria decided that the African Charter is enforceable in the country. According to the Court, when a treaty is enacted into law by parliament, it becomes binding, and the courts must give effect to it. The Court further stated that the Charter gives to citizens of member States of the Organization of African Unity (now the African Union) rights and obligations, which are to be enforced by the courts, if they must have any meaning. Thus, barring the revocation of the African Charter following due process, the substantive right to enjoy a healthy environment subsists and remains enforceable before Nigerian courts.[39]

In *Jonah Gbemre v SPDC and Others*,[40] the enforceability of the right to environment was directly in issue. Here, the plaintiff alleged that the defendant company polluted the community's environment by flaring gas while exploring and producing oil in the area continuously for over 35 years.[41] The plaintiff argued that his community's constitutional rights to life (section 33(1)) and human dignity (section 34(1)) reinforced by provisions of the African Charter, including the right to enjoy a healthy environment (Article 24), had been infringed. He argued that oil exploration and production activities in the community contributed to air pollution and acid rain, adverse climate change, reduction in crop production, respiratory diseases, and premature deaths. In a nutshell, the case premised environmental rights abuses enshrined in the African Charter as violations of the fundamental human right to life. The judge upheld the plaintiff's argument and decided in his favor on the basis that the right to life and human dignity might be interpreted broadly to include the right to enjoy a healthy environment. However, this decision has been appealed before the Court of Appeal.

The preliminary conclusions that can be drawn from the above discussion are as follows: the CFRN does not recognize the existence of the substantive right to a

[36]African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 of 2004.

[37]Ako (2013) (n 6) 25.

[38]SC 45/1997.

[39]Ako (2013) (n 6) 25.

[40]Suit No: FHC/B/C/153/05 in the Federal High Court of Nigeria, Benin Division.

[41]ibid.

healthy environment, the right exists via the African Charter, and, finally, broadly interpreting the right to life to include the protection of environmental rights is not yet an established legal principle in Nigeria.[42]

3.2 South Africa

South Africa recognizes constitutional environmental rights via section 24 of its 1996 Constitution. It states:

Everyone has a right:

(a) To an environment that is not harmful to their health or well-being; and
(b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

i. Prevent pollution and ecological degradation
ii. Promote conservation; and
iii. Secure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development.

There are a few noteworthy characteristics of this provision. First, the provision is contained in Chapter II, which lists the Bills of Rights and is described as the "highest possible constitutional level."[43] In this regard, section 39(2) compels the judiciary to promote the spirit, purpose, and objects of the provisions of Chapter II when interpreting any legislation and/or developing the common law. In essence, the judiciary is mandated to subject its decisions—which will include the interpretation of the Constitution itself—to the provisions of Chapter II. In other words, Chapter II may be described as the "bedrock upon which constitutionalism and democracy in contemporary South Africa is built."[44] Second, the inclusion of environmental rights in the Constitution necessitates and promotes the development of subsidiary legislation to ensure that the constitutional imperatives are met.[45] Indeed, South Africa's contemporary environmental legislative and governance framework is derived from section 24.[46]

[42]Ako (2013) (n 6) 27.

[43]Kotzé L and Du Plessis A, 'Some Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3 (1) J Ct Innovation 157-176.

[44]Ako (2013) (n 6) 42.

[45]ibid.

[46]Kotzé and Du Plessis (2010) (n 43) 166.

Section 24 is wide in ambit and comprises both fundamental and socioeconomic rights. While section 24(a) has the flavor of a fundamental right, guaranteeing an enforceable right to enjoy a state of the environment that is not "harmful to health or well-being," subsection (b) is couched in terms of government responsibility to "promote the attainment" of certain environmental values.[47] Thus, section 24 does not only guarantee a substantive right, but it also imposes the responsibility on the government to ensure that future policies and laws are guided by its principles.[48] It is noteworthy that although section 24(b) seems akin to "State Policy and Directive Principles" provisions, it is not so as the provision is enforceable.[49] Other characteristics of the provision are as follows: it is binding on all three arms of government, it applies both vertically (between citizens and the State) and horizontally (between private persons), and it satisfies both intra- and intergenerational environmental concerns. The situation regarding the right to environment in South Africa is captured aptly by Judge Oliver's dictum in *The Director: Mineral Development Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*[50] thus:

> Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administration process in our country.[51]

While South Africa is a good example of a country that recognizes the substantive right to environment and a system that proactively protects and promotes the right, there are a couple of limitations. First, the jurisprudence of the right has not fully developed to concretize the right.[52] Second, there are still practical difficulties in enforcing the right to environment, more so where the issue at stake involves two competing human rights claims.

3.3 India

Constitutional environmental rights are nonexistent in India. The duties of the State toward the environment are contained in Part IV of the Indian Constitution (IC) titled "Directive Principles of State Policy." The provisions of Chapter IV are unenforceable by any court (Indian Constitution, Article 37) even though the provisions of the chapter are deemed to be fundamental in the governance of the country

[47]Jan Glazewski, 'The Rule of Law: Opportunities for Environmental Justice in the New Democratic Order' in D McDonald (eds), *Environmental Justice in South Africa*, (OUP 2002) 171-198.

[48]Ako (2013) (n 6) 45.

[49]*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[50](133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999).

[51]ibid 719.

[52]Kotzé and Du Plessis (n 43) 169.

and the State is duty bound to apply the principles under the Chapter in making laws. Regarding environmental duties, section 48A provides that the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country. The citizens bear a corresponding and similarly unenforceable duty to care for the environment under section 51A. Interestingly, Indian courts have nonetheless breathed life into these provisions, particularly section 48A, by interpreting the right to life contained in section 21 broadly to encapsulate the right to a healthy environment. Section 21 states: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

The broad interpretation of the right to life to include the right to environment is now settled law with a range of Supreme Court decisions contributing to the development of the jurisprudence. For example, the Supreme Court held that the right to life is broadly defined to include the right to environment in *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*[53] and that right to life guaranteed by section 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.[54] In *Kinkri Devi and Another v State of Himachal Pradesh and Others*,[55] the petitioners sought an order to have a mining lease canceled; to restrain the respondents from operating the mines covered by the lease in such a manner as to pose danger to the adjoining lands, water resources, pastures, forests, wildlife, ecology, the environment, and the inhabitants of the area; and for compensation for the damage caused by the uncontrolled quarrying of the limestone.

In the Court's opinion, the provisions of sections 48A and 51A(g) placed a constitutional duty on the State and citizens to protect and improve the environment. Consequently, it was left with no alternative but to intervene effectively by issuing appropriate writs, orders, and directions to promote environmental protection. The Court ordered the mines to stop their operations pending the State's proper determination of the balance between development and environment from mining operations and submission of the report to the Court.

Clearly, even though constitutional environmental rights are nonexistent in India, the right to environment is recognized and well established as an enforceable right within the broad interpretation of the right to life.

3.4 Papua New Guinea

Constitutional environmental rights are nonexistent in Papua New Guinea. However, the Preamble to the Constitution (Constitution of the Independent State of Papua New Guinea (Consolidated to Amendment No 22), 1975), which lists the National

[53](1989) AIR 594.

[54]See also *Subhash Kumar v State of Bihar* (1991) AIR SC 420.

[55](1988) AIR HP 4.

Goals and Directive Principles (NGDP), includes environmental responsibilities. Goal 4 states:

> We declare our fourth goal to be for the Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of our future generation. We accordingly call for:
>
> (1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for the future generations and;
> (2) the conservation and replenishment for the benefit of ourselves and posterity of the environment and its sacred, scenic and historical qualities: and
> (3) all necessary steps to be taken to give adequate protection to our valued birds, animal, fish, insects, plants and trees.

However, as is usual with aspirational provisions of the Constitution, the sections on the NGDP are not justiciable. There are limitations in the PNG Constitution with section 25(1), which states: "except to the extent provided in Subsection (3) and (4), the National Goals and Directive Principles are non-justiciable."

Section 25(1) makes it quite clear that the NGDPs are not completely nonjusticiable as the provision is subject to subsections (3) and (4) with the former being the main one. It states that where any law or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative, or other kind) can reasonably be understood, applied, exercised, or enforced without failing to give effect to the intention of the Parliament or this Constitution in such a way as to give effect to the National Goals and Directive Principles or at least not derogate them, it is to be understood, applied, or exercised and shall be enforced that way. In other words, where a law (broadly defined) has been made with the intention of giving effect to one of the NGDPs, such law must be interpreted as giving effect to the NGDP in question. In essence, the NGDPs are inchoate rights that may become fully justiciable by subsidiary law if such law can be "understood, applied, exercised or enforced" as providing the proper context to give effect to any goal or directive contained in the NGDP.[56]

PNG's Environmental Act (No. 64 of 2000) contains provisions that may make Goal 4 justiciable. The Act, the country's main environmental law, imposes extensive environmental obligations on the State that stem from the objectives of the Act itself (sections 4, 5, and 6) and the provisions of Goal 4 of the NGDP. For instance, section 4(b)–(d) states the objectives of the Act to include environmental protection while allowing for development in a way that improves the quality of life and maintains the ecological process on which life depends; sustaining the potential for natural and physical resources to meet the reasonably foreseeable needs of future generation and safeguarding the life-supporting capacity of the air, water, land, and the ecosystem; and ensuring adequate concern to both long-term and short-term

[56]ibid.

social, economic, environmental, and equity considerations in deciding all matters relating to environmental management, protection, restoration, and enhancement. Although the expression "right to a healthy environment" is not used in the above provisions, the contents encompass elements of the "right." It is arguable that since the Environment Act is an Act of Parliament that does not conflict or derogate from the intendment of Parliament and it can be construed as promoting Goal 4 of the NGDP in accordance with section 25 of the PNGC, it may be the basis that makes Goal 4(2) justiciable. In conclusion, while constitutional environmental rights are nonexistent in PNG, arguably, an inchoate right exists with the potential of making it justiciable.

4 Analysis

Environmental justice is now an integral aspect of the contemporary sustainable development paradigm. The environment/development debate has moved on considerably from merely concentrating on the integration of the environmental concerns into development plans and projects. Now, there is more focus on the interphase between the active involvement of populations—especially those that are most likely to be impacted by development plans and projects—in environmental decision-making processes linked to development. The recognition of constitutional environmental rights has been considered and highlighted as one of the means by which environmental rights (and justice) may be protected and promoted.

Indeed, there are several advantages of constitutional environmental rights provisions that lend credence to the above position. First, it creates a cause of action where none may have existed. Therefore, it is easier for those that would otherwise be deprived access to environmental justice to approach the courts to resolve (potential) environmental disputes. As the analysis of the four case study countries, which this section engages in subsequently, will reveal, the absence of constitutional environmental rights does not necessarily equate to absence of a cause of action. Second, where constitutional environmental rights exist, the chances of developing a robust legal framework that aims to protect and promote the right, both substantively and procedurally, is better. It is in this regard that the paper posits that the cause of environmental justice is better served where constitutional environmental rights exist.

The first point noted above is evident in the case of South Africa, the only country of the four case studies that recognizes constitutional environmental rights, that is, the substantive right to a healthy environment is expressly provided in the Constitution. The country's sociopolitical history has contributed to the integration of a comprehensive Bill of Rights into the Constitution to ensure that, following from its history of apartheid, no form of discrimination can take root in the country.[57]

[57] Andrea Lollini, *Constitutionalism and Transitional Justice in South Africa* (Berghahn Books 2011).

Embedded in the history of apartheid that the country sought to overcome are ethnic considerations of ensuring that all South Africans—black or white—were protected from facing any form of disadvantages in the postapartheid era, in other words, "recognition" from a theoretical perspective transmitted to legal recognition in constitutional provisions to ensure equality in terms of rights. With specific regard to environmental rights provisions, Article 24 of the South African Constitution creates the substantive right to environment; thus, any action thought to infringe on this right is actionable per se.

However, Article 24 cannot be a primary cause of action. The reasoning behind this is that actions should rather be based on subsidiary environmental legislation that has been made to elaborate on the broad purpose of the constitutional provision. However, where such subsidiary laws are deemed to fall short of the standard intended by the Constitution, recourse may be had to Article 24. The principle applied simply is that where subsidiary legislation has been passed to further the protection and/or actualization of a constitutional right, a litigant cannot directly plead the constitutional right without first challenging the subsidiary legislation as falling short of the constitutional standard.

This principle is noteworthy for a couple of reasons. First, it relates to the point made previously that constitutional rights, in a sense, make it obligatory on the State to make subsidiary legislation to elaborate the "right," including definition, scope, application, and protection, among other issues. With regard to Article 24, for instance, the National Environmental Management (NEMA) Act[58] is the principal environmental law that provides the broad environmental legislative framework for other Acts that regulate sectors of the environment such as air quality, protected areas, biodiversity, and mining. These subsidiary laws address issues ranging from the scope of the constitutionally environmental rights[59] to the relationship between the "right" and other constitutional rights (*Minister of Public Works v Kyalami Ridge Environmental Association*),[60] as well as the role of the environment in sustainable development (*Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*),[61] among others.

Second, the principle is a means to determine the efficacy of subsidiary laws made by the government in furtherance of constitutional rights. Where a litigant is of the opinion that subsidiary legislation is ineffective to form the basis of their case, they may rely on the constitutional provision thereby signifying that lacunae exist between the intent of the Constitution and the regulation. Extending this position slightly further, the principle entrenches deep democratic values that government policies and laws may be challenged to determine if they fulfill the purpose of promoting constitutionally guaranteed rights.

[58]Act 107 of 1998.

[59]Glazewski (n 47).

[60](2001) 7 BCLR 652 (CC).

[61]Case CCT 67/06 [2007] ZACC 13.

At the opposite end of the spectrum to South Africa is PNG, which does not recognize the right to environment. As noted earlier, while an academic argument may be put forward that the right is inchoate, in reality, at least until positive steps are taken to realize the potential of the relevant legal provisions, the right is nonexistent. Consequently, the rules relating to elements of environmental justice are negatively impacted. Unsurprisingly, the country has not ratified several international and regional agreements that promote environmental rights, such as the ICCPR and ICESCR. As a result, the rights and protection that these treaties offer citizens and the environment are not accessible in PNG (Papua New Guinea Constitution, section 117). Technically, because these treaties are not legally binding, they may not form the basis of judicial decisions in the country. However, the courts may refer to these treaties when determining whether an act or a law is "reasonably justifiable in a democratic society" having regard to international human rights conventions pursuant to section 39 of the Constitution.

In between the two extremely opposing situations discussed above are Nigeria and India, which share a couple of similarities. First, both countries' constitutions contain State environmental duties in nonjusticiable chapters, and second, the right to life has been broadly interpreted to include the right to environment, albeit with different degrees of success. There is a remarkable difference in both countries as Nigeria, being a signatory to the African Charter and having localized it, has incorporated the right to environment as a "justiciable right." Nonetheless, India's progress with regard to the recognition and enforcement of the right to environment surpasses Nigeria's due to the judicial activism in the former.[62] While there is now established jurisprudence regarding the existence of the right to environment in India via the broad interpretation of the right to life, this is not so in Nigeria. The position of this paper is that the dynamics of Nigeria's oil industry—ownership structure and importance to the national economy—has stalled judicial activism and, more broadly, the lack of development in the evolution of the jurisprudence of the recognition of the right to environment.

Briefly, oil is central to Nigeria's political (in)stability, economic fortunes, socioethnic relationships, among others.[63] Oil-related conflicts of different dimensions have plagued the country since the resource was discovered in commercial quantities. These conflicts have deep-rooted causes in the (lack of) "recognition" of host communities that are deprived of active involvement in the industry that has negative impacts on them and their environment. Opposition to the industry—partnership between the government and the oil multinationals—has navigated through various dimensions, peaceful and violent alike. The response thus far has included granting amnesty to militant opposition groups and the creation of State

[62]Michael Anderson, 'Individual Rights to Environmental Protection in India' in Michael Anderson and Alan Boyle (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 199-226.

[63]Cyril Obi, 'Globalization and Local Resistance: The Case of the Ogoni versus Shell' (1997) 2 (1) New Polit Econ 137-148.

development-focused institutions and improved corporate structures to handle "social responsibility."[64] However, "legal recognition" of host community rights, which is arguably the fundamental issue, remains unchanged irrespective of the fact that this is the main conflict driver in the region, as noted previously.[65]

Thus, the legal framework regulating the oil industry creates "environmental injustices," and this is purposely so as to ensure that the revenue streams from the resource to the State and oil corporations are protected. Furthermore, there are occurrences that suggest that the State has meddled with the judicial process averting the recognition of host communities' environmental rights and stalling the development of the right to environment jurisprudence. A case that highlights these assertions is the *Gbemre* case discussed previously.[66] As noted, the judge accepted the plaintiff's argument that the right to life and human dignity can be broadly defined to encompass the right to environment and ordered an immediate end to gas flaring. The defendants continued to flare gas, and contempt proceedings were filed against them. The Court then granted a conditional stay of order on its earlier decision based on three conditions:

1. Shell and NNPC (Nigerian National Petroleum Corporation) "are allowed a period of one year from today to achieve a quarterly phase-by-phase stoppage of its gas flaring activities in Nigeria under the supervision of this Honourable Court."[67]
2. The Managing Director of Shell Nigeria, the Group Managing Director of the NNPC, the Nigerian Petroleum Minister, and the Company Secretary of NNPC are ordered to "submit a detailed phase-by-phase technical scheme of arrangement, scheduled in such a way as to achieve a total non-flaring scenario in all their on-shore flow stations by 30th April 2007."[68]
3. These four individuals are ordered to appear before the judge to present the same in open court on May 31, 2006.

Shell and NNPC appealed the conditional stay of execution and the conditions. The Court of Appeal ordered the lower court not to sit on May 31, 2006, effectively voiding the third condition and adjourning the jurisdiction appeal. To date, the appeal on jurisdiction has not been heard, thereby setting aside the decision of the High Court indefinitely. Interestingly, it was reported that the staff of the Court of Appeal wrongly adjourned the case without any notice to the applicant or his lawyers

[64]Rhuks Ako, 'Environmental Justice in Nigeria's Oil Industry: Recognizing and Embracing Contemporary Legal Developments' in *Global Environmental Law at A Crossroads* R Percival, J Lin and W Piermattei (eds), (Edward Elgar 2014) 160-176.

[65]ibid.

[66]*Gbemre* (n 40).

[67]ibid.

[68]ibid.

and also misplaced the case file.[69] Furthermore, the judge who heard the case initially at the High Court was transferred to the north of the country, a move deemed to be punishment for his earlier decision. It is opined that the stagnation of the case is a purposeful attempt to ensure that the decision recognizing the right to environment as an enforceable right does not develop in Nigeria due to the "negative" consequences it will have on the oil industry. Enforcing the right is bound to have repercussions for the oil industry, especially with regard to compensation payments to plaintiffs and increased investments to improve environmentally friendly oil-field practices.

One of the contested issues arising from the above case is whether (or not) the procedure under which it was heard is the appropriate one.[70] Briefly, the case was heard under the Fundamental Rights Enforcement Procedure Rules (FREP), which is a fast-track process to determine cases bordering on fundamental human rights abuses, that is, rights expressly granted by the Constitution. In this case, the fact that the plaintiff's case also hinged on the right to environment that is provided by the African Charter, not a constitutional environmental right, casts doubts on the appropriateness of the court adopting the process. Ebeku argues that the adoption of the procedure may form one of the grounds for a successful appeal,[71] a position highlighted in *Ikechukwu Okpara & Others v Shell Petroleum Development Company Nig. Ltd. and 5 Others*.[72] While the new FREP Rules expressly lists the rights contained in the African Charter as those falling within its remit (thus the decision in cases similar to *Okpara's* case will be different now), what is obvious is that there is a substantial difference in the character of a constitutional right and otherwise.

The major points to be gleaned from the Nigerian situation are that there are important, yet easily overlooked, issues that contribute to the recognition and enforcement of environmental rights. Issues such as natural resource management and judicial proactiveness are the two that are highlighted in this paper. Indeed, as with the case in India, one can argue that judicial activeness is also aided by a diversified economy. The argument made here is that it is more likely that the judiciary will be under increased pressure to protect an industry that is the single source of national income. The impact of a practically monolithic economy is captured in the dictum of a Nigerian judge in *Allan Irou v Shell.*[73] In that case, the

[69]Rhuks Ako, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India' (2010) 3 (1) NUJS Law Review 423-445; Eferiekosa Ukala, 'Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices' (2011) 2 Wash & Lee Journal of Energy, Climate, & Env't 98-126.

[70]Kaniye Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v Shell* Revisited' (2007) 16 (3) RECIEL 199–208.

[71]ibid.

[72]Suit No. FHC/PH/CS/518/2005. The case with facts similar to *Gbemre's case*, was held to be procedurally defective on the grounds (among others) that the rights created by the African Charter were beyond the definition ascribed to 'fundamental rights' as contemplated by section 46 CFRN and so cannot be enforced by means of FREP Rules.

[73]Suit No W/89/91, Warri HC/26/11/73.

judge while refusing to grant an injunction in favor of the plaintiff whose land, fish pond, and creek had been polluted by the activities of the defendant oil company stated that nothing should be done to disturb the operation of the trade (oil), which is the main source of Nigeria's revenue. It is notable that at the time the decision was delivered, the country was basking in the euphoria of the oil boom of the 1970s. The risk of this sort of reasoning in countries where constitutional environmental rights are nonexistent is real, especially in developing countries.

5 Conclusion

The paper, based on the "legal recognition" framework, a subset of the environmental justice theory, highlights the important role that the legal framework plays in the allocation of rights. The paper highlights the importance of the constitutional recognition of the substantive right to environment (constitutional environmental rights), which it deems fundamental to promoting and protecting environmental justice. While indicating that there are factors that influence legal recognition, the paper also highlights those that limit the recognition of the right to environment and environmental justice. Based on four case study countries, it revealed that the history of South Africa's political and ethnic relations turned out to be positive drivers for "recognition." The country is the only one of the four countries discussed in this article that recognizes constitutional environmental rights.

Nigeria's circumstances highlight how the lack of recognition instigates natural resource conflicts and affects the legal framework, particularly in countries that rely extensively on a single resource economically. Here, even though the right to environment is legally recognized, the development of the jurisprudence has been stunted to protect economic interests linked to oil. The position in India, though similar to Nigeria to an extent, has results that far surpass Nigeria's. It reveals that the independence of the judiciary, as well as the desire to be proactive, can derive positive results both to recognize the right to environment as enforceable and the pursuit of environmental justice. The situation in PNG reveals that some countries still remain oblivious to the importance of environmental justice.

Following from these observations, some recommendations are briefly made. First, although constitutional environmental rights are critical to attaining environmental justice, this is by no means a prerequisite. As noted, judicial enterprise is an alternative. Thus, rather than academic and policy discourses laying continuous emphasis on changing legal provisions, focus should also be on training and advising key actors that may implement extant legal provisions to their advantage, for instance, in relevant cases, the use of experts as *amicus curiae*, training of local NGOs and legal representatives involved in promoting environmental justice, and even offering training to national judicial officers. Indeed, as the paper revealed, where there is a deficit in the knowledge of judicial officers, environmental injustices occur. Also, it is important to study local conditions to determine the challenges that affect the development of environmental justice and integrate these into seeking the

way forward. As Ali noted, environmental justice connects with issues of social justice that question sociopolitical and economic institutional arrangements of societies.[74] Thus, legal provisions, or even judicial attitudes, should be considered not abstractly but as a subset of surrounding socioeconomic, political, and ethnic considerations.

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[74] Asghar Ali, 'A Conceptual Framework for Environmental Justice Based on Shared but Differentiated Responsibilities' (Issue 2 of CSERGE Working Paper, Centre for Social and Economic Research on the Global Environment (2001)).

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Environmental Victims, Access to Justice and the Sustainable Development Goals

Engobo Emeseh

Contents

1 Introduction

Victims of environmental pollution and degradation, especially those in the developing world, face significant barriers and/or challenges in their quest for justice. These challenges are systemic, arising from inadequate legal frameworks, weak institutional capacity and other wider governance and structural deficits.[1] This is

[1]Michael Greenstone & Rema Hanna, 'Environmental Regulations, Air and Water Pollution, and Infant Mortality in India' (2014) 104(10) *American Economic Review* 3038–3072; Engobo Emeseh, Challenges to Enforcement of Criminal Liability for Environmental Damage in Developing

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exacerbated by the fact that by reason of inaction on the part of regulatory agencies, private individuals are often pitted against much better resourced defendants such as multinational corporations within under-resourced systems riddled with corruption and prone to inordinate delays in the litigation process. Even the prospect of success in a limited number of high-profile cases through transnational litigation has been dealt a huge blow owing to recent decisions under the US Alien Tort Claims Act, a forum previously thought to be one of the most promising.[2] Similarly, while there has been some positive jurisprudence emerging from regional human rights institutions in Africa, enforcement of these decisions remains a huge challenge.[3]

It is within this context that this paper explores the potential of the UN Sustainable Development Goals (SDGs)[4] as a vehicle for addressing access to justice challenges in environmental matters. This issue is particularly relevant within the context of the UN SDGs because of the wider implications and significance of environmental justice for their realisation, especially as 'environmental' sustainability is a central theme of the goals. It is now evident that human rights and environment are inextricably linked. While debate continues on the recognition of a separate right to a healthy environment, there is firm consensus that pollution and environmental degradation has direct implications on human rights generally, including the rights to life, health and food.[5] This is more so for developing countries where large numbers of people rely directly on the environment for daily subsistence and other

Countries: with Particular Reference to the Bhopal Gas Leak Disaster (2003) 1(5) *Oil, Gas and Energy Law Intelligence* 1–27.

[2]See for example Hari Osofsky, 'Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations' (1996–1997) 20 *Suffolk Transnatinal Law Review*. 335; Philip Scarborough, 'Rules of Decision for Issues Arising under the Alien Tort Statute' (2007) 107(2) *Columbia Law Review* 457–502; Douglas Brandon, 'Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation' (2011) 9 *Santa Clara J. of Int'l L.* 227.

[3]Sufian Bukurura, 'Human Rights in Sub-Saharan Africa: Towards Complementary Enforcement of Social Justice' (1997) 30(2) *Law and Politics in Africa, Asia and Latin America* 217–224 at 223. (Noting that existing mechanisms to redress social injustices in Africa are weak and inadequate); J. Mubangizi, 'Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and Gains' (2006) 6 *African Human Rights Law Journal* 160; Morris Kiwinda Mbondeyi, *International Human Rights and their Enforcement in Africa* (LawAfrica Publishing 2011) 408 (Noting that because Africa is beleaguered by illiteracy, ignorance and poverty, individuals often lack the impetus or the wherewithal to enforce the rights entrenched in the African Charter on Human and Peoples' Right 1981).

[4]Sustainable Development Goals 17 Goals to transform our World Available at http://www.un.org/sustainabledevelopment/news/communications-material/ (Accessed 13 January 2017).

[5]UNEP, 'Climate Change and Human Rights' (2015). Available at http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf (Accessed 25 April 2016); Engobo Emeseh, 'Human Rights Dimensions of Contemporary Environmental Protection' in Odello Marco and Cavandoli Sofia (eds.), *Emerging Areasof Human Rights in the the 21st Century*, (Routeledge, 2011a); Anita Halvorssen, 'International Law and Sustainable Development – Tools for Addressing Climate Change' (2011) 39(3) *Denver Journal of International Law and Policy* 397–421; Alezah Trigueros, 'The Human Right to Water: Will its fulfilment Contribute to Environmental Degradation?' (2012) 19(2) *Indiana Journal of Global Legal Studies* 599–625.

basic needs.[6] Lack of effective access to justice to redress environmental wrongs has therefore been a contributory factor in the recourse to extra-legal means, including conflicts, in some of these regions as a means of seeking redress.[7] Climate change, and its resultant impacts, is set to exacerbate tensions even further unless effective mechanisms are put in place to address environmental challenges and grievances.[8]

In exploring this issue, the paper will focus in particular on goal 16 (promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels) and the specific targets set. How may this goal be operationalised with regard to justice in environmental matters at a substantive, procedural and institutional level, including ensuring accountability of non-state actors? As well as other sources, the paper will draw upon the work of the UN special representative on human rights and environment,[9] including the 2015 report on good practices.[10]

The paper is divided into six sections. Following this introduction, Sect. 2 undertakes a brief conceptual analysis of the meaning and scope of access to justice, particularly from an environmental perspective, paying attention to key instruments such as the Aarhus Convention.[11] This provides a necessary background and context for the discussions in Sect. 3 outlining the experience of environmental victims in developing countries in their search for justice. It provides an overview of the challenges faced by these victims and the wider implications for peace and development. The strong connections between access to justice and the achievement of a range of sustainable development goals evident within this discourse lead us into the discussion in Sect. 4, which focuses on the SDGs, paying attention to the background, aims and debate leading up to their adoption, especially as regards goal 16 and the inclusion of access to justice as a key part of this goal. Section 5 then

[6]Trigueros, ibid, 620. Identifying water as a basic need, Trigueros noted that despite General Assembly adoption of Resolution 64/292 in July 2010 recognising access to safe and clean water as a human right, there is a failure to enforce this right especially in developing countries.

[7]Mbondeyi, (n 3) 393. Engobo Emeseh, 'The Niger Delta Crisis and the Question of Access to Justice' in Obi Cyril I and Rustad Siri A (eds.), *Oil and insurgency in the Niger Delta* (Zed Books 2011b).

[8]Halvorssen, ibid, 415.

[9]United Nations Human Rights Office of the High Commissioner, 'Special Rapporteur on Human Rights and the Environment (Former Independent Expert on Human Rights and the Environment)' John Knox has been Special Rapporteur since August 2012, reappointed for another three years in 2015. Available at http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx (Accessed 13 January 2017).

[10]See United Nations Mandate on Human Rights and the Environment John H Knox, UN Special Rapporteur, 'Good Practices Report – 2015' (hereinafter '2015 Good Practices Report'). Available at http://srenvironment.org/good-practices-report-2015/ (Accessed 13 January 2017).

[11]At its fourth ministerial conference as part of the 'Environment for Europe' on 25 June 1998, the United Nations Economic Commission for Europe (UNECE) adopted the 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' Aarhus Denmark. The 'Aarhus Convention' entered into force on 30 October 2001. http://ec.europa.eu/environment/aarhus/ (Accessed 15 January 2017).

explores goal 16 in much more detail, in particular its operationalisation within the context of access to justice in environmental matters. The analysis in this section draws upon the work of the UN Special Rapporteur on Human Rights and Environment, John Knox, especially the 2015 report compilation of good practices.[12]

2 Access to Justice in Environmental Matters

The obvious starting place for a discussion on access to justice in environmental matters is Principle 10 of the Rio Declaration 1992,[13] where it is identified as one of three key procedural environmental rights (the others being the rights to participation in decision-making and access to environmental information) that were later enshrined in the binding UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') 1998.[14]

However, despite this relatively recent history in relation to environment, access to justice is a long-established concept, which is an intrinsic component of the rule of law, the cornerstone of any democratic system. Although not amenable to an easy and ready definition, at its core are the principles of equal protection by the law, equal and fair treatment within the justice system and effective redress or remedy. These underlying components of access to justice are provided under Articles 7–11 of the United Nations Universal Declaration of Human Rights 1948 (UDHR)[15] and reinforced and applied to specific areas of focus under the (ICCPR)[16] and the

[12]2015 Good Practices Report (n 10).

[13]Principle 10 of the Rio Declaration on Environment and Development seeks to ensure that every person has access to information, can participate in the decision-making process and has access to justice in environmental matters with the aim of safeguarding the right to a healthy and sustainable environment for present and future generations. See 'Report of the United Nations Conference on Environment and Development (Rio d Janeiro, 3–14 June 1992)'. Available at http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (Accessed 15 January 2017).

[14]Aarhus Convention, (n 11) art 1.

[15]Articles 7–11 of the UDHR 1948 provide that everyone shall be equal before the law, the right of everyone to effective remedy under the law, non-subjection to arbitrary arrest, the right to fair and public trial and the right to be presumed innocent until proven guilty by a competent court, as well as the non-retroactivity of penal law. See the Universal Declaration of Human Rights Paris 10 December 1948 (General Assembly Res 217 A). Available at http://www.un.org/en/universal-declaration-human-rights/ (Accessed 13 January 2017).

[16]International Covenant for Civil and Political Rights (ICCPR) 16 December 1966, entered into force on 23 March 1976. Available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (Accessed 13 January 2017). Equivalent provisions are replicated in the ICCPR, arts 14–16.

International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).[17] In essence, access to justice is aimed at ensuring equal justice for all, regardless of personal circumstances.

What amounts to equal justice is, however, understandably open to a variety of interpretations. In practice, it is not uncommon for the debate on access to justice to be framed within the context of access to the formal justice system, effective representation and remedies within that system.[18] This is evident, for instance, from the access to justice movements in the 1960s, where a lot of the focus was on the plight of the poor, who were either unable to access the formal judicial system to seek redress for wrongs or who, when brought into the system, were unable to effectively defend themselves as a result of their inability to secure effective legal representation because of limited financial means. A crucial part of the efforts at promoting access to justice has therefore entailed the establishment of mechanisms such as legal aid to enable economically disadvantaged individuals or groups to be effectively represented by counsel. From an environmental context, implementation of the provisions of the Aarhus Convention has necessitated member states, especially within the EU, to address not only the existence of judicial institutions for dispute resolution but also issues about relaxation of strict rules on standing to sue in courts in environmental matters and addressing the prohibitive costs that may deter parties from instituting actions in court.

