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Book Reviews

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Editors' Introduction

Jasmine Moussa[*]
Bart Smit Duijzentkunst[†]

As it enters its second year, the Cambridge Journal of International and Comparative Law (*CJICL*) is experiencing a 'growth spurt'. Capitalising on the success of Volume 1, the CJICL has this year expanded its Academic Review Board and increased the number of its editors. Thanks to our predecessors, the CJICL is now listed on HeinOnline and Westlaw. The editorial process has become more streamlined and, with the release of our new style guide developed by Cameron Miles, the CJICL now has its own house style. Moreover, the CJICL blog has provided frequent and timely insights on developments in international and comparative law via the CJICL website and social media. Finally, the Journal will hold its Second Annual Conference on 18 and 19 May 2013 under the theme 'Legal Tradition in a Diverse World'.

Still, there is plenty of room for further growth. The CJICL occupies a unique position in the world of academic publishing, as an open access journal that is both student-run *and* peer reviewed. While the UK government, research charities and publishers fight over who should pay for academic publishing, the CJICL is and remains freely accessible to all. The success of this model is already evident: over the past year, both the quantity and the quality of submissions to the Journal have improved considerably. All points to a bright future in which the CJICL will continue to fulfil its mission: to offer a forum where theoretical inquiry meets practical reasoning, and where the best traditions of legal research are employed to develop innovative insights and methodologies.

This link between theory and practice, tradition and innovation is reflected in the opening article of this issue, in which Sir Daniel Bethlehem QC offers practical suggestions to operationalise the relationship between international humanitarian law and international human rights law in situations of armed conflict. Moreover, the former Legal Adviser to the UK Foreign and Commonwealth Office calls for more active engagement by governments with the public debate on this issue, to ensure that legal developments fit battleground realities. In a way,

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the article by Remigius Nnamdi Nwabueze seeks to achieve a similar aim, but in an entirely different field. Nwabueze examines how the law on burial rights should balance religious, cultural and familial considerations with the wishes of the deceased. While the piece does not shy away from the conceptual controversy concerning the dead as a right holder, it also offers concrete suggestions to resolve burial conflicts—arguing that the law should give priority to burial wishes of the deceased. Arnold Pronto then reflects on the work of the International Law Commission (*ILC*) concerning the effect of war on law. Having followed the discussions up close as a member of the ILC's Secretariat, Pronto provides both a historical framework and a clarifying exegesis of the role and relevance of the 2011 articles, which resulted from the ILC's sessions.

The issue continues with a timely though alarming call-to-arms by Yangmay Downing, who urges lawyers and diplomats to turn their attention to the burning issue of ocean acidification. Not only does her article establish the urgency of this issue by carefully considering scientific evidence and the possible consequences of inaction; she also offers various legal pathways to deal with this much overlooked environmental threat. In her article on the debate on prisoner enfranchisement, Georgina Bryan expresses her disquiet about the balance in a different ecosystem, namely that of the British constitution. She warns that recent parliamentary rumblings regarding Britain's relationship with the European Court of Human Rights threaten to disturb the delicate constitutional balance between law and politics in the UK. Aldo Zammit Borda critically examines the doctrine of 'binding precedent' as it applies to international criminal adjudication. By focusing on the actual practice of international courts, Borda's analysis enriches the largely theoretical academic discourse on the fragmentation of international law. Borda's article is complemented by Henri Decoeur's analysis of the jurisprudence of international criminal courts and tribunals in 2012. Decoeur's evaluation of the case law of five of these institutions reminds the reader of the challenges confronting international criminal justice. Also in the case analysis section, Naomi Burkes' article on the case of *Nicaragua v Colombia* at the ICJ unpacks the Court's complex methodological technique and critically analyses its introduction of parallel lines to adjust boundaries. Geraldo Vidigal's analysis of the Mercosur Court and its emerging jurisprudence in cases related to a 'breakdown of democracy' presents an interesting insight from the region on how international law may respond to regime change. Vidigal's exposition offers valuable food for thought to those who advocate a stronger role for international and regional institutions in enforcing democracy.

In the book reviews section, this issue features reviews of two seminal works

of international law, Crawford's *Brownlie's Principles* and Cassese's *Realizing Utopia*. Both works are associated with two recently deceased, epic figures in international law, namely Sir Ian Brownlie and Professor Antonio Cassese. They also reflect the voices of international law's most distinguished contemporary figures, namely Professor James Crawford, who took up the task of editing the 8th edition of Brownlie's textbook,[1] and in the case of Cassese's edited volume, Professors Martti Koskenniemi, Philip Alston, Michael Reisman and Judge Abdulqawi Yusuf, among other eminent scholars. Yet this is where the comparison ends. In his insightful review of Crawford's *Brownlie*, Samuel Wordsworth QC underscores the book's value to practitioners. *Realizing Utopia*, on the other hand, is far more conceptual, notwithstanding Cassese's attempts to distance the work from the realm of 'Utopianism' by adopting a methodology of 'judicious reform'. Matthew Hoisington offers a refreshing critique of this approach. He creatively contrasts the value accorded to innovation in the discipline of international law with its value in the technology industry. Hoisington's review urges international lawyers to challenge the limits of their discipline. Imbued with a sense of practicality, Avidan Kent's review of Bunn's *The Right to Development in International Economic Law* intimates to readers that while a thorough discussion of the moral and religious content of the right to development is an intellectually enriching exercise, it must be supplemented with more pragmatic engagement. The issue closes with Noam Zamir's review of two important works on the classification of armed conflicts. Zamir skilfully examines how these two works bridge the gap between theory and practice, particularly in the complex area of 'internationalisation' of armed conflicts, while providing the reader with an insightful assessment of the validity and effectiveness of this doctrine.

We would like to thank the authors of this issue for considering the CJICL as their forum for publication. We are very pleased that this issue combines perspectives from both academics and practitioners—hailing from government, international organisations and private practice—offering a diversity of intellectual standpoints. We are very fortunate to be able to rely on the expertise and support of our Academic Review Board, whose members have helped us select and shape the articles in this issue. Many authors, both young and established, have benefited from their comments and insights. Our managing editors Jastine Bar-

[1] It is noteworthy that many of the Cambridge graduate students who assisted with the revision of Crawford's *Brownlie* and who have been acknowledged in the book's preface, are or have been members of the CJCIL Editorial Board.

rett, Emma Bickerstaffe, Daniel Costelloe and Cameron Miles have worked tirelessly on the production of this issue—we are very grateful for their efforts. Many thanks also to Shona Wilson Stark for her great work on the CJICL UK Supreme Court Annual Review. We are indebted to our team of editors, who generously gave their time, in spite of their heavy workloads, to compile and copy-edit this issue. A special word of thanks goes to the blog team, consisting of Daniel Costelloe, Naomi Burke, Valentin Jeutner and Robin Morris. Yin Harn Lee continued to serve the CJICL as Secretary and Treasurer, as reliable as ever. Our Senior Treasurer, Professor James Crawford, offered help and advice throughout the year, particularly with the organisation of the Second Annual CJICL Conference. The Cambridge Law Journal generously sponsored the CJICL and its editor, Professor John Bell, kindly shared his editorial wisdom upon request.

Finally, we would like to single out Sidney Richards, who has yet again demonstrated himself to be the CJICL's most devoted supporter. Not only has Sidney singlehandedly designed the Journal's IT structure that allows the CJICL to maintain its open access policy, he also midwifed all of its issues. We are thankful for his unremitting enthusiasm for the CJICL.

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The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict

Sir Daniel Bethlehem QC[*]

Keywords
International Human Rights Law, International Humanitarian Law, Armed Conflict

1 Introduction

Following some framing remarks to place in wider context the discussion that follows on the relationship between international humanitarian law (*IHL*) and international human rights law (*HRL*), and the application of the latter in armed conflict, this paper addresses the following: (a) the systemic relationship between IHL and HRL; (b) whether key HRL provisions are amenable to reasonable application in armed conflict, and, if so, whether there are policy considerations that suggest their application as a matter of discretion, even if they are not applicable *de jure*; and (c) assuming that HRL provisions apply in armed conflict *de jure*, or ought to be applied as a matter of discretion, the relationship between relevant IHL and HRL provisions. The paper does not address issues concerning the *de jure* application of HRL in armed conflict.[1]

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[1] On this issue, see O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (2011); J Klefner, 'Human Rights and International Humanitarian Law: General Issues', in: T Gill & D Fleck (eds), *The Handbook of the International Law of Military Operations* (2010) 51-77; R Arnold, N Quénivet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (2008).

2 Framing the discussion

There are a number of elements of an enquiry into the relationship between IHL and HRL and the application of the latter in armed conflict:

1. whether HRL conventions—for ease of discussion, the 1966 International Covenant on Civil and Political Rights (*ICCPR*),[2] the 1984 Convention Against Torture (*CAT*),[3] and, given its frequent bellwether quality, the 1950 European Convention on Human Rights (*ECHR*)[4]—apply extra-territorially, and, if so, in what circumstances and to what extent;

2. if some or all of these HRL conventions apply extra-territorially, whether they apply *on their face* in armed conflict, i.e. the issue of formal *de jure* application, including questions of derogation, requiring potentially both a convention-by-convention and a provision-by-provision analysis;

3. a subset of the preceding enquiry is usefully whether these conventions, and their individual provisions, are amenable to reasonable application in armed conflict, and, if so, whether or not they apply *de jure*, there are policy considerations that suggest their application as a matter of discretion;

4. if HRL conventions and provisions apply *de jure* in armed conflict, or ought to be applied as a matter of discretion, the relationship between IHL and HRL, requiring both a convention-by-convention and a provision-by-provision analysis, including the so-called *lex specialis* issue;

5. whether any conclusion emerging from the preceding analysis needs to be revisited as we move (as we must) beyond a review of conventional law to a review of customary international law (*CIL*) standards of both IHL and HRL, including such questions as:

    a) whether there are limits on the application of CIL, e.g. issues of *erga omnes* application, territorial application, self-executing CIL etc;

    b) implications flowing from the *jus cogens* quality of a given CIL principle, e.g. the prohibition on torture;

[2] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

[3] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

c) the content of CIL rules in this area and the approach to determining this;

d) issues of potential normative uncertainty associated with the clarity of conventional rules but the potential relative vagueness of CIL rules;

e) the interaction between CIL and conventional international law, e.g. issues of supervening CIL and the relevance and application of CIL for purposes of IHL and HRL treaty interpretation;

6. the relevance of CIL principles of state responsibility (*SR*) to these issues, notably those concerning the international legal responsibility that attaches to a state in consequence of the acts or omissions *inter alia* of those:

   a) exercising governmental authority; or

   b) acting on the instructions of, or under the direction or control of, a state,

   wherever in the world such acts or omissions may take place.

   There is, separately, also the issue of the responsibility that may attach to aid or assistance provided by one state to another. Both of these issues engage distinct questions of territorial application, interaction between the primary obligations of IHL and HRL, and potentially of other obligations of international law;

7. the relevance to this broader enquiry of principles of international criminal law (*ICL*), of both conventional and customary character, which mirror IHL and HRL standards; and

8. whether the provenance of obligations potentially applicable in situations of armed conflict—IHL, HRL, SR or ICL; conventional or customary—matters for admissibility, jurisdictional, procedural, interpretative, accountability, revision, or other reasons.

Separate from these lines of enquiry are questions of the application of national constitutional and legislative provisions extra-territorially and in armed conflict, and the relationship between such provisions and applicable IHL and HRL rules. These aspects are not addressed further in this paper, although it bears emphasis that the national laws of many states, particularly in the fundamental rights and

criminal law fields, apply or are capable of being applied extra-territorially and in armed conflict. It also bears emphasis that courts in various jurisdictions have shown a sharp antipathy to perceived circumstances of the non-application of any (adequate) legal standards and safeguards, with the result that they have inclined towards the extension and application of internationally derived fundamental rights standards to situations of armed conflict notwithstanding questions about the provenance, content and formal application of the relevant international rules.