However, while this is an important and necessary element of the right and one where there are still huge challenges, including in environmental matters, access to justice encompasses much more than formal access to court and effective representation. Rather, arguably, at its core is the very notion of justice, and therefore formal access to a judicial system or other institutions that do not provide justice in principle cannot be said to be effective access to justice. Meaningful access to justice therefore requires both the content of the laws and the wider governance and institutional framework to be capable of delivering substantive justice. Thus, safeguards such as the independence and impartiality of adjudicators and adequate resources and procedures to ensure prompt adjudication of cases are essential for effective access. Similarly, the substantive laws upon which these decisions are made also have to be legitimate in accordance with general principles both in terms of content and the process by which they become law. Effective access therefore requires the absence of any barriers to equal treatment of all both substantively and procedurally, rather

[17]International Covenant on Economic, Social and Cultural Rights (ICESCR) 16 December 1966, entered into force on 3 January 1976. Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (Accessed 13 January 2017).

[18]Andrew Le Sueur, 'Access to Justice Rights in the United Kingdom' (2000) *5 European Human Rights Law Review* 457–475; Andrew Le Sueur, 'Designing Redress: Who Does It, How and Why' (2012) 20(1) *Asia Pacific Law Review* 17–44, 22. (Using the analogy of the first, second and third order changes, Le Sueur noted that certain changes in the administrative and justice systems do not only alter fundamental thinking about important aspects of justice but that they also change and extend the concerns for the redress of grievances). See also Lua Kamal Yuille, 'No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe' (2004) 42 *Columbia Journal of Transnational Law*, 863–924; Stephen L. Pepper, 'Legal Ethics: Access to What?' (1999) 2 *Journal of the Institute for the Study of Legal Ethics*, 269–288.

than mere equal access to courts, which may not necessarily produce a 'just' outcome even if the extant rules are seemingly impartially applied.[19] Moreover, access to justice ought to be focussed not solely on the formal judicial system but also on access to other forums or mechanisms that would enable individuals to have just outcomes or peaceful resolution of disputes.[20]

This wider understanding of access to justice in environmental matters is particularly important from the perspective of developing countries, where established democratic systems and respect for the rule of law cannot be taken for granted. Indeed, as will be demonstrated in the section below, weak governance and lack of accountability are some of the inherent challenges to environmental victims' search for justice.

3 Developing Countries and Challenges to Access to Justice in Environmental Matters

Environmental challenges, whether from man-made or natural causes, are a global concern, and in all jurisdictions, there are challenges faced by those who seek justice in environmental matters. Across all countries, poorer communities continue to disproportionately bear the brunt of the direct impacts of polluting activities and are least likely to be able to seek redress.[21] In the same vein, while procedural barriers such as strict rules on standing to sue have been relaxed to allow for public

[19]Jokin Alberdi Bidaguren & Daniel Nina Estrella, 'Governability and Forms of Popular Justice in the New South Africa and Mozambique: Community Courts and Vigilantism' (2002) 34(47) *Journal of Legal Pluralism & Unofficial Law* 113–135; 129–130; Wilfred Schärf and Daniel Nina, *The Other Law: Non-State Ordering in South Africa* (Cape Town Juta 2001) 40.

[20]Sufian Hemed Bukurura, 'The Maintenance of Order in Rural Tanzania: The Case of Sungusungu' (1994) 34 *Journal of Legal Pluralism & Unofficial Law* 1–31 (Noting that the Sungusungu group was formed in secrecy and by means of traditional medicine involving some divination. In fact, divination was said to be an important part of the Sungusungu *modus oprandi* to help solve the menace of thieves and other insecurity in the society at that time); Ernest U. Uwazie, 'Modes of indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria' (1994) 34 *Journal of Legal Pluralism & Unofficial Law*. 87 (In the context of the traditional Ibo society in Eastern Nigeria during the 1960s and 1970s, Uwazie wrote that alternative dispute mechanism exists in every society and particularly with the Ibos, depending on the type of dispute, there were multiple legal forms by which disputes were resolved) see pages 88 & 100–101.

[21]'The failure of redistribution is reflected in the lack of equality in access to justice. Santos (1991) states that African civil society is made up of three concentric rings: the central ring of 'intimate' civil society linked to the power of the state and therefore enjoying easy access to justice; 'intermediate' civil society, comprising layers of society or groups which have some access to formal justice; and 'outside' civil society, made up of groups and classes excluded from the state and from the services of the judicial system. Most people in third world countries belong to this last group': See Bidaguren & Estrella (n19), 119–120. See also Kate Macdonald, *The Reality of Rights: Barriers to Accessing Remedies When Business Operates Beyond Borders* (London: London School of Economics and Political Science and CORE Coalition, 2009).

interest litigation, a major barrier to environmental justice has been the huge cost implications, including adverse litigation costs such that only the richest or largest NGOs can undertake such litigation.[22] It must be noted, though, that in the UK, following the case of *The Queen (on the Application of David Edwards and Lilian Pallikaropoulos) v the Environment Agency & 2 Ors*,[23] there are developments to address the issue of adverse cost and make environmental litigation more affordable in line with the Aarhus Convention, although there are criticisms that these are not far-reaching enough.[24]

Similarly, at a systemic level, there are substantial challenges faced by citizens or NGOs that want to hold governments or institutions accountable for non-compliance with statutory obligations regarding implementation of environmental standards or other duties. For instance, there is an anomaly where despite being a party to and implementing the Aarhus Convention, EU institutions cannot be directly held accountable in national courts for violation of its own environmental laws while also refusing to be sued in EU courts.[25] This is despite the Aarhus Convention Compliance Committee's Recommendation in 2011 calling upon the EU to review its policies on this point.[26] Even at the national levels, such as in the UK, where such litigation is possible, procedural and cost barriers mean that very few cases are being filed.

Another challenge, even where cases are successfully brought, is how to immediately secure government compliance with the statutory obligation. This is

[22]Engobo Emeseh, 'Mainstreaming Enforcement for the Victims of Environmental Pollution: Towards Effective Allocation of Legislative Competence under a Federal Constitution' (2012) 14(3) *Environmental Law Review* 185–199. See also Ovo Imoedemhe, *The Complementarity Regime of the International Criminal Court: National Implementation in Africa* Springer (2017) 185 (within the context of how to implement the complementarity regime of the ICC in Africa, Imoedemhe noted that African countries' judicial systems and specifically that of Nigeria suffer from mistrust in which justice seems to go to the 'highest bidder'. See also UNODC Report 2006 at 119 where it was reported that perception of justice seems to have become that which 'works only for the rich and powerful'.

[23][2013] UKSC 78 or [2014] 1 All ELR 760.

[24]Frances McCartney, 'Litigation over the Environment: An Opportunity for Change' (January 2015) Friends of the Earth Scotland. Available at https://foe.scot/wp-content/uploads/2017/08/Litigation-Over-the-Environment-web-1.pdf (Accessed 13 January 2017). Noting that at the 5th Meeting of the Parties to the Aarhus Convention in July 2014, a further decision of the Aarhus Compliance Committee that the UK had failed to take sufficient measures to ensure that the costs for all court procedures are not prohibitively expensive and has failed to sufficiently consider the establishment of appreciate assistance mechanisms to remove or reduce financial barriers to access to justice was upheld. (see footnote 3 at 5).

[25]Hendrick Schoukens, 'Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited? (2015) 31(81) *Utrecht Journal of International & European Law* 46–67.

[26]Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/208/32 (Part 1) Concerning Compliance by the European Union Adopted 14 April 2011. Available at https://www.clientearth.org/reports/aarhus-convention-compliance-committee-c32-findings.pdf (Accessed 13 January 2017).

exemplified, for instance, in the recent 2015 Supreme Court judgment in the case of *UK (R (on the Application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs)*.[27] Although the government was ordered to introduce immediate plans to bring the UK in compliance with its statutory obligations, the government's plans still indicate that the UK will be brought into compliance in 2025—exactly the same time scale as it indicated prior to the ruling.[28]

What is, however, different between the experiences of developed and developing countries is the nature, scale and underlying causes of the challenges to access to justice and the immediate implications of lack of access. Despite the challenges noted above, developed countries such as the UK have very strong environmental regulations, strong regulatory and judicial institutions and an impartial judiciary to adjudicate on matters. These systems are able to, and do, hold to account both natural and non-natural persons for environmental law violations. The main regulatory challenge for these countries seems to be the struggle with addressing environmental interests in the face of competing economic and developmental priorities. On some level, the differences in the nature of environmental challenges and regulatory competence of countries can be seen even in Europe with reference to some of the cases brought under human rights provisions. For instance, with regard to claims of violation of Article 8 of the ECHR, the facts in the UK cases such as *Hatton v UK*[29] and *Powell and Rayner v UK*[30] show that the government had taken steps to address a rather challenging regulatory situation even if unsatisfactory from the applicants' perspective, while the facts in *Lopez Ostra v Spain*[31] and *Fadeyeva v Russia*[32] evidence regulatory failure resulting from poor environmental management practices. The difference in the effectiveness of environmental regulation can be seen in the *Lopez Astra* case, where the plant that gave rise to the case started operation without the requisite licence. The date of this operation, 1988, is quite important because at the time, Spain had only recently joined the EU (1986) and its environmental regulatory framework clearly did not reflect EU standards. Furthermore, the applicants were unsuccessful in seeking justice at the national courts, hence the recourse to the European Court of Human Rights.

[27][2015] UKSC 28.

[28]See UNECE United Kingdom Decision V/9n, 'Decision V/9n of the Meeting of the Parties on Compliance by the United Kingdom with its Obligations under the Convention' 14 October 2014.

[29](2003) 37 EHRR 28.

[30](1990) 12 EHRR 355.

[31](1995) 20 EHRR 277.

[32](2007) 45 EHRR 10.

3.1 Challenges in National Jurisdictions

This somewhat mirrors the experience in developing countries across Africa, Asia and Latin America, which is characterised by the inability of the state to effectively regulate even the most obvious and egregious acts of polluting industries or address the challenges faced by citizens from environmental degradation. While this failure occurs across the board, it is usually most evident in the regulation of multinational corporations whose operations can have serious environmental and human rights impacts. The most serious of these, where the environmental impacts have immediate direct implications for citizens, take place especially in the natural resources and manufacturing sectors, as well as trade in or illegal dumping of toxic wastes.[33]

For various reasons, which include lack of political will on the part of national governments, and capacity and governance deficits, the regulatory frameworks in these sectors are usually weak and provide little protection for the citizens. Often, states may be further weakened by investment protection laws for multinationals, without corresponding duties or obligations for the same MNCs at the international level.[34] Laws may be old and outdated, vague, or provide inconsistent or inadequate standards; while sanctions including fines for violations are usually too low to provide much deterrence. The regulatory agencies charged with the responsibility of monitoring the laws are usually under-resourced, with huge capacity deficits. This is further exacerbated by governance challenges within these countries such as corruption and lack of accountability.[35] All this creates a situation where there is little or no monitoring or enforcement of even the extant laws. Companies then exploit these gaps to carry out their activities without due regard for good environmental management practices, in a way that is largely at variance with similar

[33]see for example, 'Toxic 'e-waste' Dumped in Poor Nations, Says United Nations' *The Guardian* 14 December 2013 https://www.theguardian.com/global-development/2013/dec/14/toxic-ewaste-illegal-dumping-developing-countries (Accessed 13 January 2017); Rebecca Short, 'There is no Land for Toxic Dumping in Africa' 22 April 2016 http://afjn.org/there-is-no-land-for-toxic-dumping-in-africa/; James Temperton, 'Toxic e-waste in Asia Jumps 63% in Five Years' 17 January 2017 http://www.wired.co.uk/article/un-south-east-south-asia-e-waste-environment (Accessed 13 January 2017).

[34]Uchechukwu Nwoke, 'Two Complementary Duties under Corporate Social Responsibility Multinationals and the Moral Minimum in Nigeria's Delta Region' (2016) 58(1) *International Journal of Law and Management* 2–52; Edwin Mujih, 'The Regulation of Multinational Companies Operating in Developing Countries: A Case Study of the Chad-Cameroon Pipeline Project' (2008) 16(1) *African Journal of International and Comparative Law* 83–99.

[35]Rita Kufandarerwa, 'Corruption is Africa's Greatest Foe' News24.com 25 January 2017 https://www.news24.com/MyNews24/corruption-is-africas-greatest-foe-20170125 (Accessed 15 January 2017); Bol Mathieng Juba, 'Lack of Accountability and Causes of Current Political Instability: A Case for South Sudan' SouthSudanNation.com 26 February 2015. See also, Tumai Murombo, 'The Effectiveness of Initiatives to Promote Good Governance, Accountability and Transparency in the Extractives Sector in Zimbabwe' (2016) 60(2) *Journal of African Law* 230–263; Indira Carr, 'Corruption, the Southern African Development Community Anti-Corruption Protocol and the principal-agent-client Model' (2009) 5(2) *International Journal of Law in Context* 147–177.

operations undertaken by them in developed countries with much more effective regulatory and accountability frameworks (Shell in Nigeria, Union Carbide in India,[36] Goldcorp in Guatemala,[37] Chevron in Ecuador[38] and Trafigura in Ivory Coast).[39] The international dimension to some of these problems is important here as well.

Against the background of regulators not enforcing the laws, the task of holding these huge multinationals to account falls to the victims who are ill-equipped financially and otherwise to take on the powerful multinationals. Often, the immediate victims may have no formal education and be unaware of their rights or procedure for seeking redress. They may live too far away from the cities where legal advice is available and courts are based. Even where these and initial challenge of costs are overcome, litigation in these jurisdictions is fraught with difficulties. Judicial systems are overburdened and under-resourced, which, together with gaps in rules of procedure and appeals processes, are then exploited by the better resourced companies resulting in inordinate delays in the conclusion of cases.[40]

[36]Eghosa, Ekhator, 'Regulating the Activities of Oil Multinationals in Nigeria: A case for Self-Regulation?' (2016) 60(1) *Journal of African Law* 1–28, 15–16 (Ekhator noted that in its operations in Ogoniland in the Niger-Delta area of Nigeria, although 'Shell pledged to conduct its business as responsible corporate members of society, to comply with applicable laws and regulations, to support fundamental human rights. . .', it is argued that shell only pays lip service. . ., rather than engage in well-defined self-regulatory measures'). On the Union Carbide case in India, see Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2016) 1(1) *Business & Human Rights Journal* 21–40; Jayaprakash Sen, 'Can the Defects of Natural Justice be Cured by Appeal: Union Carbide v Union' (1993) 42(2) *International & Comparative Law Quarterly* 369–381.

[37]Hayley Woodin, 'Goldcorp's Marlin Mine: A Decade of Operations and Controversy in Guatemala' 4 May 2015 https://www.biv.com/article/2015/5/goldcorps-marlin-mine-decade-operations-and-contro/ (Accessed 15 January 2017).

[38]Business & Human Rights Resource Centre, 'Texaco/Chevron Lawsuits (Re Ecuador)' (*Chevron v Ecuador*). Available at https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador (Accessed 15 January 2017). (Multiple cases have been filed with respect to the pollution of rainforest of Ecuador in different jurisdictions and at different times. Despite the multiplicity of actions, in October 2014, the Ecuadorian communities further made a complaint to the International Criminal Court (ICC) against John Watson the CEO of Chevron alleging that the pollution and the subsequent failure of the high-ranking officers and CEO of Chevron to remedy the situation constituted crimes against humanity. However, in March 2015, the Chief Prosecutor of the ICC declined investigation and noted that the allegations were purely outside the jurisdiction of the ICC).

[39]'Trafigura Found Guilty of Exporting Toxic Waste' BBC News 23 July 2010 www.bbc.co.uk/news/world-africa-10735255 (Accessed 15 January 2017). (A Dutch Court found the multinational, Trafigura guilty of illegally exporting toxic waste from Amsterdam, concealing the nature of the cargo and dumping them in Ivory Coast in 2006, thereby causing injury to thousands of people.

[40]Gideon Kanner, 'Beyond the Limits; Case Overload in Appellate Courts Breeds Incomprehensible Law (11 June 1993) 106(120) *The Los Angeles Daily Journal* 6; 'Why Justice in Africa is Slow and Unfair, the Challenges of Establishing the Rule of Law' *The Economist* 1 July 2017. Available at https://www.economist.com/news/middle-east-and-africa/21724390-challenges-establishing-rule-law-why-justice-africa-slow-and (Accessed 16 January 2017).

The outcomes of cases may also be difficult to predict because the independence and impartiality of the judiciary cannot be guaranteed.[41] Even where cases are ultimately successful, compensation awarded may be so low that it is inadequate and the environment and its remediation in many instances are not really addressed.[42] Furthermore, as demonstrated in the *Chevron v Ecuador*[43] case, enforcing the judgment of a national court against a multinational parent company without assets in the jurisdiction can be a Herculean task since the frameworks that facilitate such enforcement under international economic law do not exist for environmental matters.[44]

3.2 Challenges in Alternative Forums

In light of the challenges in national jurisdictions, environmental victims in these countries and NGOs that support them have sought justice elsewhere. The most common of these are through voluntary corporate social responsibility frameworks such as the National Contact Points of the OECD Guidelines for Multinational Enterprises,[45] transnational litigation in the home state of the parent company[46] and human rights claims in regional human rights courts or institutions.[47] However, these have provided very limited success for the victims because of the barriers and shortcomings even in these frameworks and systems. In the first instance, both of these procedures require significant cost implication such that only with the support of major NGOs or through securing representation on a contingency fee basis are victims from the developing countries able to take advantage of them. However, even here, there are no guarantees that they can secure justice. Decisions from voluntary frameworks such as the OECD, while being good sources for publicity and potentially consequent reputational damage for the companies, are not binding

[41]Godswill Agbaitoro, Mark Amakoromo & Eddy Wifa, 'Enforcement Challenges in the Protection of the Environment from Upstream Petroleum Operations in Nigeria: The Need for Judicial Independence' (2017) 3 *International Energy Law Review* 85–93, 90–92. (Highlighting the importance of the *Jonah Gbemre* case, in which Gbemre sued on behalf of himself and the Iwherekan community in Delta State Nigeria, Agbaitoro et al. observed that the important distinction of the case was its focus on the protection of the environment as against other cases where compensation was the focus. Although the court gave judgment in favour of Gbemre, enforcement remained problematic because of lack of independence of the judiciary).

[42]Agbaitoro et al. ibid, 92.

[43]*Chevron v Ecuador,* (above, note 38).

[44]Ibid.

[45]OECD Guidelines for Multinational Enterprises http://www.oecd.org/corporate/mne/ (Accessed 16 January 2017).

[46]Such as the *Ecuador v Chevron* transnational multiple cases.

[47]For example, the use of the African regional court, African Court of Human Right to enforce the provisions of the African Charter on Human and Peoples Right. See Mbondeyi, (2011n 3) 395–400.

and unenforceable.[48] Where a company fails to implement the decisions, there are no mechanisms for holding them to account.

In the same vein, there are significant barriers to accessing the courts in the countries of the parent company. Although the US ATCA provided much promise for transnational litigation in environmental matters, the case of *Shell v Kiobel*[49] in 2013 has more or less shut the door on litigants in the future owing to the restrictive interpretation given by the Supreme Court on the US court's jurisdiction in such matters.[50] However, even before the Kiobel case, other than the publicity generated in these litigations and a few that were settled out of court after several years, there had really not been much success for environmental victims in this forum.[51]

The UK and the Netherlands are two other jurisdictions that are seen as being favourable to such transnational litigation. However, while recent cases such as *Shell v Akpan* (Netherlands)[52] and *Shell v Bodo* (UK)[53] have raised expectations from these jurisdictions, the extent to which jurisdictions can actually provide justice for environmental victims remains to be seen. In the Akpan case, for instance, while the decision of the court to assume jurisdiction was significant, the claimants were only successful in one of the claims. In the Bodo case, the company did not contest the jurisdiction of the court, nor did it indeed contest the claim. In another case now currently before the UK courts (*Shell v Gbile*),[54] it will be interesting to see Shell's, and the Court's, position on jurisdiction. Another perhaps less explored challenge in the context of transnational litigation is that of requiring judges to decide on matters based on a foreign law in which they have no specific expertise. They would therefore be relying on expert witnesses and are often being asked by the litigants

[48]The OCED guidelines provide ***non-binding*** principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. See above, note 45.

[49]569 U.S (2013) or 133 S. Ct. 1659 (2013). For detail of the cases see Business & Human Rights Resource Centre, 'Shell Lawsuit (Re Nigeria – Kiobel & Wiwa – *Koibel v Shell, Wiwa v Shell*)'. Available at https://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa (Accessed 16 January 2017).

[50]Ibid. In March 2008, the US district court dismissed the claims for lack of jurisdiction. On 16 November 2009, the plaintiffs brought a motion for reconsideration. The court re-examined the issue of jurisdiction and said that a direct business relationship must be established between the USA and SPDC in order for Alien Tort Claims Act (ATCA) to apply and for the court to assume jurisdiction. On 21 June 2010, the district court ruled that the plaintiffs had not shown that a direct business relationship existed, and the judge dismissed the suit against SPDC.

[51]Ibid.

[52]*A,F Akpan v Royal Dutch Shell, plc.; E. Dooh v Royal Dutch Shell, plc.; F.A Oguru v Royal Ducth Shell plc.* Court of Appeal of the Hague (18 December 2015). Available at https://www.elaw.org/af-akpan-v-royal-dutch-shell-plc-0 (Accessed 17 January 2017).

[53]*The Bodo Community & Others v Shell Petroleum Development Company of Nigeria Ltd.*: TCC 4 July 2014 [2014] EWHC 2170 (TCC).

[54]See *Shell Lawsuit (Re Oil Pollution in Nigeria)* involving oil spillages in three villages namely, Oruma, Goi and Ikot Ada Udo. The spillage destroyed plaintiffs' farmlands and fishponds, resulting in pollution and making them unfit for use.

to challenge the position of courts in those jurisdictions. In the Bodo case, Akenhead J expressed this unease when he said, '. . . as a judge I have felt some trepidation at making decisions on Nigerian Law, particularly when I have had as a mere puisne, to disagree with some of the views expressed by the two retired eminent supreme court judges and when their prior knowledge of Nigerian law compared to mine before the start of the case, was immense'.[55] The extent to which this sort of unease may affect the outcomes of a case is unknown. Would judges in these instances be much more cautious than they would otherwise be, thereby affecting the outcome of cases?

Regional human rights courts have been another avenue open to environmental victims to seek redress. A case in point is the African human rights system, where environmental NGOs have successfully brought claims against national governments for failure to protect their citizens against pollution from the activities of multinational corporations (SERAC & SERAP cases).[56] One of the advantages of using the African human rights courts system is the express recognition of the right to a healthy environment under Article 24 of the African Charter on Human and Peoples Rights. Both the African Commission and the ECOWAS courts have relied on these, as well as other international human rights instruments, to hold national governments accountable. However, there are also significant cost implications involved. Also, the ECOWAS court held in SERAP *v Federal Republic of Nigeria* that corporations are not subject to the jurisdiction of the court for human rights. With regard to states over which they have assumed jurisdiction, a major challenge of this process is enforcement. In SERAP *v Federal Republic of Nigeria*,[57] for instance, the court ordered the Nigerian government to, inter alia, 'take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta; take all measures that are necessary to prevent the occurrence of damage to the environment; and to take all measures to hold the perpetrators of the environmental damage accountable;. . .'.[58] In 2013, the International Commission of Jurists wrote to the Nigerian government enjoining it to comply with and enforce the judgment and to notify it of measures taken to do so.[59] Similarly, SERAP made a freedom of information (FOI) request to the government to inform it of steps being taken to comply with the judgment.[60] So far, there is nothing within the public domain indicating that steps have been taken by the government to comply.

[55] Akenhead J in the *Bodo Community* case, ibid.

[56] *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001); Socio-Economic Rights and Accountability Project (SERAP) *v Federal Republic of Nigeria and others (2012) N° ECW/CCJ/JUD/18/12.*

[57] SERAP (n 56).

[58] Ibid.

[59] Ibid.

[60] Ibid.

4 Consequences of Regulatory Failure

The direct consequence of the regulatory failure in these states is evidently degradation and pollution of the environment, which have far-reaching implications for species and the ecosystem. This is particularly so where the environment being degraded, as is the case in the Niger Delta (which is the sixth largest wetland in the world) or the Amazon forests, is a rich and dynamic ecosystem, which is home to diverse species of flora and fauna. The biodiversity loss and wider ecological damage has consequences not only at a national but also at a global level. Beyond the natural environment, environmental pollution has implications for the health and socio-economic rights of local communities. Serious health impacts such as deaths or long-term diseases may result directly from an environmental pollution incident, as happened in the *Bhopal* gas leak[61] and the Trafigura toxic waste dump[62] incidents.

However, perhaps by far the most pervasive health impacts occur more insidiously from long-term pollution. This is particularly because local communities rely on polluted waters and land for their daily domestic needs, as well as for subsistence. For instance, because of lack of potable water sources, local communities in the Niger Delta continue to drink from polluted waters, as well as use the same for other domestic needs such as cooking or bathing. They also continue to plant and eat crops from polluted lands and fish from polluted waters. These can have serious health impacts owing to the often hazardous nature of the pollutants. For instance, a 2011 UNEP Report on oil pollution in Ogoni land in Nigeria found '. . .hydrocarbon contamination . . . taken from 28 wells at 10 communities adjacent to contaminated sites. At seven wells the samples are at least 1000 times higher than the Nigerian drinking water standard of 3 µg/l . . . Approximately 10% of detected benzene concentrations in Ogoniland were higher than the concentrations WHO and the United States Environmental Protection Agency (USEPA) report as corresponding to a 1 in 10,000 cancer risk.'[63] The Report therefore recommended that alternative water supplies be provided for the communities and mechanisms put in place for ongoing health assessments.

Pollution also affects the economic lives of local communities that rely on the land for their various sources of livelihood, usually farming and fishing. Pollution affects productivity of land and fish stocks. In the age of climate change, these impacts are going to be even further exacerbated. Ill health, in the face of a more difficult working environment, may further compromise the ability of families to sustain themselves through their traditional occupations. These all have wider implications such as poverty, which in itself can result in families being unable to pay for and keep children in education, and inability to pay for health care. In the face of such difficulties, and without being able to access justice formally, local

[61] See Baxi, 'Learning from *Bhopal* case' (n 36).

[62] See Trafigura case, (n 39).

[63] UNEP (2011) 'Environmental Assessment of Ogoniland', available at: http://www.unep.org/nigeria/ (accessed 12 August, 2011).

communities have in several instances resorted to self-help. Often, these have started on a low level with demonstrations and sit-ins. Unfortunately, the experience in many of these countries is that such protests have historically often been met with force from state security agents, allegedly with complicity from corporations, the result being abuse of citizen's civil and political rights (Nigeria, South Africa). Ultimately, grievances from these injustices, together with lack of meaningful benefit to local communities from the activities giving rise to these environmental challenges, have culminated in violent conflict in various jurisdictions (Nigeria, PNG, Congo, Ecuador, Columbia, etc.)[64] with wider implications for the nation.

Lack of access to justice in environmental matters therefore has far-reaching ramifications. This is captured eloquently by the past Sectary General of the UN, Kofi Annan, when he said, '[T]he United Nations has learned that the rule of law is not a luxury and that justice is not a side issue ... without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means ... the Rule of Law delayed is lasting peace denied, and that justice is a handmaiden of true peace ...'.[65] Against this background, the centrality access to justice in environmental matters to the achievement of sustainable development becomes apparent.

5 The Sustainable Development Goals and Environment

The UN Sustainable Development Goals (SDGs) were adopted in September 2015 to build upon, and as a replacement for, the Millennium Development Goals (MDGs), adopted at the turn of the millennium and which were coming to an end that year. Seventeen key SDGs with 169 targets were outlined for the international community for it to achieve over the next 15 years the UN Resolution entitled 'Transforming Our World: The 2030 Agenda for Sustainable Development'.[66] The Resolution is quite ambitious, aiming to '... strengthen universal peace in larger freedom. ... free the human race from the tyranny of poverty and want and to heal and secure our planet. ... [and] take the bold and transformative steps which are

[64]William Godnick, Diana Klein, and Camilo González-Posso, *Conflict, Economy, International Cooperation and Non-Renewable Natural Resources* (2008) IfP/International Alert/INDEPAZ/PLASA/Socios Peru); Maxi Lyons, 'A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress' (2004) 32 *Denver. Journal of International Law and Policy*, 701–732; Jodie Michalski, 'The Careless Gatekeeper: Sarei V. Rio Tinto, Plc, and the Expanding Role of U.S. Courts in Enforcing International Norms' (2006) 15 *Tulane Journal of International and Comparative Law* 731–752

[65]Kofi Annan, 'Secretary-General's remarks to the Ministerial Meeting of the Security Council on Justice and the Rule of Law: The United Nations Role (2003). 24 September 2003, New York. Available at http://www.un.org/apps/sg/sgstats.asp?nid=518 (Accessed 20 July 2006).

[66]See 'Transforming our World: The 2030 Agenda for Sustainable Development'. Available at https://sustainabledevelopment.un.org/post2015/transformingourworld (Accessed 19 January 2017).

urgently needed to shift the world on to a sustainable and resilient path'.[67] A major departure of the SDGs from the MDGs is the recognition of the need for an integrated approach to the challenges being addressed with sustainable development (comprising the three key pillars of economics, social and environment), at its core.

A key feature of the SDGs is how central the environment is to each of the goals. Of the 17 goals, at least six are specifically environment focussed. These are sustainable management of water and sanitation for all (goal 6); affordable, reliable, sustainable and modern energy for all (goal 7); sustainable consumption and production patterns (goal 12); action to combat climate change and its impacts (goal 13); conservation and sustainable use of the oceans, seas and marine resources for sustainable development (goal 14); and sustainable use of terrestrial ecosystems, sustainable management of forests, combatting desertification, halting and reversing land degradation and halting biodiversity loss (goal 15). Of the others, two goals (16 and 17) provide for the relevant institutions, processes and partnerships, while the environment is a necessary factor for the realisation of the remaining nine goals. This is not too surprising considering the focus on sustainable development and the importance of the environment in its origins and meaning—i.e., that growth and development cannot be achieved without integration of environment into development policies, processes and projects. Furthermore, outcomes from the 2012 Rio+20 UN Conference on Sustainable Development[68] fed into and was crucial to the development of the SDGs right from the beginning. Indeed, it was the Rio+20 conference that first proposed the development of a new set of Sustainable Developments Goals, to be prepared by an Open Working Group to build on the MDGs. It was subsequent to this that this process was combined with the UN Secretary General's parallel initiative of a multi-stakeholder High-Level Panel of Eminent Persons, co-chaired by UK Prime Minister David Cameron on a post 2015 UN development agenda.

This interrelationship between the SDGs and the environment makes access to justice in environmental matters particularly pertinent in ensuring the achievement of the goals. The environment has to be properly managed if we are to achieve any one of those goals, and where there is failure to do so, citizens—both natural and non-natural persons—ought to be able to enforce this without facing significant barriers in the process. Indeed, the link between access to justice in environmental matters and the achievement of sustainable development has been established in various documents starting from Principles 10 and 11 of the Rio Declaration, which set out the need for effective 'environmental legislation' and 'access to judicial and administrative proceedings, including redress and remedy'. At the subsequent UN Conference on Sustainable Development in 2002 in Johannesburg, a side event—the First Global Judges Symposium—highlighted the role of judges and access to justice for environmental justice, especially in developing countries. Ten years later, at Rio

[67]Ibid, See the Preamble.

[68]Rio + 20 outcome document, *The Future We Want (*2012*)* Available at https://sustainabledevelopment.un.org/futurewewant.html (last accessed 30 December 2015).

+20, the judges conference again asserted the importance of 'accessible, fair, impartial, timely and responsive dispute resolution mechanisms' for the achievement of environmental sustainability.[69] Outside of the environmental system, in 2012, the UNGA adopted a Resolution (A/RES/67/1) on the Rule of Law in recognition of the importance of this to 'sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development', recommending that this forms part of the post-2015 development agenda.

5.1 Goal 16: Access to Justice

Goal 16 of the SDGs aims to promote '... peaceful and inclusive societies for sustainable development, provide *access to justice for all* and build effective, accountable and inclusive institutions at all levels'.[70] Whereas initial proposals for the post-2015 development agenda had included the broader concept of the rule of law as a goal, as can be seen from the above, the SDGs, as finally agreed, now provide only for 'access to justice' within goal 16. The reason for this has been said to be on account of disagreements from a number of countries –although 58 countries had supported the proposal. Part of the argument was that rule of law was separate and distinct from the three pillars of sustainable development—the focus of the goals to be selected. There is some merit for this viewpoint in that the rule of law is such a wide concept that merits its own attention by the UN. However, arguably providing for the rule of law within the SDGs could have been seen as being necessary for the framework that will ensure the realisation of all the goals. Indeed, this is the context in which access to justice is provided within the targets of goal 16. Target 16.3 provides for the promotion of 'the rule of law at the national and international levels and ensures equal access to justice for all'.[71] Other targets further address the other two procedural environmental rights. These are participation in decision-making (16.7—'Ensure responsive, inclusive, participatory and representative decision-making at all levels') and access to information (16.10 —'Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements').[72]

Arguably, a headline goal of the rule of law or access to justice alone within the SDGs would have given the issue greater visibility and potentially more resources. However, even in its current form, the targets within the wider context of goal

[69]Rio + 20 Declaration on Justice, Governance and Law for Environmental Sustainability (2012) Available atwww.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf (last accessed 30 December 2015).