Also not addressed in this paper, but potentially important to the wider enquiry, are two further questions. The first is the relevance to the issues identified above of whether an armed conflict is an international armed conflict, a non-international armed conflict or a conflict having some hybrid character.[5] This goes to questions of the potential application, perhaps even of a trumping nature, of the domestic law of the state in whose territory the armed conflict is taking place. The second question goes to the implications, if any, of the international legal basis for the use of force, notably, the terms of any authorisation by the UN Security Council under Chapter VII of the UN Charter, including any reference therein to compliance with IHL and/or HRL. This raises the questions of whether Security Council authorised action amounts to an armed conflict of the same nature, and engaging the same legal framework, as a more traditional armed conflict, and whether a Security Council authorisation could properly have the effect of requiring compliance with applicable HRL obligations directly, of elevating the bar of IHL standards by reference to an overlay of HRL standards, or of limiting the scope of otherwise applicable IHL rules and principles. This last element might take the form, for example, either explicitly or by reference to the purpose of the action, of imposing limits on targeting objectives, of requiring a broader appreciation of such principles as military necessity and proportionality, of requiring compliance with HRL-derived standards going beyond IHL relevant to detention, etc.

None of the preceding questions is abstract or academic in nature. Whether or not always in this precise form or detail, all have required and engaged operational attention from government legal advisers, both civilian and military. Amongst the significant challenges of operational advice in this area are that (a) few of these questions admit of clear or authoritative answers; (b) the variable geometry of applicable legal standards across allies engaged in a common endeav-

[5] For a recent discussion of this issue, see E Wilmshurst (ed), *International Law and the Classification of Armed Conflicts* (2012).

our, or in shared or joint operations, pose significant additional de-confliction and inter-operability issues; (c) not all of these issues are readily amenable to definitive slower time strategic advice, as opposed to stressed, real-time operational advice; and (d) the complexities of these issues is by some margin not often adequately understood by courts, legislators and non-governmental commentators actively engaged on these issues from the perspective of their own competences and responsibilities.

For purposes of discussion, the remainder of this paper addresses core issues relevant only to questions 3 and 4 above.

3 The systemic relationship between IHL and HRL

Operating at a level of high generality, the currently controlling appreciation of the relationship between IHL and HRL is set out in the 2004 *Wall* Advisory Opinion of the International Court of Justice in the following terms:

> the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[6]

The focus of the Advisory Opinion was Israel's long-term belligerent occupation of the West Bank, presumptively engaging issues under both Hague Regulations law[7] and the Fourth Geneva Convention,[8] the further question being whether obligations under the ICCPR also applied. While the ICJ went on to address the

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 p 136, para 106.

[7] See Hague Convention (II) with Respect to the Laws and Customs of War on Land and Annex, Regulations concerning the Laws and Customs of War on Land, 29 July 1899,187 CTS 429; and Hague Convention (IV) respecting the Laws and Customs of War on Land and Annex, Regulations concerning the Laws and Customs of War on Land, 18 October 1907, 205 CTS 277.

[8] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

extra-territorial application of the ICCPR, Israel's derogation thereunder, and the application of particular ICCPR provisions in the circumstances under review, it did not undertake any further analysis of the relationship between the applicable IHL rules and those of the ICCPR that it held to apply, simply commingling in its analysis various provisions from both strands.

Given the high level of generality of the Court's statement on the relationship between IHL and HRL, and the absence of any subsequent analysis of the interaction of these two bodies of law at an operational level, there is little useful guidance to be had from this opinion on the detail of the relationship between IHL and HRL apart from the Court's bottom line conclusion that certain specified provisions of the ICCPR applied in the circumstances of Israel's (then) 37 year belligerent occupation of the West Bank.

There is, of course, other jurisprudence, both prior and subsequent to the *Wall* Advisory Opinion, that addresses these matters. Of greater assistance to the analytical enquiry is the narrower observation in the ICJ's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons* in the following terms:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[9]

The general propositions that follow from this observation are that:

[9] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 p 226, para 25.

1. ICCPR provisions (and by extension potentially also those of other applicable HRL conventions) apply in armed conflict save insofar as they have properly been the subject of derogations;

2. the relevant applicable ICCPR (or other HRL) provision operates as an enquiry gateway, with an implicit *renvoi*, once the gateway has been passed, to the *lex specialis* governing these matters;

3. IHL is the *lex specialis* relevant to armed conflict;

4. the substantive enquiry turns on the *lex specialis* alone, not on the terms of the applicable ICCPR (or other HRL) provision; but that

5. a violation of the relevant IHL rule will *ipso jure* also constitute a violation of the relevant Covenant (or other HRL) provision.

This analysis does not address other important threshold questions, such as those of the extra-territorial application of ICCPR (and/or other HRL) provisions and issues of jurisdiction and control, and a more nuanced enquiry would be necessary in circumstances in which there was either no relevant applicable IHL rule or the relevant applicable IHL rule was somehow substantively inadequate. But, these issues apart, the conclusions flowing from the *Nuclear Weapons* Advisory Opinion are both more considered and more useful, and better attuned to the complexity of the issues, than those flowing from the more recent *Wall* Advisory Opinion.

One of the challenges of the present debate about the relationship between IHL and HRL is that it is the broad brush of the *Wall* Advisory Opinion that is usually reflexively quoted and relied upon as the starting point for any judicial or other analysis of these issues, usually to the detriment of a more considered enquiry. So, for example, it was the *Wall* statement that was the starting point of the analysis of the European Court of Human Rights in its *Al-Skeini* judgment of 7 July 2011,[10] which thereafter turned on an appreciation of belligerent occupation in Iraq, although without at any point ever engaging with the more detailed issue of the operational relationship of relevant principles of IHL and Article 2 of the ECHR.[11] While there may be a case for saying that the Court's bottom line—that the UK's investigative responsibilities had not adequately been acquitted[12]—was

[10] *Al-Skeini and Others v UK*, [2011] ECHR 55721/07, para 90.
[11] Ibid, paras 143-8.
[12] Ibid, paras 168-77.

correct, the absence of any analysis of applicable IHL obligations, and of the relationship between those obligations and those of Article 2 of the ECHR, is a cause for disquiet.

Another challenge of the present debate is that discussion of the application of ICCPR or other HRL standards in armed conflict is proceeding on the basis that it is a lock-stock-and-barrel exercise, i.e. the discussion invariably addresses only the generic application of the ICCPR or other HRL conventions in armed conflict, rather than proceeding by way of a provision-specific analysis. If a discussion of these issues is to be useful, however, it must focus on specifics. To this end, a helpful initial enquiry is simply whether particular HRL provisions are in common sense terms amenable to reasonable application in armed conflict. As an enquiry of this nature side-steps questions of the *de jure* application of HRL, it allows a detached evaluation of whether, even if such principles do not apply *de jure*, there may be broad support for their application as a matter of discretion. This aspect is addressed further below.

Consideration is also required at a level of detail of the potential range of the relationship between IHL and HRL provisions. To unpack this, it is useful to proceed by way of an assumption that HRL provisions are applicable extra-territorially and in armed conflict and move from there to address a number of scenarios, including:

1. circumstances in which there are relevant and applicable IHL provisions addressing the circumstances at issue;

2. circumstances in which there are relevant IHL provisions that would address the circumstances at issue but that, for one reason or another, are not applicable;

3. circumstances in which there are relevant and applicable IHL provisions but there is a reasonable basis for concluding that, for whatever reason, they are insufficiently developed for purposes of appropriate contemporary application;

4. circumstances in which there are relevant and applicable IHL provisions but they are materially at odds with relevant applicable HRL provisions;

5. circumstances in which there is no relevant IHL provision;

6. circumstances in which there is substantive overlap between relevant and applicable IHL and HRL provisions but the relevant HRL would introduce additional elements of process or remedy.

The purpose of this enquiry is to require a more focused analysis of how IHL and HRL provisions might interact in circumstances in which both are applicable. Various possibilities are apparent, on the assumption that IHL is the *lex specialis* and therefore the body of law of presumptive and principal application. Thus, by reference to the preceding scenarios, HRL might:

1. simply act as a gateway for the application of the relevant and applicable IHL provision by way of an implicit *renvoi*;

2. operate to give effect to a relevant but otherwise inapplicable provision of IHL;

3. inform the interpretation of the substantive IHL obligation, possibly including by way of supplementing or completing it for purposes of appropriate contemporary application;

4. prevail over an inconsistent IHL provision;

5. fill in the gap in circumstances in which there is no relevant IHL provision;

6. augment the relevant and applicable IHL obligation by way of HRL procedural and accountability mechanisms.

Against this background, what is clear is that governments and their legal advisers should be more prepared to engage in a deeper public discussion of these issues than has hitherto been the case. For understandable reasons—to do with operational pressures, the complexity of the issues, anxieties around litigation, entrenched positions around issues of extra-territoriality, jurisdiction and control, etc—the public debate about the relationship between IHL and HRL in armed conflict has so far attracted less public governmental participation than it warrants. Closer governmental engagement would facilitate a more informed debate and would assist in shaping the development of the law in this area to sensible ends.

4 Are core HRL provisions amenable to reasonable application in armed conflict?

For ease of discussion, this section takes as its focus provisions of the ICCPR. The initial question is whether these provisions are amenable to reasonable application in armed conflict. This enquiry is intended as a practical tool to evaluate the possible application of ICCPR provisions in particular armed conflict situations.

For purposes of a considered analysis, it is necessary to parse armed conflict action into its constituent parts. A number of sub-divisions may be possible. One possible matrix might be:

1. conduct of battlefield operations;
2. battlefield operational control of territory;
3. battlefield capture, i.e. temporary detention away from fixed or dedicated detention facilities;
4. tactical (battlefield) questioning;
5. elongated operational military control of territory;
6. detention;
7. interrogation;
8. prosecution;
9. investigation of battlefield incidents;
10. compensation for civilian damage as a result of battlefield incidents;
11. extended strategic military control of territory short of belligerent occupation;
12. belligerent occupation, i.e. territory under military occupation authority.

The purpose of a matrix of this kind is to assess the types of situations in which it may be reasonable, or unreasonable, to regard HRL provisions as amenable to application, whether for purposes of informing the interpretation of relevant and applicable IHL provisions or to some other end.

Within this matrix, it is useful to consider the potential for reasonable application of each substantive provision of the ICCPR, including the extent to which a given ICCPR provision finds corresponding expression in some provision of IHL.

For purposes of the present discussion, a review against the preceding matrix of a number of ICCPR provisions illustrates the trend. So, for example, at one end of the spectrum, looking at Article 7—the prohibition on torture or cruel, inhuman or degrading treatment or punishment—it is unlikely to be controversial to conclude that this is amenable to reasonable application in all situations of armed conflict. Further, it is readily apparent that the principle in Article 7 finds corresponding expression in all the key IHL conventions.

In contrast, at the other end of the spectrum, taking Article 25, ICCPR—the right to take part in the conduct of public affairs and to participate in periodic elections—it is difficult to sensibly contend that this is amenable to reasonable application in armed conflict other than perhaps under matrix heading (12), circumstances in which the territory in question is under military occupation authority, i.e. the law of belligerent occupation applies. There may possibly be argument about whether this provision could be capable of reasonable application in circumstances of extended strategic military control of territory short of belligerent occupation (heading (11)), perhaps because an election had previously been scheduled, but even this is likely to be controversial. It follows from this that it is likely to be largely uncontroversial to conclude that Article 25, ICCPR is not amenable to reasonable application in virtually all circumstances of armed conflict.

Unsurprisingly, most of the provisions of the ICCPR fall between these two extremes, although with significant doubt arising about the reasonable application of even the non-derogable ICCPR rights the closer one gets to the battlefield. So, for example, it is not clear that Article 11 (imprisonment for contractual obligations), Article 15 (non-retroactivity of criminal offences) and Article 18 (freedom of thought, conscience and religion) could have any meaningful application to the conduct of battlefield operations, battlefield operational control of territory, battlefield capture, tactical (battlefield) questioning, elongated operational military control of territory, and perhaps other scenarios. And, as regards most of the ICCPR derogable rights, significant questions arise about their potential for reasonable application in most of the scenarios apart from belligerent occupation and perhaps, in respect of some provisions, circumstances of detention. And, as regards Article 6 (the right to life and the prohibition of arbitrary deprivation of life), the ICJ *Nuclear Weapons* Advisory Opinion concluded that 'whether a partic-

ular loss of life … is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'.[13]

The upshot of a review of this kind is that it is apparent that not all provisions of the ICCPR are amenable to reasonable application in all situations of armed conflict and, even if they are in some circumstances, very few are amenable to reasonable application in situations of armed conflict across the board. As a rule of thumb, the closer one gets to the battlefield the less amenable to reasonable application are most provisions of the ICCPR.

An article-by-article review also discloses that in many cases ICCPR provisions find detailed corresponding expression in some form in IHL. So, for example, Articles 49–57 of the Third Geneva Convention contain detailed provisions concerning the labour of prisoners of war, provisions that might be said to occupy the same space as Article 8 of the ICCPR, concerned with the prohibition of slavery and forced or compulsory labour. In similar vein, Article 14 of the Third Geneva Convention and Article 80 of the Fourth Geneva Convention, *inter alia* affirming the civil capacity of prisoners of war and internees respectively, find some correspondence in Article 16, ICCPR, containing the right to recognition as a person before the law.

In contrast, in other cases, IHL provisions either expressly or implicitly cut across ICCPR principles such as to raise questions about the scope of application of the latter. So, for example, the terms of Article 76 of the Third Geneva Convention, which *inter alia* permits the censoring of correspondence addressed to prisoners of war, an issue which might be said to engage the application of Article 17 (interference with privacy) and Article 19 (freedom of expression) of the ICCPR, raises questions about the reasonable application of the ICCPR in such circumstances.

A number of questions and issues follow from the preceding. The *first* is whether a deeper analysis by courts and commentators would not be appropriate on the question of whether derogations are properly required in circumstances in which an armed conflict is taking place outside of the territory of the state. While there is undoubtedly an argument to the effect that the explicit latitude to derogate in times of public emergency implies the application of non-derogable and non-derogated from HRL treaty provisions in times of armed conflict, there is also a basis for saying that, given that IHL is the *lex specialis*, and that all of HRL is self-evidently not readily amenable to reasonable application in armed

[13] See above, n 9.

conflict, it is unreasonable to conclude that there is a presumption in favour of the application of HRL treaty provisions absent derogation.

It may not ultimately be necessary to choose between these two propositions, however, as they may be reconcilable through a pragmatic enquiry that would turn simply on whether the HRL rule operated as a gateway, with an implicit *renvoi* to the relevant rule of IHL. If so, questions of derogation and the substantive application of HRL would become considerably less challenging.

A *second* issue is that the sharp end of the IHL–HRL relationship arises in circumstances in which rules derived from each strand address the same issues but are substantively at odds. While, in practice, circumstances in which the substantive content of overlapping IHL and HRL provisions will be materially divergent are likely to be relatively limited, where there are such material divergences it will be important that the law develops an appropriate methodology of hierarchy, presumption, reconciliation and interpretation.

A *third* issue is that some of the challenges around the debate about the IHL–HRL relationship arise from courts or bodies of limited jurisdiction being seised of questions which transcend not simply their jurisdictional competence but also their material competence. The result is often that, even as they stretch their jurisdictional competence, they fail to properly engage with the law relevant to the merits of the case.

A *fourth* question is whether, and if so what, significance attaches to the provenance of a given legal principle. While provenance may be relevant to issues of process, remedies etc, it may not ultimately be critically determinative of the existence of a legal obligation. The United Kingdom, for example, is party to the four Geneva Conventions, Additional Protocols I and II, the ICCPR, ECHR and the CAT, and the Statute of the International Criminal Court, and also takes a reasonably expansive view of CIL in this area, all these principles being justiciable before UK courts. In any given circumstance, therefore, although questions of process, remedies and related considerations may be relevant, there may also be a practical question of whether it ultimately makes any real difference from where a principle is derived.

The *final* question flowing from the preceding is, in the event that a given HRL rule is amenable to reasonable application in armed conflict, but may not be, or be questionably, applicable *de jure*, whether there are policy considerations that would in any event favour its application as a matter of discretion. The short answer to this is likely to be that such considerations do indeed operate and that many states frequently give effect on a discretionary basis to principles that do not have *de jure* application. It would further be said, however, that discretion is

discretion, and that it is important to preserve the flexibility and perhaps other considerations that come with discretion.

Such considerations are undoubtedly important but there may be a risk here of elevating form over substance to no useful effect. As noted in opening, courts have shown an antipathy towards situations of perceived non-application of adequate legal standards, with the result that they have inclined towards the application of internationally derived standards without undue regard to questions of provenance, content and formal application. Given this, it may be sensible for states both to be more forward leaning and transparent about the application of HRL standards on a discretionary basis and ultimately to consider whether there is a mechanism to give effect to such standards *de jure*.

Four conclusions are suggested by the preceding review. First, the risk of real normative discordance between IHL and HRL is probably overstated. Second, the anxiety in this area is largely driven by warranted concern over the methodological shortcomings of courts and other bodies seised of these issues, particularly on the human rights side of the equation. Third, there is a reasonable and proper space within IHL for reference to HRL standards. Fourth, governments and their legal advisers ought to encourage and engage more fully in wider and better informed public debate on these issues.

5 Assuming that HRL provisions apply in armed conflict, what is the relationship between relevant IHL and HRL provisions?

Elements of an enquiry into the operational relationship between IHL and HRL rules have been addressed above. The observations by the ICJ in its *Nuclear Weapons* and *Wall* Advisory Opinions, to which can be added the Court's 2005 observations in the *Armed Activities (DRC v Uganda)* case,[14] are the starting point. As noted, the view preferred in this paper is that the Court's analysis in the *Nuclear Weapons* Advisory Opinion engages with this debate at a greater level of nuance appropriate to the complexity of the issues even if both the ICJ and other courts and bodies have subsequently inclined towards an approach that has avoided analysis of the operational interaction between IHL and HRL.

[14] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005 p 168, paras 215-21.

One possible explanation for the absence of such analysis may be that the tribunals in these cases have not regarded the relevant IHL and HRL principles as in conflict, a *lex specialis* or other de-confliction analysis only being necessary in circumstances in which there are conflicting rules. This explanation raises the question of whether a different analysis may not properly be required, addressing the question of whether a *lex specialis* does not displace the *lex generalis* more comprehensively.

There is some support for the proposition that a *lex specialis* occupies the legal space to the exclusion of general rules, i.e. that it operates as a choice of law principle rather than simply as a principle of interpretation. Article 55 of the International Law Commission's articles on state responsibility, for example, provides that the SR principles 'do not apply where and to the extent that … [issues of responsibility] are governed by other rules of international law'.[15] The International Law Commission's 2006 *Conclusions of the work of the Study Group of the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* also contemplates the possibility that the function of *lex specialis* may be to set aside the general law.[16] ILC conclusion (8), for example, provides 'that special law may be used to apply, clarify, update or modify as well as set aside general law.'[17] While there is some force to this argument, however, this issue may in practice hinge more on appreciations of competence, jurisdiction and admissibility than on a compelling view of international law as a system of discrete, non-interacting islands of substantive rules. Before a court of general jurisdiction, it would be unlikely to be persuasive to contend that only one strand of law relevant to an issue should be addressed.

Beyond this issue, there is a range of other questions that arise for consideration under this head. One is whether it is correct at all to think of IHL as the *lex specialis*, rather than considering both IHL and HRL as special bodies of law that properly apply in situations in which the rights of persons are engaged. While the *Nuclear Weapons* Advisory Opinion proceeded on the basis that IHL was the *lex specialis*, it is not clear from subsequent jurisprudence that this appreciation subsists.

Separately from this issue, there would be advantage in greater clarity about the interaction between IHL and HRL in particular situations of armed conflict. As suggested above, this might be usefully analysed around scenarios that would

[15] UNGA Res 56/83, 12 December 2001, Annex.
[16] Report of the International Law Commission, 58th session (2006), UN Doc A/61/10, p 407-23.
[17] Ibid, p 409.

facilitate a better understanding of how such interaction might actually unfold in practice. As mentioned, this could take a number of forms:

1. HRL might act as a gateway for the application of IHL by way of *renvoi*;
2. HRL might give effect to a relevant but otherwise inapplicable provision of IHL;
3. HRL might inform the interpretation of IHL, including possibly by supplementing or completing the IHL rule;
4. HRL might prevail over inconsistent IHL;
5. HRL might fill in the gaps in circumstances in which there is no relevant IHL provision;
6. HRL might augment IHL through HRL procedural and accountability mechanisms.

Clarity would also be aided by a provision-by-provision analysis, by reference to a matrix of conduct, rather than the more stratospheric analysis that has tended to take place to this point. A more nuanced analysis would facilitate the development of a methodological framework more appropriate to the complexity of the issues.

6 Conclusion

The issues of the application of HRL to armed conflict, whether *de jure* or on a discretionary basis, and of the interaction between IHL and HRL, are both of operational importance and have wider systemic implications, including for the values at the heart of our democracies. The debate to this point, however, has too often been characterised by a high level of generality, a lack of judicial rigour, a failure by those in government to engage actively in public discussion, overly expansive claims on the part of non-governmental commentators, and anxiety on the part of the military that these developments are hampering the flexibility to act effectively to keep society safe. In reality, however, many of the issues are likely to be readily and reasonably addressed if those with responsibilities in these areas engage with the issues at a greater level of nuance and have a better appreciation of their wider implications.

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Legal Control of Burial Rights

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Abstract
This article argues that the common law rule in *Williams v Williams*, regarding the non-enforcement of burial wishes, is not only unjustifiable, but is also based on shaky jurisprudence and ignores some fundamental human rights issues. Accordingly, the author suggests that a person's burial wishes should be recognised and enforced by law. Where the deceased left no burial directions, it is suggested that the law should empower the surviving spouse or civil partner to determine the time, place and manner of burial. Apart from the value (for instance, identity) inherent in the legal recognition and enforcement of a person's burial wishes, the foregoing suggestions provide a decisive framework for adjudicating intra-familial burial disputes.

Keywords
Funerals, Burial Wishes, Burial Direction, Enforcement of Burial Directions

1 Introduction

Burials[1] and funerals can become the focus of intra-familial,[2] feminist,[3] political,[4] cultural,[5] spiritual[6] or philosophical[7] struggle, a fact obscured by the tendency to

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[1] In this article, unless otherwise stated, 'burial' is used in a sense that includes cremation and other methods of disposal of human remains.

[2] H Conway, 'Dead, but not buried: bodies, burial and family conflicts' (2003) 23 *LS* 423.

[3] R N Nwabueze, 'Dead Bodies in Nigerian Jurisprudence' (2007) 51 *Journal of African Law* 117; R N Nwabueze, 'Legal approaches to burial rights of a surviving wife' (2008) 73 *Amicus Curiae* 12.