[70]See Goal 16 UN SDG (n 4). (emphasis mine).

[71]Ibid.

[72]Ibid.

16 provides sufficient framework for advancing effective access to justice in environmental matters. Target 16.3 provides for access to justice within the wider context of the rule of law, thereby eschewing attempts at narrow interpretations focussed mainly or solely on formal access to courts and representation. This is further strengthened by the provisions for participation in decision-making and access to information—both of which are essential for effective access to justice, which entails enabling effective input to the decision-making process, and appropriate information to facilitate decision-making and seeking redress.

Furthermore, as noted in Sect. 3 of this paper, institutional and governance challenges are a huge contributory factor to lack of effective access to justice in developing countries. Goal 16, in its broader form, therefore provides for a holistic approach to addressing this challenge. Some of the particularly relevant targets include 16.5—'Substantially reduce corruption and bribery in all their forms'; 16.6—'Develop effective, accountable and transparent institutions at all levels'; 16.a—'Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime'; and 16.b—'Promote and enforce non-discriminatory laws and policies for sustainable development'.[73] The inclusion of the international levels within the context of access to justice provides the potential for addressing the international dimension of challenges to access to justice earlier discussed. On this point, 16.8 provides for broadening and strengthening 'the participation of developing countries in the institutions of global governance'.[74] While this in no way translates to these countries having sufficient clout within these global governance institutions, it does provide a necessary step to the 'democratisation' of these institutions and a voice for developing countries' interests within them.

5.2 Operationalising Goal 16 of the SDGs

The inherent potential of goal 16 to be transformative in addressing challenges to access to justice in environmental matters can, however, only be realised if the goal and its targets are effectively operationalised and implemented. One of the main challenges for goal 16 is that while it has lofty ambitions, it has very few specific indicators for measuring progress or success. Indeed, it has been dubbed the goal with the most number of targets (ten) and least number of indicators (two).[75] As yet,

[73]See generally UN SDG (n 4).

[74]Ibid.

[75]UNDP, 'Goal 16 – The Indicators We Want: Virtual Network Sourcebook on Measuring Peace, Justice and Effective Institutions'. Available at http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Virtual%20Network%20on%20Goal%2016%20indicators%20-%20Indicators%20we%20want%20Report.pdf (Accessed 18 January 2017).

there is no definitive set of indicators for each of the targets. Although it is possible to draw upon work on governance and rule of law, and there are various initiatives putting forward some measurable indicators, for some of the target, this may be an impossible task such that any indictors that are identified may be of little or no practical utility. An example is one of the core targets for access to justice: 16.3—'promote the rule of law at the national and international levels and ensure equal access to justice for all'. The quality of the indicators may therefore yet prove decisive for whether or not goal 16 achieves its potential of being transformative.

Beyond the measurability of the targets, the SDGs, including goal 16, provide the opportunity for bold solutions. All stakeholders—governments, civil society, international organisations, businesses, research institutions, think thanks and citizens—all have a role to play towards developing effective strategies and their implementation. This may involve participation in consultation processes, capacity building, development of effective tools and guidelines, adopting appropriate policies and implementation strategies, utilisation of frameworks to hold governments and non-state actors accountable, etc. This section sets out some key areas of focus. These draw upon the analysis in earlier sections on the scope of access to justice in environmental matters, as well as the challenges faced by victims in developing countries.

5.3 Rule of Law and Access to Justice

Significant effort needs to be made towards ensuring that the enabling environment and substantive laws facilitate effective access to justice. Three key issues to address here are strengthening of substantive laws, ensuring impartiality and independence of the judiciary and addressing the governance and accountability challenges faced by developing countries. Clearly each of these is a huge task, and there are no easy answers or quick fixes. However, the SDGs provide the opportunity to scale up support of international organisations, think tanks and major NGOs for the development and strengthening of environmental laws in developing countries. Various capacity-building organisations can prove useful here, utilising this as capacity building opportunity so as to ensure sustainability of the process. It will also help develop laws best suited to national circumstances rather than the experience in the past where some of these laws were more or less derivative of similar laws in more developed countries. Similarly, there needs to be a review of the process of appointment, promotion, remuneration and transfer of judges so that they are independent of the executive. Training of judges is another issue that needs to be addressed. Support for this can be from developed country partners, international organisations and civil society groups. Local NGOs also need to be empowered to be able to use the frameworks available, both formal and informal, to hold public officers to account. On the wider issue of accountability and governance deficits, anti-corruption laws—especially at regional and international levels—as well as mechanisms for

accountability, need to be strengthened. However, as noted, this is one of the particularly difficult targets to measure.

5.4 Participation and Access to Information

Most developing countries are not parties to the Aarhus Convention, which recognises the rights to participation and access to information in a binding framework. However, the SDGs provide an opportunity for national legislation, which provides for these rights and provides mechanisms for their realisation. On a practical level, implementation needs to address contentious matters such as who is an appropriate representative of the community or other interests for purposes of participation, the mechanisms for ensuring that information is readily available in a format and language that is accessible to citizens and the right to request such information. Civil society groups can help facilitate developments in this area in collaboration with the government. Although the indicators on participation are rather more difficult to develop measurable indicators for, this is less so for access to information. Indicators could include what proportion of key information is publicly available (preferably online) relative to good practice in other jurisdictions. Some of these would include financial information, procurement, concessions, environmental information, etc. The availability or otherwise of legal protections for these rights could also be an indicator.

5.5 Dispute Resolution

A key question here is what kinds of dispute resolution systems and institutions work best for different environmental disputes in order to facilitate access to justice. This may vary between regions and countries in light of differing socio-cultural and legal traditions, needs and the prevailing legal system. Several options exist—the traditional court systems, alternative dispute resolution, specialised environmental courts, environmental ombudsman and customary systems. What form should it take? Some of the underlying factors that need to be considered here include making access to dispute resolution affordable, proximity of dispute resolution bodies to aggrieved parties, addressing undue technical and procedural challenges, demystifying the adjudicatory process, addressing undue delays in conclusion of cases. A ‘one-size fits all’ approach is unsuited to the complex myriad of environmental issues and challenges faced by victims. All key stakeholders—governments, civil society groups and citizens—will need to contribute towards a dialogue. This is one of the targets where it is possible to identify measurable indicators relating to numbers of cases that are instituted, the costs involved, the time taken to resolve cases, the number of legal practitioners per capita and distance of courts to litigants.

5.6 Other Relevant Issues for Further Discussion

What is the role of regional/international systems where national regimes are unable or unwilling to act? This is particularly relevant for multinational corporations. What role can companies themselves play here? How can non-binding frameworks, including the UN Guiding Principles on Business and Human Rights, be utilised? What role can UNEP play in developing guidance and recommendations for countries?

Other concerns are public interest litigation, interim reliefs, compensation and enforcement- providing access for environmental NGOs and citizens for public interest litigation on environmental matters, availability of interim reliefs where there is significant implication for ongoing environmental degradation, adequate compensation and orders that take long-term environmental remediation into consideration and facilitating enforcement procedures.

6 Conclusion

The SDGs, and in particular goal 16, provide a unique opportunity for addressing access to justice challenges faced by environmental victims, especially those in developing countries. However, the extent to which this can result in meaningful progress by 2030 is dependent on a range of factors, not least of which is development of measurable indicators to assess progress. This is particularly important as it will ensure that countries cannot hide behind the abundance of activities or projects that may not necessarily change much on the ground. However, there are clear areas where gaps and challenges can be addressed with the participation of all relevant stakeholders. Again, the success of this will largely depend on the momentum behind the SDGs, funding that is available and the engagement of all key stakeholders. In the circumstances, the current focus of the indicators on criminal law and not environmental justice leaves much to be desired.

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Promoting Functional Distributive Justice in the Nigerian Sovereign Wealth Fund System: Lessons from Alaska and Norway

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1 Introduction

The Nigerian Sovereign Wealth Fund was designed in 2010, signed into law in 2011 and approved by state governors in 2012.[1] The fund is derived from the difference between budgeted and actual market prices of oil and invested in profitable ventures so as to earn returns. It is designed to save and invest excess crude revenues in order to provide economic backup and financial pool for the use of present and future generations of Nigerians. The ultimate policy aim underlying the SWF is therefore not controversial: it is to build a savings base for future generations, enhance infrastructural development in key sectors and protect Nigeria's economy from external shocks arising from volatile and unstable oil prices.[2] As such, it addresses an array of interests revolving around this aim.[3] The SWF became statutory in 2011, incorporating this aim.[4]

However, despite its sound policy underpinning, the design and implementation of the SWF as a common pool fund has, since its introduction, been a subject of controversy in Nigeria.[5] Three key issues appear in debates on the design and implementation of the scheme. First is the concern that by failing to distribute excess crude oil funds equitably among states, pursuant to the Nigerian Constitution, the

[1] See National Assembly, Nigerian Sovereign Investment Authority Bill, 2010 SB 457 <http://www.nassnig.org/document/download/1332> accessed 29 November 2015; also Africa Research Bulletin, 'NIGERIA: Sovereign Wealth Fund— It will not replace the ECA Buffer as Intended' (Blackwell 2012); also Oserogho & Associates, 'Nigeria Sovereign Wealth Fund Law' (2011) <http://www.jdsupra.com/legalnews/nigerian-sovereign-wealth-fund-law-06187/> assessed 1 June 2016.

[2] See National Assembly, Nigerian Sovereign Investment Authority Bill 2010 (n 1); see also Cynthia Ugwuibe, 'Strengthening the Nigerian Sovereign Investment Authority: A Policy Analysis of the Nigerian Excess Crude Account and the Nigerian Sovereign Investment Authority Act' (MA thesis, University of California Los Angeles 2012); John St. Claret Ezeani, 'An Overview of the Nigerian Sovereign Investment Authority' (The Sovereign Wealth Fund Initiative of the Fletcher School 2012) <http://fletcher.tufts.edu/~/media/Fletcher/Microsites/swfi/pdfs/2012/NigeriaSWFFinal.pdf> accessed 1 June 2016; Chiazor Ezenwa, 'Nigeria's Sovereign Wealth Fund and Inter-generational Equity' *Thisday Live* (Nigeria, 13 October 2013); 'Nigerian Sovereign Investment Authority' (Sovereign Wealth Fund Institute 2015) <www.swfinstitute.org/swfs/excess-crude-account/> accessed 1 June 2016.

[3] See Long Title to the Sovereignty Investment Authority (Establishment etc) Act 2011; see also A Brown Bassey *et al*, 'Excess Crude Account and Sovereign Wealth Fund as Strategic Tools for Sustainable Development in Nigeria' (2014) 5(2) Journal of Economics and Sustainable Development 57.

[4] See Nigerian Sovereign Investment Authority, 'Sovereignty Investment Authority (Establishment etc.) Act 2011, Cap N166 Laws of the Federation of Nigeria 2004 [Sovereign Investment Authority Act]; also B Brown (n 3).

[5] See for example, Tony Odiadi, 'The Constitution and Sovereign Wealth Fund: Matters Arising' *The Guardian* (Lagos, 7 August 2012); also Solomon E Ekokoi, 'Legal and Constitutional Evaluation of the Nigerian Sovereign Wealth Fund' (2015) Afe Babalola University Journal of Sustainable Development Law and Policy 101; Ezeani (n 2).

SWF will exacerbate inequitable allocation and control of resources in Nigeria.[6] A second concern is that the scheme might, like the operating framework of the Excess Crude Account, result in excessive aggregation of resource investment powers in the federal government, thereby violating principles of federalism and resource control entrenched in the Nigerian Constitution.[7] A third concern is that the Nigerian SWF is incapable in its current design, especially when compared to similar systems in other resource-based jurisdictions, to foster equitable resource distribution and management in the short and long term. These three issues appear to be related. While the first two issues are about implementation, dealing with constitutional and administrative laws, the third issue relates to legal and policy design.

However, while the first two issues on constitutionality and administration have received substantial attention in the literature, the third issue, on the design and practical implementation of the scheme, is yet to be substantially explored. Meanwhile, this third issue on legal and policy design is arguably germane in determining the effectiveness of the SWF because it lays the operational and practical foundation for the scheme. Any problem with this foundation might lead to the failure of the scheme. As such, the article explores this foundational issue.

The article theorises functional distributive justice (FDJ) as a normative framework for deconstructing the legal design and implementation of Nigeria's SWF scheme. FDJ is increasingly promoted as a rights-based approach to resource allocation and management.[8] It builds on the concept of distributive justice, which relates to how costs and benefits are shared within a political space, to promote a just and equitable allocation of resource wealth, both in theory and practice.[9] The underlying assumption of FDJ is that distributive justice becomes functional when

[6]The resource control issue has been extensively debated in Nigeria since the seminal case of *A-G Federation v A-G Abia State (No 2)* [2002] All NLR 72. See for example Mukhtar Abdullahi, 'Politics of Resource Control and Revenue Allocation: Implications for the Sustenance of Democracy in Nigeria' (2014) 7(4) Journal of Politics and Law 176; Sylvester Adejoh Ogba, 'Nigerian Offshore Seabed: The Challenges of Ownership and Resource Control' (2014) 2(1) American Journal of Humanities and Social Sciences 13; AS Antai & Bassey Anam, 'Resource Control and Grassroot Development in the Niger Delta Region of Nigeria' (2014) 5(20) Journal of Economics and Sustainable Development 1; also Ekokoi (n 5); Odiadi (n 5).

[7]Ekokoi (n 5); Ezeani (n 2).

[8]See Temitope Tunbi Onifade, 'Peoples-based Permanent Sovereignty over Natural Resources: Toward Functional Distributive Justice' (2014) 16(4) Human Rights Review 343.

[9]For specific discussions on FDJ, see Onifade (n 8). For general discussions on distributive justice, Michael Allingham, *Distributive Justice* (Routledge 2014); Ross Zucker, *Democratic Distributive Justice* (Cambridge University Press 2000); Peter Vallentyne, '*Distributive Justice*', in RE Goodin, P Pettit and T Pogge (eds) *A Companion to Contemporary Political Philosophy,* vol 2 (2nd Wiley-Blackwell 2007). For rights-based approach to environment and development generally, see United Nations Practitioners' Portal on Human Rights Based Approaches to Programming, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies' (n.d.) <hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> accessed 2 December 2015; Gina Castillo and Marjolein Brouwer, 'Reflections on Integrating a Rights-Based Approach in Environment and Development' (2007) 15 Policy Matters: Conservation and Human Rights 153.

resource revenues have equitable, positive and measurable impacts on people's lives.[10] Hence, FDJ posits that benefits and burdens of resource exploitation must be fairly distributed in manners proportionate to ownership stakes and risk exposure.

FDJ provides a normative threshold for testing whether SWF schemes could be effective in promoting fair and equitable resource allocation. This threshold encapsulates two major elements: whether SWF schemes acknowledge the rights that citizens have over natural resources and whether SWF schemes establish mechanisms that actualise these rights. This article adopts the normative threshold of FDJ to examine whether, and to what extent, the Nigerian SWF could foster a just and equitable distribution of oil wealth in Nigeria.

In answering this core question, the article takes a lesson-learned approach to examine how SWF schemes in Norway and Alaska provide comparative case studies for evaluating the conceptualisation and design of Nigeria's SWF. The choice of Norway and Alaska as comparative models is influenced by key sociopolitical realities that Nigeria shares with these jurisdictions. Like Nigeria, oil and gas development is the mainstay of the economy of Norway[11] and that of the state of Alaska in the United States of America.[12] Furthermore, like Nigeria,[13] oil and gas development in Norway and Alaska has been closely associated with concerns of human rights violations, inequitable wealth distribution and inadequate accommodation of indigenous groups.[14] More importantly, like Nigeria, SWF systems in

[10]Onifade (n 8).

[11]Norway ranks as the world's seventh largest oil exporter. In 2012, Norwegian petroleum production totalled approximately 225 million standard cubic meters of oil equivalents. See The Norwegian Economy – Key Facts <https://www.regjeringen.no/conten–tassets/455b1741a3814eb8823ce404fc0de3a0/norwegian_economy_2013.pdf> accessed December 02, 2015.

[12]The oil and natural gas industry dominates Alaska's economy. Alaska's waters are believed to contain more than 30 percent of the USA's known recoverable offshore resources. Specifically, Alaska's Prudhoe Bay field is one of the largest oil fields in the US. Alaska's oil and gas industry has produced more than 17 billion barrels of oil and 13 billion cubic feet of natural gas. See US Department of Energy, 'Top 100 U.S. Oil & Gas Fields' (U.S. Energy Information Administration 2015), p. 5, 8 < https://www.eia.gov/naturalgas/crudeoilreserves/top100/pdf/top100.pdf> accessed September 16, 2016.

[13]Oil production in Nigeria has been closely associated with concerns of environmental pollution, human rights violations, governmental corruption, inequitable wealth distribution and inadequate accommodation of oil producing communities. See generally Olubayo Oluduro, 'Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities' (2012) 25(2) Afrika Focus 160 at 165 (providing an account of the nature and scope of the problems discussed); see also Human Rights Watch, '*The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*' (Human Rights Watch 1999) at 47: <hrw.org/reports/1999/nigeria/nigeria0199.pdf> accessed 1 June 2016. (Discussing the impact of governmental corruption in the forms of systematic kickbacks for the award of contracts, special bank accounts in the control of the presidency, and fraudulent allocation of oil or refined products to political favorites, on sustainable resource governance in Nigeria).

[14]For a detailed account of human rights issues in oil and gas development in Norway see Middlesex University Department of Law, Indigenous Peoples Links and the Irish Centre for Human Rights, 'Submission to the UN Committee on the Elimination of all forms of Racial

Norway and Alaska were established to address distributional concerns in resource utilisation and to establish long-term savings mechanism for present and future generations.[15] Due to their relative successes over several years in promoting inclusivity, equity and accountability, SWF systems in Norway and Alaska have been discussed as excellent models of effective oil wealth distribution and investment.[16] This article explores how the implementation of the SWF in Norway and Alaska may inform thoughts on the effective design and implementation of the SWF in Nigeria.

The effectiveness of an SWF scheme arguably depends less on the form of legal support but more on its capability to foster inclusivity, equity and accountability in resource distribution and allocation. Consequently, rather than revisiting academic debates on the legitimacy and constitutionality of the Nigerian SWF, this article examines how the design and implementation of the SWF in Nigeria could, like established regimes in Alaska and Norway, be enhanced to be more inclusive, equitable and accountable.

This article is in five sections. After this introduction, Sect. 2 provides a review of the theory of FDJ as a basis for a peoples-based governance of natural resources. Section 3 evaluates Nigeria's SWF and discusses why it is incapable in its current design to foster inclusivity, equity and accountability. Section 4 provides a comparative analysis of the Norwegian and Alaskan schemes and examines how the Nigerian system may draw comparative lessons from them. The article concludes in Sect. 5.

Discrimination with regard to Norway's responsibility to ensure respect indigenous peoples rights overseas in the context of its investment and transnational corporate activity impacting on them <http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_NGO_NOR_78_9789_E.doc> accessed September 17, 2016.

<http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NOR/INT_CERD_NGO_NOR_78_9789_E.doc> accessed 1 June 2016. For a summary of how oil and gas development projects affect the lives and lands of indigenous peoples of Alaska, see Arctic Leaders to Congress, 'Oil Development in Alaska is a Human Rights Issue' (Arctic Leaders to Congress 2015) <http://thinkprogress.org/climate/2015/09/18/3703004/indigenous-leaders-arctic-refuge-protection/> accessed November 21, 2015.

[15]See Adam D Dixon and Ashby HB Monk, 'The Design and Governance of Sovereign Wealth Funds: Principles and Practices for Resource Revenue Management' (2011) <www.ssrn.com/abstract=1951573> accessed 1 June 2016; Paul Segal, 'How to Spend It: Resource Wealth and the Distribution of Resource Rents' (2012) 51 Energy Policy 340.

[16]Norway's sovereign wealth fund was launched in 1990 and is currently one of the largest in the world at about $600 billion. Alaska's Permanent Fund was established in 1976 and currently has about $37 billion. See Gary Flomenhoft, 'Applying the Alaska Model in a Resource-Poor State: The Example of Vermont' in Karl Widerquist and Michael W Howard (eds), *Exporting the Alaska Model: Adapting the Permanent Fund Dividend for Reform Around the World* (Palgrave Macmillan 2012) 85-108; Scott Goldsmith, 'The Alaska Permanent Fund Dividend: An Experiment in Wealth Distribution' in G Standing (ed), *Promoting Income Security as a Right: Europe and North America* (Anthem Press 2005) 553, 563.

2 Theoretical Background: Functional Distributive Justice

This part discusses key legal and sociopolitical theories and norms that underpin FDJ. FDJ draws from a series of sources. Apart from legal principles of permanent sovereignty over natural resources and the rule of self-determination that have been well explored in international law, sociolegal norms and concepts of the commons, common ownership and environmental justice all provide theoretical support for the view that the people have equitable, fair and permanent ownership and rights over natural resources in a country.[17]

2.1 The Commons and Common Ownership

The idea that the people have collective, equal and permanent ownership and rights over natural resources in a country is deeply rooted in early sociopolitical theories on commons and common ownership.[18] The underlying assumption is that resources such as atmosphere, oceans, rivers, fish stocks, petroleum and mineral resources are commonly owned by every member of the society.[19] Laying the background for commons and common ownership, classic 'social contract' theory posits that everyone has rights over everything but vests these rights in governments to avoid the problems of the 'state of nature', and the theory of 'trusteeship' posits that governments act in trust for the people.[20] Invariably, both social contract and trusteeship affirm the inherent ownership rights of people.

[17]In the literature on peoples' rights over resources, the meaning of 'people' itself is contested. While some scholars understand peoples' rights to mean individual rights held by all human beings, other scholars take the view that although all peoples have human rights, certain human rights are commonly held by vulnerable and marginalised groups whose identity, life and existence depend on such unique rights. This article will not delve into this debate on this distinction between individual and community rights. Rather this article takes the view that distinctions between individual and collective rights are artificial, and fail to recognise the indivisible and interdependent nature of human rights. Peoples in this article therefore refers to all individuals in a sovereign state, who by virtue of being humans, have legal rights to freely access and enjoy resources located in that sovereign state. For the debates on individual versus community rights, see Helen Quane, 'Further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous People' (2012) 25(1) Harvard Human Rights Journal 49; Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, CUP 2003), 27-33; Garry Teeple, *The Riddle of Human Rights* (University of Toronto Press 2004), 24; James Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30(4) Human Rights Quarterly, 984, 985.

[18]See Onifade (n 8).

[19]See Garrett Hardin, 'The Tragedy of the Commons' (1962) 162 *Science* (3859), 1243-1248.

[20]See for example Thomas Hobbes, *Leviathan* (Reprint, Oxford University Press 2009) chs 10-14, (stating that without law and regulation, society could easily regress to the 'state of nature', i.e. a state characterised by perpetual strife, in which according to Hobbes, human life will be 'solitary, poor, nasty, brutish and short').

The commons concept operates within a broader political economy and often applies to cross-boundary resources. Several scholars have contributed to refining it for protecting natural resource rights. Godon applied the commons idea to fishery in 1954 to ascertain the rights of the people to access and use aquatic resources.[21] Similarly, Hardin rightly argued in 1968 that as population grows, people attempt to maximise their access to and enjoyment of natural resources but do not take corresponding responsibility for the implications of this.[22]

Common ownership is more specific as the idea that natural resources vest equally in all members of the society. This concept is often invoked to justify people's right to access and use natural resources and has created two major sides to the debate on who has rights over natural resources.[23] While traditionally common ownership is invoked to underscore the rights and responsibilities of citizens over natural resources located in a country,[24] some scholars have adopted an expansionist view to argue that all human beings, as global citizens, have rights or responsibilities over natural resources anywhere and everywhere.[25] Although the extent of ownership rights over natural resources enjoyed by people vary from jurisdictions, common ownership in this article is simply the notion that all natural resources in a country or region vest commonly on all peoples of the country or region, who therefore have rights to take part and influence decision-making processes on the utilisation and distribution of such resources.[26]

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[21]Scott H. Scott Gordon, 'The Economic Theory of a Common Property Resource: The Fishery' (1954) 62(2) Journal of Political Economy 124.

[22]Hardin (n19).

[23]Onifade (n 8).

[24]See Anna Di Robilant, 'The Virtues of Common Ownership' (2011) 91 Boston University Law Review 1359-1347; Anna Di Robilant, 'Common Ownership and Equality of Autonomy' (2012) 58 (2) McGill Law Journal 263-32; Allingham (n 9); Hans Morten Haugen, 'The Right to Self-determination and Natural Resources: The Case of Western Sahara' (2007) 3(1) Law, Environment and Development Journal 72; Hans Morten Haugen, 'People's Right to Self-determination and Self-governance over Natural Resources: Possible and Desirable?' (2014) 8(1) Nordic Journal of Applied Ethics 3.

[25]For discussion on global rights over natural resources, see Mathias Risse, 'Common Ownership of the Earth as a Non-parochial Standpoint: A Contingent Derivation of Human Rights' (2008) 17 (2) European Journal of Philosophy 277; Chris Armstrong, 'Sovereign Wealth Funds and Global Justice' (2013) 27(04) Ethics and International Affairs 413. For discussions on global responsibilities over natural resources, see Bernard Boxill, 'Compensation and Past Injustice', in A Cohen and C Heath Wellman (eds) *Contemporary Debates in Applied Ethics* (2nd edn, Wiley Blackwell 2014); Nahshon Perez (2014), 'Must We Provide Material Redress for Past Wrongs?' in A Cohen and C Heath Wellman, ibid.

[26]Generally, in many dominial regimes such as Nigeria and Norway, there is no private ownership of subsurface oil and gas. Oil and gas ownership is vested in the state, while members of the public can only acquire the right to use, manage, control or enjoy benefits of oil production. In less dominial jurisdictions such as Alaska, USA and Alberta, Canada, subsurface petroleum and natural gas ownership could be both freehold and leasehold (i.e. a majority owned by the government, while some are privately owned). In Canada for example, apart from crown leases, oil and gas rights to a particular parcel may be owned by private individuals. Individuals who are the assigns or

Overall, the contribution of the commons and common ownership to FDJ is the recognition of ownership rights that vest in people. This sets the context for resource claims that people could make.

2.2 *Environmental Justice*

The principle of environmental justice is a major influence on the FDJ concept.[27] Environmental justice is the fair treatment and meaningful involvement of all people, regardless of status, ethnicity, race, colour, national origin or income in the development, implementation and enforcement of environmental laws, regulations and policies.[28] Environmental justice evolved in the US to protect vulnerable minorities from environmental pollution.[29] Since then, it has become a theoretical basis for addressing how environmental equity could be achieved within a society.

The concept of environmental justice has received various elucidations over the years. It has most recently been deployed by scholars to emphasise the need for broad-based participation, procedural justice, intergenerational justice, fairness and equity when designing legal and policy frameworks.[30] Environmental justice encompasses striking a balance between costs and benefits associated with the environment to prevent a trade-off, respecting and fulfilling the rights of people to take part in and influence decision-making processes on the use of natural resources, protecting and preserving the rights of future generations to enjoy natural resources, striking a balance between the benefits and responsibilities of current and future generations and creating a balance between dual or plural stakeholders in the same generation.[31]

For example, Haugen evaluates how the rights of citizens could stem from their unique relationship with the environment.[32] Allingham analyses how distributive

descendants of Alberta's original homesteaders are the registered owners of the petroleum and/or natural gas beneath approximately 6.0 million acres (four percent of the Province's surface area). See Damilola S Olawuyi, 'Legal Strategies and Tools for Mitigating Legal Risks Associated with Oil and Gas Investments in Africa' (2015a) 39(3) OPEC Energy Review 247, 350.

[27]See Onifade (n 8).

[28]Damilola S Olawuyi, *Principles of Nigerian Environmental Law* (Revised edn, Afe Babalola University Press 2015b) 271; also United States Environmental Protection Agency <http://www.epa.gov/environmentaljustice/> accessed 1 June 2016.

[29]Bunyan Bryant and Paul Mohai (eds) *Environmental Racism: Reviewing the Evidence* (Westview Press 1992) 204.

[30]For an excellent and detailed consideration of the concept of environmental justice, see Rhuks Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Routledge 2013) 1-20, see also, *Environmental Governance* (United Nations Environment Program 2009) 1 at 2 <http://www.unep.org/pdf/brochures/EnvironmentalGovernance.pdf> accessed 1 June 2016.

[31]Olawuyi (n 28).

[32]Haugen, 'The Right to Self-determination and Natural Resources' (n 24); Haugen, 'People's Right to Self-determination and Self-governance' (n 24).

rights could arise from common ownership frameworks.[33] Banzhaf discusses how distributive rights could enhance social welfare.[34] Zucker is interested in how just distribution of economic resources play out in democracy.[35] While distributive justice appears central to these contributions, many of them encompass the intra-generational paradigm often described in terms of social justice, the intergenerational paradigm couched in terms of current versus future generations and the procedural paradigm embedded in the discussions on public participation.

Generally, the underlying contribution of environmental justice to FDJ is that an equitable policy or law must recognise and balance the unique circumstances and rights of the people to enjoy the benefits of natural resources, most especially the rights of poor and marginalised communities that often bear a disproportionate burden of resource investments and projects.[36]

2.3 Permanent Sovereignty Over Natural Resources

The principle of permanent sovereignty over natural resources is a firmly established principle of international law that authorises states to exercise exclusive jurisdiction over natural resources and all components of the natural environment within their national boundaries.[37] One of the early instruments to recognise this principle is the United Nations General Assembly Resolution 1803 (XVII) of 1962 on 'Permanent sovereignty over natural resources'. Although not legally binding, the Resolution recognises the right of peoples and nations to permanent sovereignty over their natural wealth and resources, a right that must be exercised in the interest of their national development and of the well-being of the people of the state concerned.[38]

This principle has been recognised and adopted in several international, regional and national instruments to include the right of states to freely control, exploit and dispose of natural resources in their territories without outside interference and also the right to regulate and nationalise foreign investment.[39] This principle reinforces the notion that the government of a sovereign state has inalienable rights and responsibilities to design legal instruments and policy aimed at managing and

[33] Allingham (n 9).

[34] Spencer Banzhaf, 'Regulatory Impact Analyses of Environmental Justice Effects' (2011) 27 (1) Journal of Land Use and Environmental Law 1.

[35] Zucker (n 9).

[36] Ako (n30).

[37] Jérémie Gilbert, 'The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?'(2013) 31(2) Netherlands Quarterly of Human Rights 314.

[38] General Assembly resolution 1803 (XVII) of 14 December 1962, 'Permanent Sovereignty over Natural Resources' <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803%28XVII%29> accessed 1 June 2016.

[39] For a detailed review of this, see Lillian Aponte Miranda, 'The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human rights, and Peoples-based Development' (2012) 45 Vanderbilt Journal of Transnational Law 785.

controlling the resources within its territorial jurisdiction and control. As the United Nations, however, notes, this right must be exercised in the interest of the well-being of the people of the state concerned.[40] Paragraph 4 of the *Resolution* specifically notes that nationalisation, expropriation or requisitioning of natural resources shall be based on public utility, security or the national interest.[41]

In contributing to FDJ, the principle of permanent sovereignty over natural resources emphasises the responsibility of governments to protect the rights and interests of peoples while exercising sovereign rights over natural resources.[42] As Miranda rightly argues, this principle places a fundamental responsibility on governments to adopt good governance models and policies that protect current and future interests of the people in natural resources.[43] It also includes an obligation on governments to design policies that promote equitable resource rent distribution, based on notions of common ownership and environmental justice, to properly distribute or allocate resource income and wealth.[44]

2.4 The Right of Self-Determination

The right of self-determination of peoples is a fundamental principle in international law. It is recognised in core international human rights instruments to include the right of a people to freely determine their political status and freely pursue their economic, social and cultural development and to dispose of and benefit from their wealth and natural resources.

Article 1 paragraph 1 of the Charter of the United Nations and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all provide that 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[45] Although not legally binding, Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples also affirms that indigenous peoples have the right to self-determination, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development.[46]

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[40] Article 1, General Assembly resolution 1803 (XVII) of 14 December 1962 (n 38).

[41] ibid.

[42] Gilbert (n 37); Segal (n15).

[43] Miranda (n 39) 785.

[44] See Onifade (n 8).

[45] International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171 (ICCPR); the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (ICESCR); and Universal Declaration on Human and Peoples Rights, 10 December 1948 G.A. res. 217A (III), U.N. Doc A/810 at 71.

[46] United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc/A/61/L.67.

With the potential to further advance FDJ, the right of self-determination emerged to strengthen the principle of permanent sovereignty.[47] It opposes arbitrary acquisition of people's land or the exclusion of traditional landowners from decisions affecting their properties.[48] The right to self-determination clarifies the collective rights of indigenous groups to ownership and use of land and resources and to participate in decision-making concerning the use, management and conservation of land, water and resources. The right to self-determination places an obligation on governments to encourage self-reliance of indigenous groups and strengthen the abilities of such groups to freely pursue their economic, social and cultural development.[49] It arguably provides a basis for allocating resources to marginalised and minority groups so as to empower them to freely enjoy and exercise their rights over natural resources found in their communities.[50]

2.5 From Theory to Practice: Functional Distributive Justice

The commons, common ownership, environmental justice, permanent sovereignty over natural resources and self-determination have greatly influenced arguments on the roles of the government to recognise and protect the rights of the people to equitable, fair and permanent ownership and interests over natural resources in a country or region. To protect this right, it is imperative for governments to adopt laws and policies that functionally enhance the equitable allocation and distribution of resource income and wealth. This is the core of FDJ as a theoretical frame.