[4] P Stamp, 'Burying Otieno: the politics of gender and ethnicity in Kenya' (1991) 16 *Signs* 808; N Palmer, *The Report of the Working Group on Human Remains* (Department for Culture, Media and Sport, 2003), 28–29; G Scarre, 'The Repatriation of Human Remains' in J O Young & C G Brunk (eds), *The Ethics of Cultural Appropriation* (2009), 72–92; M A Katzenberg & S R Saunders (eds), *Biological Anthropology of the Human Skeleton* (2008).

pass off questions relating to the time, place and manner of burial as the emotive or sentimental preoccupation of the bereaved in the immediate aftermath of death. That response, however, belies the fundamental issues of identity, religion, culture and politics raised by questions relating to burial.[8]

In the early nineteenth century, the iconoclast Jeremy Bentham chose medical anatomisation over burial as the preferable means of disposing of his remains,[9] and also ordered that his skeleton be used to make an 'auto-icon' (or self-statue) of himself.[10] Bentham's action was a symbolic protest against the hegemonic religion and belief in an afterlife that were prevalent in his era.[11] As Davies and Naffine observe, Bentham had no 'patience with what he regarded as the prevailing mystical nonsense about the spiritual significance of his physical remains'.[12] By willing his body for anatomical dissection, Bentham not only demonstrated his utilitarian purpose—ensuring that sufficient corpses were available for dissection and medical education[13]—he also wished to 'challenge the dominant contemporary view that the corpse was essential for resurrection and that what was commonly regarded as mutilation of the corpse by the anatomists would therefore threaten the immortality of the soul'.[14] In the late nineteenth century, a period marked by legal uncertainty surrounding the lawfulness of cremation in England and Wales, Dr Price, an Arch-druid and self-declared infidel,[15] cremated the dead body of his five-month old son as a way of giving

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[5] P Vines, 'Bodily Remains in the Cemetery and the Burial Ground: A Comparative Anthropology of Law and Death or How Long Can I stay?' in D Manderson (ed), *Courting Death: The Law of Mortality* (1999) 111–127; J W Doren, 'Death African Style: the case of S M Otieno' (1988) 36 *American Journal of Comparative Law* 329.

[6] Generally, W Wagner, 'Death, Dying and Burial: Approaches in Religious Law and Practice' (1999) 51 *The Jurist* 135. See also *Hunter v Hunter* [1930] 65 OLR 586.

[7] R Feagan, 'Death to Life: Towards My Green Burial' (2007) 10 *Ethics, Place & Environment: A Journal of Philosophy & Geography* 157–175.

[8] Generally, D Rees, *Death and Bereavement: The Psychological, Religious and Cultural Interfaces* (1977); L Dacome, 'Resurrecting by numbers in eighteenth-century England' (2006) 193 *Past and Present* 73–110.

[9] C C Woodhead, '"A Debate Which Crosses All Borders" The Repatriation of Human Remains: More Than Just A Legal Question' (2002) 7 *Art Antiquity & Law* 317, 338.

[10] M Davies & N Naffine, *Are Persons Property? Legal Debates About Property and Personality* (2001) 106.

[11] C Fuller (ed), *The Old Radical — Representations of Jeremy Bentham* (1998).

[12] Davies & Naffine, above n 10, 105.

[13] Ibid, 106. See also R Richardson, *Death, Dissection and the Destitute* (1988) 159–161.

[14] Davies & Naffine, above n 10.

[15] *R (Ghai) v Newcastle City Council* [2010] 3 WLR 737, 766 (Cranston J).

acute expression to his paganism.[16] More recently, in 2010 a political protester in Tunisia burned himself alive and, as a result, triggered the wave of political unrest now known as the Arab spring.[17] In the same year, the use of death or funeral rituals to express a person's fundamental belief or personality was demonstrated in the courts in *R (Ghai) v Newcastle City Council*, in which the claimant, an orthodox Hindu, had to go up to the Court of Appeal to get legal recognition of his wish to be cremated on a traditional open-air funeral pyre, which, according to his beliefs, would be necessary for a good death and flourishing afterlife.[18] These examples suggest that the courts should recognise and enforce a person's lawful burial wishes whenever possible and that to do so would not merely be pandering to some sentimental or religious posturing. Of course, it might not be possible or practicable for the courts to enforce or accord overriding status to burial instructions in some cases, such as where the instruction is illegal or contrary to public policy, or where the deceased's executor and relatives are opposed to the deceased's burial instructions and there is no friend or family member willing to carry out the deceased's burial wishes. However, where judicial recognition and enforcement of burial wishes is possible, such recognition would help to effectuate the conception of his or her identity that the deceased held in life. Burial wishes, the fulfilment of which depends upon the exercise of 'burial rights',[19] therefore raise significant concerns that involve contestations of power, identity, religion and culture. Where the deceased expressed no burial wishes, it is suggested that the law should empower the surviving spouse or civil partner to determine the time, place and manner of burial.[20]

Some caveats might be useful in order to clarify the analytical context of this article. This article is not directly concerned with such questions as to whether or not property interests exist in a corpse or excised parts of a human body.[21] Nor does it seek to explore the remedial potential of using a non-property

[16] *R v Price* [1884] 12 QB 247; S White, 'A burial ahead of its time? The Crookenden burial case and the sanctioning of cremation in England and Wales' (2002) 7 *Mortality* 171, 181.

[17] G Blight, S Pulham & P Torpey, 'Arab spring: an interactive timeline of Middle East protests' *The Guardian*, 5 January 2012.

[18] *Ghai*, above n 15. Generally, R Gupta, 'Death Beliefs and Practices from an Asian Indian American Hindu Perspective' (2011) 35 *Death Studies* 244–266.

[19] Particularly, 'burial rights' is used here to indicate the right to determine the time, place and manner of burial.

[20] Civil partners have the same right as spouses under the Civil Partnership Act 2004. In *JM v UK* [2011] 53 EHRR 6, the ECtHR held that a same-sex couple would be regarded as a family.

[21] See R N Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts and Genetic Information* (2007); R Hardcastle, *Law and the Human Body: Property Rights,*

framework, such as the law of negligence or privacy, to redress interference with a corpse or parts of a human body.[22] Such questions and issues are, of course, interesting and important and have certainly generated a considerable amount of academic literature,[23] but the focus of this article is on the legal recognition and enforcement of burial wishes and, by extension, the control of burial rights, such as the right to determine the time, place and manner of burying a dead person. Furthermore, this article does not address the potential impact of the interposition of coronial jurisdiction on the recognition and enforcement of burial wishes and the exercise of burial rights.[24]

Following this introduction, the second part of this article puts burial wishes in context by examining the value and significance of appropriate funerals and burials and the theoretical underpinnings of burial wishes. The third part examines and critiques the common law rule which prioritises the right of an executor to take custody of the deceased for burial, and the fourth part makes a case for the legal recognition of a person's burial wishes whenever possible. The fifth part examines the intersections between burial wishes and the Human Rights Act 1998. The sixth part argues that, absent burial directions from the deceased, the law should give primacy to the decision of the surviving spouse or civil partner regarding the time, place and manner of burying their partner; the seventh part examines issues relating to the enforcement of burial wishes; and the eighth part draws together some conclusions.

Ownership and Control (2007); J Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31 *OJLS* 783–804.

[22] See L Skene, 'Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws' (2002) 22 *LS* 102; J Herring & P-L Chau, 'My Body, Your Body, Our Bodies' (2007) 15 *Med L Rev* 34.

[23] The debate regarding the existence of property rights in the body and body parts has been rekindled by recent cases, such as *Yearworth v North Bristol NHS Trust* [2010] 1 QB 1; *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; and *Re the estate of the Late Mark Edwards* [2011] NSWSC 478. See also R N Nwabueze, 'Death of the "No-Property" Rule for Sperm Samples' (2010) 21 *King's LJ* 561; C Hawes, 'Property Interests in Body Parts: Yearworth v North Bristol NHS Trust' (2010) 73 *MLR* 130; and M Brazier, 'Retained organs: ethics and humanity' (2002) 22 *LS* 550.

[24] See P Matthews, *Jervis on the Office and Duties of Coroners* (12th edn, 2002) para 7-03; I Freckelton & D Ranson, 'The evolving institution of coroner' in I Freckelton & K Petersen (eds), *Disputes and Dilemmas in Health Law* (2006) 296–323; P Vines, 'Objections to Post-mortem Examination: Multiculturalism, Psychology and Legal Decision-making' (2000) 7 *JLM* 422; R Atherton, 'Who owns your body?' (2003) 77 *ALJ* 178, 191.

2 The significance of appropriate funerals and burials and the theoretical basis of burial wishes

The nature and content of funeral rites may be determined by their cultural and social contexts,[25] but the decent treatment of the deceased is valued in all cultures.[26] As the court observed in *Vogelaar v US*, 'few things are more cherished, respected, or sacred than the right to bury our dead. There is a cognizable and compensable interest … in the comfort of knowing that the deceased has been given a comfortable and dignified resting place'.[27] Funerals are the means through which survivors experience the sort of comfort described by the *Vogelaar* court. Ritualised mourning, as Harrison observes, achieves the externalisation and depersonalisation of grief, so that through 'this work of objectification' the larger community is able to participate in the mourning in order to contemplate their own mortality; ultimately, ritualised mourning enables the bereaved to 'distantiate and … master the emotions involved', thereby avoiding the catalepsy or psychic dissolution that ordinarily results from violent grief.[28] As such, funeral contracts are grounded in the emotional health and mental well-being of living relatives. Leavitt observes that 'funeral serves primarily as a viaduct conducting sympathy, good will, and prestige towards the leading mourners. These emotional outpourings are the real objects of the agreement between the survivors and the funeral director'.[29] Similarly, O'Rourke and colleagues opine that funeral services aim to maintain social order, facilitate beliefs in spirit and afterlife, assist the process of grieving, and provide opportunities for the expression of emotional connection, love and respect for the deceased.[30] What all this means is that funerary rituals are not only, as Reeves suggests, psychotherapeutic[31] but, as St Augustine recognised in the fifth century, funerary

[25] N L Cantor, *After We Die: The Life and Times of the Human Cadaver* (2010) 91; T O'Rourke, B H Spitzberg & A F Hannawa, 'The Good Funeral: Toward an Understanding of Funeral Participation and Satisfaction' (2011) 35 *Death Studies* 729–750; B L Wickkiser, 'Speech in context: Plato's *Menexenus* and the ritual of Athenian public burial' (1999) 29 *Rhetoric Society Quarterly* 65–74.

[26] In *Lamm v Shingleton*, 55 SE 2d 810, 813 (1949), the court observed that the 'tenderest feelings of the human heart center around the remains of the dead'.

[27] *Vogelaar v US*, 665 F Supp 1295, 1306 (ED Mich 1987).

[28] R P Harrison, *The Dominion of the Dead* (2003) 56.

[29] J Leavitt, 'The Funeral Director's Liability for Mental Anguish' (1964) 15 *Hastings LJ* 464, 466.

[30] O'Rourke, above n 25, 729–30.

[31] N C Reeves, 'Death Acceptance Through Ritual' (2011) 35 *Death Studies* 408-419; B D Romanoff, 'Rituals and the Grieving Process' (1998) *Death Studies* 697, 698.

rituals also provide comfort to the living rather than the dead.[32] Thus, Harrison observes that the 'primary purpose of ritual lament is not to honor the dead, nor to mechanically discharge emotion, but to master grief by submitting its potentially destructive impulse to objective symbolization'.[33] Funerals are, however, equally important for the dead. Harrison, for instance, observes that 'so much of the traditional mourning ceremony works to appease the dead, to secure their goodwill, as it were, so that they might go gently, without rage or reluctance, into that good night'.[34] Similarly, Gittings has shown how funerals respond to the needs of the dead and dying.[35]

Gittings illustrates her arguments with wills from medieval England in which testators painstakingly took time to prepare and make elaborate, and often expensive, arrangements for their funerals and burial. A significant part of those arrangements consisted of charitable bequests for the celebration of requiem masses in honour of, and for the repose of the soul of, the dead. Eschatologically, therefore, testators deployed funerals to 'mitigate the fear of death'[36] and, through requiem masses, expressed their hope for a shorter stay in purgatory pending their translation to heaven. Not uncommonly, testators specify funeral grandeur in order to highlight the social status and material wealth that they enjoyed during their lifetime.[37] Funeral grandeur could also be a means of constructing the posthumous identity and memorialisation of the dead[38] as what Schneidman calls a 'post-self'.[39] Jessica Mitford, however, made a blistering attack on ostentatious funerals, condemning the aggressive commercialism of undertakers and observing that the grandeur of most modern American funeral ceremonies bordered on corpse worship.[40]

While these criticisms might generally be valid, Gittings has observed that they do not accord sufficient weight to the fundamental social and religious issues that underpin most funeral rituals.[41] Thus, contrary to the view expressed by

[32] St Augustine as quoted by C Gittings, *Death, Burial and the Individual in Early Modern England* (1984) 39.
[33] Harrison, above n 28, 65–6.
[34] Ibid, 69.
[35] Gittings, above n 32, 39–58.
[36] Ibid, 24.
[37] R Blauner, 'Death and Social Structure' (1966) 29 *Psychiatry* 378–394.
[38] Gittings observed that funeral grandeur was both 'a display of status and also self-perpetuating ceremonies', above n 32, 159.
[39] E Schneidman, *Voices of Death* (1995).
[40] J Mitford, *The American Way of Death Revisited* (2000—originally published 1963).
[41] Gittings, above n 32, 24.