FDJ seeks to connect international law with national policy. FDJ emerged to, among other things, create a connection between the rights that people have in international law and the functional actualisation of these rights within domestic jurisdictions. Functionality literally means practicality.[51] If one accepts that citizens are the inherent owners of natural resources and have legal titles over them, then one should conclude that they should derive some benefits from them. This logic negates what one finds in many resource-rich jurisdictions where citizens suffer in the midst of abundant natural resources. Jurisdictions like these include Nigeria, Liberia, Iran, Algeria, Indonesia, Sudan, Venezuela, Russia, Turkmenistan, Kazakhstan,

[47]See Ulrike Barten, 'What's in a Name? Peoples, Minorities, Indigenous Peoples, Tribal Groups and Nations' (2015) 14(1) Journal on Ethnopolitics and Minority Issues in Europe 1.

[48]Robert McCorquodale and Raul Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries' (2001) 12(5) European Journal of International Law 867.

[49]Haugen, 'The Right to Self-determination and Natural Resources' (n 24); Haugen, 'People's Right to Self-determination and Self-governance' (n 24).

[50]See generally Barten (n 47) (asserting that minorities are precluded from bearing the right to self-determination).

[51]John Burrit McArthur, 'International Environmental Law: Can it overcome its Weaknesses to Create an Effective Remedy for Global Warming?' (2013) 10(2) Santa Clara Journal of International Law 253.

Democratic Republic of the Congo and Angola.[52] Hence, the aim of FDJ is to advance the practical realisation of peoples-based permanent sovereignty claims to natural resources as opposed to theoretical claims or declarations by states.

Similarly, FDJ improves on the concept of distributive justice. Arguably, distributive justice *simpliciter* does not provide a practical standard for measuring the realisation of equality and fairness in resource distribution. People may have rights to enjoy natural resources, as well as the right of access in principle, but then may end up with no real access to these resources. Access to natural resources is real when it transcends mere theoretical or statutory recognition and results in measurable opportunities for people to exert greater control and influence decision-making processes on natural resources in a country. It includes removing practical barriers such as arbitrary land tenure systems, haphazard social service mechanisms and wealth distribution models, administrative bottlenecks and poor redress systems that stifle the equitable allocation of resource wealth. FDJ advocates for the design of effective wealth distribution models that guarantee transparent minimum standards for measuring access to natural resources *ab initio* in order to ensure that statutory rights over resources translate into actual enjoyment.

FDJ could apply to people in multifarious contexts as long as the contexts showcase its standard. The standard which FDJ advocates go beyond providing social services haphazardly or sharing wealth indiscriminately, but rather fostering a systematic and practical approach to meeting the interests of people through an equitable appropriation of the resources of a jurisdiction. This standard has two main elements, which drive this article's approach to the evaluation of Nigeria's SWF.

The first element is the acknowledgement of the ownership rights that the people have over natural resources. As earlier noted, an underlying theme of FDJ is the acknowledgement of the permanent rights and interests of people to access, enjoy and exert influence over natural resources. People's collective titles stem from individual ownership rights, which make up the common ownership pool.[53] Since inherent ownership, as held by people, is separated from control, as exercised by

[52]Michael Alexeev and Robert Conrad, 'The Elusive Curse of Oil' (2005) 91(3) Review of Economics and Statistics 586-598; Paul Stevens, 'Resource Impact: Curse or Blessing? – A Literature Survey' (2003) 9(1) J of Energy Lit 3, 42; *see also* Antonio MA Pedro, *Mainstreaming Mineral Wealth in Growth and Poverty Reduction Strategies* (Economic Commission for Africa 2004) <http://repository.uneca.org/bitstream/handle/10855/5565/Bib-39857.pdf?sequence=1> accessed 1 June 2016, 2015; Jeffrey D Sachs & Andrew M Warner, 'The Curse of Natural Resources', (2001) 45 European Econ Review 827, 827; Leif Wenar, 'Property Rights and the Resource Curse' (2008) 36 Philosophy and Public 2 Affairs, 5-7; Xavier Sala-i-Martin and Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria* (International Monetary Fund 2003) 13-15 <https://www.imf.org/external/pubs/cat/longres.cfm?sk=16582.0> accessed 1 June 2016.

[53]See Risse (n 25); Robilant, 'The Virtues of Common Ownership' (n 24); Robilant 'Common Ownership and Equality of Autonomy' (n 24).

governments, citizens retain permanent ownership rights over natural resources but vest control in governments. Governments are vested with sovereign rights to control and manage natural resources in trust and on behalf of people, who ultimately have collective titles over these resources as inherent owners.

The second element of FDJ is that it requires governments to put in place appropriate systems that foster the practical protection and enjoyment of ownership rights of people to natural resources. If governments ought to manage natural resources as trustees for the people, then people should have evidence of beneficial ownership. In many jurisdictions, especially in the developing bloc, people can hardly lay any real, direct or functional claim over natural resources. Their ownership rights are often acknowledged through the provision of social services to a large extent and public participation in resource-based decision-making to a lesser extent.[54] Both approaches to the acknowledgement of common ownership rights have major flaws. For one, it is difficult to measure the share of social services going to each person or group, and as such some stakeholders and individuals may receive more than the others. Similarly, deciding who participates, what to participate on, when to participate and how to measure participation are also problematic.[55] As a result, public participation may not necessarily be fair or equitable. Due to these problems, there is the need to design additional mechanisms to ensure that the permanent sovereignty of citizens are realised through equitable wealth distribution. One such mechanism is the SWF, designed to save, invest and allocate resource revenues fairly, equally and in the overall interest of present and future generations of the people.

[54]See Francis Onojiribholo, 'Kwale Chief Laments Plight of Communities', *Daily Independent* (Nigeria, 16 August 2011) discussing how local communities in Nigeria's Niger Delta are denied practical opportunities to participate in decision-making processes for energy projects in Nigeria. See also Sheila Foster, 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance and the Transformative Politics of the Environmental Justice Movement' (1998) 85 California Law Review 775, 812.

[55]See for example Gregory H Fox, 'The Right to Political Participation in International Law' in Gregory H Fox and Brad R Roth, (eds) *Democratic Governance and International Law* (CUP 2000) 48-55, Fox questioned whether the international community is prepared to accept a right to participation in practice**. See** also Maria Lee, Chiara Armeni, Javier de Cendra, Sarah Chaytor, Simon Lock, Mark Maslin, Catherine Redgwell and Yvonne Rydin, 'Public Participation and Climate Change Infrastructure' (2013) 25(1) Journal of Environmental Law 33, where the authors discuss how untempered public participation might become a 'simple bureaucratic hurdle, frustrating for all concerned'. See also Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 Modern Law Review 80; Cass R Sunstein, 'Deliberative Trouble? Why Groups Go To Extremes' (2000) 110 Yale Law Journal 71; Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20(4) Oxford Journal of Legal Studies 597; Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) Oxford Journal of Legal Studies 33.

3 The Nigerian Sovereign Wealth Fund Scheme: A Diagnosis

Nigeria discovered crude oil in commercial quantities as far back as the 1950s and has relied on it since, at least, the 1970s.[56] Since crude oil is a non-renewable natural resource, especially one serving as a 'volatile source of public revenue',[57] its management is important. Such a resource could serve as both a blessing and a curse. If well governed and managed, it might benefit Nigerians for many generations, and if otherwise, it might cause hardships for current and future generations.[58] For many years, the preponderance of evidence has shown that crude oil is more of a curse than a blessing to the country.[59]

Attempts at reversing the resource problems of Nigeria have gone on for many years. For example, the Structural Adjustment Programme was designed to manage the collapse of oil prices, which plunged Nigeria into inflation in the 1980s, followed by various attempts at creating debt relief programmes.[60] Recent attempts have been driving towards less reliance on foreign aid and more efforts on saving for the future. This is where the idea of financial pools or vehicles such as the Excess Crude Account (ECA) or the SWF comes in.

3.1 Excess Crude Account

The ECA was established in 2004, primarily to address Nigeria's resource curse problems. The ECA was designed to save excess funds, above the budget benchmark, derived from the sale of crude oil.[61] This was to prevent an overflow of resource funds that might lead to inflation and other macroeconomic problems, like

[56]For a review of the history of oil production in Nigeria, see Olawuyi (n 28) 173; also S Tamuno and JM Felix, 'Crude Oil Resource: A Blessing or Curse to Nigeria - The Case of the Niger Delta' (2006) 4(2) African Journals Online 53; Aniefiok E Ite, Udo J Ibok, Margaret U Ite, and Sunday W Petters, 'Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria's Niger Delta' (2013) 1(4) American Journal of Environmental Protection 78.

[57]Ugwuibe (n 2) 5.

[58]See also ibid 1.

[59]See Emeka Duruigbo, 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) 26(1) University of Pennsylvania Journal of International Economic Law 1; Michael Watts, 'Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria' (2010) 9(1) Geopolitics 50; Terra Lawson-Remer and Joshua Greenstein, 'Beating the Resource Curse in Africa: A Global Effort' (Council on Foreign Relations, August 2012) <www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> accessed 1 June 2016.

[60]Ikemefuna S Nwoye, 'Nigeria Sovereign Wealth Fund: A Road Map to Avoid the Oil Curse' (Council on African Security and Development 2015) <www.casade.org/nigeria-sovereign-wealth-fund-a-road-map-to-avoid-the-oil-curse/> accessed 1 June 2016.

[61]See Ekokoi (n 5) 105.

the one the Netherlands experienced during its North Sea gas boom.[62] Because of Nigeria's dependence on oil, there are indications that price volatility could have far-reaching implications such as the devaluation of the Naira, savings stagnation, debt spiking, underperformance of capital expenditure and unemployment.[63] These potential repercussions show why it is important to handle excess funds wisely.

Sections 162(1) and 162(2) of the Nigerian Constitution provide for the Federation Account and the procedure for allocating revenue in this account to various federating units. This account is designed to pool public funds from various sources, specifically the revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the ministry or department of government charged with responsibility for foreign affairs and the residents of the Federal Capital Territory, Abuja.[64] Section 162(10) further defines revenue in the following words:

(a) any receipt, however described, arising from the operation of any law;
(b) any return, however described, arising from or in respect of any property held by the Government of the Federation;
(c) any return by way of interest on loans and dividends in respect of shares or interest held by the Government of the Federation in any company or statutory body.

The implication of these provisions is that the revenues from crude oil are not excluded from the pool of funds in the Federation Account. These provisions form the basis on which the ECA is considered unconstitutional as there are no exceptions created for incomes from crude oil.[65] Further to this, there have been legal battles between the various federating units as to how to properly deal with the fund in the account.[66]

While these constitutional problems of the ECA are far-reaching and remain problematic, they did not stop the federal government of Nigeria from establishing the SWF. There is the speculation that the SWF was established to foster 'legality, accountability and transparency' in the management of crude oil revenue.[67] However, the Constitution does not provide for the SWF; hence, it is doubtful whether its establishment brings any legality to the management of crude oil revenue. To ensure legality, a constitutional amendment might be necessary.[68]

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[62]See The Economist Explains, 'What Dutch disease is, and why it's bad' *The Economist* (5 November 2014) <www.economist.com/blogs/economist-explains/2014/11/economist-explains-2> accessed 1 June 2016.

[63]BudgIT, 'Falling Oil Prices: An Opportunity for Reforms' (2014) <www.yourbudgit.com/wp-content/uploads/2014/12/FALLING-OIL-PRICE_BudgIT_Nigeria.pdf> accessed 1 June 2016.

[64]Federal Republic of Nigeria, 'Constitution of the Federal Republic of Nigeria 1999 CAP. C23 L.F.N. 2004', section 162(1).

[65]See Akpo Mudiaga-Odje, 'Excess Crude Oil Account' *ThisDay* (Nigeria, 5 September 2005 <http://allafrica.com/stories/200509060429.html> accessed 1 June 2016.

[66]See Ekokoi (n5) 105.

[67]ibid 106.

[68]See generally Ekokoi, ibid (providing an analysis of the roles of a constitutional amendment).

Questions on accountability and transparency, on the other hand, could be feasibly addressed through a reform of the SWF scheme, as it is currently designed. These deal more with practical delivery and effectiveness. Consequently, this article focuses on how to reform and enhance the legal and policy framework underpinning the Nigerian SWF to make it more equitable, accountable and transparent.

3.2 Sovereign Wealth Fund

Like many other jurisdictions, Nigeria's SWF scheme was conceived to protect the country from the potential implications of volatile oil prices, which could impair its sustainable development goals.[69] The Sovereignty Investment Authority [Establishment etc.] (SIA) Act 2011 establishes the Nigerian SWF and the regulatory institution, Nigerian Sovereignty Investment Authority, to administer the fund.[70] As provided in section 32, federal, state, federal capital territory and local governments and area councils own the fund on behalf of the people and provide the initial input amounting to USD 1 billion, following sections 29 and 30; meanwhile, subsequent contributions are derived from residual funds in the Federation Account based on section 30. Section 32 shows that, commendably, the Act acknowledges citizens as inherent owners of the SWF, suggesting, at least, a philosophy of public ownership. Therefore, Nigeria seems to have a rudiment of the first FDJ element on people's sovereignty over natural resources.

However, despite the provision on public ownership, the SWF scheme does not contain sufficient provisions, procedures and mechanisms to ensure that the fund will, in line with natural resource goals, be transparently managed by the government in trust for the people. This makes the scheme fall short of the second element of FDJ on the protection and actuation of people's sovereignty to ensure actual enjoyment of natural resources. The perennial problems that could impair people's enjoyment such as corruption, diversion of funds, governmental oppression and inappropriate management of resources are well documented.[71]

It is therefore not enough for the SWF to stipulate preambular recitals that the funds will be managed for the people. Relevant measures must be integrated into the scheme to ensure inclusivity, equity and accountability. Measures to enhance inclusivity may encompass public participation or representation in decision-making on how the SWF is designed or implemented in practice. To achieve equity, the SWF may make material provision for people within and across generations in an attempt to balance intra-generational and intergenerational interests. Accountability

[69]See also Ade Ogidan and Wole Shadare, 'Analysis: Nigeria's Sovereign Wealth Fund' *The Guardian* (Nigeria, 28 June 2012) <http://www.proshareng.com/news/Nigeria%20Economy/Analysis:-Nigeria-s-Sovereign-Wealth-Fund/17588> accessed 1 June 2016.

[70]Sovereignty Investment Authority Act (n 4).

[71]See O Oluduro (n 13).

measures may involve the separation of ownership, administration and operation of the fund with the aim of creating a distance between the government and the fund as much as possible. These measures are not exhaustive but rather serve as illustrations.

There are no legal provisions or policy practices explicitly pushing these goals in Nigeria's SWF regime. For example, on the issue of inclusivity, the government did not consult the people when it created the SWF and does not consult the people on how to appropriate it.[72] While engaging the representative system by involving government executives, could address this problem, federal executives dominated the process of setting up the scheme and currently dominate its administration.[73] Similarly, consulting the legislature could address this problem, but the consultation process in Nigeria mainly took place at the national assembly, typical of the procedure for passing acts, hence excluding the grass roots.[74]

The most disturbing problem at the moment is the lack of consultation during withdrawals.[75] The Minister of Finance has powers to appropriate the fund without any reasonable public consultation.[76] A simple but practical analogy, for example, is that if a common fund in a family savings account is to be utilised for any reason, all the members of the family, or at least the principal members, should have a say on such withdrawal. It is not enough to say that X is such a family fund if members of the family have no say on its appropriation. The family fund analogy is even more instructive considering that the SWF is designed as a financial pool for present and future generations.[77] This means that the representation required should be not only for current Nigerians but also for future Nigerians. To make this possible, a broader range of stakeholders representing diverse interests must be assigned greater roles in the decision-making processes. This might ensure a higher level of caution in dealing with the fund, hence taking care of a broad range of interests that may extend beyond the current generation. Moreover, to enhance transparency and accountability, access to information and proactive disclosure of activities must be enhanced and not limited to selective publication of investment plans, as provided in section 39 (2) of the SIA.

Concerning equity, the Nigerian SWF fails to pay adequate attention to intergenerational justice. It provides for three pools of fund, namely Future Generations Fund, Infrastructure Fund and Stabilisation Fund.[78] The Future Generations

[72]The design and enactment of the sovereign wealth fund instruments as well as the creation of the relevant regulatory institutions were done within government circles, and as such did not involve the public directly. Following this foundation, the trend has thus been to take decisions within government circles without any form of consultation.

[73]Odiadi (n5).

[74]ibid. See also Ekokoi (n 5) 108-110.

[75]Odiadi (n 5). See also Patick Keenan 'Sovereign Wealth Funds and Social Arrears: Should Debts to Citizens be Treated Differently than Debts to Other Creditors?' (2009) 49(2) Virginia Journal of International Law 431, 432.

[76]See Sovereign Investment Authority Act, sections 3 (a) and 4 (2) (a).

[77]ibid.

[78]ibid, sections 39, 41 and 47.

Fund is, as the name suggests, established to provide for intergenerational interests; the Infrastructure Fund substantially caters for both intra-generational and intergenerational interests; and the Stabilisation Fund focuses more on intra-generational interests. The explanation behind these pools supports this analysis.[79]

The Future Generations Fund, as section 39 of the SIA Act provides, has 'the objective of providing future generations of Nigerians with a solid savings base for such time as the hydrocarbon reserves of Nigeria are exhausted, with due regard to macroeconomic factors'. The term 'macroeconomic factors' is open for interpretation and could mean economic conditions that might occur, such as the reduction in the value of the funds due to fluctuation in the value of hydrocarbons. Some of these conditions may be politically triggered, hence subject to unpredictable political misfeasance. Subsection 2 of the same section allows the SWF Investment Authority to impose strict confidentiality restrictions on its investment plan and use of the fund. This creates room for low-level accountability and transparency of the SWF Investment Authority.

Similarly, section 40 of the SIA Act provides for continued investments of the funds. These provisions appear decent for the goals of intergenerational justice but do not provide adequate safeguards for potential economic and political problems that might affect the fund. As recent crashes in oil prices have shown, without adequate mechanisms that limit withdrawals, present Nigerians might deplete the SWF, leaving future Nigerians with little or nothing.[80] By not embedding prohibitions on withdrawals, the Nigerian SWF may be incapable in its current design to protect the rights of future Nigerians to access and utilise hydrocarbon revenues.

With regard to intra-generational equity, which borders on the interests of current Nigerians, a major concern is that the Stabilisation Fund, with the purpose of acting as a buffer against macroeconomic problems that might arise in the short term, is currently the smallest pool in the Nigerian SWF scheme.[81] More than ever, the importance of stabilisation is evident due to concerns relating to instability of revenues from petroleum production and sale. The Stabilisation Fund is designed to operate in the short term, with target investments that could mature within 5 years.[82]

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[79]ibid.

[80]In Nigeria, savings are often depleted to pay for political patronage just before major elections. For example, reports indicate that the withdrawal of over $2bn from the excess crude revenue account (ECA) was unilaterally approved by the Government of former President Goodluck Jonathan in December 2014, close to the presidential elections in which the former president was an unsuccessful candidate. See Bassey Udo '$2bn ECA Fund: Okonjo Iweala Shifts; Says Jonathan Unilaterally Approved Withdrawal' *Premium Times* (Abuja 9 July 2015) <www.premiumtimesng.com/business/186365-2bn-eca-fund-okonjo-iweala-shifts-says-jonathan-unilaterally-approved-withdrawal.html> accessed 1 June 2016.

[81]See 'Stabilisation Fund Investment Policy Statement' (Nigerian Sovereign Investment Authority 2013) <http://nsia.com.ng/wp-content/uploads/2013/08/Investment-Policy-Statement-for-Stabilisation-Fund.pdf> accessed 1 June 2016.

[82]See ibid.

Moreover, section 47 (2) of the SIA Act vests the Minister of Finance with powers to withdraw from the Stabilisation Fund in order to stabilise the national economy and to meet urgent needs.[83] While such emergency provision is by itself not a problem, the SIA Act fails to clarify what qualifies as 'urgency' and 'economic stress' to warrant withdrawals. It also fails to establish public disclosure benchmarks through which the government could demonstrate such urgency to the public and how such withdrawals will be used to meet social services and public needs. These problems undermine accountability and transparency.

With the problems currently associated with inclusivity, equity and accountability, the SWF may represent the same old wine in a new bottle. It may perpetuate extant lopsided and skewed distribution and appropriation of petroleum revenue that favours the exclusion of people from decision-making, disregards the interest of future generations and marginalises some people in the society. By conferring excessive control of the SWF on the Minister, with limited safeguards and opportunities for real participation by the public, the Nigerian SWF is arguably incapable in its current form to achieve the goals of inclusivity, equity and accountability.

4 Emerging Best Practices in Sovereign Wealth Fund: Lessons from Norway and Alaska

Many commentators consider SWF systems of Alaska and Norway to be good exemplars of inclusive, equitable and accountable wealth distribution models, especially with regard to the administration of economic rents.[84] These jurisdictions have different but exemplary SWF models that have been described as functional and having passed the standard of FDJ.[85] Norway appears to be the most reputable in this category, with an SWF scheme acclaimed to have successfully managed problems related to inclusivity, equity and accountability, and has multiple reinforcing channels for ensuring actual enjoyment of petroleum revenue. For some of these reasons,

[83]Sovereign Investment Authority Act (n 76).

[84]See Flomenhoft (n 16); Goldsmith (n16) 563; also Alanna Hartzok, 'Citizen Dividends and Oil Resource Rents: A Focus on Alaska, Norway and Nigeria' (2004) < http://www.earthrights.net/docs/oilrent.html> accessed 1 June 2016; Erling Røed Larsen, 'Escaping the Resource Curse and the Dutch Disease? When and Why Norway Caught up with and Forged ahead of its Neighbours' (2004) 65(3) The American Journal of Economics and Sociology 605; Halvor Mehlum, Karl Moene, Ragnar Torvik, 'Mineral Rents and Social Development in Norway' (2011) <https://ideas.repec.org/p/hhs/osloec/2011_014.html> accessed 1 June 2016; Christopher L Griffin Jnr, 'The Alaska Permanent Fund Dividend and Membership in the State's Political Community' (2012) 29 Alaska Law Review 79; Larry Persily, 'Norway's Different Approach to Oil and Gas Development' (Alaska Natural Gas Transportation Projects Office of the Federal Coordinator 2011); Paul Segal, 'Resource Rents, Redistribution, and Halving Global Poverty: The Resource Dividend' (2011) 39(4) World Development 475; Karl Widerquist, *The Alaska Model: A Citizen's Income in Practice* (Open Democracy 2013).

[85]Larsen, ibid, also Onifade (n 8).

commentaries have suggested that the country has escaped the resource curse.[86] Alaska has also successfully fostered inclusivity, equity and accountability and has taken an unusual step by paying dividends in ensuring actual enjoyment of petroleum wealth. Given their effectiveness in the light of diversity, these two models might present some lessons on how the Nigerian SWF system may be reformed.

4.1 Norway

Norway's sovereign wealth fund was launched in 1990 and is currently one of the largest in the world at about $600 billion.[87] The scheme has been influenced by the country's natural resources regime.

Norway practices a mixture of public and private land ownership. Concerning public ownership, state land title, including the right of transfer, is formally vested in Statskog. Under the private ownership system, natural or juristic persons could gain titles over land and could transfer these titles. The Land Act 1995 subjects both state and private ownership to public interest by providing that land should be used in manners that are beneficial to the society, taking into account the need of future generations.[88]

The first attempt at determining the proper way to appropriate Norway's oil wealth was in 1974, presented in the parliamentary report entitled 'The Role of Petroleum Activity in Norwegian Society', later followed by the Tempo Committee report in 1983 that proposed the establishment of a fund for saving excess revenue from the booming petroleum sector.[89] Since Norway has a unitary form of government, the parliamentary procedures ensured inclusivity through a nationwide representative endorsement. Based on the outcomes of the parliamentary procedures, especially in adopting the Tempo Committee report, the country created the Government Petroleum Fund in 1990, receiving its first fund underlay in 1996 and later changing its name to the Government Pension Fund in 2006.[90]

Statutorily, Norway's Ministry of Finance formally manages the fund;[91] however, it does this on behalf of the people.[92] In practice, the ministry only safeguards

[86]Larsen ibid, also Kamma Thordarson, 'The Wealth of a Nation: How Norway Escaped the Oil Curse' (Future Challenges 2012) <https://futurechallenges.org/local/the-wealth-of-a-nation-how-norway-escaped-the-oil-curse/> accessed 1 June 2016.

[87]Dixon and Monk (n15)

[88]Ministry of Agriculture and Food, 'Act No. 23 of 12 May 1995 relating to Land', section 1 <https://www.regjeringen.no/en/dokumenter/The-Land-Act/id269774/> accessed 1 June 2016.

[89]See Norges Bank Investment Management, 'History' (n.d.) <www.nbim.no/en/the-fund/history/> accessed 1 June.

[90]ibid.

[91]Norges Bank Investment Management, 'Government Pension Fund Act No 123 of 21 December 2005' (2015), section 2 (Government Pension Fund Act); Norges Bank Investment Management, 'About the Fund' (2011) <http://www.nbim.no/en/the-fund/about-the-fund/> accessed 1 June 2016.

[92]ibid.

the fund to protect the interest of the people through checks and balances. Also, relevant sections of the law provide for rules that ensure the protection of the peoples' interests, for example the restriction on the transfer of the capital to the central government[93] and obligations to private and public authorities.[94] As such, there is public ownership of the SWF, meaning that the government controls it on behalf of the people.

By section 2, the Government Pension Fund Act (GPFA) 2005 regulates both the Government Pension Fund Global and the Government Pension Fund Norway, the two pools in the Norwegian model. The first aims at fairly managing Norway's petroleum wealth in the interest of current and future generations, while the second, formerly the National Insurance Scheme Fund, focuses on the management of public assets. Both pools are legally managed by Norway's Ministry of Finance on behalf of the people. Operationally, the Government Pension Fund Global is managed by the Norges Bank, while the Government Pension Fund Norway is managed by *Folketrygdfondet*. Both pools in the Government Pension Fund strive to allocate costs and benefits fairly between the current and future generations of Norwegians. However, the Government Pension Fund Global more directly addresses distributive justice issues arising from petroleum revenue appropriation, hence the reason the article concentrates on it.

Unlike what the name suggests, the Government Pension Fund Global does not deal with pension but only reflects its history. In terms of its input, it comprises 'net cash flow from petroleum activities, transferred from the central government budget, the net results of financial transactions associated with petroleum activities and the return on the Fund's capital', as section 3 of the GPFA shows. This means that its input comes not from royalties but rather from taxes on the profits of petroleum companies, equity shares in petroleum projects and stock dividends from joint venture participation via Statoil.[95]

Norway invests the bulk of the fund in long-term projects that might benefit future generations more and withdraws a small percentage that it employs for social services, such as '[s]tate assistance to single mothers, long maternity leave, vacation benefits, reliable liberal sick leave and day care, and enhancement of part time job opportunities are other social services the country provides'.[96] The country appears to be investing more for the future while providing comparatively smaller benefits to the current generation, a point that might soon be the basis of criticisms for the model.[97] Notwithstanding, the general principles driving the system appear to offer more advantages than disadvantages.

One could summarise the key principles that distinguish the Norwegian system into four. These are minimisation of withdrawals from the funds to protect

[93]Government Pension Fund Act, section 5.

[94]ibid section 6.

[95]Persily (n 84).

[96]ibid; see also Hartzok (n 84).

[97]ibid.

intergenerational interests, minimisation of investment risks, transparency and accountability in management and ethics in investment choices. The first three of these principles seem to account for the substantial success of the system, while the fourth, on ethics, exclusively gives it a reputation, thus indirectly contributing to its success. The article focuses on the first three.

There are strict regulations on withdrawals from the fund to protect the interests of future generations. Following the oil boom in the 1980s, the country originally developed the system to cope with vulnerabilities that pensions may face due to fluctuating commodity prices and foreign exchange rates in the future and also to prevent inflation that the resources could cause such as the one that the Netherlands experienced due to the North Sea gas boom captured by the Dutch disease concept.[98] As a result, the country's withdrawal from the funds only averaged four percent a year as at 2011.[99] This has ensured that the funds would last generations.

The country ensures the minimisation of risks through diversification of investments, via various schemes, sectors and countries. As at 2014, the fund had 60% equities, 35–40% fixed-income securities and about 5% real estate investments all spread out globally, outside Norway, hence its name, and geographically, the investments cover Europe, North America, Asia, Oceania and emerging markets all around the world and among international organisations, totalling a coverage of 75 countries and 47 currencies.[100] The country also tracks possible risks that might arise as a result of market situations, considering factors such as the distribution of equities, movements in stock prices, exchange and interest rates, and credit risk changes in fixed-income investments.[101]

The separation of ownership and formal management from business management is another outstanding feature of the Norwegian model. This creates a form of separation of power that allows a considerable level of checks and balances, leading to transparency and accountability. The Ministry of Finance, as the legal trustee, protects the interests of the citizens through its formal management activities, including the exercise of verification and consent duties. On the other hand, the Norges Bank, through its Investment Management unit, and particularly the Leader Group, takes responsibility for the day-to-day running of the scheme as a profitable entity. Another advantage of this system is that neither of the institutions is overburdened with responsibilities, thus ensuring professionalism in the 'small' area that each focuses on.

[98] See also Armstrong (n 25).

[99] Persily (n 84).

[100] See Norges Bank Investment Limited, 'Holdings' (2015) <www.nbim.no/en/the-fund/holdings/> accessed 1 June 2016.

[101] See Norges Bank Investment Limited, 'Principles for Risk Management in Norges Bank Investment Management' 2016) <https://www.nbim.no/en/the-fund/governance-model/executive-board-documents/principles-for-risk-management-in-norges-bank-investment-management/>.

4.2 Alaska

Alaska established its SWF scheme following the commercial discovery of oil at the North Slope in 1968.[102] Like Norway, much of the scheme has relied on its natural resource regime.

Prior to the creation of the SWF, the state had ratified its Constitution to provide for joint ownership of unoccupied land in 1956[103] and had stipulated its natural resource policy as encouraging 'the settlement of its land and the development of its resources by making them available for maximum use consistent with public interest'.[104] This joint ownership policy also seems to apply to surface and subsurface waters, considered available for common use. Hence, the Alaskan natural resource sector has been guided by common ownership and built on inclusivity from the beginning.

Non-renewable natural resources found on land or in water are, according to Article 8(11) of the Alaskan Constitution 1956, subject to 'discovery and appropriation'. As such, common ownership of crude oil exists in that the people collectively own it in its natural state. However, access is based on discovery and appropriation, although subject to overriding public interest. Those that could exercise the right of access may be public stakeholders such as government corporations or private stakeholders such as companies, native peoples and citizens at large. These stakeholders have the right to transfer titles based on public regulations.

Around the time Alaska completed its pipelines, the Trans-Alaska Pipeline System, the people of Alaska amended the state's Constitution to create its SWF scheme, called the Alaska Permanent Fund.[105] The scheme receives inputs through Article 9(15) of the Constitution, which provides that '[a]t least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund'. Hence, Alaska's SWF scheme developed from and still depends on revenues derived from the exploitation of minerals, particularly petroleum, on public property.[106]

Concerning the ownership of the SWF, it appears that since no separate provision showing who owns the Alaska Permanent Fund exists, the ownership flows from the constitutional policy on natural resources: considering that the fund derives most of

[102]Alaska History and Cultural Studies, 'Modern Alaska: Oil Discovery and Development in Alaska' (2015) <www.akhistorycourse.org/articles/article.php?artID=140> accessed 1 June 2016.

[103]Karl Widerquist and Michael W Howard, *Alaska's Permanent Fund Dividend*: *Examining its Suitability as a Model* (Palgrave Macmillan 2012b) 1.

[104]Office of the Lieutenant Governor, 'The Constitution of the State of Alaska, Constitutional Convention February 5, 1956' (2012) Article 8(1) (Alaskan Constitution).

[105]See Alaska Permanent Fund Corporation, 'What is the Alaska Permanent Fund' (n.d.) <www.apfc.org/home/Content/aboutFund/aboutPermFund.cfm> accessed 1 June 2016.

[106]See generally Hartzok (n 84); Widerquist (n 84); Widerquist and Howard, *Alaska's Permanent Fund Dividend* (n 103); Onifade (n 8).

its input from petroleum revenue accruing from the exploitation of common property, and earned by the government for the people, then the government only manages the funds while the people own them. Since common ownership of land and waters has been the norm in Alaska, it appears that the state has a common ownership of the SWF as well.

The Alaska Permanent Fund received legal support in 1980 and, consistent with the idea of common ownership, attempted allocating dividends to people that same year.[107] However, not much was done before the scheme began facing legal hurdles between 1980 and 1982, dealing with issues around the criteria for the allocation of dividends, and then proceeded into a series of reforms. In 1982, the jurisdiction resumed dividend payment, and that year became the official commencement of payment under the scheme.[108] The legal hurdles and reforms that followed in the years after have led to the current system that now exists in Alaska.[109] At the moment, the jurisdiction allocates a substantial part of the fund as dividend to citizens, hence catering sufficiently for the current generations of Alaskans, perhaps more than future generations, a point on which it could also be criticised.[110]

The Alaskan model showcases three major outstanding features. These could be seen in its constitutional support, operational model and approaches to business risk. While it differs substantially from the Norwegian model on its legal support system by making a constitutional provision for its SWF scheme, it shares most of the features inherent in its operational model and approaches to business risk with Norway.

Unlike the Norwegian model, Alaska grounds the rights to natural resources as well as the establishment of the SWF scheme in the supreme law, the Constitution, hence enhancing predictability, dependability and defensibility. These might also improve the enforceability and justifiability of the rights and standards. The constitutional support also serves as a guideline and source of power for the judiciary to perform the duty of a 'watchdog' for the protection of the rights to natural resources and the SWF. Administrative processes complement these constitutional provisions.

Like the Norwegian model, the Alaskan model also shows a separation of administrative management and business management, hence presenting some elements of accountability through checks and balances. Even its business management structure is, clearly, further de-concentrated, separating business governance from business operations. A closer look at these features might be instructive.

The operational model of the Alaskan SWF scheme has changed over the years. Between 1976 and 1980, the jurisdictions' Department of Revenue Treasury Division managed the funds as a single entity.[111] This management function appears to

[107] Griffin (n 84).

[108] cf Widerquist (n 84).

[109] See Alaska Department of Revenue Permanent Fund Dividend Division, 'Historical Timeline' (2015) <https://pfd.alaska.gov/Division-Info/Historical-Timeline> accessed 1 June 2016.

[110] ibid.

[111] ibid.

have covered both administrative and business matters as it was the only entity responsible for the fund. The government established the Alaska Permanent Fund Corporation in 1980 and transferred the business responsibilities to it. In 1988, the government established the Department of Revenue Permanent Fund Dividend Division and gave it administrative responsibilities. As such, at the moment, the Alaska Permanent Fund Corporation takes business responsibilities, while the Department of Revenue Permanent Fund Dividend takes administrative responsibilities.

The Alaska Permanent Fund Corporation is governed by a Board of Trustees, with some members representing the public, and managed by an executive director and a team of staff. The corporation manages the Alaskan SWF as a single investment pool, unlike its Norwegian counterpart, which manages two pools. However, for accounting purposes, and apparently for transparency and accountability, it classifies the fund into the principal and the earnings reserves. The principal reserve cannot be spent, but the earnings reserve may be appropriated by the legislature for public use, including the payment of dividends, subject to the provisions of Article 9 of the Constitution on finance and taxation.[112]

Alaska also minimises risk in its business approaches. The SWF is invested in diversified portfolios. It diversifies into public and private sectors, within Alaska and outside the United States, going beyond economic and social projects and ranging from stocks and bonds to real estate and infrastructure.[113] The corporation ensures that the scheme targets only income-producing investments, ensures the maintenance of principal while maximising returns and is guided by prudence based on the standards of an institutional investor.[114]

The Department of Revenue Permanent Fund Dividend Division is basically responsible for the administration of the dividend scheme. It determines the eligibility of applicants and pays dividends based on the relevant provisions of the law. Relevant provisions on both eligibility and payment are now enshrined in the Permanent Fund Dividend Statutes 2015 and the Permanent Fund Dividend Regulations 2015. The current eligibility procedure could be summarised as follows: an application, evidence of residence and physical presence, evidence of citizenship or other acceptable civic status thereof and compliance with certain military law requirements, where applicable.[115]

[112]'What is the Alaska Permanent Fund' (n 105).

[113]See ibid.

[114]See Alaska Permanent Fund Corporation, 'Investments' (2009) <www.apfc.org/home/Content/investments/investIndex2009.cfm> accessed 1 June 2016; see also Alaskan Constitution 1956.

[115]State of Alaska Department of Revenue Permanent Fund Dividend 2015, 'Statutes and Regulations 2015' <https://pfd.alaska.gov/LinkClick.aspx?fileticket=w2wistFJR8E%3d&portalid=6> accessed 1 June 2016.

4.3 Nigeria: Comparative Lessons

Although Nigeria discovered oil many decades ago, it did not establish an SWF until 2011. Like Norway and Alaska, its SWF system also rests on its natural resource regime. Like Norway, the Constitution of Nigeria does not provide for common or public ownership of land. The country's Land Use Act 1990 fills this vacuum by vesting land found in each state in the governor of the respective states, to hold in trust for the people.[116] Thus, Nigeria has public ownership of land like Norway.

Section 44(3) of the Nigerian Constitution also vests the ownership and control of 'minerals, mineral oils and natural gas' upon land and sea in the federal government. This provision could be compared to its equivalent in Norway's Petroleum Activities Act 1996, equally affirming the public ownership of minerals. Unlike Norway, however, the Nigerian law even does more by specifically excluding private ownership based on a communal reading of section 43 of the Constitution on private property. In addition, unlike Norway, where vesting title in the central government caters for people at all levels as per the unitary system of government, the Nigerian system vests ownership only in the federal government such that decisions made at that level may not necessarily involve the other levels of government in the Federation.

Like Norway, Nigeria also has public ownership of its SWF, following the SIA. The statute vests legal ownership of the SWF in federal, state, federal capital territory and local governments and area councils, stating that this ownership is on behalf of the people.[117] It is interesting to note the contradistinction with the situation for minerals where the federal government has exclusive right. In any case, issues around the ownership of the SWF are of utmost relevance in this article, not those on the ownership of minerals.

The three pools of fund that Nigeria has appeared to be unique, and if well operated, may yield some successes with regard to the enhancement of current and future interests. This is because they explicitly identify the goals that each of these pools caters for. This type of system might address the potential criticisms that the Norwegian and Alaskan systems do not balance these rights well.[118] The Nigerian pools, if well operated, may balance current and future interests.

However, the challenges of inclusivity, equity and accountability may undermine the Nigerian SWF in general. Based on the comparison with Norway and Alaska, these problems deal less with the form of legal support given to the system and more with the ownership principle, the operational model and the risk management protocol of the system.

[116]Federal Republic of Nigeria, 'Land Use Act' (1978) Laws of the Federation of Nigeria 1990, Chapter 202 <http://www.nigeria-law.org/Land%20Use%20Act.htm> accessed 1 June 2016.

[117]Sovereignty Investment Authority Act, section 32.

[118]See Onifade (n 8).

4.3.1 Form of Legal Support

The SWF is not enshrined in or recognised by the Nigerian Constitution. There are already questions on the constitutionality of the scheme, and there is a recent submission that these should not affect its operation.[119] The current legal support behind the Nigerian model is statutory, primarily under the SIA regime. While it might be essential to provide constitutional support to the SWF scheme, the absence of constitutional support mostly borders on the legality issues of legitimacy and formality, not effectiveness.

The issue of effectiveness needs to be considered in the early stages of an SWF policy to avoid failure. It is acceptable for jurisdictions to provide constitutional or non-constitutional support for an SWF. Alaska provides constitutional support, but Norway relies more on administrative support, and both jurisdictions back the system with statutes and regulations. Despite the difference, the models of both jurisdictions appear to be effective.

By its constitutional support, Alaska ensures inclusivity, equity and accountability based on the two elements of FDJ. With regard to the first element, Alaska's common ownership system ensures that every Alaskan has an ownership right. This first feature accords with a peoples-based right that fosters inclusivity by justifying participation in decision-making, promotes equity by ensuring the sustenance of revenues and access of citizens and ensures accountability by giving citizens the legal standing to ask questions. This right in itself may not necessarily ensure performance, hence the need for the second FDJ element. Shifting to the second element, the Constitution provides for a natural resource policy of encouraging the settlement of its land and maximising the use of its resources based on public interest and then creates the Alaska Permanent Fund model, which allows substantial long-term savings and dividend distribution based on the resource policy. These features take the first feature further in ensuring inclusivity by involving multiple sectors of the society, including citizens, in the management of the SWF and allocating dividends to citizens; promoting equity by not exhausting the fund via current allocation of dividends and saving for the future; and fostering accountability by providing for administrative separation of power, as well as making the management of the SWF and the allocation of dividends transparent, given that the court serves as a watchdog.[120]

Unlike Alaska, Norway's model is powered by statutes and administrative law. These also advance inclusivity, equity and accountability based on the elements of FDJ. Concerning the first element, the provision of Norway's law that the Ministry of Finance manages the Government Pension Fund on behalf of the citizens speaks to the sovereignty of citizens as end owners. Like Alaska, this is equally a peoples-based approach fostering inclusivity by justifying the right to be involved in decision-making, promoting equity by giving people the legal standing to lay

[119] See Ekokoi (n 5).

[120] See *Zobel v Williams* 457 U.S. 55 (1982).

claim and boosting accountability by giving citizens the right to ask questions. This does not also guarantee its own protection, hence the need for practical mechanisms envisaged by the second element of FDJ. On the second element, Norway's Government Pension Fund arguably provides for inclusiveness in that, having emerged from labour advocacies, it has continued to involve citizens in decision-making; it is most reputable for fostering equity in the provision of impactful social services to citizens and saving sufficiently for future generations, and its accountability is made possible through an administrative system that has separation of power and checks and balances.

Despite the different forms of legal support that Alaska and Norway employ however, both jurisdictions appear to have effective schemes. This shows that the form of legal support is less important, compared to some other variables. However, this is not to pre-empt the advantages that constitutional support might have for the local conditions of a jurisdiction, as Norway's model might have sociopolitical peculiarities that make up for the absence of constitutional support. One such peculiarity could be its constitutional monarchy, which drives its administrative law.

4.3.2 Ownership Principle

An SWF system should have the FDJ ownership principle enshrined in the peoples-based permanent sovereignty doctrine. The primary purpose of the ownership principle is to ground the right to natural resources, which then provides a legal standing for inclusivity, equity and accountability.

The ownership principle of FDJ could appear in provisions or practices that embody the peoples-based sovereignty doctrine directly or, alternatively, public ownership, common ownership and environmental justice principles. The primary purpose of such ownership principle is to ground the right to natural resources and the income therefrom. Because peoples-based permanent sovereignty, public ownership and common ownership principles are fairly older, they tend to ground the right to natural resources more often than environmental justice.

The ideal SWF ownership principle is clearly outlined by the first FDJ element, as developed from the peoples-based approach to permanent sovereignty. This principle positions citizens as end owners of natural resources. While citizens may assign their control rights to governments, under no circumstance could they transfer ownership titles to governments.

In jurisdictions with effective SWF systems, it is common to find peoples-based permanent sovereignty or public ownership, common ownership and environmental justice philosophies in natural resource policy instruments, sometimes embedded in enforceable rules of law or otherwise. Depending on the legal system of the jurisdiction and the choice of policy instrument, these provisions may be found in the preamble, the long title or operative parts of statutes and other policy documents. These philosophies or the rules therefrom either directly or indirectly emphasise citizens as owners of natural resources. These philosophies often relate to rights that could be exercised over land and seas and sometimes distinguish between resources.

The Nigerian SWF scheme appears to have an ownership principle. As already discussed, it has public ownership like Norway, at least as an ideal, not common ownership like Alaska's. However, unlike Alaska and Norway, Nigeria's ownership principle is in the long title. The implication of this is that this provision might not give citizens robust legal standing to defend the goals of the SWF. In Alaska and Norway, similar provisions are in the operative parts of the relevant statutes. Section 1 of GPF of Norway and section 37.13.020 of the Alaska Statutes make similar provisions. These provisions provide a robust basis for obtaining legal remedies, unlike Nigeria's SIA, which only provides a scanty and superficial guiding philosophy.

4.3.3 Operational Model

How properly configured the operational model of a SWF is might determine whether people's rights to natural resources are actually protected or not. A haphazardly designed SWF scheme might not guarantee that citizens would be involved in, have access to or receive accountability on the management of the SWF. The operational model directly touches on the issue of accountability more than inclusivity and equity.

One of the two obvious similarities in the Norwegian and Alaskan models is the separation of administrative or formal management from business management. This is a form of separation of powers that enhances checks and balances, hence ensuring accountability.

While the Nigerian system has a guise of this type of separation, it does not appear that the system is adequate. As already discussed, legal ownership is vested in federal, state, federal capital territory and local governments and area councils, while management is vested in the Nigerian Sovereign Investment Authority. The Nigerian Sovereign Investment Authority has a Board of Directors, mostly constituted by business experts supposedly performing administrative management functions, the Managing Director/Chief Executive Officer and specialised committees on risk, investment, compensation and audit-performing business functions and then a governing council chaired by the President of the country and constituted by mostly government officials. Although there may be noble intentions behind this structure, it might not exhibit sufficient checks and balances needed in an SWF scheme. Also, the plurality of structures creates regulatory uncertainties that might undermine independence.[121]

In the Norwegian model, the Ministry of Finance legally administers the SWF for people who are the owners, while the Norges Bank Investment Management operates the scheme as a business entity. The Norges Bank Investment Management then has an executive board responsible for business administration and strategic issues, while the leadership team, mostly composed of business experts, is

[121] See Ezeani (n 2).

responsible for actual business operations. While allowing for checks and balances, the system is not flooded with governance structures and personnel, and reduces government contact. This model minimises administrative cost and ensures modest checks and balances, reduces overburdening and clashes and enhances expertise.

When one turns to Alaska, Alaskans collectively own the SWF, the Alaska Permanent Fund Corporation manages it as a business concern and the Alaska Department of Revenue Permanent Fund Dividend Division administers permanent funds. The Alaska Permanent Fund Corporation also has an internal separation of administrative and strategic functions from actual business functions. Its Board of Trustees is responsible for administration and strategic issues, while the Executive Director, together with a staff, conducts the business. This also shows checks and balances, reduces government involvement to the minimum, prevents possible clash of duties and enhances efficiency.

Some of the advantages of the Norwegian and Alaskan models impact not only accountability but also inclusivity and equity. The rate at which inclusivity and equity play out in the two jurisdictions varies.

On inclusivity, the operational models of Norway and Alaska involve the public in decision-making. Being a unitary state, the parliament of Norway makes decisions, including hitherto on the establishment of the SWF, for the entire country. Alaska employed a constitutional referendum when it established its scheme and has slots for citizens on the governing board responsible for business policy. In addition, the laws of both jurisdictions ensure that decision-making on the appropriation of the SWF is as distant from the government and brought closer to the people as much as possible.

Unlike Norway, Nigeria has a centralised decision-making structure, and unlike Alaska, members of the public are not directly involved in the governance of the SWF. Members of the governing council are drawn from the federal and state governments, for example, the president, minister of finance, state governor, attorney general of the Federation, minister of national planning, the governor of the central bank and the chief economic adviser.[122] This does not ensure the full participation of local governments and area councils, which happen to be closest to the people.

With regard to equity, the Norwegian and Alaskan models ensure that the sustenance and profitability of their SWF models are maximised by engaging structures that could secure the investments of the scheme. They also ensure operational efficiency by making the institutions and officials involved compact. Without these, the fund saved or distributed may be depleted, hence implicating the interests of both current and future generations.

Unlike Norway and Alaska, the Nigerian scheme is not structurally configured to be as profitable at the moment. Also, players in the Nigerian scheme are too numerous, leading to increased administrative costs. This might hamper the

[122]See Nigerian Sovereign Investment Authority, 'Governing Council' (2015a) <http://nsia.com.ng/governing-council/> accessed 1 June 2016.

efficiency of the system. This will be given more attention under the next section on risk management protocol.

4.3.4 Risk Management Protocol

Also an aspect of the operational model in a strict sense, the protocol employed in managing the risk of an SWF scheme determines how efficient the system would be. This deals mainly with equity, not inclusivity or accountability. This is because the risk management protocol determines how safe and profitable the SWF is, hence how much is available for current and future generations. As such, any risks having the tendency to undermine people's interest should be reduced to the barest minimum.

The risk management protocol determines the success of an SWF as a business venture. This is why it is one of the outstanding features across the Norwegian and the Alaskan models. Across SWF schemes in general, it appears to be the second most emphasised feature after intergenerational components. This article discusses it separately from the operational model because of the importance attached to it in SWF schemes.

Nigeria's Future Generations Fund and the Stabilisation Fund have a global focus, while the Nigerian Infrastructure Fund focuses on domestic ventures.[123] There are no clear guidelines on risk management practices and procedures for these pools, aside from mere risk governance philosophies that lack evidence of implementation. Risk philosophies not backed by implementation are inadequate for securing an SWF scheme.

The risk management protocols of Norway and Alaska reveal three basic strategies. The first is the minimisation of withdrawals, which seems to feature more in Norway than Alaska. The prohibitions on withdrawals in both jurisdictions ensure the sustenance of the fund. The second is the diversification of investments, a feature one could find somewhat comparably in both jurisdictions. The jurisdictions invest through diverse portfolios, in several sectors and in multiple geographical locations around the world; Norway goes a step further by prohibiting local investments. This diversity in investment reduces the risks that the schemes could be exposed to as a result of problems that might arise from any one portfolio, in any one sector or at any one region. The third is the scrutiny of investments through practical measures, found in both jurisdictions. As a result of the separation of powers in the systems of both jurisdictions, administrative and business management bodies scrutinise each other's operations, thus ensuring that the SWF scheme performs at maximum.

Nigeria has no clear provision on the minimisation of withdrawals. In fact, the scheme is designed to allow flexible withdrawals by the Minister of Finance.[124]

[123]See Nigerian Sovereign Investment Authority, 'Nigeria Infrastructure Fund' (2015b) <http://nsia.com.ng/nigeria-infrastructure-fund/> accessed 1 June 2016.

[124]See Ezeani (n 2).

Also, there is no clear evidence of diversity or globalisation in the SWF investments as priority is given to local ventures at the moment. While this should not be a problem in and of itself, the Nigerian landscape is such that politicians or politically influenced businesses could dominate investments. A related problem is that the scheme tends to be in favour of short-term liquid public investments as opposed to long-term assets such as infrastructure, real estate and private equities.[125] This is likely to undermine long-term savings that could benefit future Nigerians. Further, the current governance scrutiny system might not be effective because of the overwhelming involvement of government institutions. As such, governments may influence business decisions. The country could easily address these challenges by learning from Norway and Alaska.

5 Conclusion

Legal instruments and administrative structures backing SWF systems vary across the three jurisdictions compared. Notwithstanding, the effectiveness of the SWF schemes across diverse jurisdictions appears to depend on the ownership principle, operational models and risk management protocols, which embed pertinent inclusivity, equity and accountability safeguards, more than the form of legal support.

Based on the elements of FDJ, this article has investigated SWF schemes of Norway, Alaska and Nigeria. It has argued that despite the difference in the form of legal support given to the SWF systems in Norway and Alaska, the ownership principles, operational models and risk management protocols in these jurisdictions enhance inclusivity, equity and accountability of their respective models, leading to effectiveness. Conversely, the absence of inclusivity and the insufficiency of equity and accountability measures limit the effectiveness of the Nigerian SWF scheme. The comparison of the three jurisdictions reveals the overall lesson that the difference in the form of legal support does not have a direct bearing on the effectiveness of the models.

What Nigeria or any other jurisdiction could learn from Norway and Alaska should depend on local contexts. One point is, however, clear: the Nigerian SWF scheme will only achieve its ultimate goal of safeguarding reserve funds for present and future generations if it is reformed and enhanced to be more inclusive, accountable and transparent.

[125] ibid.

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Part V
Book Review

International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations by Daniëlla Dam-de Jong

Chilenye Nwapi

Daniëlla Dam-de Jong's *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*[1] appears in "Cambridge Studies in International and Comparative Law" series. The book aims to answer three key questions: (1) to what extent does international law provide rules to ensure that natural resource exploitation promotes sustainable development? (2) To what extent do those rules continue to apply in times of armed conflict? And (3) to what extent do the norms developed out of ad hoc mechanisms (such as through United Nations Security Council (UNSC) resolutions) for countries recovering from natural-resource-related armed conflicts contribute to improving natural resource governance in those countries? The analysis is set out in nine chapters, divided into an introduction (Chap. 1), three thematic parts comprising seven chapters (Chaps. 2 to 8), and a concluding chapter (Chap. 9).

In Chap. 1, Dam-de Jong reviews the resource curse thesis to provide a foundation for the subsequent international legal analysis. Her review shows how natural resources can provide the "*means*" to finance armed conflicts and "*prolong*" ongoing

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[1]Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, Cambridge Studies in International and Comparative Law (CUP 2015).

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armed conflicts and how they can contribute to the "*outbreak*" of armed conflicts.[2] Dam-de Jong identifies the range of actors involved in resource-related armed conflicts. They include domestic governments, armed groups, (sometimes) foreign States and companies. Dam-de Jong's thesis is that the range of actors involved in an armed conflict not only determines the applicable legal rules to resolve the conflict but also can pose challenges to the legal resolution of the conflict.

Part I of the book (Chaps. 2 to 4) addresses the right of States to exercise sovereignty over their natural resources (right of permanent sovereignty). Dam-de Jong stresses that this right is exercisable by the government on behalf of the State and its people. The question then is whether a government that has lost legitimacy in the eyes of its people can continue to exercise this right on their behalf. Dam-de Jong begins in Chap. 2 by tracing the origins of the principle of permanent sovereignty, analyzing its evolution, nature, and legal status. She analyzes the significance of the 1962 UN Declaration on Permanent Sovereignty over Natural Resources, which emphasizes the need for the right to be exercised in the interest of "national development." Dam-de Jong discusses the principle's maturation into "a duty-based concept" integrated into the no-harm principle in international environmental law. She broaches the idea that the principle might qualify as a principle of customary international law. Her discussion reveals the dynamic nature of the principle but also its enduring usefulness in the understanding of the right of States to exploit their natural resources.

On the question of legitimacy of a government to continue to exercise the right of permanent sovereignty on behalf of the State and its people, Dam-de Jong reviews modern State practice and highlights the silence of international law on the question. She reviews State practice on the appropriate response to regime change, as happened in countries like Libya, Syria, and Sierra Leone. The review shows a not-very-consistent response pattern. However, she cautiously concludes that regime change through internal revolutions against authoritarian regimes are generally more acceptable to the international community than regime change through *coup d'état*. Her analysis, however, does not address the role of the great powers in successful regime changes over the decades, which, in my view, should be taken into account in determining the legitimacy of a government ushered in through a regime change.[3]

In Chap. 3, Dam-de Jong examines the implications of the obligation to exercise the right to permanent sovereignty for the governance of natural resources. She views permanent sovereignty as both a right and an obligation and ties the discussion to the right to self-determination and the right to development in international law. To Dam-de Jong, the most important aspect of the right to self-determination (for the purposes of her book) is that it embodies "the right of peoples to freely dispose of their natural resources."[4] The practical implication is that peoples have a right to

[2] *ibid* 7.

[3] See, e.g., Mehrdad Payandeh, 'The United Nations, Military Intervention and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 355–404.

[4] Dam-de Jong (n 1), 66.

participate in national and local decisions regarding the disposal of their natural resources. It therefore behooves States to establish mechanisms that allow their people to exercise this right. On the other hand, Dam-de Jong argues that the right to development is one of the means of achieving the right to self-determination. It includes not merely the right to participate in the process of development but also the "right to enjoy the fruits of development."[5] The practical implication is that the State must establish mechanisms to enable its people to participate in the process of development and to enjoy the fruits of development.

Dam-de Jong rounds off Part I of the book with an analysis, in Chap. 4, of the contributions of international environmental law to the development of the rights and obligations of States to freely dispose of their natural resources. The discussion is centered on the duties formulated in international environmental law (condensed in the principle of sustainable use, intergenerational equity, the prevention principle, the precautionary principle, etc.) for the protection of the environment. The overarching conclusion of Part I is that international law contains obligations that, if fulfilled by States in their exercise of their right to permanent sovereignty, would help to prevent or resolve resource-related armed conflicts and even facilitate postconflict rebuilding.

Part II of the book (Chaps. 5 and 6) focuses on the legal framework for the governance of natural resources in armed conflict situations. Chapter 5 is concerned with the question: does armed conflict terminate or suspend the operation of treaties? As per the 1969 Vienna Convention on the Law of Treaties, termination or suspension must be in conformity with treaty provisions. But what about where there is no indication in the treaty regarding termination or suspension during an armed conflict? Dam-de Jong examines in particular the International Law Commission Draft Articles on the Effects of Armed Conflicts on Treaties and argues that it is the nature of the subject matter of the treaty that determines the operation of a treaty in such a situation.[6] Resorting to human rights treaties, Dam-de Jong argues that human rights treaties, due to their nature, continue to apply in armed conflict situations and that this applies to both derogable and nonderogable rights under the International Convention on Civil and Political Rights.[7] The application of this argument to derogable rights is, however, qualified, as the International Court of Justice indicated in the *Nuclear Weapons Advisory Opinion*: emergency can provide justification for derogation and, therefore, for the termination or suspension of an obligation to respect a derogable right.[8] Dam-de Jong further argues that under customary international law, States remain bound to dispose their natural resources for the well-being of the people.[9] Another important highlight of this chapter is that neither international human rights law nor international environmental law contains direct

[5] *ibid* 100.

[6] *ibid* 163.

[7] *ibid* 168.

[8] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Reports 226.

[9] Dam-de Jong (n 1), 192.

obligations for nonstate armed groups. With regard to the conduct of foreign States in armed conflict situations, the obligations created under these two regimes are relevant only in part.

Chapter 6 shifts the discussion to the contributions of international humanitarian law (IHL) to the protection of natural resources in armed conflict situations. Dam-de Jong argues that IHL's contributions can be distilled from treaty provisions that afford protection to property in occupied territories and to civilian objects. She believes that IHL is the only field of international law containing binding obligations for nonstate armed groups, including obligations that are relevant for natural resource exploitation.[10] However, the protections afforded in IHL, according to Dam-de Jong, fall short of what is necessary to protect the environment during resource-related armed conflicts.[11] For instance, IHL's prohibition of widespread, long-term, and severe damage to the environment applies only in situations of international armed conflicts, leaving out internal armed conflicts. Moreover, the required threshold under IHL is so high that only the most extreme cases of environmental damage resulting from natural resource exploitation are covered. Dam-de Jong points, without further analysis, to debates calling for the adoption of a legal instrument to protect the environment during armed conflicts. Her analysis would have been richer had she addressed the debate about the viability of such an idea.

Part III (Chaps. 7 and 8) turns to approaches to end trade in natural resources used to finance armed conflicts and to the governance of natural resources in post-conflict situations. What is the role of international law in resolving natural resource-related armed conflicts and in facilitating peacebuilding after conflict has ended? Dam-de Jong posits that international law has evolved around two approaches: UNSC sanctions and voluntary intergovernmental agreements that have often involved the private sector.

Chapter 7 focuses on UNSC sanctions and assesses the role of peacekeeping operations in supporting the implementation of the sanctions. Dam-de Jong's principal aim is to ascertain the extent to which UNSC sanctions have actually led to the resolution of natural-resource-related armed conflicts. She also asks whether the UNSC is the appropriate body to address resource-related armed conflicts or whether it is "exceeding its authority."[12] After reviewing the use and evolution of sanctions in the resolution of natural-resource-related armed conflicts, comparing the various sanctions regimes, Dam-de Jong argues that although the UNSC has wide discretionary powers to use sanctions to address natural-resource-related armed conflicts that threaten international peace and security, its powers are still limited.[13]

Chapter 8 focuses on the use of voluntary intergovernmental initiatives: how have those initiatives shaped the regulatory framework for the governance of natural

[10] *ibid* 252–253.
[11] *ibid* 257.
[12] *ibid* 268.
[13] *ibid* 365.

resources in postconflict situations? Of particular interest to Dam-de Jong are the role of the initiatives in promoting sustainable natural resource governance and whether those initiatives have provided a reliable alternative to legally binding mechanisms. Dam-de Jong focuses on three initiatives: the Kimberly Process for the Certification of Rough Diamonds, the Extractive Industries Transparency Initiative and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. After discussing the features and operation of each of these initiatives, Dam-de Jong decries that none of the initiatives incorporates a requirement to promote sustainability.[14] On the effectiveness of the initiatives, she argues that the initiatives do not obviate the need for legally binding standards.

In Chap. 9, Dam-de Jong summarizes the most important conclusions of her book on the role of international law in addressing the challenges arising from resource-related armed conflicts and proposes ways to address some of the challenges. She calls for the need to strengthen existing treaties. Her most remarkable proposal, however, is, perhaps, that armed groups in control of a portion of a State's territory should be granted "a qualified right to exploit natural resources" within that territory (a right of *usufruct*).[15] To Dam-de Jong, this is the best way to protect the environment and civilian population within that portion of a State's territory as such a right would give armed groups an incentive to respect IHL. Dam-de Jong downplays the risk that armed groups might use the proceeds from the exploitation to buy arms, pointing out that *usufruct* "does not entail a right to use the proceeds ... to buy weapons."[16] Without a thorough understanding of the varied motivations that drive armed groups, this proposal is hard to swallow. The risk that an armed group granted such a right might seek to expand its territory in order to gain access to more natural resources cannot be glossed over.

In sum, the underlying thesis of this book is that international law in its current state is inadequate to address the challenges arising from resource-related armed conflicts. My general perception of the book is that it is a fantastic contribution toward the resolution of a global problem. The author deserves commendation for tackling the problem comprehensively. Nonetheless, I feel that its comprehensiveness affected the author's ability to deepen her analysis in some areas. One example is her analysis of the legitimacy of a government ushered in by regime change. I feel also that her proposals lack sufficient substance and do not measure up with the richness of her analysis of the problem.

[14] *ibid* 412.
[15] *ibid* 422–423.
[16] *ibid* 423.

Part VI
Year in Review

Africa, International Courts/Tribunals and Dispute Settlement: Year in Review 2015

Uche Ewelukwa Ofodile

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1 Introduction

This article reviews recent decisions and opinions of international and regional courts and tribunals that are pertinent to countries in Africa. The decisions and opinions analyzed arise out of cases brought by or against African States and governments, as well as cases that, although not brought by or against African States and governments, are nonetheless relevant to these countries. Altogether, the decisions and opinions of six international and regional courts are reviewed:

- the International Tribunal for the Law of the Sea,
- the Permanent Court of Arbitration,
- the International Criminal Court,
- the African Court on Human and Peoples' Rights,
- the International Criminal Tribunal for Rwanda, and
- the General Court of the European Union, which is a constituent court of the Court of Justice of the European Union.

The article also highlights three recent decisions by domestic courts in the United States (US), the United Kingdom (UK), and the Netherlands that have serious implications for countries in Africa. The decisions and opinions reviewed in this article touch on areas of law ranging from maritime law, law of the sea, sustainable development, and international trade law to human rights law and international criminal law. The cases reviewed address a wide range of issues, including corporate liability for human rights violations, environmental degradation, the status of criminal defamation laws under international human rights law, maritime boundary disputes, and self-determination struggles in Western Sahara, also known as "Africa's last colony." In the area of international criminal law, cases reviewed highlight the first conviction ever of a woman for genocide by an international criminal court, the first indictment of a woman before the International Criminal

Court for crimes against humanity, and the criminal indictment of a sitting president of State and a subsequent withdrawal of that indictment. Collectively, the cases reviewed address or highlight cutting-edge issues of our time such as the following:

- the challenge of illegal, unreported, and unregulated fishing for poor coastal States;
- the tension between the sovereign right of States to exploit their natural resources and their duty to protect and preserve the marine environment;
- the fishing rights of States in Africa and some historical impediments to the development of a viable blue economy for some countries in the continent;
- the legal status, in international law, of an undertaking given by a former colonial empire to a former colony;
- the intersection of international trade law and the right of self-determination in occupied territories; and
- the responsibility of the world's most powerful companies for human rights violations and environmental pollution occurring in their area of operation.

The article focuses primarily on decisions and opinions rendered in 2015. However, with respect to the African Court on Human and Peoples' Rights, three highly significant 2014 decisions and opinions were also reviewed. Altogether, the cases reviewed point to several trends in the approach to disputes and dispute settlement in Africa: a growing judicialization of interstate disputes, a willingness to submit to dispute settlement mechanisms other than the International Court of Justice, as well as a growing acceptance of international arbitration as a means for resolving disputes.

2 International Tribunal for the Law of the Sea (ITLOS)[1]

The International Tribunal for the Law of the Sea (ITLOS or Tribunal) is a judicial body established by the United Nations Convention on the Law of the Sea (UNCLOS or Convention)[2] with the mandate to adjudicate disputes arising out of the interpretation and application of the Convention.[3] The Tribunal is composed of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. African States were active before ITLOS in 2015. In April 2015, ITLOS delivered its Advisory Opinion on the obligation of flag States in relation to illegal, unreported, and unregulated fishing. Also in April 2015, a Special Chamber of ITLOS, formed to deal with the dispute between Côte d'Ivoire and Ghana

[1] "International Tribunal for the Law of the Sea" (Latest News) <https://www.itlos.org/en/top/home> accessed 11 June 2016 [hereinafter ITLOS].

[2] "United Nations Convention on the Law of the Sea" (10 December 1982). <http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed 11 June 2016.

[3] ITLOS, *n* 1.

concerning the delimitation of a maritime boundary in the Atlantic Ocean, delivered its Order on a request for provisional measures filed by Côte d'Ivoire.