St Augustine, funerals are important both for the dead and for the survivors, which raises interesting problems in cases where the deceased and survivors had different expectations for burial. Whose interests should prevail: the deceased's interest in their posthumous identity and memorialisation; or the survivors' interest in obtaining psychological relief through a ritualised mourning of their own choosing? While this sort of situation calls for a balancing of the various interests involved in a particular case, it is suggested that the law might wish to accord priority to the wishes of the deceased, whenever possible, because of the importance of the deceased's posthumous autonomy in comparison to the interests of survivors.

Theoretically, therefore, a person's burial instructions could be prioritised, recognised and protected as *persisting critical interests* 'that survive their death, and hence there are some senses in which an individual's interests are still in play *post mortem*'.[42] Interestingly, Harris recognises persisting or critical post-mortem interests, although he generally favours a situation where the dead enjoy no legal rights to their body or parts of it. Of course, what Harris had in mind was a legal approach that would facilitate the supply of transplantable organs; thus, he was not opposed to the conscription of cadaveric organs for the purpose of transplantation.[43] A person's interest in the distribution of their property after their death provides a quintessential example of persisting or critical post-mortem interest, and this type of persisting interest is recognised by law through the statutes on wills. However, a person's interest in the time, place and manner of their burial is no less important than the testamentary distribution of their property and, thus, qualifies as a persisting or critical interest. Harris identifies reciprocity as the moral criterion of persisting or critical interests; for instance, we enforce the lawful testamentary bequests and devices of the dead in the hope and confidence that, after our death, our own wishes would be respected and enforced by the living.[44] Arguably, reciprocity equally underpins the enforcement of a dead person's lawful burial wishes. If, therefore, we fail to honour the burial wishes of the dead, we take the risk that, after our death, the living would thwart our own solemn burial directions.

Harris, however, argues that persisting or critical interests, while potentially able to survive a person's death, are much weaker or less important than the interests of the living; in other words, persisting or critical interests must yield

[42] J Harris, 'Law and regulation of retained organs: the ethical issues' (2002) 22 *LS* 527, 534.
[43] Ibid, 534–9.
[44] Ibid, 535.

to the exigencies and dictates of public interest. As persisting or critical interests, however, burial wishes are not susceptible to the limitation identified by Harris, because they hardly engage important or overriding public interests, except where issues relating to organ donation and procurement might be involved. For instance, *Williams*-type cases do not raise public interest issues as they involve straightforward problems of choice between the burial wishes of the deceased and the mortuary decision of the executor.[45] Absent public interest, therefore, nothing stands in the way of protecting burial wishes as persisting or critical interests.

Similarly, Sperling identifies four categories of interests—*pre-birth interests*, *life-interests*, *after-life interests*, and *far-lifelong interests*—and observes that the last two types of interests have the potential to survive a dead person.[46] He opines that the deceased could be harmed posthumously by actions that thwart their after-life interests and far-lifelong interests; thus, he argues that certain posthumous interests should be protected as legal rights, such as interests that 'accord with some significant moral attributes characterizing the dead'.[47] Of course, a significant problem in the analysis of posthumous interests, such as those expressed in burial directions, is the difficulty of locating the subject of such interests since, in the case of burial wishes, the person is already dead by the time the question of enforcement arises.[48] In other words, if the thwarting of burial wishes constitutes a posthumous harm, who is harmed? Is it the deceased, who is no longer a person? Price suggests a proprietary solution to this problem, under which a corpse represents the 'property of the ante-mortem person and thus subject to that individual's power of choice and right of control'.[49] In other words, the thwarting of a burial direction harms the *ante-mortem* person.[50] Sperling, however, doubts a solution based on the ante-mortem person because of the difficult problems of retroactivity and the determination of the moment of harm.[51] He observes that the debate on the subject of posthumous harm is

[45] *Williams v Williams* [1882] 20 Ch D 659.

[46] D Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (2008) 14.

[47] Ibid, 84.

[48] See generally, J Callahan, 'On Harming the Dead' (1987) 97 *Ethics* 341-352; W Glannon, 'Persons, Lives, and Posthumous Harms' (2001) 32 *Journal of Social Philosophy* 127-142; J Feinberg, *Harm to Others* (1984).

[49] D Price, 'Property, Harm and the Corpse' in B Brooks-Gordon *et al* (eds), *Death Rites and Rights* (2007) 199, 210.

[50] Feinberg also suggested that the subject of posthumous harm is the *ante-mortem* person: above n 48, 89.

[51] Sperling, above n 46, 20-5.

exacerbated by the binary construction of existence into persons or things, such that, since a corpse is not a person, it can only be a thing and cannot therefore be the subject of harm.[52] To overcome this problem, Sperling conceptualises an abstract, non-material and persistently existent entity which he identifies as the *Human Subject*, to serve as a third category beside things and persons for the analysis of existence.[53] Sperling's Human Subject is coterminous with the person when the latter is alive; however, the Human Subject continues to exist after the person's death and, more interestingly, continues 'to hold certain human interests important to that person'.[54] Thus, Sperling's analysis suggests that where a burial direction is thwarted, the interests of the deceased, now held for them by the Human Subject, would be harmed. Sperling observes that although a person might be dead, they nonetheless continue to exist symbolically in the minds, thoughts and language of other existing creatures; thus, he argues that the law should acknowledge and recognise an interest in 'one's symbolic existence'.[55] Sperling's concept of symbolic existence after death implies that the dead could be harmed posthumously by actions that frustrate their burial directions.

More specifically, Sperling argues that a person's interest in determining the disposal of their body after death could be justified on the basis of a view of autonomy that 'emphasizes the integrity of the autonomous person'.[56] An integrity account of autonomy enables a person to express their own character and values and allows them to shape their own lives according to their distinctive personality.[57] Thus, Sperling observes that if the 'person's prior wishes accord to and are continuous with the person's overall character and values, there is no justification in arguing that this person, although dead, does not enjoy autonomy'.[58] He also suggests that burial directions could be justified on the basis of the deceased's 'prospective autonomy with regard to the manner in which we wish to die or be considered dead because it is a person's effort to shape, and interest in shaping, other people's posthumous recollections of her character and values'.[59] Thus, while Sperling's conception of the Human Subject might not be generally accepted, his analysis of posthumous interests provides support for the

[52] Ibid, 40.
[53] Ibid, 34–40.
[54] Ibid, 40.
[55] Ibid, 41.
[56] Ibid, 147.
[57] R Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (1993) 224.
[58] Sperling, above n 46, 148.
[59] Ibid, 148–9.

existence of posthumous autonomy, and the need for its protection through the enforcement of burial wishes in appropriate circumstances.

In the same vein, Conway has argued that showing respect for the autonomous choice of an individual should provide a firm basis for giving legal effect to burial directions.[60] Anticipating Harris' argument that the dead have no autonomy and thus no posthumous interests in their remains sufficient to override the public interest in harvesting and using parts of cadavers for medically necessary purposes (such as organ transplantation) and research,[61] Conway argues that posthumous autonomy or rights (enabling individuals to make autonomous decisions that relate to the dead body) do actually exist and have been recognised in areas such as posthumous reproduction, organ donation and advance directives.[62] Thus Conway argues that, just as law gives posthumous effect to an individual's decisions in the three areas identified above, 'burial instructions should be upheld as an extension of an individual's autonomy'.[63] In essence, therefore, it is suggested that the notion of extended autonomy provides a strong basis for protecting and upholding burial directions in appropriate circumstances.

In sum, the analysis above suggests that burial wishes and funerals provide authentic media for expressing the social, personal and religious identities of both the dead and their survivors. Thus, the right to determine the time, place and manner of burial was, and largely remains, an important power of enormous social and legal significance. Against this background, the analysis below examines the control of burial rights by the deceased's executor.

3 Control of burial and cremation by the executor

Under the common law of England and Wales, it is generally accepted that the paramount right to control the funeral and burial of a person who died testate belongs to the executor.[64] Even before the will is admitted to probate, an executor is entitled to take possession of the deceased's body for burial.[65] Space does not permit a detailed analysis of the legislative, substantive and

[60] Conway, above n 2.
[61] Harris, above n 42.
[62] Conway, above n 2, 433.
[63] Ibid.
[64] *Grandison v Nembhard* [1989] 4 BMLR 140; *Williams*, above n 45.
[65] *Buchanan v Milton* [1999] 2 FLR 844. The relevant statutory position is covered in full in *Jervis on Coroners*, above n 24, para 7-01.

procedural frameworks for burial and cremation, which are covered in full in *Jervis on Coroners*,[66] but it should be observed that the major statutes on burial and cremation do not engage directly with issues relating to the legal effects of burial wishes.[67] Regulation 15(1)(a) of the Cremation (England and Wales) Regulations 2008 provides the statutory underpinning of the executor's authority and power over mortuary decisions:[68] it states that 'an application for cremation must be made to the cremation authority by (a) an executor of the deceased person'.[69]

Where the deceased died intestate, but owned some property, the person appointed as an administrator of the deceased's estate is entitled to take possession and custody of the deceased for burial.[70] In a situation of urgency, before the appointment of an administrator, the person ordinarily entitled to a grant of letters of administration is given custody of the deceased for burial;[71] however, this is only a convenient and practical rule.[72] In *Holtham v Arnold*, for instance, Hoffmann J held that the deceased's estranged wife, rather than the claimant with whom the deceased had cohabited for the last two years of his life, was entitled to control the funeral and burial of the deceased because 'the person lawfully entitled to administration has the duty to conduct the funeral'.[73] In other words, in the case of testacy, the executors, rather than the deceased or the deceased's surviving spouse or civil partner, parents or children, are entitled to determine the time, place and manner of burial.[74] However, in the case of intestacy, the deceased's surviving spouse or civil partner, children, parents, siblings of the whole blood, siblings of the half blood, grandparents, uncles and aunts of the whole blood, and

[66] See *Jervis on Coroners*, above n 24, paras 7-08–7-31.

[67] Births and Deaths Registration Act 1953; Registration of Births and Deaths Regulations 1987; Cremation Act 1902; Cremation (England and Wales) Regulations 2008.

[68] Also, Births and Deaths Registration Act 1953 s 16(1)(f) and s 17(1)(d) stipulate that the 'person causing the disposal of the body' (presumably the executor) shall be qualified to give information for the registration of a person's death. Similarly, Registration of Births and Deaths Regulations 1987 s 49(1) provides that the registrar shall issue a 'certificate for disposal' for the use of the 'person effecting the disposal' (presumably the executor).

[69] Cremation (England and Wales) Regulations 2008.

[70] *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474; *Calma v Sesar* [1992] 2 NTLR 37; *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

[71] See Non-Contentious Probate Rules 1987 r 22(1); Administration of Estates Act 1925 (as amended) s 46.

[72] *Jones v Dodd* [1999] SASC 125; *Jervis on Coroners*, above n 24, paras 7-01 and 7-05.

[73] *Holtham v Arnold* [1986] 2 BMLR 123.