2.1 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS Case No. 21, Advisory Opinion of April 2, 2015*[4]

2.1.1 Introduction

Illegal, unreported, and unregulated fishing (IUU) is a problem and a major challenge for many coastal States in the global South. IUU fishing undermines food security in poor countries and also undermines the capacity of poor coastal States to maintain viable and sustainable fishing industries. On April 2, 2015, ITLOS issued an advisory opinion that focused primarily on the responsibility of a flag State under UNCLOS with regard to IUU.[5] Five ITLOS judges wrote separate declarations or opinions. The request for advisory opinion came from the Permanent Secretary of the Sub-Regional Fisheries Commission (SRFC),[6] a fisheries commission made up of seven West African nations.[7] The SRFC made the request pursuant to the *Convention on the Definition of the Minimum Access Conditions and Exploitation of Fisheries Resources Within the Maritime Zones* (MAC Convention) under the Jurisdiction of SRFC Member States.[8] In requesting an advisory opinion, the SRFC relied on Article 138 of ITLOS's *Rules of Procedure*[9] and Article 20 of the *Statute of ITLOS*.[10] Four questions were before ITLOS. First, what are the obligations of the flag State in cases where illegal, unreported, and unregulated (IUU) fishing activities are conducted within the exclusive economic zone (EEZ) of third party States?

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[4] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion [2015] ITLOS <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf > accessed 11 June 2016 [hereinafter SRFC Advisory Opinion].

[5] ibid.

[6] "Commission Sous-Regionale Des Peches Sub-Regional Fisheries Commission" (June 2012) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_CMA_ENG.pdf> accessed 11 June 2016 [hereinafter Commission].

[7] "Request for an Advisory Opinion to the International Tribunal for the Law of the Sea—ITLOS" (November 2013) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_19_CSRP_orig_Eng_rev.pdf> accessed 11 June 2016 (finding the seven member states to be Guinea, Cape Verde, Gambia, Guinea Bissau, Mauritania, Senegal, and Sierra Leone).

[8] Commission, *n* 6.

[9] "International Tribunal of the Law of the Sea" (Rules of the Tribunal, 17 March 2009) <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf> accessed 11 June 2016.

[10] Annex VI. Statute of the International Tribunal for the Law of the Sea, s 2, article 20 (1-2).

Second, to what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag? Third, where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question? Fourth, what are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?

This case is very important as it clarifies the advisory jurisdiction of ITLOS. The case is also very important as it sheds light on the responsibility of coastal States for the conservation and management of living resources in their EEZ, as well as the obligation of flag States in relation to IUU occurring in the EEZ of coastal States.

2.1.2 Jurisdiction and Admissibility

The Tribunal first considered whether it had jurisdiction to give the advisory opinion requested. The main argument against an advisory jurisdiction, the Tribunal noted, was that "the Convention makes no reference, express or implied, to advisory opinions by the full Tribunal" and that if it were to exercise advisory jurisdiction, it would be acting ultra vires under the Convention.[11] Whether the Tribunal has implied powers to serve as an independent source of authority to confer upon itself an advisory jurisdiction that it does not otherwise have was thus a question that was raised and considered in this case. For the Tribunal, the challenge was that neither UNCLOS nor the ITLOS Statute makes explicit reference to the advisory jurisdiction of the Tribunal. Article 288 of UNCLOS provides for the contentious jurisdiction of the Tribunal in clear and express terms but is silent on the issue of advisory jurisdiction. Article 20 of the ITLOS Statute (Access to the Tribunal) stipulates that the Tribunal "shall be open to States Parties." It further provides that the Tribunal "shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case." Cast in broad terms, Article 21 of the ITLOS Statute (Jurisdiction) stipulates that "The jurisdiction of the Tribunal comprises *all disputes* and *all applications* submitted to it in accordance with this Convention and *all matters* specifically provided for in any other agreement which confers jurisdiction on the Tribunal."[12] The Tribunal concluded that there were three elements to its jurisdiction under Article 21 of the ITLOS Statute: "(i) all 'disputes' submitted to the Tribunal in accordance with the Convention; (ii) all 'applications' submitted to the Tribunal in accordance with the Convention; and (iii) all 'matters' ... specifically provided for in any other

[11] SRFC Advisory Opinion, *n* 4, at [40].

[12] Emphasis added.

agreement which confers jurisdiction on the Tribunal."[13] Advisory jurisdiction could be found under the third element, the Tribunal held. To the Tribunal, "all matters" "must mean something more than only 'disputes'" and "[t]hat something more must include advisory opinions, if specifically provided for in 'any other agreement which confers jurisdiction on the Tribunal.'"[14] The Tribunal ruled that the other agreement that conferred jurisdiction on it was the MCA Convention. Article 33 of the MCA Convention provides that "[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the International Tribunal of the Law of the Sea for advisory opinion."

What about Article 138(1) of the Rules of the Tribunal? Article 138(1) of the Rules of the Tribunal stipulates that "[T]he Tribunal may give an advisory opinion on *a legal question* if *an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion*." Article 138 (2) further provides: "A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal." The Tribunal stressed that Article 138 of the Rules of the Tribunal cannot and does not establish the advisory jurisdiction of the Tribunal but merely "furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction."[15] The Tribunal ultimately ruled that the prerequisites specified in Article 138 of the Rules were satisfied[16] and found no compelling reason why it should not give the advisory opinion that the SRFC had requested.[17]

2.1.3 The Decision

What Are the Obligations of the Flag State in Cases Where Illegal, Unreported, and Unregulated (IUU) Fishing Activities Are Conducted Within the Exclusive Economic Zones of Third Party States?

The Tribunal clarified that the first question relates "only to the obligations of flag States not parties to the MCA Convention in cases where vessels flying their flag are engaged in IUU fishing within the exclusive economic zones of the SRFC Member States" and did not relate to the obligations of flag States in cases of IUU fishing in other maritime areas, including the high seas.[18]

On the issue of conservation and management of living resources within the EEZ, the Tribunal held that under the Convention, responsibility for the conservation and

[13]SRFC Advisory Opinion, *n* 4, at [54].
[14]ibid at [56].
[15]ibid at [59].
[16]ibid at [61-9].
[17]ibid at [70-9].
[18]ibid at [89].

management of living resources in the EEZ rests with the coastal State. The coastal State "is entrusted with the responsibility to determine the allowable catch of the living resources in its exclusive economic zone"[19] and to ensure that the maintenance of the living resources in the EEZ is not endangered by overexploitation.[20] The coastal State is also "required through agreements or other arrangements to give other States access to the surplus of the allowable catch if it does not have the capacity to harvest the entire allowable catch" and, to this end, is "required to adopt the necessary laws and regulations, including enforcement procedures, which must be consistent with the Convention." The primary responsibility of the coastal State in cases of IUU fishing conducted within its exclusive economic zone "does not release other States from their obligations in this regard," the Tribunal added.[21]

The Tribunal examined the obligation of flag States in the EEZ of the SRFC members in relation to the living resources in these zones from two perspectives: *general obligations* of States under the Convention with regard to the conservation and management of marine living resources and *specific obligations* of flag States in the exclusive economic zone of the costal State.[22] Under Articles 58(3), 62(4), and 192 of UNCLOS, flag States "are obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities"[23] and "have the *responsibility to ensure* that vessels flying their flag do not conduct IUU fishing activities within the EEZs of the SRFC Member States." For the meaning and scope of "responsibility to ensure," the Tribunal drew attention to the clarification given by the Seabed Disputes Chamber in its Advisory Opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*.[24] The Seabed Disputes Chamber found, in the referenced case, that the obligation "to ensure" was an obligation "of conduct," not "of result" and was an obligation of "due diligence." Drawing on the Seabed Disputes Chamber's analysis, the Tribunal concluded that the obligation of a flag State not party to the MCA Convention to ensure that vessels flying its flag are not involved in IUU fishing is also an obligation "of conduct."[25] According to the Tribunal:

> this is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost" to prevent IUU fishing by ships flying its flag. However, as an obligation "of conduct" this is a "due diligence obligation", not an obligation "of result". This means that this is not an obligation of the flag State to achieve compliance by fishing vessels flying its flag in each case with the requirement not to engage in IUU fishing in the exclusive economic zones of the SRFC Member States. The flag State is under the "due diligence

[19] ibid at [104].

[20] ibid.

[21] ibid at [108].

[22] ibid at [109].

[23] ibid at [124].

[24] *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion [2011] ITLOS <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf> accessed 11 June 2016.

[25] SRFC Advisory Opinion, *n* 4, at [129].

obligation" to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.[26]

The Tribunal went on to define what constitutes the "due diligence obligation" of the flag State. The flag State has "to take necessary measures . . . to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States"[27] and is obliged "to adopt the necessary measures prohibiting its vessels from fishing in the exclusive economic zones of the SRFC Member States, unless so authorized by the SRFC Member States."[28] The flag State must also "take the necessary measures to ensure that vessels flying its flag comply with the protection and preservation measures adopted by the SRFC Member States."[29] Although flag States have discretion as regards the nature of the laws, regulations, and measures that are to be adopted, any law adopted must include in them enforcement mechanisms to monitor and secure compliance with the laws and regulations. Moreover, sanctions applicable to involvement in IUU fishing activities "must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities."[30] The flag State must also undertake investigations of ships alleged to have been involved in IUU fishing and, if appropriate, must take action necessary to remedy the situation, as well as inform the reporting State of that action.

To What Extent Shall the Flag State Be Held Liable for IUU Fishing Activities Conducted by Vessels Sailing Under Its Flag?

The Tribunal noted that neither UNCLOS nor the MCA Convention provided guidance on the issue of flag State liability for IUU fishing activities conducted by vessels under its flag. To decide the issue, the Tribunal relied on general rules of international law as set out in the International Law Commission's (ILC's) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ASR). Liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones because the violation of such laws and regulations by vessels is not per se attributable to the flag State. Rather, the liability of the flag State arises "from its failure to comply with its 'due diligence' obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States."[31] Would isolated IUU fishing activities or only a repeated pattern of such activities entail a breach of "due diligence" obligations of the flag State? According to the Tribunal, the frequency of IUU fishing activities by vessels in the

[26] ibid at [129].
[27] ibid at [134].
[28] ibid at [135].
[29] ibid at [136].
[30] ibid at [138].
[31] ibid at [146].

exclusive zones of the SRFC Member States is not relevant to the issue as to whether there is a breach of "due diligence" obligations by the flag State.[32]

What Are the Rights and Obligations of the Coastal State in Ensuring the Sustainable Management of Shared Stocks and Stocks of Common Interest, Especially the Small Pelagic Species and Tuna?

The coastal State, as an SRFC Member State, has the obligation to ensure the sustainable management of shared stocks while these stocks occur in their EEZs. This includes (1) cooperation with the international organizations to ensure that the shared stocks are not endangered by overexploitation, (2) seeking to agree upon the measures necessary to coordinate and ensure the conservation and development of the stocks, and (3) regarding tuna species, cooperation with the SFRC to ensure conservation and optimal utilization of such species in the exclusive zones.

This Advisory Opinion confirms that ITLOS in plenary has advisory jurisdiction. The case is also important because it offers a detailed and comprehensive examination of the obligations of flag and coastal States in relation to fisheries management.

2.2 Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and the Republic of Cote d'Ivoire Submitted to a Special Chamber of the Tribunal[33]

2.2.1 Introduction

On April 25, 2015, a Special Chamber of the Tribunal formed to deal with the dispute between Côte d'Ivoire and Ghana concerning the delimitation of the maritime boundary between the two countries in the Atlantic Ocean delivered its *Order on Request for Provisional Measures* filed by Côte d'Ivoire.[34] In 2010, soon after oil was discovered in the Dzata-1 deepwater well, Côte d'Ivoire petitioned the United Nations to complete the demarcation of the Ivorian maritime boundary with Ghana. In December 2014, Ghana initiated arbitration proceedings under Annex VII of

[32]ibid at [150].

[33]Case Number 23—Provisional Measures, Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean, Order of 25 April 2015 [2015] ITLOS <https://www.itlos.org/cases/list-of-cases/case-no-23/case-no-23-provisional-measures/> accessed 11 June 2016 [hereinafter Case No. 23.

[34]ibid.

UNCLOS seeking confirmation of its rights to carry out oil exploration in the disputed maritime areas. On December 3, 2014, Ghana and Cote d'Ivoire concluded a Special Agreement to submit the dispute to a Special Chamber of ITLOS. By Order of January 12, 2015, ITLOS formed a Special Chamber to deal with the dispute.[35] On February 27, 2015, Côte d'Ivoire submitted a request to the Special Chamber under Article 290, paragraph 1, of UNCLOS seeking the prescription of several provisional measures.[36] Article 290, paragraph 1, provides:

> If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

As countries around the globe show increased interest in the blue economy, maritime disputes are likely to grow in Africa and with them an interest by countries in the region in demarcating their maritime boundaries. This case clarifies the criteria for the order of provisional measures under UNCLOS. The case also sheds light on the tension between state sovereignty and environmental protection. How to balance the sovereign rights of States to exploit their natural resources pursuant to their environmental policies against their duty to protect and preserve the marine environment was a central issue in this case.

2.2.2 The Request for Provisional Measures

Côte d'Ivoire asked the Special Chamber to prescribe as provisional measures that Ghana shall (1) "take all steps to suspend all oil exploration and exploitation operations under way in the disputed area"; (2) "refrain from granting any new permit for oil exploration and exploitation in the disputed area"; (3) "take all steps necessary to prevent information resulting from past, present or future exploration operations in the disputed area conducted by Ghana, or with its authorization, from being used in any way whatsoever to the detriment of Côte d'Ivoire"; (4) "generally, take all necessary steps to preserve the continental shelf, the waters superjacent to it, and its subsoil"; and (5) "suspend, and refrain from, any unilateral activity entailing a risk of prejudice to the rights of Côte d'Ivoire and from any unilateral action which could lead to aggravating the dispute."

Invoking Article 2(2), Article 56(1), Article 77(1), Article 81, and Article 246 (5) of UNCLOS, Côte d'Ivoire claimed that it was requesting the prescription of

[35] 'Press Release: Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and the Republic of Cote d'Ivoire' *ITLOS* (12 January 2015) <https://www.itlos.org/en/press-media/press-releases/press-releases-2015/> accessed 11 June 2016 [hereinafter January Press Release].

[36] 'Press Release: Cote d'Ivoire Seeks Provisional Measures in the Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and the Republic of Cote d'Ivoire in the Atlantic' *ITLOS* (2 March 2015) <https://www.itlos.org/en/press-media/press-releases/press-releases-2015/> accessed 11 June 2016 [hereinafter March Press Release].

provisional measures to preserve three categories of exclusive sovereign rights that arise under UNCLOS. First, Côte d'Ivoire claimed in the disputed area "the right to explore for and exploit the resources of Côte d'Ivoire's seabed and the subsoil thereof by carrying out seismic studies and drilling, and installing major submarine infrastructures there."[37] Second, Côte d'Ivoire claimed "the right to exclusive access to confidential information about its natural resources" in the disputed area and argued that this is one of the sovereign rights of the coastal State for the purpose of exploring the continental shelf and exploiting its natural resources as provided for in Article 77 of the Convention and that the sovereign rights "include all rights necessary for and connected with the exploration and exploitation of the resources of the shelf."[38] Third, Côte d'Ivoire claimed "the right to select the oil companies to conduct exploration and exploitation operations and freely to determine the terms and conditions in its own best interest and in accordance with its own requirements with respect to oil and the environment."[39] Côte d'Ivoire further alleged that, as regards the conditions for awarding oil contracts, Ghana's legislation "[was] out of step with international standards" and that the recent exploitation of a field adjacent to the disputed area (Jubilee field) "ha[d] already evidenced many technical failings."[40]

Ghana contended that Côte d'Ivoire sought provisional measures "on the basis of wholly theoretical rights," rights that were "newly claimed."[41] Ghana further contended that "Ghana and Côte d'Ivoire share a maritime boundary which has been mutually recognized for decades in numerous ways, although not formally delimited";[42] that "[t]his customary boundary is based on international law";[43] that "activities undertaken on the Ghanaian side of the customary boundary based on equidistance . . . have been carried out there for decades"[44] without any objections or protests from Côte d'Ivoire; and that "Côte d'Ivoire has respected precisely the same equidistance line as Ghana."[45] Further, Ghana argued that "[t]here were no objections over a lengthy period of Ghanaian oil operations" in the areas concerned and argues that this was because "there were no rights, . . .and . . . there are no rights today."[46] To Ghana, Côte d'Ivoire's alleged right to information was not based on any specific provisions of the Convention and Côte d'Ivoire failed to establish a basis for the legal existence of the alleged right.[47] Ghana further argued that its

[37]Case No. 23, *n* 34, at [41].
[38]ibid at [47].
[39]ibid at [48].
[40]ibid at [50].
[41]ibid at [51].
[42]ibid at [52].
[43]ibid.
[44]ibid.
[45]ibid.
[46]ibid at [54].
[47]ibid at [55].

concessions were being operated in a transparent manner, in full accordance with contractual commitments, best industry practice, and the highest international standards.[48] It was also significant to Ghana that "[s]ince the start of the Jubilee operations, there has not been an oil pollution incident resulting in an oil slick that has reached the shores of Ghana";[49] that constant monitoring was required by law; and that Ghana's environmental protection legislation was among the most robust in the region.[50]

2.2.3 The Decision

The Special Chamber first examined and found that it had prima facie jurisdiction over the dispute.[51] Citing *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*,[52] the Special Chamber reiterated the rule that it may not prescribe provisional measures unless it finds that there is "a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute."[53] The Special Chamber concluded that Côte d'Ivoire had presented enough materials to show that the right it sought to protect in the disputed territory are plausible[54] and that there was a link between the rights that Côte d'Ivoire claimed and the provisional measures it sought.[55] Although the Special Chamber found that Côte d'Ivoire had not adduced sufficient evidence to support its allegations that the activities that Ghana conducted in the disputed area were such as to create an imminent risk of serious harm to the marine environment,[56] it nevertheless held that the risk of serious harm to the marine environment was of great concern to it.[57] Specifically, the Special Chamber cited Article 192 of UNCLOS, which stipulates that "States have the obligation to protect and preserve the marine environment," and Article 193 of UNCLOS, which provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment."

The Special Chamber did not suspend all oil exploration and exploitation operations under way in the disputed area as that would cause prejudice to the rights claimed by Ghana and create an undue burden on it. However, the Special Chamber unanimously decided that Ghana should (1) take all steps to ensure that no new

[48] ibid at [65].
[49] ibid at [66].
[50] ibid at [67].
[51] ibid at [34-8].
[52] Order of 23 December 2010 [2010] ITLOS, [72].
[53] Case No. 23, *n* 33, at [41].
[54] ibid at [62].
[55] ibid.
[56] ibid at [67].
[57] ibid at [68].

drilling either by Ghana or under its control takes place in the area; (2) take all steps to prevent information from past, ongoing, or future exploration and prevent the area from being used in any way to the detriment of Cote d'Ivoire; and (3) carry out strict and continuous monitoring of all activities undertaken by Ghana or with its authorization in the disputed area, ensuring the prevention of serious harm to the marine environment. Furthermore, the Special Chamber decided unanimously that both parties should take all steps to prevent serious harm to the marine environment, including the continental shelf and its waters, and that both parties shall pursue cooperation and refrain from actions aggravating the dispute. Both parties were ordered to submit a report detailing compliance with the measures by May 25, 2015. The Order does not prejudge the question of the jurisdiction of the Special Chamber to deal with the merits of the case and does not prejudge the merits of the case.

The case demonstrates the considerations that go into balancing the sovereign right of States to exploit their natural resources and their duty to protect and preserve the marine environment. The case raises interesting questions about the rights of coastal States over their continental shelf and whether this right includes all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. It also raises interesting questions about the right to information about the resources of the continental shelf.

3 The Permanent Court of Arbitration: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*[58]

The Permanent Court of Arbitration (PCA) was established by treaty in 1899 to facilitate arbitration and other forms of dispute resolution between States.[59] The PCA "administers arbitration, conciliation and fact finding in disputes involving various combinations of states, private parties, state entities, and intergovernmental organizations."[60] The PCA has signed Host Country Agreements with a number of countries. In Africa, the PCA has signed Host Country Agreements with the Republic of Mauritius (Mauritius) and the Republic of South Africa. In 2010, the PCA opened its office in Mauritius pursuant to the PCA-Mauritius Host Country Agreement. With the goal of making its dispute resolution services more widely accessible, the PCA has entered into cooperation agreements with several arbitration

[58] *In the Matter of the Chagos Marine Protected Area Arbitration* [2015] PCA (Arbitral Tribunal constituted under Annex VII of ITLOS) 6.

[59] "About Us" (Permanent Court of Arbitration) < https://pca-cpa.org/en/about/> accessed 11 June 2016.

[60] "PCA Service" (Permanent Court of Arbitration) <http://www.pca-cpa.org/showpage8a88.html?pag_id=1028> accessed 11 June 2016.

institutions and international organizations around the world. In Africa, the PCA has entered into cooperation agreement with the Arbitration Foundation of Southern Africa.

3.1 Introduction

On March 18, 2015, an Arbitral Tribunal constituted under the auspices of the PCA issued its award in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*. The dispute stemmed from a decision of the UK, taken on April 1, 2010, to establish a marine protected area (MPA)—the world's largest MPA—around the Chagos Archipelago (or Chagos Islands). Chagos Archipelago is described as "a group of seven atolls comprising more than 60 individual tropical islands in the Indian Ocean about 500 kilometres (310 mi) south of the Maldives archipelago."[61] The UK at one time administered the Chagos Archipelago as a Dependency of Mauritius. However, prior to the independence of Mauritius in 1968, UK excised the archipelago from Mauritian territory.[62] Since November 8, 1965, the UK has administered the Chagos Archipelago as a British Indian Ocean Territory (BIOT). Mauritius obtained its independence from Britain on March 12, 1968.

The MPA extends to a distance of 200 nautical miles from the baselines of the Chagos Archipelago and covers an area of more than half a million square kilometers. Sovereignty over the Chagos Archipelago is disputed; Mauritius and the UK both claim sovereignty over the territory. On December 20, 2010, Mauritius initiated arbitration proceedings against the UK pursuant to Article 287 of UNCLOS and in accordance with Article 1 of Annex VII to the Convention. Mauritius presented four requests to the Arbitral Tribunal. First, Mauritius asked the Arbitral Tribunal to declare that the UK is not entitled to declare an "MPA" or other maritime zones over the Chagos Archipelago, given that it is not a "coastal State" within the meaning of, *inter alia*, Articles 2, 55, 56, and 76 of the Convention. Second, Mauritius prayed the Arbitral Tribunal to declare that having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the UK was not entitled to unilaterally declare an "MPA" or other maritime zones, given the fact that Mauritius has rights as a "coastal State" within the meaning of, inter alia, Articles 56(1)(b)(iii) and 76(8) of the Convention. Third, Mauritius prayed the Arbitral Tribunal to declare that the UK shall take no steps that may prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any full submission that Mauritius may make to the Commission regarding the Chagos Archipelago under Article 76 of the Convention. Fourth, Mauritius asked the Arbitral Tribunal to declare the UK's purported "MPA" to be incompatible

[61] 'Chagos Archipelago' *Wikipedia* (24 January 2016) <https://en.wikipedia.org/wiki/Chagos_Archipelago> accessed 11 June 2016.

[62] ibid.

with the substantive and procedural obligations of the United Kingdom under the Convention, including, *inter alia*, Articles 2, 55, 56, 63, 64, 194, and 300, as well as Article 7 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995. The UK asked the Arbitral Tribunal to find that it was without jurisdiction over each of the claims of Mauritius and, in the alternative, to dismiss Mauritius' claims.

This case, which pits a former colonial empire against a former colony, is legally significant for a number of reasons. The case clarifies the legal status and significance, under international law, of an undertaking given by a former colonial empire to a former colony. The case also sheds interesting light on the enduring legacies of colonialism in Africa.

3.2 Jurisdiction and Admissibility

Did the Tribunal have jurisdiction to consider the claims arising in respect of each of Mauritius' submissions? The UK argued that Mauritius' submissions were essentially a "sovereignty claim" in disguise ("an artificial re-characterisation of the long-standing sovereignty dispute as a 'who is the coastal State' dispute") and was a matter that fell outside the dispute settlement provisions of the Convention.[63] The Arbitral Tribunal largely agreed. Ultimately, the Arbitral Tribunal found that it only had jurisdiction with respect to Mauritius' Fourth Submission because it fell within the exception from jurisdiction set out in Article 297(3)(a) of UNCLOS and came within the ambit of Article 288(1) and Article 297(1)(c) of the Convention.

3.3 The Decision

Is the UK's purported "MPA" incompatible with the substantive and procedural obligations of the UK under UNCLOS, as well as under Article 7 of the *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* of 4 August 1995?

On this Fourth Submission, discussion centered primarily on the Lancaster House Undertakings made by the UK to Mauritius on September 23, 1965. This was the agreement between the UK and the Mauritius Council of Ministers pertaining to the detachment of the Archipelago from Mauritius (1965 Agreement). In return for the

[63] n58 at [207].

detachment of the Chagos Archipelago, the UK had made a series of commitments regarding its future relations with Mauritius. As part of the Lancaster Undertaking, the UK agreed to (a) return the Chagos Archipelago to Mauritius when no longer needed for defense purposes, (b) preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for the Mauritius Government, and (c) ensure that fishing rights in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable. Where these undertakings binding legal commitments as Mauritius contended, or were they merely political commitments with no legal consequences as the UK contended? The Tribunal considered how the parties understood the 1965 Agreement at the time it was concluded.[64] On this issue, the Tribunal concluded that the Lancaster House Undertakings were an essential condition to securing Mauritian consent to the detachment of the Archipelago and that the Mauritius Council of Ministers would not have agreed to the detachment without the undertakings.[65]

As to the legal status of the Lancaster commitments under international law, the Tribunal observed that had Mauritius remained part of the British Empire, "the status of the 1965 Agreement would have remained a matter of British constitutional law."[66] To the Tribunal, the independence of Mauritius in 1968 "had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement."[67] Under international law, "the intention for an agreement to be either binding or non-binding as a matter of law must be clearly expressed or is otherwise a matter for objective determination," the Tribunal observed citing the decision of the International Court of Justice in *Aegean Sea Continental Shelf*.[68] Because the parties did not themselves characterize the status of the 1965 Agreement either at its conclusion or at the moment of Mauritian independence, the Tribunal focused on objective considerations and concluded that the undertakings were legally binding. According to the Tribunal:

> Objectively, the Tribunal considers the subject matter of the 1965 Agreement— an agreement to the reconstitution of a portion of a soon-to-be-independent colony as a separate entity in exchange for compensation and a series of detailed undertakings—to be more in the nature of a legal agreement than otherwise. And, as set out above, the Tribunal sees no hint in the course of negotiations or in the language used in 1965 that anything less than a firm commitment was intended.[69]

Weighing strongly in favor of a finding that the undertakings constituted binding legal commitments was the fact that since independence, the UK had repeated and reaffirmed the Lancaster House Undertakings on multiple occasions. This repetition, the Tribunal found, "continued after Mauritius began proactively to assert its

[64] ibid at [420].
[65] ibid at [422].
[66] ibid at [425].
[67] Ibid.
[68] ibid at [426].
[69] ibid at [427].

sovereignty claim in the 1980s, and even after such a claim was enshrined in the Constitution of Mauritius in 1991."[70] In the final analysis, the Tribunal concluded that UK's repetition of the undertakings, and Mauritius' reliance thereon, sufficed to resolve any concern that defects in Mauritian consent in 1965 would have prevented the Lancaster House Undertakings from binding the UK. At various times over the course of over 40 years, the UK gave and reaffirmed its undertaking to Mauritius that, *inter alia*, there was no intention of permitting prospecting for minerals and oils while the islands remain British, there were no plans to establish an exclusive economic zone around the Chagos islands, any oil and mineral rights will revert to Mauritius when the territory is ceded, and the territory will be ceded when no longer required for defense purposes subject to the requirements of international law.

Faced with the task of construing undertakings given as part of an agreement concluded in 1965 between the UK and one of its colonies that became a matter of international law upon the independence of Mauritius and that were reaffirmed in correspondence between the parties in the decades since independence, the Tribunal turned to the principle of estoppel.[71] Under international law, estoppel may be invoked where "(a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely."[72] The Tribunal concluded that all four elements of estoppel were fulfilled in this case[73] and held that the UK was estopped from denying the binding effect of these commitments.[74] The Tribunal also went on to construe the scope of the undertaking with respect to fishing rights.[75]

3.4 Conclusion

This case has implications for the future of the blue economy of countries in Africa. The Tribunal's finding that Mauritius was entitled to fishing rights in the territorial sea pursuant to the UK's undertaking at Lancaster House can go a long way in supporting Mauritius' efforts to establish a sustainable blue economy.[76] The case raises interesting questions about the status, under international law, of undertakings between an empire and a former colony.

[70] ibid at [428].
[71] ibid at [434-35].
[72] ibid at [438].
[73] ibid at [439], [443-44], [447].
[74] ibid at [448].
[75] ibid at [449-56].
[76] ibid at [455-56].

4 The African Court of Human and Peoples' Rights

The African Court of Human and Peoples' Rights (AfCHPR or Court) is a continental court established pursuant to Article 1 of the 1998 *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (Protocol).[77] The Protocol entered into force in 25 January 2004 after it had garnered the requisite 15 ratifications. Thirty countries in Africa have ratified the Protocol.[78] The Court was established to complement the protective mandate of the African Commission on Human and Peoples' Rights (Commission).[79] The Court has broad material jurisdiction. Pursuant to Article 3 of the Protocol, the jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and *any other relevant Human Rights instrument ratified by the States concerned*."[80] The personal jurisdiction of the Court is more restricted. Only the African Union Commission, States Parties and African Intergovernmental Organizations have automatic right to submit contentious cases to the Court.[81] Pursuant to Articles 5(3) and 34(6) of the Protocol, relevant nongovernmental organizations (NGOs) with observer status before the Commission, and individuals, can institute cases directly before the Court if at the time of the ratification of the Protocol or any time thereafter the State makes a declaration accepting the competence of the Court to receive such cases. Sadly, As at July 2017, of the thirty (30) States Parties to the Protocol only eight (8) had made the declaration recognizing the competence of the Court to receive cases from individuals and NGOs. The eight (8) States Parties are; Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and the Republic of Tunisia. The Republic of Rwanda made the requisite declaration but subsequently withdrew it on March 1, 2016.

The Court's permanent seat is in Arusha, Tanzania. Article 11 of the Protocol stipulates, "The Court shall consist of eleven judges, nationals of Member States of the [Organisation of African Unity], elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights."

The Court issued its first decision in December 2009, ruling inadmissible an application against Senegal.[82] The Court delivered its first judgment on the merits in 2013 in a case involving Tanzania.[83] In 2014, it delivered three judgments on the

[77]"Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights" (ACHPR, 2016) <http://www.achpr.org/instruments/court-establishment/#3> accessed 11 June 2016 [hereinafter, Protocol to the African Court].

[78]ibid.

[79]Protocol to the African Court, *n* 77, at Article 2.

[80]Emphasis added.

[81]ibid Article 5.

[82]*Michelot Yogogombaye v. The Republic of Senegal,* Judgment [2009] ACHPR; *Femi Falana v. The African Union,* Judgment [2012] ACHPR.

[83]*Tanganyika Law Society et al. v. The United Republic of Tanzania,* Judgment [2013] ACHPR.

merit: *Konaté v. Burkina Faso*, *Chacha v. Tanzania (28 March 2014)*,[84] and *Zongo and Others v. Burkina Faso.* In 2014 also, the Court issued an important advisory opinion. In 2015, the Court for the first time awarded reparations in the form of monetary compensation, in a case against Burkina Faso. On November 20, 2015, the Court rendered its fifth judgment on the merits in *Alex Thomas v. United Republic of Tanzania*.

4.1 Alex Thomas v. United Republic of Tanzania *(Application No. 005/2013)*

The application in this case was filed on August 2, 2013. The applicant, Alex Thomas, a citizen of Tanzania, was at the time of filing his application a convict serving a thirty (30)-year custodial sentence at Karanga Central Prison in Moshi, Kilimanjaro, Tanzania. The applicant was tried and convicted for his alleged involvement in a 1996 armed robbery that occurred along the Tanzania–Kenya border. The applicant was represented by the Pan African Lawyers Union (PALU).

Based on allegations of wrongful conviction, failure on the part of the prosecution to prove his guilt beyond reasonable doubt, lack of opportunity to defend himself during his trial, and lack of counsel during his criminal trial, the applicant asked the Court for a number of reliefs. Specifically, the applicant asked the Court for an order compelling the respondent State to release the applicant from detention, an order for reparations, and a declaration that the respondent State had violated the applicant's guaranteed rights under the African Charter. The respondent raised preliminary objections on issues of jurisdiction and admissibility.

Several questions were before the Court in this case. Did the court lack jurisdiction *ratione materiae* in so far as the applicant improperly cited Articles 5 and 34 (6) of the Protocol and did not specifically cite any provision of the African Charter? Did the applicant fail to exhaust local remedy? Did the respondent State violate the applicant's right to be heard? Did the respondent State violate the applicant's right to defend himself? Did the respondent State violate the applicant's right to liberty?