[74] *Murdoch v Rhind* [1945] NZLR 425; *Robertson v Pinegrove Memorial Park Ltd & Swann* [1986] ACLD 496. For a contrasting case, see *Lewisham Hospital NHS Trust v Hamuth* [2006] All ER (D) 145 (Jan), discussed by *Jervis on Coroners*, above n 24, para 7-03 (Third Supplement).

uncles and aunts of the half-blood (ranked in that order) are legally designated as the deceased's next of kin for the purpose of the law of succession under r 22 of the Non Contentious Probate Rules 1987.[75] The next of kin of the highest rank (for instance, the surviving spouse or civil partner) can be appointed as the administrator of the estate of the deceased and thus is able to determine the manner and form of burial. As Cranston J observed generally in *Burrows v HM Coroner for Preston*, the executors 'have the right to determine the mode and place of disposal of the body, even where other members of the family object. The personal representative's claims to the body oust other Claimants'.[76] Cranston J however observed that it is no longer good law that the views of the deceased could be ignored.[77] That general common law rule had been declared in *Williams v Williams*[78] and had been accepted in the comparable jurisdictions of Australia[79] and Canada.[80] Although Vinelot J observed in *Grandison v Nembhard* that the rigour of the rule in *Williams* was such that the 'court had no power in any circumstances to interfere',[81] the courts appear to have power to override the priority of the executor under section 116 of the Supreme Court Act 1981 (now the Senior Courts Act 1981). In *Holtham v Arnold*, Hoffmann J observed that section 116 of the 1981 Act 'is not really adapted to dealing with the sort of question [control of burial rights] which is raised in this case';[82] however, the detailed analysis of *Burrows* and *Buchanan* below suggests otherwise.[83]

3.1 The litigation in *Williams*

In *Williams*, the testator Mr Henry Crookenden directed in his will that, three days after his death, his body should be given to Miss Eliza Williams for a purpose which he had already communicated to her.[84] In a separate letter to Miss Williams, Mr Crookenden provided detailed instructions for his cremation. At the death of Mr Crookenden, and against Miss Williams' protest, the surviving

[75] Non Contentious Probate Rules 1987 r 22(1).
[76] *Burrows v HM Coroner for Preston* [2008] EWHC 1387, para 13.
[77] Ibid, para 20.
[78] *Williams*, above n 45.
[79] R F Croucher, 'Disposing of the dead: Objectivity, subjectivity and identity' in I Freckelton & K Petersen, above n 24, 324–342; Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body* (2011) *QLRC* 69.
[80] *Saleh v Reichert* [1993] 104 DLR (4th) 384.
[81] *Grandison v Nembhard* [1989] 4 BMLR 140.
[82] *Holtham v Arnold* [1986] 2 BMLR 123.
[83] *Buchanan*, above n 65.
[84] See White, above n 16.

widow and her children, with the consent of the executor, buried him in the unconsecrated part of Brompton Cemetery. Three years later, Miss Williams deceptively obtained a licence from the Home Secretary authorising the exhumation and re-burial of Mr Crookenden in consecrated ground at Manafan in Montgomeryshire. Miss Williams' real intention in applying for the licence was to take custody of Mr Crookenden's body and convey it to Italy for cremation; the ashes were then returned to Wales and buried at Manafan.[85] Miss Williams presented the executors with a bill for the costs of this exercise, which they refused to honour, whereupon Miss Williams commenced judicial proceedings.

Kay J thought that the case raised the question of who, as between Miss Williams and the executors, was entitled to the possession of Mr Crookenden's body for burial or cremation. He observed that 'there can be no property in the dead body of a human being',[86] and that 'after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried'.[87] Finding no property interests in a dead human body, Kay J concluded that Mr Crookenden lacked the power to make a testamentary bequest of his own body:

> [T]he direction in this codicil to the executors to deliver over the body to Miss Williams, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void. She had no right of property in the body under that direction, nor could she enforce the delivery of the body by the executors.[88]

Kay J's property analysis, while interesting, hardly captured the crux of the claimant's argument. Simply put, the claimant's case was that she desired to enforce (and had enforced) Mr Crookenden's burial wishes. The claimant accepted this as a moral obligation on her part, the satisfaction of which depended on her ability to obtain lawful possession of Mr Crookenden's body. Thus, the claimant never asserted that she had a right to custody of Mr Crookenden's body, but that his burial directions were legally enforceable and binding on the executors, who ought to have complied with the direction or surrendered the remains of the deceased to the claimant who was willing to comply with Mr

[85] Mr Crookenden's remains were transported to Milan, with the assistance of the then newly formed Cremation Society of England: White, above n 16, 175.
[86] *Williams*, above n 45, 662–3.
[87] Ibid, 665.
[88] Ibid.

Crookenden's burial direction.[89] Kay J neither accepted nor fully considered this point about the enforceability of burial directions; he rather assumed that the claimant needed to show a proprietary right in the remains of Mr Crookenden. Conway, after highlighting the tenuous nature of the jurisprudence that undergirds the no-property rule expounded by Kay J in *Williams*, observed that 'in any event, giving effect to the deceased's burial wishes would not require any explicit recognition of property rights in a dead body, but would simply create a power to give legally enforceable directions in respect of its fate'.[90] Thus, Kay J's property analysis largely misconceived or undermined the case made by the claimant, which was most lucidly outlined in her counsel's written argument:

> The direction in the codicil is not exactly a legacy, but it has always been considered that a man can dispose of his own body. If he directs his executors to bury him in a particular place or way they must do so. *Even if there is no property in a body ... a direction as to disposal may be good*.[91]

Croucher seems to have captured these insights, observing that disputes over burial hardly engage proprietary questions; for instance, she opines that 'rules for arbitrating claims to the body of the deceased are not about proprietary issues; not about property at all. They are reflective of an entirely different logic'.[92] In the same vein, the claimant's counsel's submission above shows that two non-proprietary issues were involved in the case. Firstly, a direction for burial is not a legacy and does not even need to be contained in a will or formal document. If I give directions regarding the way I should be buried after my death, I should not be taken as having made a gift of my body to the person authorised to carry out my instructions in the same way that I might dispose of my possessions in my will. Secondly, and more importantly, a decedent's burial direction is binding on the executors, regardless of the executors' entitlement to custody and possession of the decedent's body. Thus, it was utterly illogical to hold that Mr Crookenden's burial direction was not binding on his executors because his executors had the legal custody and possession of Mr Crookenden's body. Accordingly, the critical

[89] Even under the current system, the executor's right to possession of a corpse for the purpose of burial is not indefeasible; the court can override the executor's possession under Senior Courts Act 1981 s 116 if special circumstances are shown.

[90] Conway, above n 2, 432.

[91] *Williams*, above n 45, 661 (emphasis added).

[92] Croucher in Freckelton & Petersen, above n 24, 341.

question raised in *Williams'* case, whether or not a burial direction was legally binding and enforceable, was left almost completely unanswered[93] and *Williams'* case is therefore not sound authority for the common law rule which accords the executor a paramount right of burial that overrides the burial wishes or direction of the deceased.[94]

3.2 Justifications and rationale of the rule in *Williams*

It is difficult to ascertain, let alone justify, the rationale of the rule in *Williams*. If the rule was meant to ensure the decent disposal of a corpse and the protection of public health, then it was unnecessary as those objectives had already been effected by the relevant statutory provisions[95] and by the rule in *R v Stewart*, which imposes duties of burial on specified persons[96] and, in their absence, imposes (as a default rule) a duty of burial on the occupier of the premises in which the deceased died.[97] Atherton, however, argues that the 'underlying logic and ethical rationale' for the priority given to the executor reflects 'an element of extended, or surrogate, autonomy'; in the sense that, being the deceased's surrogate and 'repository for the deceased's wishes with respect to his or her body', the executor is entitled to control the deceased's burial.[98] Atherton's justificatory analysis based on surrogate autonomy sits oddly with the right of the executor to disregard the burial wishes of the deceased, as demonstrated by *Williams* and the Australian case of *Milanka Sullivan v Public Trustee*.[99]

Arguably, a better justification for *Williams* is that it avoids, or furnishes a framework for resolving, intra-familial conflicts that often arise when family members disagree on the time, place and manner of burying a deceased relative. Thus, by selecting the executor (or other specified persons) as the legally designated person to control the disposal of a corpse, the rule in *Williams* avoids, or fairly easily resolves, intra-familial mortuary conflicts. Conway anticipates

[93] See P Matthews, 'Whose Body? People As Property' (1983) 36 *CLP* 193, 210–212.

[94] See, generally, L Griggs & K Mackie, 'Burial Rights: The Contemporary Australian Position' (2000) 7 *JLM* 404–414.

[95] Public Health (Control of Diseases) Act 1984.

[96] For instance, a parent with means has a duty to bury their child: *R v Vann* (1851) 169 ER 523; *Clark v London General Omnibus Co Ltd.* [1906] 2 KB 648.

[97] *R v Stewart* [1840] 12 Ad & E 1007.

[98] Atherton, above n 24.

[99] *Milanka Sullivan v Public Trustee* (unreported, 24 July 2002, Gallop AJ), discussed by Atherton, ibid, 187.

the merits of this sort of explanatory framework.[100] Accordingly, under the hierarchical structure of burial rights derived from the common law, the rule in *Williams*, as we have seen, accords priority to the executor in the case of testacy and, in the case of intestacy, the right (or, actually, the duty) of burial belongs to the administrator, or the person lawfully entitled to administration.[101] Also, the burial rights of natural parents are prioritised over those of foster parents,[102] and the burial rights of adoptive parents take precedence over those of natural parents.[103] While potentially helpful in resolving family disputes over the exercise of burial rights, the rule in *Williams* was not enunciated against the backdrop of intra-familial mortuary disputes. Moreover, the rule in *Williams* is not able to resolve family conflicts where the parties are equally ranked in the exercise of burial rights, such as conflicting claims between two executors of the deceased, or between a father and mother over the posthumous fate of their deceased child.[104] In relation to disputes among equally ranked family members, Freckelton, for instance, observes that 'vesting the entitlement in an executor, an administrator or a person likely to be entitled to be the administrator has proved of little help'.[105] Although Conway suggests that courts are guided by pragmatism in such cases,[106] Freckelton observes that focusing upon the 'practicalities' and giving 'due regard to the need for expeditious burial with proper respect and decency' had not 'advance[d] the decision-making far'.[107]

It might be argued that the common law rule in *Williams* vests paramount possession of a corpse for burial in an executor in order to prevent the sort of situation that arose in *R v Fox*[108] and *R v Scott,*[109] whereby creditors could arrest the body of a deceased debtor for debts owned.[110] However, with the condemnation of cadaveric detention in *Jones v Ashburnham* as a practice 'contrary to every principle of law and moral feeling', such a rationale has since become

[100] Conway, above n 2, 427.
[101] *Williams*, above n 45; *Burrows v Cramley* [2002] WASC 47.
[102] *R v Gwynedd County Council, ex parte B* [1992] 3 All ER 317; *Warner v Levitt* [1994] 7 BPR 15.
[103] *Smith v Tamworth City Council* [1997] 41 NSWLR 680; *Buchanan*, above n 65.
[104] See *Fessi v Whitmore* [1999] 1 FLR 767; *Leeburn v Derndorfer* [2004] VSC 172; *R (Fatima Haqq) v HM Coroner for Inner West London & Alfia Haqq* [2003] 1 Inquest LR 52; *Joseph v Dunn* [2007] 35 WAR 94; *AB v CD* [2007] NSWSC 1474.
[105] I Freckelton, 'Disputed Family Claims to Bury or Cremate the Dead' (2009) 17 *JLM* 178, 182.
[106] Conway, above n 2, 428.
[107] Freckelton, above n 105, 182.
[108] *R v Fox* [1841] 2 QB 246.
[109] *R v Scott* [1842] 2 QB 248.
[110] Thanks to Professor Peter Sparkes for this insight. See also *R v Cheere* [1825] 107 ER 1294.

anachronistic.[111]

4 Legal recognition and enforcement of burial wishes

The following analysis shows that, even before the more recent and important cases of *Burrows* and *Buchanan* (examined below) and contrary to the suggestion in *Williams* that burial directions were irrelevant, the court had indeed recognised burial wishes in certain circumstances, such as liability for funeral payments. The protection of burial wishes in appropriate circumstances might be analogised to some areas where the law currently protects posthumous interests. For instance, the law recognises and enforces the wishes of a dead person concerning the distribution of their property;[112] similarly, a person's decision concerning the post-mortem donation of their body or parts of their body for transplantation or medical education is enforced by law.[113] Whenever possible, therefore, the law might wish to grant similar protection to a burial direction, which from an individual's personal point of view might be as important as organ donation and testamentary bequests. Thus, Brazier observes that without such protections for burial directions, a person might be 'rendered defenceless in death' and that '[l]aws which enable me by Will to determine the fate of my material goods, but not my own remains, need to be revisited'.[114]

The non-recognition of a decedent's burial wishes creates a number of temporal and transcendental difficulties. Take, for instance, a religious person who believes in reincarnation and regards the burial of the dead body intact as the prerequisite for a flourishing afterlife; if this person's executor was to cremate the body instead of burying it, their spiritual expectation would have been defeated.[115] Similarly, a routine disregard for the burial wishes of the dead

[111] *Jones v Ashburnham* [1804] 102 ER 905, 909.