The Court unanimously dismissed the respondent's objection on the lack of jurisdiction *ratione materiae*. On this issue, the Court reiterated its position that an applicant need not specify the rights guaranteed by the Charter alleged to have been violated. According to the Court, "It is not necessary that the rights alleged to have been violated are specified in the Application."[85] In other words, "as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter."[86]

The Court also unanimously dismissed the respondent's objections on admissibility. With specific respect to the respondent's preliminary objection on the

[84] *Peter Joseph Chacha v. The United Republic of Tanzania* , Judgment [2014] ACHPR.
[85] ibid at [45].
[86] ibid.

admissibility of the application for nonexhaustion of local remedies as required by Article 6(2) of the Protocol, read together with Article 56(5) of the African Charter, the Court was persuaded by the reasoning of the African Commission in *Southern African Human Rights NGO Network v. Tanzania*, where the African Commission stated that for the requirement of exhausting local remedies, only ordinary remedies that exist in jurisdictions and normally accessible to people seeking justice needed to be exhausted.[87]

On the merits, the Court held:

1. unanimously, that there has been no violation of Articles 3, 5, 6, 7(1)(b) and 9 (1) of the Charter;
2. unanimously, that there has been a violation of Articles 1 and 7(1)(a), (c) and (d) of the Charter and Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR);
3. by a vote of six (6) to two (2), Judge Elsie N. Thompson, Vice-President and Judge Rafâa Ben Achour dissenting, that the applicant's prayer for release from prison is denied;
4. unanimously, that the respondent is directed to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defense case and the retrial of the applicant, and to inform the Court, within six (6) months from the date of this judgment of the measures taken;
5. unanimously, that in accordance with Rule 63 of the Rules of the Court, the Court directs the applicant to file submissions on the request for reparations within thirty (30) days hereof and the respondent to reply thereto within thirty (30) days of the receipt of the applicant's submissions.

The case is significant for a number of reasons. First, the Court concluded that it had jurisdiction *ratione personae* even though the alleged violation occurred before Tanzania deposited its instrument of ratification of the Protocol (on February 10, 2006) and before Tanzania made the declaration in terms of Article 34(6) of the Protocol accepting the seizure of the Court by individuals and qualifying NGOs.[88] Second, the Court shed important light on the meaning and scope of Article 1 of the African Charter, which states, "The Member States of the Organisation of African Unity, parties to the present Charter *shall recognise the rights, duties and freedoms enshrined in the Charter* and *shall undertake to adopt legislative or other measures to give effect to them*." Footnote: Emphasis added. Can a State that has ratified the Charter, adopted constitutional and statutory measures to domesticate it, and made a declaration under Article 34(6) of the Protocol nevertheless be found to be in violation of Article 1 of the Charter? The Court answered in the

[87] *Southern Africa Human Rights NGO Network and Others/Tanzania,* No 333/06 [2010] ACHPR <http://www.achpr.org/communications/decision/333.06/> accessed 11 June 2016.

[88] ibid at [48].

positive, persuaded, in part, by the reasoning of the African Commission *in Sir Dawda K. Jawara v. The Gambia*.[89] In the words of the Court:

> ... in assessing whether the obligation set out under Article 1 of the Charter has been fulfilled, the Court does not merely examine whether the Respondent The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

4.2 Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child Before the African Court on Human and Peoples' Rights

On December 5, 2014, the Court gave its opinion in regard to a request for advisory opinion filed by the African Committee of Experts on the Rights and Welfare of the Child (Committee). The Committee is a body created under Article 32 of the *African Charter on the Rights and Welfare of the Child* (African Charter) to promote and protect the rights and welfare of the child.[90] The Committee had filed an application with the Court on November 11, 2013, requesting advisory opinion under Article 4 and 5(1)(e) of the Protocol, as well as under Rules 68 and 33(1)(e) of the Rules of the Court. In the Advisory Opinion, the Court addressed whether the Committee was an "organ" of the African Union with standing to request advisory opinion pursuant to Article 4(1) of the Protocol. The Court also provided guidance on the scope of Article 5(1) of the Protocol, which addresses standing to submit contentious cases to the Court. In particular, the Court delved into the meaning of "African Intergovernmental Organizations." The issue is important because apart from the Commission and States Parties, only "African Intergovernmental organizations" enjoy automatic right to submit contentious cases to the Court.

4.2.1 Issues Raised

Two questions were before the Court: first, whether the Court has jurisdiction, under Article 4(1) of the Protocol and Rule 68(1) of the Rules of the Court, to provide an

[89] *Sir Dawda K. Jawara/Gambia,* No 147/95-149/96 [2000] ACHPR <http://www.achpr.org/communications/decision/147.95-149.96/> accessed 11 June 2016.

[90] African Charter on the Rights and Welfare of the Child [1990] CAB/LEG [1999], Article 32 (providing that an African Committee of Experts on the Rights and Welfare of the Child [hereinafter Committee] shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child).

advisory opinion upon request by the Committee and, second, whether the Committee has access before the Court in contentious matters pursuant to Article 5 (1)(e) of the Protocol and Rule 33(1)(e) of the Rules. Regarding advisory opinion, Article 4(1) of the Protocol stipulates:

> At the request of a Member State of the OAU, the OAU, *any of its organs*, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.[91]

Article 68(1) of the Rules of the Court stipulates:

> 1. Requests for advisory opinions pursuant to article 4 of the Protocol may be filed with the Court by a Member State, by the African Union, by any organ of the African Union or by an African Organization recognized by the African Union. The request shall be on legal matters and shall state with precision the specific questions on which the opinion of the Court is being sought.

Regarding contentious jurisdiction, Article 5(1) of the Protocol stipulates:

> The following are entitled to submit cases to the Court:
> a) The Commission
> b) The State Party which had lodged a complaint to the Commission
> c) The State Party against which the complaint has been lodged at the Commission
> d) The State Party whose citizen is a victim of human rights violation
> e) African Intergovernmental Organizations.

Article 33(1)(e) of the Rules of the Court (Access to Court) provides that pursuant to the provisions of Articles 5 and 34 (6) of the Protocol, the following are entitled to submit cases to the Court: "(a) The Commission; (b) The State Party which has lodged an application to the Commission; (c)The State Party against which an application has been lodged at the Commission; (d) The State Party whose citizen is a victim of a human rights violation; (e) An African Intergovernmental Organization; (f) An individual or a Non-Governmental Organization which has observer status before the Commission provided the requirements of article 34(6) of the Protocol are met."

4.2.2 The Decision

The Committee argued that it was one of the bodies entitled to request advisory opinion. The Court concluded that the Committee was an organ of the African Union and had locus *standi* to request for an advisory opinion from the Court pursuant to Article 4(1) of the Protocol.[92] The Court also concluded that "even though there has not been any formal decision of the Union to the effect that the Committee shall be an organ of the Union, the Policy organs of the AU have treated the Committee as an organ of the Union."[93] The Court cited a 2002 decision (AU/ASS/Dec.1(i)(xi))

[91]Emphasis added.

[92]ibid at [47].

[93]ibid at [56].

adopted at the First Ordinary Session of the Assembly of the African Union, which states that "the Committee would henceforth operate within the framework of the Union" and concluded that it appeared that the Assembly of the Union has interpreted and implemented the decision as assimilating the Committee as an organ of the Union.[94]

Is the Committee an "African Intergovernmental Organization" empowered under Article 5(1)(e) of the Protocol to submit contentious cases to the Court? The Court started by identifying the attributes of an "intergovernmental organization." Referencing the Vienna Convention on the Law of Treaties, as well as the Encyclopedia of Public International Law, the Court concluded that the Committee was not an intergovernmental organization. The Court noted that its hands were tied and that even though the African Charter on the Rights and Welfare of the Child under which it is established has States as "parties," the Committee as a body or organization is not "intergovernmental" in the sense that it is not composed of government representatives.[95] According to the Court:

> Pursuant to the Provisions of ... the Children's Charter, the Committee is composed of eleven expert members, nominated and elected by States as individuals, and who after their election serve in their personal capacity. Thus, the members of the Committee cannot be described as representatives of states, which seems to the Court to be an important element in determining whether an entity is an "intergovernmental" body or not. Indisputably, States have no representatives directing the affairs of the Committee.

The conclusion thus reached is that the Committee lacked standing to bring cases to the Court alleging violations of human or children's rights under Article 5(1)(e) of the Protocol in the capacity of an "intergovernmental" organization.[96] To the Court, "an organ cannot at the same time be an intergovernmental organization as the former would ordinarily be part of an organization whilst the latter legally stands on its own."[97] While so holding, the Court nevertheless was of the view that it was in the interest of protection of rights in Africa that the Committee's mandate be reinforced to allow it to bring cases directly to the Court.[98] The Court observed that while the African Commission is explicitly included among the organs that can bring cases before the Court under Article 5(1) of the Protocol, the Committee was not. This was an anomaly, in the opinion of the Court. As the Court put it, "there does not appear to be a conceivable reason why the Committee was not included among the organs that can bring cases before the Court under Article 5(1) of the Protocol, in order to give it the same reinforcement that the African Commission has under the complementary relationship with the Court."[99]

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[94] ibid.

[95] ibid at [73-4].

[96] ibid at [74].

[97] ibid.

[98] ibid at [75].

[99] ibid.

4.3 Zongo v. Burkina Faso *(March 28, 2014)*[100]

4.3.1 Introduction

The central issue in this case was whether Burkina Faso's failure to investigate, prosecute, and punish individuals responsible for assassinating investigative journalist Norbert Zongo and his companions amounted to a violation of Articles 7 and 9 (2) of the African Charter, read together with Article 66(2) of the Revised ECOWAS Treaty. The Court used the opportunity to define the due diligence obligation of States under the African Charter. This case is important as it addresses the question of effectiveness of national justice and the freedom of expression of journalists.

4.3.2 The Applicant's Case

The case revolves around the December 13, 1998, murder of Nobert Zongo, an investigating journalist, and his three colleagues: Abdoulaye Nikiema, Blaise Ilboudo, and Zongo's younger brother, Ernest Zongo. All four individuals were found burnt in a car that they were traveling in. At the time of the murder, Zongo was conducting investigations on various political, economic, and social scandals in Burkina Faso. The applicants alleged violations of several provisions of the African Charter, including Article 1 (the obligation to take appropriate measures to give effect to the rights enshrined in the charter), Article 3 (equality before the law and equal protection of the law); Article 4 (the right to life), Article 7 (the right to have one's cause heard by competent national courts), and Article 9 (the right to express and disseminate his or her opinion). Applicants in this case also alleged violations of the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the Revised Treaty of the Economic Community of West African States (ECOWAS).

4.3.3 Decision

In its ruling of March 28, 2014, the Court unanimously found that Burkina Faso violated Article 7 of the Charter, as well as Article 1 of the Charter. In Article 1 of the Charter, States Parties "recognise the rights, duties and freedoms enshrined in the Charter and ... undertake to adopt legislative or other measures to give effect to them." Article 7 provides for the right of every individual "to have his cause heard." This right, according to Article 7, comprises "(1) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and

[100] *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & The Burkinabe Human and Peoples' Rights Movement v. Burkina Faso,* Judgment [2014] ACHPR [hereinafter *Zongo v. Burkina Faso*].

guaranteed by conventions, laws, regulations and customs in force; (2) The right to be presumed innocent until proved guilty by a competent court or tribunal; (3) The right to defence, including the right to be defended by counsel of his choice; (4) The right to be tried within a reasonable time by an impartial court or tribunal." In this case, therefore, the Court defined the contours of the right to be heard. According to the Court, this right imposes a due diligence obligation on States Parties to the Charter. As the Court put it:

> The Respondent is compelled under article 7 of the Charter, which guarantees the right to have one's cause heard by competent national courts, to make all necessary efforts to search, prosecute and bring to trial the perpetrators of crimes such as the murder of Nobert Zongo and his companions. The question therefore is, whether the Respondent had fully complied with that obligation, and more specifically, whether it had acted with due diligence.[101]

The Court by a majority of five to four found that Burkina Faso had violated the right of the freedom of expression of journalists in violation of Article 9(2) of the Charter, read together with Article 66(2)(c) of the Revised ECOWAS Treaty in so far as its failure to identify and apprehend Norbert Zongo's assassins caused fear and anxiety in media circles. The Court deferred its ruling on the issue of damages.

4.3.4 *Zongo v. Burkina Faso: Judgment on Reparations* (June 5, 2015)

In a landmark decision rendered on June 5, 2015, the Court, for the first time, awarded reparations in the form of monetary compensation to successful applicants in a case before it. Drawing on customary international law rules on reparations, decisions of the Permanent Court of International Justice, as well as relevant provisions of the Draft Articles on Responsibility of States for Internationally Wrongful Acts and Article 27(1) of the Protocol, the Court unanimously granted the applicant's claims for reparation of moral prejudice. The Court also ordered Burkina Faso to pay the applicants the sum of forty (40) million CFA francs in attorney's fees and an additional three million one hundred and thirty-five thousand, four hundred and five CFA francs and eighty cents (3,135,405.80) for out-of-pocket expenses incurred by the applicant's counsel. Significantly, the Court ordered Burkina Faso to make the necessary payments within six months and imposed interests on any delayed payment. By ten votes to one, the Court ordered Burkina Faso to reopen investigations into the assassination of Nobert Zongo and his companions.

The case confirms the Court's inherent power to award reparations to victims of human rights violations in Africa. The case confirms the Court's power to award both moral and material reparations and to order extraordinary remedies. Article 27 (1) of the Protocol is cast in broad terms and provides: "If the Court finds that there has been violation of a human or peoples' rights, *it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation*."[102]

[101] ibid at [150].

[102] Emphasis added.

4.3.5 Conclusion

Zongo v. Burkina Faso is a win for freedom of the press in Africa, for human rights defenders in Burkina Faso, and for the cause of human rights generally in the continent. As Chrysogone Zougmoré, President of Burkinabé Human and Peoples' Rights Movement, put it:

> The assassination of Norbert Zongo remains a dark point in our recent political history, and the State, for not having rapidly considered such a symbolic case, is responsible for the denial of justice suffered by victims' families. The African Court has just reminded the authorities of this failure. This is a first victory for human rights defenders in Burkina, who have been demanding truth and justice for Norbert Zongo and his companions for the past 16 years. This is also a victory for regional justice in the fight against impunity.[103]

Although a win for the applicants, whether the case is enough to address the culture of impunity in the continent remains to be seen. Zongo confirms the Court's mandate and willingness to award reparations to human rights victims. Although the Court rendered its first-ever ruling on reparations in *Mtikila v. Tanzania*, it did not award monetary damages in that case.

4.4 Lohe Issa Konaté v. Burkina Faso *(December 5, 2014)*[104]

4.4.1 Introduction

On December 5, 2014, the Court issued an opinion finding several provisions of Burkina Faso's law relating to defamation to be in violation of freedom of expression enshrined in key regional and international human rights treaties to which Burkina Faso is a party and ordering that those provisions be amended. The Court addressed the questions when and under what circumstances would custodial sentence, fines, and damages for defamation violate international human rights law. The case demonstrates the growing influence of the Court in Africa. The case also suggests that in many respects and on many issues, the Court will embrace the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission).

This case involved an application by Lohé Issa Konaté, a journalist and an editor of the weekly newspaper *L'Ouragan Weekly* in Burkina Faso, challenging his criminal conviction, subsequent imprisonment, and imposition of fines, damages, and costs by a court in Burkina Faso.[105] Konaté was prosecuted for defamation, public insult, and contempt of court following the publication of articles he wrote

[103] 'World Movement for Human Rights, Burkina Faso/Norbert Zongo Case: The African Court recognizes the responsibility of the State of Burkina Faso in the denial of justice for the victims' *FIDH* (15 April 2014) <https://www.fidh.org/en/region/Africa/burkina-faso/15142-burkina-faso-norbert-zongo-case-the-african-court-recognizes-the> accessed 11 June 2016.

[104] *Lohe Issa Konate v. Burkina Faso*, Judgment [2014] ACHPR.

[105] ibid

accusing the Prosecutor, Placide Nikeiema, of counterfeiting and laundering of fake bank notes, as well as miscarriages of justice. Upon publication of these accusations, the Prosecutor, Placide Nikiema, filed a complaint for defamation, public insult, and contempt of court against Lohé Issa Konaté. Criminal proceedings were subsequently brought and damages sought against Konaté. The Ouagadougou High Court (the *Tribunal de Grande Instance* of Ouagadougou) found Konaté guilty of defamation, public insult, and insulting a magistrate (*diffamation, injures publiques, outrage a magistrate*) and sentenced him to a 12-month term of imprisonment. The Court also ordered Konaté to pay a fine of 1,500,000.00 CFA francs (the equivalent of USD 3000.00); civil damages in the amount of 4,500,000.00 CFA francs (the equivalent of USD 9000.00); and court costs in the amount of 250,000.00 CFA francs (the equivalent of USD 500.00). The Court also imposed a six-month suspension on *L'Ouragan Weekly*. Konaté was imprisoned immediately after judgment was delivered by the High Court.

4.4.2 Issues Raised

The applicant, Konaté, alleged that the "jail term, huge fine, damages as well as the court costs violate his right to freedom of expression," all of which are protected by treaties that Burkina Faso submits. Specifically, Konaté alleged a violation of Article 9 of the African Charter on Human and Peoples' Rights (African Charter), Article 19 of the International Covenant on Civil and Political Rights (ICCPR), as well as a violation of Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States (Revised ECOWAS Treaty).

4.4.3 Jurisdiction and Admissibility

Pursuant to Rule 39(1) of the Rules of the Court, the Court conducted a preliminary examination of its jurisdiction and concluded that it had the jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci* to hear the application.[106] The Court also ruled that the application was admissible.[107] On the issue of admissibility, Burkina Faso raised a number of issues. First, Burkina Faso argued that the applicant was not a journalist and had failed to comply with some of the administrative requirements in Burkina Faso. Second, based on Rule 40(3) of the Rules, Burkina Faso also argued that the applicant's application contained disparaging and insulting language. This was based on the fact that in his application, applicant used the term "People's Democratic Republic of Burkina Faso," instead of "Burkina Faso." Third, Burkina Faso alleged that the applicant failed to exhaust domestic remedy.

[106] ibid at [30-42].

[107] ibid at [43-115].

The Court found Burkina Faso's allegation that the applicant did not have the status of a journalist unfounded[108] and ruled that Article 9 of the African Charter and Article 19 of the ICCPR guarantee the right of freedom of expression to anyone regardless and not only to journalists.[109] On whether the application contained "any disparaging or insulting language," the Court disagreed with Burkina Faso. Citing an earlier decision of the African Commission, the Court observed that Burkina Faso had not shown in what manner the name "People's Democratic Republic," as used by the applicant, undermines the dignity, reputation, or integrity of Burkina Faso and had failed to prove that such designation "is used for the purpose of poising the minds of the public or of any reasonable person or that it is intended to subvert the integrity and status of Burkina Faso or to bring it to disrepute."[110] On the question of whether the applicant failed to exhaust domestic remedy, the Court referenced criteria listed by the African Commission and other international human rights courts based on the criteria of availability, effectiveness, and sufficiency of local remedies.[111] While holding that in the instant case local remedy in Burkina Faso (appeal at the *Cour de Cassation*) was indeed available,[112] the Court found the remedy to be ineffective and insufficient.[113]

4.4.4 Decision

Regarding the applicants' first allegation, that the "jail term, huge fines, damages as well as the court costs violated his right to freedom of expression," the Court found that "all sentences pronounced by the High Court and confirmed by the Ouagadougou Court of Appeal were disproportionate to the aim pursued by the relevant provisions of the Information Code and the Burkinabe Penal Code." The Court focused particularly on Articles 109, 110, and 111 of the Information Code of December 30, 1993, as well as Article 178 of the Penal Code of 1996. The Court examined whether the restrictions on freedom of expression in Burkina Faso were provided by law, were within international standards, pursued a legitimate objective, and were proportionate means to achieve the objective sought.[114] While holding that the restrictions were sufficiently provided by law and consistent with international standards because they respond to a legitimate objective, the Court concluded that custodial sentence for defamation in the instant case was not a necessary limitation to freedom of expression and constituted "a disproportionate interference in the exercise of the freedom of expression by journalists in general" and the applicant in

[108] ibid at [59].
[109] ibid at [58].
[110] ibid at [72].
[111] ibid at [77].
[112] ibid at [107].
[113] ibid at [114].
[114] ibid at [125].

particular.[115] Is custodial sentence ever a permissible punishment for defamation? According to the Court:

> Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to [relevant provisions of the African Charter, the Covenant, and the Revised ECOWAS Treaty].

The Court also found the amount of fines, damages, interests, and costs imposed on the applicant to be excessive, especially in the light of the fact that the six-month suspension imposed by the High Court deprived the applicant of revenue from publishing *L'Ouragan Weekly*.[116]

The Court ordered Burkina Faso to amend its legislation on defamation to comply with Articles 9 of the African Charter, Article 19 of the ICCPR, and Article 66(2)(c) of the Revised ECOWAS Treaty by, *inter alia*, repealing custodial sentences for acts of defamation and adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality in accordance with its obligation under the Charter and other international instruments.

4.5 Conclusion

The years 2014 and 2015 saw the Court handing out several landmark decisions and consolidating its position in Africa. In *Zongo*, the Court confirmed its power to award reparations for human rights violations. In *Konaté*, the Court sent a clear and strong message that the States may not use severe criminal penalties to stifle freedom of speech and expression in Africa. The Court's decision in *Konaté* may be a death knell for insult and criminal defamation laws of many countries in Africa many of which are mere relics of colonialism. According to Faith Pansy Tlakula, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, "This is a landmark decision that will change the free expression landscape on the African Continent. The decision will not only give impetus to the continent-wide campaign to decriminalise defamation but will also pave the way for the decriminalisation of similar laws such as insult laws and publication of false news."[117] The World Association of Newspapers and News Publishers (WAN-IFRA) also recognizes

[115] ibid at [164].

[116] ibid at [171].

[117] 'African Court Addresses Freedom of Expression in Burkina Faso, in Landmark Judgment' *IJRC* (2 February 2015) <http://www.ijrcenter.org/2015/02/03/african-court-addresses-freedom-of-expression-in-burkina-faso-in-landmark-judgment/> accessed 11 June 2016; See also, 'Special Rapporteur on Freedom of Expression and Access to Information' ACHPR <http://www.achpr.org/mechanisms/freedom-of-expression/> accessed 11 June 2016.

Konaté as a "landmark case on freedom of expression."[118] While expressing delight with the *Konaté* decision, WAN-IFRA hopes that the ruling "will be another nail in the coffin for criminal defamation in Africa, and that African states will take note and repeal with urgency the out-dated criminal defamation and libel laws that restrict freedom of speech on the continent." For Mabassa Fall, FIDH Representative to the African Union, the Court's ruling in *Zongo*, "proves once again that the African Court is an essential means of redress for victims of human rights violations that would not get justice before their national courts. Additionally, it shows that NGOs and individuals have a definite role to play in increasing the effectiveness of the regional judicial system."[119]

The Court is still very young, and its jurisprudence is yet to develop fully. While the Court has shown that it has the independence to rule against States in Africa, the fact remains that only few countries (seven in all) have filed declarations permitting individuals to initiate cases against them. Clearly, more involvement from States in Africa is needed if the Court is truly to make its mark in the continent.

5 The International Criminal Court

In a decision delivered on May 27, 2015, in a case involving the former first lady of Côte d'Ivoire, Simone Gbagbo, the Appeals Chamber of the International Criminal Court (ICC) rejected an appeal by the Republic of Côte d'Ivoire and confirmed the ICC Pre-Trial Chamber I's decision of December 11, 2014, which declared the case against Simone Gbagbo admissible before the Court.[120] In 2013, Côte d'Ivoire challenged the admissibility of the case against Simone Gbagbo on the ground that the same case was already being prosecuted at the national level in Côte d'Ivoire.

The drama surrounding the indictment of Uhuru Muigai Kenyatta, President of the Republic of Kenya, saw the ICC rendering a number of important decisions in 2015. On December 3, 2014, the Trial Chamber delivered its *Decision on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute* (Impugned Decision). On March 9, 2015, Trial Chamber V(B) (Trial Chamber) of the ICC rendered its *Decision on the Prosecution's request for leave to appeal* in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*. On March 15, 2015, the Trial Chamber V(B) (Chamber) of the International Criminal Court (ICC) delivered its *Decision on the withdrawal of charges against Mr Kenyatta.* On

[118] Alison Meston, 'The World Association of Newspapers and News Publishers, World's Press Urges African States to Repeal Criminal Defamation after Landmark Ruling' WAN IFRA (4 December 2014) <http://www.wan-ifra.org/articles/2014/12/06/world-s-press-urges-african-states-to-repeal-criminal-defamation-after-landmark-> accessed 11 June 2016.

[119] *n* 103.

[120] 'Press Release: Appeals Chamber Confirms Admissibility of the ICC's Simone Gbagbo Case' ICC (27 May 2015) < https://www.icc-cpi.int//Pages/item.aspx?name=pr-1112> accessed 11 June 2016.

August 19, 2015, the Appeals Chamber unanimously reversed the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" and remanded the case.

While all charges against President Uluru Muigai Kenyatta have been withdrawn, even more interesting is the ICC's interpretation of Article 87(7) of the Rome Statute of the International Criminal Court, which requires States Parties to the Rome Statute to cooperate with the ICC. The ICC's ruling on Article 87(7) is important. While the Court has made prior findings of noncompliance pursuant to Article 87(7) of the Statute in relation to states that fail to cooperate in respect of arrest and surrender, it is the first time that the Court is addressing noncompliance in relation to a state's refusal or failure to produce financial and other records relating to an accused.

5.1 The Prosecutor v. Simone Gbagbo[121]

On February 29, 2012, Pre-Trial Chamber III issued a warrant of arrest (hereinafter "Warrant of Arrest") under seal against Simone Gbagbo for various crimes against humanity, including murder, rape, and other forms of sexual violence, persecution, and other inhuman acts, allegedly committed in the context of postelectoral violence in the territory of Côte d'Ivoire between December 16, 2010, and April 12, 2011.[122] Pre-Trial Chamber III confirmed the arrest warrant with a decision rendered on March 2, 2012.[123] Pursuant to Articles 17, 19, and 95 of the Rome Statute, Côte d'Ivoire challenged the admissibility of the case against Simone Gbagbo on September 30, 2013.[124] Article 17(1)(a) provides:

> ***Article 17(1)(a)***
>
> ***Issues of admissibility***
>
> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> . . ..

[121] *Prosecutor v. Simone Gbagbo*, 'Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo' (ICC, 27 May 2015) <https://www.icc-cpi.int/iccdocs/doc/doc1976613.pdf > accessed 11 June 2016.

[122] 'Warrant of Arrest for Simone Gbagbo' (ICC, 29 February 2012) <https://www.icc-cpi.int/iccdocs/doc/doc1344440.pdf > accessed 11 June 2016.

[123] ibid.

[124] '*The Prosecutor v. Simone Gbagbo* Case Information Sheet' *ICC* <https://www.icc-cpi.int/cdi/simone-gbagbo/Documents/SimoneGbagboEng.pdf > accessed 11 June 2016.

Côte d'Ivoire's admissibility challenge was based on the fact that domestic proceedings had been instituted against Simone Gbagbo based, according to Côte d'Ivoire, on allegations similar to those made in the case before the ICC. In a ruling delivered on December 11, 2014, Pre-Trial Chamber I rejected the Republic of Côte d'Ivoire's challenge to the admissibility of the ICC proceedings and reminded Côte d'Ivoire of its obligation to surrender Simone Gbagbo to the Court without delay.[125] Côte d'Ivoire appealed.[126] Cote d'Ivoire raised two grounds of appeal. First, Cote d'Ivoire submitted that the Pre-Trial Chamber erred in law in its interpretation and application of the admissibility criteria established under the Rome Statute. Second, Cote d'Ivoire submitted that the Pre-Trial Chamber erred in fact and in law in its assessment of the domestic investigations and proceedings in respect of Simone Gbagbo and its conclusion that the factual parameters of the cases being investigated domestically in Cote d'Ivoire were unclear. Côte d'Ivoire ratified the Rome Statute on February 15, 2013. However, by a declaration made in accordance with Article 12(3) of the Rome Statute, Côte d'Ivoire accepted the jurisdiction of the ICC on April 18, 2003.[127] The Presidency of Côte d'Ivoire reconfirmed the country's acceptance of this jurisdiction on both December 14, 2010, and May 3, 2011.[128]

In its May 27, 2015, decision, the Appeals Chamber confirmed the admissibility of the ICC's *Simone Gbagbo* case. The case is important as it clarifies (1) when and under what condition the presumption in favor of domestic jurisdiction applies, (2) what the expression "the case is being investigated" appearing in Article 17(1)(a) of the Rome Statute means,[129] (3) what the word "case" appearing in Article 17(1)(a) of the Rome Statute means,[130] (4) the burden of proof on a State that challenges the admissibility of a case,[131] and (5) the criteria for establishing the existence of investigations or prosecutions at the national level. The Appeals Chamber reiterated the two-step analysis to determining whether a case is inadmissible pursuant to Article 17(a)(a) of the Rome Statute. Altogether, the case is important for its discussion of the scope of the principle of complementarity and when the principle is violated and the existence of jurisdictional conflict warranting the dismissal of a case already before the ICC.

[125] 'Press Release, Simone Gbagbo Case: ICC Pre-Trial Chamber I Rejects Cote d'Ivoire's Challenge to the Admissibility of the Case and Reminds the Government of its Obligation to Surrender Simone Gbagbo' *ICC* (12 December 2014) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1075.aspx > accessed 11 June 2016.

[126] *n* 124.

[127] 'Declaration Accepting the Jurisdiction of the International Criminal Court' (Minister of Foreign Affairs, 18 April 2003) < https://www.icc-cpi.int/NR/rdonlyres/57B00915-8FDF-4532-9BDE-8AF338E3E364/279844/ICDEENG7.pdf > accessed 11 June 2016.

[128] <https://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf> accessed 11 June 2016.

[129] *n* 121 at [4].

[130] ibid at [10].

[131] See ibid.

The Appeals Chamber rejected Côte d'Ivoire's argument regarding the alleged violation of the principle of complementarity noting "the presumption in favour of domestic jurisdictions only applies where it has been shown that there are (or have been) investigations and/or prosecutions at the national level."[132] The Appeals Chamber also rejected Côte d'Ivoire's challenge of the Pre-Trial Chamber's assessment of the subject matter of the domestic proceedings against Simone Gbagbo and its ultimate conclusion that the conduct alleged against Simone Gbagbo in the domestic proceedings was clearly of a different nature from that giving rise to her criminal responsibility as alleged in the case before the ICC.

The practical implications of the case are somewhat unclear and may yet unfold in 2016. Côte d'Ivoire refused to honor the ICC's arrest warrant on Simone Gbagbo and refused to transfer her to The Hague. In March 2015, a court in Côte d'Ivoire unanimously convicted Simone Gbagbo of undermining State security and sentenced her to 20 years in prison.[133] Perhaps in response to the Appeals Chamber's ruling and as a snub to the ICC, a second trial in Cote d'Ivoire for Simone Gbagbo began on May 31, 2016, this time for Côte d'Ivoire's highest criminal court (Cour d'Assises) and for crimes against humanity and war crime. Meanwhile, Simone Gbagbo's husband, former President Laurent Gbagbo, is at The Hague awaiting trial for crimes against humanity. It is not clear why Côte d'Ivoire transferred Laurent Gbagbo to The Hague but refused to transfer Simone Gbagbo. Charges against Laurent Gbagbo were confirmed on June 12, 2014,[134] and trials began on January 28, 2016.

5.2 The Prosecutor v. Uhuru Muigai Kenyatta *(Withdrawal of Charges)*[135]

Uhuru Muigai Kenyatta is the President of the Republic of Kenya. On March 13, 2015, Trial Chamber V(B) (Trial Chamber) of the ICC or Court delivered its *Decision on the withdrawal of charges against Mr Kenyatta* essentially ruling to terminate the proceedings in the case of *The Prosecutor v. Uhuru Muigai Kenyatta* (*Kenyatta* case) and to vacate the summons to appear against Mr Kenyatta.

[132] ibid at [10].

[133] Marilia Brocchetto, 'Ivory Coast's Simone Gbagbo Sentenced to 20 Years in Prison' *CNN* (10 March 2015) <http://www.cnn.com/2015/03/10/africa/ivory-coast-first-lady/> accessed 11 June 2016.

[134] *The Prosecutor v. Laurent Gbagbo*, 'Decision on the confirmation of charges against Laurent Gbagbo' (ICC, 12 June 2014) < https://www.icc-cpi.int/iccdocs/doc/doc1783399.pdf > accessed 11 June 2016.

[135] *The Prosecutor v. Uhuru Muigai Kenyatta*, 'Decision on the Withdrawal of Charges Against Mr Kenyatta' (ICC, 13 March 2015) <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-1005 > accessed 11 June 2016.

The case started in 2011, when Pre-Trial Chamber II summonsed Mr Kenyatta to appear before the ICC.[136] Pre-Trial Chamber II confirmed the charges against Mr Kenyatta on January 23, 2012.[137] Mr Kenyatta was accused of crimes against humanity as a result of murder (Article 7(l)(a)), deportation or forcible transfer (Article 7(l)(d)), rape (Article 7(l)(g)), persecution (Articles 7(l)(h)), and other inhumane acts (Article 7 (l)(k)). On March 29, 2012, the *Kenyatta* case was referred to the Trial Chamber.[138] In a decision rendered on December 3, 2014, the Chamber, *inter alia*, directed the Office of the Prosecutor (Prosecution) to file a notice within one week of the date of the decision, either indicating its withdrawal of the charges in the *Kenyatta* case or indicating that the evidentiary base had improved to a degree that would justify proceeding to trial.[139] On December 5, 2014, the Prosecutor filed a notice to withdraw the charges against Kenyatta.[140] The notice stated, *inter alia*, that the evidence "has not improved to such an extent that Mr Kenyatta's alleged criminal responsibility can be proven beyond reasonable doubt."[141] The notice further states that the withdrawal was "without prejudice to the possibility of bringing new charges against Mr Kenyatta 'at a later date, based on the same or similar factual circumstances, should [the Prosecution] obtain sufficient evidence to support such a course of action.'"[142]

In its March 13, 2015 decision, in light of the Notice of Withdrawal filed by the Prosecutor, the Trial Chamber considered it appropriate to terminate the proceedings against Kenyatta. The Trial Chamber noted that the Summons to Appear "should now be formally discharged and that the conditions therein will cease to have effect." It further ruled that pursuant to Article 70 of the Statute, "the Court retains jurisdiction over any interference with a witness or with the collection of evidence"[143] and that protective measures ordered in respect of victims or witnesses in this case shall continue after proceedings have been concluded, subject to revision by a Trial Chamber.[144] The Trial Chamber further noted that although the present proceedings will now be terminated, it "retain[ed] a limited residual jurisdiction to consider

[136]'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirirni Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein AIi' (ICC, 8 March 2011) < https://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf > accessed 11 June 2016.