[112] For instance, the Wills Act 1837 (as amended).

[113] For instance, the Human Tissue Act 2004. In practice, however, organ procurement authorities would respect the wishes of a living relative who objects to cadaveric donation made by the deceased, and this is recognised by the HTA Code of Practice.

[114] Brazier, above n 23, 564.

[115] Under regulations 4 and 12(1) of the Cremation Regulations 1930, it was unlawful to cremate the remains of any person who was known to have left a written direction to the contrary. However, regulations 4 and 12(1) above were revoked by regulation 7 of the Cremation Regulations 1965, so that under the current Cremation Regulations 2008 a cremation can take place contrary to the direction of the deceased. See also D A Smale, *Davies' Law of Burial, Cremation and Exhumation,*

is likely to motivate the living to make elaborate and expensive arrangements to ensure compliance (after their death) with their burial directions. For instance, a person might bequeath a legacy to a family member or another person on the condition that the recipient comply with the testator's burial directions.[116] It is unlikely that the common law intended to engender these awkward situations. McGuinness and Brazier have argued that it is important to respect the wishes of the dead because the living have an interest in what happens to them after their death.[117] Thus, the way the dead are treated affects the way we live our lives.

In the eighteenth-century case of *Stag v Punter*,[118] the court allowed the executors more money for funeral expenses than was ordinarily the practice in the case of insolvent estates; the reason was that the deceased had given a burial direction that entailed more financial outlay. As the court observed: 'I am of opinion that sixty pounds (rather than £10) is not too much for the funeral expense, especially as the testator had directed his corps (sic) should be buried at a church thirty miles from the place of his death'.[119] In the context of liability for funeral payments, therefore, the court held that the executors' compliance with the deceased's burial direction was a relevant consideration. *Ambrose v Kerrison* is another interesting case where compliance with the deceased's burial direction was an important consideration in determining the defendant's liability for funeral payments.[120] *Ambrose* established the anachronistic common law rule that a husband was bound to bury the corpse of his wife and, therefore, was liable for her funeral expenses, even if his wife was separated from him before her death.[121] However, *Ambrose* is more interesting for the way in which the court treated the effect of burial directions on the then duty of a husband to bury his wife. In *Ambrose*, the husband and wife had been married in 1820, but had separated soon afterwards. Mrs Kerrison (the wife) had lived alone at Kelvedon, Essex but had then moved to Camberwell where she died in 1850. Gale, Mrs Kerrison's friend, learned about her death and, on searching Mrs Kerrison's house, found that she 'had expressed a desire to be placed in the family-vault at

(7th edn, 2002) 204.

[116] C Gittings, 'Eccentric or enlightened? Unusual burial and commemoration in England, 1689–1823' (2007) 12 *Mortality* 321, 341.

[117] S McGuinness & M Brazier, 'Respecting the living means respecting the dead too' (2008) 28 *OJLS* 297, 311.

[118] *Stag v Punter* [1744] 3 Atk 119.

[119] Ibid.

[120] *Ambrose v Kerrison* [1852] 10 CB 776. See also *Thomas v Harris* [1947] 1 All ER 444.

[121] The rule was abrogated (impliedly) by the Married Women's Property Act of 1882, as confirmed by the Court of Appeal in *Rees v Hughes* [1946] KB 517.

Kelvedon'.[122] Without locating Mr Kerrison, Gale contacted a distant relative of Mrs Kerrison's who organised and paid for Mrs Kerrison's burial at Kelvedon. The relative then sought to recover the burial expenses from Mr Kerrison. Mr Kerrison argued that he was only obliged to pay about half of the total sum sought, being what the funeral expenses would have been had the burial taken place in Camberwell—that is, excluding the money spent in the transportation of Mrs Kerrison's corpse to Kelvedon. Thus, he argued that he was not liable for the additional burial expenses entailed by compliance with Mrs Kerrison's burial wishes. Parke B observed that 'her wishes as to the place of interment were reasonable wishes, and might be properly complied with'.[123] On appeal, however, Mr Kerrison's counsel appears to have conceded the reasonableness of Mrs Kerrison's burial wishes and focused, instead, on a different contention, to the effect that a husband was not liable for the funeral expenses of his separated wife. That argument was equally dismissed by the Court of Appeal, which concluded that there was no need to 'discuss the propriety of incurring the expense of removing the deceased to Kelvedon for interment'.[124] Thus, the court sanctioned the payment of expenses reasonably incurred as a result of following the deceased's wishes, indicating that burial directions could be relevant in certain circumstances.

Unlike the cases above, *Buchanan v Milton* is one of the few cases where the legal effects of a burial direction were specifically considered.[125] In *Buchanan*, the applicant, an Aboriginal Australian, was the deceased's birth mother and applied to have the mother of the deceased's daughter displaced as administrator of the estate of the deceased solely in relation to the issue of burial. The application was brought on the basis of section 116 of the (then) Supreme Court Act 1981:

> (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.

The deceased had been born in Australia, was put up for adoption when he was four days old and, two years later, was adopted by an English couple who

[122] *Ambrose*, above n 120, 777.
[123] Ibid, 778.
[124] Ibid, 779.
[125] *Buchanan*, above n 65.

were then resident in Australia but subsequently returned with the deceased to live in England. The deceased died in a road accident at the age of twenty-six, being survived by his infant daughter. A dispute arose between the deceased's adoptive mother, who wanted to bury the deceased in England, and his birth mother, who wanted to bury him in Australia. Hale J identified six special circumstances that were relevant: the circumstances of the deceased's adoption; the deceased's Aboriginal heritage; the initial agreement for the disposal of the deceased; the interest of the deceased's daughter; the interests of the deceased's Australian family; and the deceased's wishes. Hale J held that, under the above circumstances, the displacement sought under section 116 of the Supreme Court Act 1981 was not *necessary* because 'arrangements for the disposal of the remains had already been made before the applicant came on the scene'.[126] Hale J then considered whether it was *expedient* to grant the application in view of the views of the birth family, the views of the adoptive family, the interests of the deceased's daughter, and the wishes of the deceased. After balancing these factors, Hale J concluded that it was not 'expedient to displace the persons ordinarily entitled to the grant of letters of administration of the estate'.[127] As regards the deceased's wishes in particular, Hale J observed that it was not 'argued on behalf of the applicant that the deceased would have wished his remains to be returned to Australia. There is no evidence to suggest that he would'.[128] Thus, *Buchanan* begins the articulation of a framework of burial rights that involves a balancing of competing interests, including the burial wishes of a decedent. It highlights the relevance of the deceased's burial direction as a significant factor in the application of section 116 of the Senior Courts Act.

However, the most telling erosion of the authority of *Williams* is the recent decision of Cranston J in *Burrows v HM Coroner for Preston*.[129] In *Burrows*, the deceased's uncle and the deceased's natural mother could not agree on his final resting place. The uncle had lived with the deceased for the last eight years of the deceased's life and wanted his nephew to be cremated according to the wishes he had expressed in life. However, the deceased's mother wished him to be buried. She was entitled to administration under r 22(1)(c) of the Non Contentious Probate Rules 1987 and was therefore entitled to control the funeral arrangements

[126] Ibid, 855.

[127] Ibid, 857.

[128] Ibid. See also T R Shek, 'Can Dust Remain Dust? English Law and Indigenous Human Remains' (2000) 5 *Art Antiquity & Law* 265, 283, emphasising the importance attributed to the deceased's wishes, or lack of it, in *Buchanan*.

[129] *Burrows v HM Coroner for Preston* [2008] EWHC 1387.

and disposal of the deceased. The deceased's uncle brought an application under section 116 of the Senior Courts Act, seeking to displace the deceased's mother as an administrator in relation to the disposal of the deceased. Cranston J began his judgment by considering the common law principle stated in *Williams* in the light of the European Convention on Human Rights (*ECHR*); he observed that the impact of the ECHR had not been 'considered by the domestic authorities' in relation to burial conflicts.[130] Cranston J observed that while Articles 8 and 9 of the ECHR might be relevant to burial conflicts, Article 8 was the more relevant for the decision in *Burrows*.

After a review of some of the relevant jurisprudence on Article 8, which attached importance to the wishes of the deceased in relation to their disposal, Cranston J observed: '[o]ne thing is clear, that in as much as our domestic law says that the views of a deceased person can be ignored it is no longer good law. That rule of common law can be traced back to *Williams v Williams*, where it was said that directions given by a deceased as to the disposal of his body were not enforceable as a matter of law'. Cranston J observed that this change of legal policy was dictated by the ECHR and the jurisprudence of the European Court of Human Rights, under which the 'views of a deceased person as to funeral arrangements and the disposal of his or her body must be taken into account'.[131] However, Cranston J observed that the Strasbourg jurisprudence, which demands that the views of the deceased should be taken into account in relation to burial conflicts, is 'easily accommodated within domestic law: in this type of case a person's wishes can be regarded as a special circumstance in terms of s 116 of the Act'.[132] The earlier analysis of *Buchanan*, under which the burial wishes of the deceased were regarded as a relevant consideration for the purpose of section 116 of the (then) Supreme Court Act, justifies Cranston J's observation that domestic law has incorporated Strasbourg's jurisprudence according respect to burial directions.

Furthermore, Cranston J observed that apart from the wishes of the deceased, the claims of other family members in relation to the disposal of the deceased might be engaged by Article 8(1) of the Convention: [t]here may be, for example, as there was in this case, the family life that Liam [the deceased] enjoyed with the Burrows family on the one hand and his family life with his mother, Mrs McManus on the other hand'.[133] Thus, he observed that 'there is no doubt that

[130] Ibid, para 18.
[131] Ibid, para 20.
[132] Ibid.
[133] Ibid, para 21.

those in Mr Burrow's position can invoke art 8.1'.[134] Such a conflict of rights under Article 8 would require the court to consider the 'comparative importance of the different rights being claimed, and to balance those competing rights so as to minimise the interference with each to the least possible extent'.[135] Accordingly, Cranston J identified five special circumstances relevant for the claimant's application under section 116 of the Act:[136] the long-time addiction of the deceased's mother to heroin; the deceased's clear wishes that he wanted to be cremated; the intention of the deceased's mother to bury the deceased (contrary to the deceased's wishes); the deceased's relationship with his uncle's family; and the interest in burying or cremating the deceased in the St Helen's area where he had spent the last eight years of his life. Cranston J concluded that these special circumstances 'all point in the direction of varying the priority given to the natural mother…and therefore giving the right to the Burrows to take Liam's body and to arrange the funeral',[137] and that, given the deceased mother's addiction and inability to assume responsibility for the funeral, 'it is necessary for the natural mother's rights to be displaced'.[138] Thus, *Burrows* has made it clear that the law requires the wishes of the deceased to be considered in matters relating to their disposal.

Since burial wishes are just one of the competing factors to be considered in a particular case, whether or not they should prevail must depend on the circumstances of each case and the nature and strength of other competing interests; this calls for a balancing exercise by the judge. Such a conflict might arise where family members are opposed to the deceased's burial wishes. For example, the deceased might have directed that he wanted to be cremated, but his parents, who qualify as next of kin, are opposed to cremation for religious reasons: whose view should prevail? Of course, this sort of problem arose in *Burrows,* where the deceased's wish to be cremated, although supported by his uncle, was contrary to the mother's wish to bury the deceased. Cranston J observed that the views of the deceased and the uncle (on the one hand) and the deceased's mother (on the other hand), although in conflict, were all protected under Article 8 of the ECHR. Cranston J observed that such cases require an analysis of the comparative importance of the different rights involved, and the balancing of such competing rights to minimise a conflict. It is suggested that

[134] Ibid.
[135] Ibid.
[136] Ibid, para 26.
[137] Ibid, para 27.
[138] Ibid.

such comparative assessments and balancing of competing interests should be resolved in favour of the deceased's burial wishes in three circumstances.