[137]'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (ICC, 23 January 2012) < https://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf > accessed 11 June 2016.

[138]'Decision Referring the Case of The Prosecutor II Francis Kirimi Muthaura and Uhuru Muigai Kenyatta to Trial Chamber V' (ICC, 29 March 2012) <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-414> accessed 11 June 2016.

[139]'Decision on Prosecution's application for a Further Adjournment' (ICC, 3 December 2014) <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-981 > accessed 11 June 2016.

[140]ibid.

[141]ibid.

[142]ibid.

[143]'Decision on the Withdrawal of Charges Against Mr Kenyatta' (ICC, 13 March 2015), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-1005 > accessed 11 June 2016.

[144]ibid at [10].

certain procedural matters, including any review and possible reclassification of confidential filings in the case record, which shall remain confidential unless otherwise decided."[145] Finally, the Trial Chamber noted that it considers that the termination of the proceedings was "without prejudice to the continuation of the mandate of the LRV for such limited period as may be necessary to enable him to properly inform and advise the victims regarding the impact of the withdrawal of charges in this case and of the present decision, as well as, if applicable, to participate in the outstanding proceedings before the Appeals Chamber."[146] Although dismissed, still pending is a final decision on the Prosecution's application for a finding of noncompliance under Article 87(7) of the Statute.[147]

5.3 The Prosecutor v. Uhuru Muigai Kenyatta *(Noncompliance)*

On November 29, 2013, the Prosecutor filed an application requesting that the Trial Chamber make a finding of noncompliance under Article 87(7) of the Rome Statute against the Government of Kenya. In its December 3, 2014, decision, the Trial Chamber rejected the Article 87(7) application and essentially declined to refer the matter to the Assembly of States Parties (*Decision on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute* (Impugned Decision)).[148] On December 9, 2014, the Prosecution filed a request for leave to appeal the Impugned Decision. In its March 9, 2015, decision, the Trial Chamber granted the Prosecutor's request to appeal its decision (*Decision on the Prosecution's request for leave to appeal*) in the Kenyatta case.[149] Article 87(1)(a) of the Rome Statute stipulates:

> The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession. Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

Article 87(7) goes on to provide:

> Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court *may make a finding to that effect and refer the matter to*

[145] ibid at [11].

[146] ibid at [12].

[147] 'Decision on the Prosecution's Request for Leave to Appeal' (ICC, 9 March 2015) <https://www.icc-cpi.int/iccdocs/doc/doc1919141.pdf > accessed 11 June 2016.

[148] 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' (ICC, 3 December 2014) < https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-982 > accessed 11 June 2016.

[149] *n* 147.

> *the Assembly of States Parties* or, where the Security Council referred the matter to the Court, to the Security Council.[150]

At least three critical questions arose in this case. First, is the Court's power to make a finding of noncompliance under Article 87(7) of the Statute discretionary? Second, where a finding of noncompliance is made, is the decision whether or not to refer the matter to the Assembly of States (ASP) or to the United Nations Security Council (or UNSC) discretionary? Third, what factors must the Court weigh in deciding whether or not to make a finding of noncompliance?

5.3.1 *Judgment on the Prosecutor's Appeal Against Trial Chamber V(B)'s "Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute"*, August 19, 2015

In an appeal filed on March 20, 2015, the Prosecutor raised two grounds of appeal.[151] Kenya requested that the Appeals Chamber dismiss the Prosecutor's appeal for failing to demonstrate any error in the Trial Chamber's exercise of its discretion. On August 19, 2015, the Appeals Chamber unanimously reversed the "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute" and remanded the case.[152] Essentially, the Appeals Chamber reversed the Trial Chamber's decision regarding the Kenyan Government's alleged noncompliance with its obligations under the Rome Statute due to errors in the Trial Chamber's assessment.

As the appeal raised the question of the scope of a Trial Chamber's discretion in making a decision pursuant to Article 87(7) of the Statute, the Appeals Chamber first discussed the appropriate standard of review. The Appeals Chamber "will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling" but "will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made." Essentially:

> [The Appeals Chamber] will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[153]

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[150] Emphasis added.

[151] *n* 148.

[152] 'Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"' (ICC, 19 August 2016) <https://www.icc-cpi.int/pages/record.aspx?uri=2034599> accessed 11 June 2016.

[153] ibid at [22].

The Appeals Chamber further noted that "[w]ith respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, [it] will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law." With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber "applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings."[154]

Did the Trial Chamber Err in Law by Not Referring Kenya to the ASP When It Had Made a Finding Under Article 87(7) of the Statute That Kenya Had Not Complied with the Prosecutor's Request for Cooperation and That This Noncompliance Prevented the Court from Exercising Its Functions and Powers?

The Prosecutor argued that the Trial Chamber erred in adopting a "two-stage analysis," thus creating an unnecessary distinction between its findings on Kenya's noncompliance and its impact on the Trial Chamber's ability to exercise its powers and function "from the 'formal' or 'judicial' findings of non-compliance" under Article 87(7) of the Statute. Kenya made no arguments in relation to the first ground of appeal.

According to the Appeals Chamber, the substantive question that arises is whether, as a matter of law, the scope of a Trial Chamber's discretion under Article 87(7) is limited to making a finding relevant to the factual determinations of a failure to comply with a request to cooperate that has prevented the Court from exercising its functions and powers under the Statute or whether it includes an assessment of whether it is appropriate to refer the matter of the State's noncompliance to the ASP or to the UNSC. After reviewing a number of prior cases,[155] the Appeals Chamber concluded that "an automatic referral to external actors is not required as a matter of law" and was not persuaded that such automatic referral would be beneficial as a matter of policy as the Prosecutor had contended.[156] The Appeals Chamber took the position that a referral "was not intended to be the standard response to each instance of non-compliance, but only one that may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand."[157] In other words, a refusal to refer a matter of noncooperation to the ASP or the UNSC "does not necessarily imply acceptance of non-cooperation, but may be based on the Chamber's conclusion that such a referral may not be an

[154] ibid at [24].

[155] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court' (ICC, 5 September 2013) <https://www.icc-cpi.int/iccdocs/doc/doc1640857.pdf > accessed 11 June 2016.

[156] *n* 152, at [49].

[157] ibid at [51].

effective means to address the lack of cooperation in the specific context of the case."[158] According to the Appeals Chamber:

> Since the ultimate goal is to obtain cooperation, a Chamber has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain the cooperation requested taking into account the form and content of the cooperation; whether the referral would provide an incentive for cooperation by the requested State; whether it would instead be beneficial to engage in further consultations with the requested State; and whether more effective external actions may be taken by actors other than the ASP or the UNSC, such as third States or international or regional organisations.[159]

Ultimately, the Appeals Chamber found that the Trial Chamber did not err in law by not automatically referring Kenya to the ASP once it had made a factual determination of a failure to cooperate which affected the Trial Chamber's ability to exercise its functions and powers under the given Statute. In determining whether a referral is appropriate, "a Chamber will often need to take into account considerations that are distinct from the factual assessment of whether the State has failed to comply with a request to cooperate."[160]

Even if the Trial Chamber Had Discretion Not to Refer Kenya to the ASP, Did It Err in Exercising Its Discretion "by Taking into Account Extraneous or Irrelevant Considerations and by Failing to Take into Account or Give Sufficient Weight to Relevant Considerations"?

The Appeals Chamber took the position that the Pre-Trial or Trial Chamber "is endowed with a considerable degree of discretion" in deciding whether to refer a matter to the ASP or UNSC under Article 87(7) of the Statute because it "is intimately familiar with, inter alia, the entirety of the proceedings, including any consultations related to cooperation matters that have taken place, as well as the potential impact of the non-cooperation at issue."[161]

The Appeals Chamber made clear that noncompliance proceedings and proceedings against an accused before the Court were distinct proceedings that involve different parties (States versus an individual) and have different purposes under the Statute (State cooperation versus individual criminal responsibility).[162] This means that even where noncompliance proceedings originate in the context of a case against an accused, the interests and rights at stake are not interchangeable between these two. The Appeals Chamber found that the Trial Chamber erred in the exercise of its discretion by conflating the noncompliance proceedings with the proceedings against Mr Kenyatta. The Trial Chamber also held that the Trial Chamber erred by failing to address whether

[158] ibid at [52].
[159] ibid at [53].
[160] ibid.
[161] ibid at [62].
[162] ibid at [73].

judicial measures had been exhausted and by assessing the sufficiency of evidence and the conduct of the Prosecutor in an inconsistent manner. The errors, the Appeals Chamber concluded, "materially affected the Trial Chamber's decision not to refer the matter of Kenya's non-compliance"[163] and "prevented the Trial Chamber from making a conclusive determination on the existence of a failure to comply with a request to cooperate by the Court contrary to the provisions of the Statute, which prevents the Court from exercising its functions and powers under the Statute, as required by the first clause of article 87(7) of the Statute."[164]

The Appeals Chamber held that in determining whether there was a failure to cooperate within the terms of the first clause of Article 87(7), the Trial Chamber should take into account all relevant factors, including the evidence that was required in the cooperation request and the conduct of the parties to the proceedings. Rather, it remanded the Impugned Decision to the Trial Chamber "to determine whether Kenya has failed to comply with a cooperation request that has prevented the Court from exercising its functions and powers under the Statute and decide, if that is the case, whether or not to refer the matter to the ASP."[165] In determining whether there was a failure to cooperate within the terms of the first clause of Article 87(7), the Trial Chamber is to take into account "all relevant factors, including the evidence that was required in the cooperation request and the conduct of the parties to the proceedings." It "should avoid conflating the criminal proceedings against Mr Kenyatta with the proceedings under article 87 (7)" and is to determine whether, at the time of the Impugned Decision, judicial measures to obtain the cooperation had been exhausted and consultations had reached a deadlock.[166] Finally, if the Trial Chamber concludes that there has been such a failure to comply with a cooperation request, the Trial Chamber "should make an assessment of whether a referral of Kenya to the ASP would be an appropriate measure to seek assistance to obtain the requested cooperation or otherwise address the lack of compliance by Kenya."

6 The International Criminal Tribunal for Rwanda (ICTR)[167]

The International Criminal Tribunal for Rwanda (ICTR) concluded its work and closed its doors in December 2015, 20 years after it was created by the United Nations Security Council.[168] However, before closing its doors, the ICTR delivered

[163] ibid at [90].

[164] ibid at [91].

[165] ibid at [94].

[166] ibid at [95].

[167] The International Criminal Tribunal for Rwanda (*ICTR*) < http://unictr.unmict.org > accessed 11 June 2016.

[168] 'Rwanda: International Tribunal Closing Its Doors' *HRW* (23 December 2015) <https://www.hrw.org/news/2015/12/23/rwanda-international-tribunal-closing-its-doors> accessed 11 June 2016.

its last and final judgment on appeal in a case involving Pauline Nyiramasuhuko, a mother of four, a grandmother, and a former Minister of Family and Women's Development in Rwanda, and five coaccused. With the December 2015 decision, Nyiramasuhuko is now on record as the first woman to be convicted of genocide by an international criminal court.[169] Also in December 2015, Interpol agents arrested Ladislas Ntaganzwa, Rwanda's "most wanted man" implicated in the 1994 genocide in Rwanda. In 1994, at the time of the genocide, Ntaganzwa was the mayor of the commune of Nyakizu and head of the National Republican Movement for Democracy and Development in Nyakizu. The ICTR indicted Ntaganzwa in 1996. In 2012, Ntaganzwa's case was transferred to Rwanda in light of the ICTR's impending closure. If successfully extradited, Ntaganzwa will stand trial in Rwanda.

6.1 The ICTR: The Curtain Falls

As at December 31, 2015, when the ICTR closed its door for the last time, the Tribunal had indicted 93 individuals for genocide and other serious violations of international humanitarian law committed in 1994[170] and concluded proceedings for 85 accused.[171] Of the individuals that were indicted and convicted, 16 have served their sentence, 32 were transferred to a State to serve their sentence, 11 are awaiting transfer to a State to serve their sentence, and 3 died while serving their sentence.[172] The ICTR transferred a total of five cases to other jurisdictions: Rwanda (3) and France (2).[173] Not every accused that appeared before the ICTR was convicted. Of those accused and indicted, 14 were acquitted and released and two had their indictment withdrawn.[174] The ICTR had eight fugitive cases at the time it closed, and all eight have been transferred to other jurisdictions; five fugitive cases are now under Rwandan jurisdiction, and three fugitive cases are under the jurisdiction of the United Nations Mechanism for International Criminal Tribunals (MICT).

[169] 'Rwandan ex-minister becomes first woman convicted of genocide' *The Guardian* (24 June 2011) < http://www.theguardian.com/world/2011/jun/24/rwanda-first-woman-genocide-conviction > accessed 11 June 2016.

[170] 'United Nations Mechanisms for International Criminal Tribunal, Key Figures of Cases' *ICTR* <http://unictr.unmict.org/en/cases/key-figures-cases> accessed 11 June 2016.

[171] ibid.

[172] ibid.

[173] 'Rwanda Genocide Trial Opens in France' *The Guardian* (4 February 2014) <http://www.theguardian.com/world/2014/feb/04/rwanda-genocide-trial-opens-france-pascal-simbikangwa> accessed 11 June 2016.

[174] ibid.

6.2 The Prosecutor v. Pauline Nyiramasuhuko et al.: *"The Butare Six"*

As already noted, Nyiramasuhuko is the first woman to be convicted of genocide by an international criminal court. The initial joint indictment against Nyiramasuhuko and Ntahobali was confirmed on May 29, 1997, and last amended on March 1, 2001.[175] Nyiramasuhuko was arrested in Kenya and was transferred to the ICTR's detention facility in Arusha, Tanzania, on July 18, 1997. The coappellants in this case were Nyiramasuhuko's son, Arsène Shalom Ntahobali, and four others: Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje. The joint trial of the coaccused commenced on June 12, 2001,[176] and Trial Chamber II pronounced the Trial Judgment on June 24, 2011.[177] In its 2011 decision, Trial Chamber II convicted Nyiramasuhuko of genocide; conspiracy to commit genocide; crimes against humanity, including rape, persecution, and murder; and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Nyiramasuhuko was sentenced to life imprisonment. Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, Ndayambaje, and the Prosecution filed appeals against the Trial Judgment. Although Nyiramasuhuko initially advanced 32 grounds of appeal against her convictions and sentence, she eventually abandoned one ground of appeal (Ground 6).

On December 14, 2015, the Appeals Chamber of the ICTR, composed of Judge Fausto Pocar, presiding, Judge Carmel Agius, Judge Liu Daqun, Judge Khalida Rachid Khan, and Judge Bakhtiyar Tuzmukhamedov, delivered its judgment on the appeals. The Appeals Chamber affirmed the conviction of five of the coaccused but lowered their respective sentences. The Appeals Chamber affirmed Nyiramasuhuko's conviction for conspiracy to commit genocide, genocide, extermination, and incitement to rape but reduced her sentence from life imprisonment to 47 years imprisonment.

The conclusion of Nyiramasuhuko's case was slow in coming and took more than 14 years. The trial in this case started in 2001, the Trial Chamber's judgment was handed down in June 2011, and the Appeals Chamber's decision came down in December 2015. The case, which is considered the longest and possibly the most costly in the history of international criminal justice, lends credence to the criticism that the wheels of international criminal justice are indeed very slow. Nevertheless, the ICTR's success in securing the first conviction of a woman by an international criminal tribunal for the crime of genocide will go down in the history books and may go a long way in addressing the culture of impunity in Africa.

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[175] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali,* Judgment [2011] ICTR.

[176] ibid at [9].

[177] ibid.

6.3 Beyond the ICTR

The closure of the ICTR does not mean that the work of the tribunal is completely done. The International Residual Mechanism for Criminal Tribunals (IRMCT) was created in 2010 "to carry out a number of essential functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), after the completion of their respective mandates."[178] Security Council Resolution 1966 of 2010 spells out the mandate of the IRMCT and sets out its terms of reference.[179] Annexed to Resolution 1966 is the Statute of the International Residual Mechanism for Criminal Tribunals. The IRMCT will handle ad hoc functions such as tracking and prosecution of remaining fugitives, appeals proceedings, retrials, trials for contempt of court and false testimony, and proceedings for review of final judgment. The IRMCT will also have continuing function, including those of protection of victims and witnesses, supervision of enforcement of sentences, assistance to national jurisdictions, and preservation and management of IRMCT, ICTR, and ICTY archives.

6.4 Conclusion

The ICTR was from the onset in 1994 beset by problems. Whether the ICTR was truly effective and whether it ultimately delivered justice to the victims of genocide in Rwanda are questions that experts are likely to disagree on and debate for years to come.[180] There is likely to be considerable disagreement over the true legacy of the ICTR. Nevertheless, the ICTR undoubtedly contributed to the evolution of international criminal law and its jurisprudence. The history and jurisprudence of the ICTR suggest that the era of impunity in Africa for genocide and war crimes may be coming to an end even if not completely over. The ICTR was quite instrumental in making rape and sexual violence prosecutable crimes in international criminal law. Several decisions of the ICTR, including the ICTR's ruling in *Prosecutor v. Jean-Paul Akeyesu*, helped establish that rape and other forms of sexual violence can constitute genocide and war crimes.[181] While the global fight against impunity continues, questions about the impact of international criminal tribunals on the

[178] 'About the MICT', *United Nations Mechanism for International Criminal Tribunals*, 2012) <http://www.unmict.org/en/about> accessed 11 June 2016.

[179] Security Council Resolution 1966, *IRMCT* (22 December 2010) <http://www.refworld.org/docid/4d270e432.html> accessed 11 June 2016.

[180] Mark Kersten, 'The Rwanda Tribunal Closes — But Who Owns its "Legacy"?' *Justice in Conflict* (18 December 2015) <http://justiceinconflict.org/2015/12/18/the-rwanda-tribunal-closes-but-who-owns-its-legacy/> accessed 11 June 2016.

[181] *Prosecutor v. Jean-Paul Akeyesu, Judgment* [2001] ICTR <http://unictr.unmict.org/en/cases/ictr-96-4> accessed 11 June 2016.

culture of impunity in Africa will also continue to fuel debates and discussions for the foreseeable future.

7 European Court of Justice: Western Sahara, Indigenous Rights, and the Legality of Certain EU–Morocco Trade Agreements

7.1 Introduction

In a verdict delivered on December 10, 2015, the General Court of the European Union, a constituent court of the Court of Justice of the European Union, annulled the agricultural agreement entered into between Morocco and the European Union in March 2012 and voided the reciprocal liberalization measures on agricultural products, processed agricultural products, and fish and fishery products. The two cases bring to the fore the situation of Western Sahara located in northwest Africa, which has been the subject of a long-standing dispute between Morocco and the Saharawi people. The case brings into sharp focus the question of the status of Western Sahara under international law, possible violations of the right of self-determination of the Saharawis as declared by the International Court of Justice (ICJ) in 1975, and the legality of Morocco's effective control over most of the territory of Western Sahara.

7.2 Frente Polisario v. Council *(Case T-512/12)*[182]

In this case brought on November 19, 2012, Frente Polisario—the National Liberation Movement for Western Sahara—sought the Annulment of the EU Council decision adopting the 2010 *EU–Morocco Agreement on Agricultural, Processed Agricultural and Fisheries Products*. The applicant raised five pleas in law in support of its action. The applicant alleged, first, infringement of the duty to state reasons, when it was particularly necessary to state reasons having regard to the legal environment, and, second, infringement of the right to a hearing, since the Frente Polisario was not consulted. Third, the applicant alleged infringement of the fundamental rights protected by Article 67 of the Treaty on the Functioning of the European Union (TFEU), Article 6 of the Treaty on European Union (TEU), and the principles laid down in the case law by breaching the right to self-determination of the Saharawi people and by encouraging the policy of annexation followed by the Kingdom of Morocco, an occupying power. Furthermore, the applicant alleged

[182] *Al Toun and Al Toun Group v Council,* Order of 14 December 2012 (2013/C 55/25) *Official Journal of the European Union* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012TN0512&from=EN> accessed 11 June 2016.

infringement of the principle of coherence laid down in Article 7 TFEU by the failure to respect the principle of sovereignty and infringement of the values on which the European Union is based and the principles governing its external action in contravention of Articles 2, 3(5), and 21 of the TEU and Article 205 of the TFEU. Fourth, the applicant alleged infringement of international agreements concluded by the European Union, in particular the Association Agreement concluded between the European Union and the Kingdom of Morocco, and UNCLOS. Fifth, the applicant alleged a number of norms of international law, including the right to self-determination, the relative effect of the Treaties, and the essential provisions of international humanitarian law. Last, the applicant alleged that the contested acts were unlawful since the illicit nature of the European Union's conduct under international law makes those acts unlawful.

In a decision delivered on December 10, 2015, the GCE recognized Frente Polisario's standing to initiate the case and granted (partial) annulment of the disputed Council decision. In the words of the Court:

> The Council Decision 2012/497 of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, is annulled insofar as it permits the implementation of the agreement in Western Sahara.

7.3 Conclusion

On February 19, 2016, just days before a February 22, 2016, deadline, the European Council officially filed its appeal in the case.[183] In an Opinion delivered on September 13, 2016, Advocate General Melchior Wathelet of the Court of Justice of the European Union ruled that Western Sahara was not part of Moroccan territory and as such, neither the EU–Morocco Association Agreement nor the Liberalisation Agreement was applicable to it.[184] Given his opinion that the agreements cited do not apply to Western Sahara, the Advocate General proposed that the Court set aside the judgment of the General Court and dismiss the action brought by the Polisario Front as inadmissible.[185] Even if the two agreements were applicable to Western Sahara, in the opinion of the Advocate General, the Polisario Front was not directly and individually concerned by the contested decision and its action must also be rejected for that reason.[186] According

[183] *Council v. Front Polisario and Commission*, Case C-104/16 P.

[184] Court of Justice of the European Union, Press Release, 13 September 2016. *Advocate General's Opinion in Case C-104/16 P Council v Polisario Front*. http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-09/cp160094en.pdf.

[185] Ibid.

[186] Ibid.

to the Advocate General, while "the Polisario Front is recognised by the international community solely as the representative of the people of Western Sahara in the political process aiming to resolve the issue of the self-determination of the people of that territory and not for the purpose of defending the commercial interests of that people."[187] The Advocate General questioned whether the Polisario Front was indeed the sole representative of the people of Western Sahara in international relations since, in his view, it was conceivable that Spain, the former colonial power of that territory, still has responsibilities in that regard.[188] However, the Advocate General went on to rule that should the Court decide that the agreements at issue are nevertheless applicable to Western Sahara, and that the Polisario Front is entitled to challenge the contested decision, then the Council failed to fulfill its obligation to examine all the relevant evidence regarding the circumstances in which the Liberalisation Agreement was concluded.[189] In his view, although the Council was not required to evaluate the effects of the conclusion of that agreement on the exploitation of the natural resources of Western Sahara, it should have taken into account the human rights situation in that territory and the potential impact of the agreement on it.[190]

The case has implications for EU–Morocco relations and for EU external relations more broadly. According to one commentary, "The ruling places Morocco in a negative light, and if adopted by the Council of the European Union, it will affect relations between the European Union and the North African country."[191]

8 Selected Decisions by National Courts

8.1 High Court (UK): Western Sahara Campaign UK, R (on the Application of) v. HM Revenue and Customs[192]

In October 2015, a High Court in the U.K. delivered a landmark decision on the legality of the *EU–Morocco Association Agreement* and the *EU Morocco Fisheries Partnership Agreement*.[193] The High Court essentially ruled that the case should be heard by the Court of Justice of the European Union.

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[187] Ibid.

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] 'Europe's Court of Justice Voids EU Agricultural Trade Agreement With Morocco' *Morocco World News* (10 December 2015) <http://www.moroccoworldnews.com/2015/12/174803/europes-court-of-justice-voids-eu-agricultural-trade-agreement-with-morocco/> accessed 11 June 2016.

[192] *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs* [2015] EWHC 2895 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2015/2898.html> accessed 11 June 2016.

[193] ibid.

The claimant in this case is the Western Sahara Campaign UK (WSCUK), an independent voluntary organization founded in 1984 with the aim of supporting the recognition of the right of the Saharawi people of Western Sahara to self-determination and independence and to raise awareness of the unlawful occupation of the Western Sahara.[194] The defendants are the Commissioners for Her Majesty's Revenue and Customs (HMRC) and the Secretary of State for the Environment and Rural Affairs (DEFRA). The claim at its core challenges acts of the European Union in making agreements with Morocco with respect to customs tariffs and fisheries that do not distinguish between goods and activities arising in the sovereign territory of Morocco and those arising from the territory of Western Sahara. Given the issues in question, the claimant sought a reference for a preliminary ruling pursuant to Article 267 of the TFEU. The defendants opposed such a reference. The High Court ruled to refer the case to the CJEU concluding that there was "an arguable case of a manifest error by the Commission in understanding and applying international law relevant to these agreements."[195] The Honorable Mr Justice Blake observed that he could not "with complete confidence decline to make a reference on the basis that the claimant's arguments are bound to fail."[196]

8.2 *Court of Appeals (U.S.):* John Doe I, et al v. Nestlé, USA, et al.[197]

In January 2016, the United States Supreme Court (Supreme Court) declined to hear a joint appeal filed by three companies—Nestlé, Archer Daniels Midland, and Cargill—in a long-running case involving allegations of human trafficking and child slavery on cocoa farms in Côte d'Ivoire. In the original suit filed in 2005, the claimants, who are former child slaves, alleged violations of the Alien Tort Claims Act, the Torture Victim Protection Act, the United States Constitution, and California state law. On September 8, 2010, a lower court—the United States District Court for the Central District of California—dismissed the case on the grounds that corporations could not be sued under the Alien Tort Claims Act and that the plaintiffs failed to allege the elements of aiding and abetting. However, on September 4, 2014, the United States Court of Appeals for the Ninth Circuit reversed and vacated the 2010 ruling and remanded the case for further proceedings.[198] Significantly, the Ninth Circuit concluded that the plaintiffs had standing to bring their Alien Tort Claim Act case because of the universal prohibition against slavery. In a petition filed in September 2015, the defendants urged the Supreme Court to

[194] ibid at [1].
[195] ibid at [55].
[196] ibid at [44].
[197] *Nestle Inc. v. John Doe* [2014] SCOTUS.
[198] ibid.

throw out the federal appeals court's ruling and rule definitively on whether corporations are subject to liability under the Alien Tort Claims Act. By its January 2016 decision, the Supreme Court has declined to hear the corporate defendant's appeal.[199]

Scholars are likely to disagree on the legal and practical implications of the Supreme Court's decision to let the Ninth Circuit's 2014 decision stand. While this case does not change the Supreme Court's 2013 ruling in the *Kiobel v. Royal Dutch Petroleum Co*. case (a case that was brought by Nigerian plaintiffs and involved allegations that Royal Dutch Shell plc aided State-sponsored torture and murder in Nigeria), it arguably suggests that the Alien Torts Claim Act is not completely dead and buried. Undoubtedly, the Supreme Court could have used the opportunity presented by this case to clarify its holding in *Kiobel* and shut down corporate litigation under the Alien Torts Claims Act in a more definitive way, but it chose not to.

With the Supreme Court passing up on the opportunity to resolve the circuit conflict over the meaning of *Kiobel*'s "touch and concern" test and other Alien Torts Claim Act issues that *Kiobel* did not resolve, divergent opinions should be expected from the lower courts. Several questions thus persist regarding litigation under the Alien Torts Claim Act. For example, what amount of domestic contact is necessary to rebut *Kiobel*'s presumption against extraterritoriality? Does the Alien Torts Claim Act provide jurisdiction for aiding/aiding liability and under what circumstances?

8.3 Court of Appeals in The Hague (Netherlands)*: A Landmark Decision Against Shell*

In December 2015, a Dutch appeals judge—Judge Hans van der Klooster—overruled a 2013 decision of a lower court and ruled that a court in the Netherlands should hear a case against Royal Dutch Shell brought by four Nigerian farmers.[200]

The case was initiated in 2008 by Friday Alfred Akpan from Ikot Ada Udo, Eric Dooh from Goi, and Alali Efanga and Fidelis Oguru from Oruma (the four Nigerian farmers) and Milieudefensie (Friends of the Earth Netherlands).[201] The case revolved around oil spills that occurred in four villages in the Niger Delta in Nigeria that polluted drinking water, fishing ponds, and agricultural lands in the area and were not properly cleaned up. At least four issues came up in this case: liability for the oil spills, responsibility for the cleanup of the oil spills, compensation for losses

[199] Lawrence Hurley, 'U.S. top court rejects Nestle bid to throw out child slavery suit' *Reuters* (11 January 2016) <http://uk.reuters.com/article/usa-court-nestle-idUKL2N14V11120160111> accessed 11 June 2016.

[200] 'Shell to face Nigeria oil spill lawsuit' *BBC News* (18 December 2015) <http://www.bbc.com/news/business-35134704> accessed 11 June 2016.

[201] *Friday Alfred Akpan (Ikot Ada Udo) v. Shell* [2013] District Court of The Hague.

arising from the oil spills, and duty to prevent new leakages. While Shell blamed the oil spills on sabotage, the plaintiffs argued that the company was legally obliged to prevent or repair the deterioration of pipelines that makes spills possible. The plaintiffs also argued that Shell had a duty to prevent sabotage through proper security and better corporate–community relations. The plaintiffs demanded that Shell clean up the oil spills, compensate them for their losses, and prevent new leakages by ensuring that the company's pipelines are properly maintained and patroled. The plaintiffs also demanded that the company disclose a number of vital documents—documents that could show the company's negligence in maintaining its oil pipelines and guarding against sabotage. While the lower court ruled for the plaintiff in *Friday Alfred Akpan (Ikot Ada Udo) vs Shell*, it ruled against the other plaintiffs in *Fidelis A. Oguru (Oruma) vs Shell* and *Barizaa Tete Dooh (Goi) vs Shell*.

With the December 2015 ruling, the substantive issues in the case will now be heard by a court in the Netherlands in March. "The Dutch courts and this court consider it has jurisdiction in the case against Shell and its subsidiary in Nigeria," Judge Hans van der Klooster said at the appeals court in The Hague. "All appeals by Shell are rejected," Judge Van der Klooster also added. Even more damaging to Shell is the court's order for the company to hand over vital documents that could shed light on whether the company failed to properly maintain oil pipelines and prevent sabotage. Shell's Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, is quoted as saying: "We believe allegations concerning Nigerian plaintiffs in dispute with a Nigerian company, over issues which took place within Nigeria, should be heard in Nigeria."[202] The case has been described as unique and a landslide victory for environmentalists and for the Nigerian plaintiffs.

The 2015 decision sets a landmark legal precedent. The decision is a victory for the Nigerian plaintiffs and arguably opens the door for potential lawsuits in the Netherlands against Dutch corporations or their subsidiaries operating in Nigeria, other parts of Africa, and, indeed, other parts of the globe. As the nongovernmental organization Friends of the Earth Netherlands, which helped the Nigerian plaintiffs bring their legal action, put it: "The ruling is unique and can pave the way for victims of environmental pollution and human rights abuses worldwide to turn to the Netherlands for legal redress when a Dutch company is involved."[203] "There is now jurisprudence that means victims of human rights violations or pollution can sue Dutch multinationals in the Netherlands," Geert Ritsema of the Friends of the Earth Netherlands is quoted as saying.[204] Regarding the Court's order for Shell to provide

[202] ibid.

[203] ibid.

[204] 'Dutch court: Shell can be liable for Nigeria spills' *Al Jazeera* (18 December 2015) <http://www.aljazeera.com/news/2015/12/dutch-court-shell-liable-nigeria-spills-151218120516428.html> accessed 11 June 2016.

access to internal company documents, Channa Samkalden, legal counsel for Friends of the Earth and the Nigerian farmers, says:

> This is the first time in legal history that access to internal company documents was obtained in court. An appropriate ruling, because these documents may contain important corroborating evidence regarding the oil spills caused by Shell affecting these farmers' land and fishing ponds. This finally allows the case to be considered on its merits.[205]

The case has serious implications for Shell, for Shell's Nigerian subsidiary, and for other Dutch corporations operating in Nigeria and the rest of Africa.[206]

[205] 'Outcome appeal against Shell: victory for the environment and the Nigerian people' *Milieudefensie* (18 December 2015) <https://milieudefensie.nl/english/pressreleases/outcome-appeal-against-shell-victory-for-the-environment-and-the-nigerian-people> accessed 11 June 2016.

[206] 'Dutch ruling: What does it mean for Shell in Nigeria?', *Phys.org* (18 December 2015 <http://phys.org/news/2015-12-dutch-shell-nigeria.html> accessed 11 June 2016.