First, consider a case where the deceased died testate and left a burial direction which the executor is willing to enforce but, for religious or cultural reasons, the deceased's burial direction is not acceptable to the deceased's family members who plan an alternative burial arrangement for the deceased. 'Family members' should be construed in a wide sense to recognise the fragmented nature of modern familial relationships. For instance, the Civil Partnership Act 2004 recognises that a civil partner ranks as one of the closest family members of the deceased. Arguably, the deceased's family members should also include a cohabiting partner, long-term boyfriend or girlfriend and stepchildren,[139] yet succession law (as noted above) does not recognise this latter category of people as the deceased's legally designated next of kin. Unfortunately, the deceased's legally designated next of kin may not 'truly reflect the relationship which the deceased enjoyed while alive, and may not correspond with the deceased's subjective understanding of who represents his or her family'.[140] In balancing the competing interests of the deceased and those of the family members as highlighted above, it is suggested that the court should give primacy to the burial wishes of the deceased which the executor is willing to enforce; such an outcome reinforces the (extended) autonomy of the deceased and the deceased's critical or persisting interests, as well as giving effect to the executor's paramount right of burial under the common law. Although the interests of the deceased's family members are also important, they should take a secondary position to the interests of the deceased for the reasons already highlighted.

Second, there might be cases where the deceased died testate and left a burial direction which the executor is unwilling to enforce although the surviving spouse or civil partner and other close family members of the deceased are willing to comply with the deceased's burial direction. Should the executor's contrary plan for burial prevail over that of the deceased, which is supported by the deceased's close family members? Under the rule in *Williams*, the burial arrangements made by the executor would prevail over the burial direction of the deceased, even if the deceased's burial direction is supported by the deceased's close family members; however, such an approach potentially conflicts with the rights of the deceased and the deceased's family members which, in certain

[139] In *EM (Lebanon) v Secretary of State for the Home Department* [2009] 1 AC 1198, Lord Bingham observed that 'there is no pre-determined model of family or family life to which article 8 must be applied'.

[140] Conway, above n 2, 435.

circumstances, might be protected under Articles 8 and 9 of the ECHR. In balancing the competing interests of the deceased and family members against the right of the executor, it is suggested that a court should give priority to the deceased's burial wishes (supported by family members) for the reason that burial and funerals vindicate the extended autonomy and posthumous identity of the deceased, as well as providing comfort and psychotherapeutic relief to survivors, rather than the executor (at least, to the extent that the executor is a non-family member). In such cases, there is no logical purpose to be served by giving the executor's claim an overriding status.

Third, and finally, there might be cases where the deceased died intestate and left a burial direction to which the surviving spouse or civil partner, or other family members, are opposed—in other words, the deceased's burial wishes, standing alone (without the support of an executor), conflict with those of close family members. How would the court balance such competing interests? Under the common law, the interests of the surviving spouse or civil partner or the highest-ranking next of kin would prevail. However, fidelity to the deceased's extended autonomy as expressed in their burial wishes means that a court should prioritise the deceased's burial wishes in such circumstances whenever possible; the interests of the deceased's family members should rank second to the interests of the deceased in the posthumous fate of their remains. Who then would carry out the deceased's burial direction? Of course, it is absurd to expect or compel close family members to carry out a burial direction to which they are opposed; in order to deal with a practical problem of this sort, the court should grant standing to any member of the deceased's family (close or distant) or even a third party who is willing to comply with the deceased's burial direction.[141] Otherwise, the balance would be resolved in favour of the wishes of the deceased's family.

5 Burial directions and the Human Rights Act

The framework of the Human Rights Act 1998, which incorporates Articles 8 and 9 of the ECHR, is certainly relevant to the analysis of burial conflicts with a vertical dimension, such as those in *Burrows* and *Ghai* (below) because section 6(1) of the Human Rights Act makes the Convention binding against public

[141] This, however, raises some issues for future consideration, such as who is to pay for the expenses of carrying out the burial direction, and what if there is insufficient money in the estate to pay for the deceased's funeral arrangements? In such situations the deceased might wish to make sufficient money available for the execution of their burial direction.

authorities. It is doubtful that the human rights framework is applicable to burial disputes in horizontal cases, such as *Buchanan*, although it is possible that indirect horizontal effects could be achieved through the duty imposed on the courts as a public authority under sections 3 and 6 of the Human Rights Act.[142] Thus the analysis below, highlighting the potential role of the Human Rights Act in the resolution of burial disputes, assumes a context in which a public authority is involved.

Even within the limited sphere of operation of the Human Rights Act in relation to burial conflicts and burial directions, some complex and difficult issues still arise. For instance, are burial wishes (or directions) entitled to posthumous protection under the Human Rights Act? Davies and Naffine have argued, persuasively, that a person's legal personality or personhood transcends their biological death, through the instrumentality of a will.[143] Legal orthodoxy, however, stipulates that human rights are personal to living human beings and, therefore, expire upon the bearer's death.[144] In that sense, a burial direction would not be enforceable as a human right after the person's death, for the simple reason that the deceased has ceased to be a human being[145] and, as such, is not a subject with rights, much less human rights. In *Jones v United Kingdom*,[146] for instance, the applicant argued that the refusal of a burial authority to allow him to place a memorial incorporating a photograph on his daughter's grave violated his right under Article 8 of the ECHR. The European Court of Human Rights observed that 'the exercise of Article 8 rights of family and private life pertain, predominantly, to relationships between *living* human beings',[147] and that while Article 8 might extend to certain situations after death, such as the right to attend a deceased relative's funeral, 'there is no right as such to obtain any particular mode of funeral or attendant burial features'.[148] More recently, in *Ibuna v Arroyo*, the claimant (the deceased's partner), supported by the deceased's daughter and executrix, planned to bury the deceased (a Filipino Congressman who had died in London) in accordance with the deceased's wishes but contrary to the burial

[142] See e.g. H Fenwick, *Civil Liberties and Human Rights (*4th edn, 2007) 249–256.
[143] Davies & Naffine, above n 10, 100-4.
[144] *Silkwood v Kerr-McGee Corporation*, 637 F 2d 743 (10th Cir 1980).
[145] See the US case of *Na Iwi O Na Kupuna O Mokapu v Dalton*, 894 F Supp 1397 (1995), where the court rejected an argument that a dead human body was a person, and could bring a lawsuit in its own name.
[146] *Jones v UK,* App no 42639/04 (ECtHR, 13 September 2005).
[147] Ibid, para 2.
[148] Ibid, para 2.

arrangements made by the deceased's estranged wife.[149] Peter Smith J accepted that, in determining the person with the right to control the disposal of the deceased, the court should identify and balance the various competing interests of the parties, including the wishes of the deceased Congressman, as stipulated in *Buchanan* and *Burrows*. However, unlike Cranston J in *Burrows*, Peter Smith J held that the deceased's burial wishes were not entitled to the reinforcement of human rights protection because he had 'some difficulty in a post-mortem application of human rights in relation to a body as if it has some independent right to be heard which is in effect what Cranston J is saying'.[150] Thus, Peter Smith J was sympathetic to the traditional principle that human rights expire upon death and that 'there is no room further for any application of any human rights concepts to protect the right of the body to speak from death as it were'.[151]

In two ways, however, a person's burial wishes could be given legal effect in their lifetime under the Human Rights Act.[152] First, it is arguable that burial wishes are protectable privacy interests under Article 8.[153] For instance, in *Ghai,*[154] Ghai wished that, consistent with his orthodox Hindu belief system, his body should be cremated on an open-air funeral pyre and, for that purpose, he sought a pledge of land from the defendant Council, which would be dedicated to Hindu-type cremations. The Council refused to grant Ghai's request, arguing that open-air funeral pyres were prohibited under the Cremation Act of 1902 and the Cremation (England and Wales) Regulations 2008. Consequently, Ghai brought an application for a judicial review of the Council's decision. Before Cranston J, at first instance, Ghai argued that the prohibition of open-air funeral pyres under the Cremation Act and its regulations violated his rights under Articles 8 and 9 of the ECHR. Cranston J observed that 'in some circumstances the respect accorded to private (and indeed family life) in Article 8 can extend to aspects of funeral arrangements. That is because they are so closely related to a person's physical, psychological or familial identity'.[155] While Cranston J accepted that

[149] *Ibuna v Arroyo* [2012] All ER (D) 36.

[150] Ibid, para 50.

[151] Ibid.

[152] Some cases have held that matters of burial and exhumation engage the protection of right to private and family life: *Dödsbo v Sweden* (2007) 45 EHRR 581; *Ploski v Poland,* App no 61654/00 (ECtHR, 12 November 2002); *Pannulo and Forte v France* (2001) 36 EHRR 757.

[153] Price observed that the 'Convention is not applicable to deceased persons but rights under article 8 might be invoked prior to death in respect of the subsequent treatment of the cadaver': D Price, 'The Human Tissue Act 2004' (2005) 68 *MLR* 798, 810.

[154] *Ghai*, above n 15.

[155] Ibid, 790.

'Article 8 is capable of being engaged because the claimant is prevented from choosing during his lifetime the manner of his funeral to avoid a bad death,'[156] he concluded that Article 8 was not engaged in this instance because open-air funeral pyres involved the performance of a public activity outside the realms of privacy protection.[157] Similarly, although Cranston J held that Ghai's Article 9 rights were engaged, he concluded that any interference with those rights was justified under Article 9(2).[158] On appeal, however, Ghai produced further evidence upon which he argued that, instead of open-air funeral pyres, the law permits cremations done within any enclosed structure that qualifies as a 'building' under the Cremation Act; he also argued that such cremations could be done with traditional fire, under the glare of sunlight directed to the body during the cremation process. Lord Neuberger accepted Ghai's revised claims, observing that 'Mr Ghai's wishes as to how, after his death, his remains are to be cremated can be accommodated under the Act and the Regulations'.[159] Thus, the Court of Appeal in *Ghai* decided the case under the Cremation Act rather than the Human Rights Act. *X v Federal Republic of Germany* also shows that funeral arrangements might be inextricably intertwined with a living person's identity and privacy.[160] In that case, the applicant wished to be cremated after his death and for his ashes to be scattered on his own land. He applied to the German authorities for permission for his ashes to be scattered on his land after his death but the application was rejected. The applicant argued that this rejection amounted to a violation of his right of privacy under Article 8. The European Commission on Human Rights 'doubted whether or not this right [Article 8] includes the right of a person to choose the place and determine the modalities of his burial'.[161] However, it held that Article 8 was engaged, reasoning that while funeral 'arrangements are made for a time after life has come to an end, this does not mean that no issue concerning such arrangements may arise under Article 8 since persons may feel the need to express their personality by the way they arrange how they are buried'.[162]

Second, a burial wish grounded in a religious faith might be protected as the manifestation of religion or the practice and observance of a religion

[156] Ibid, 789.

[157] Ibid, 790. See also *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719; P Cumper & T Lewis, 'Last rites and human rights: funeral pyres and religious freedom in the United Kingdom' (2010) 12 *Ecc LJ* 131–151.

[158] *Ghai*, above n 15, 796.

[159] Ibid, 807.

[160] *X v Federal Republic of Germany* (1981) 24 DR 137.

[161] Ibid, 139.

[162] Ibid.

under Article 9(1). As we have seen in *Ghai*, Cranston J accepted that the claimant's religious belief relating to an open-air funeral pyre cremation was genuine, serious and held in good faith and, thus, qualified as a manifestation of religion under Article 9.[163] Consequently, he observed that the '1902 Act and 2008 Regulations stifle the claimant's desire to have an open air funeral pyre [and therefore] constitute an interference with the manifestation of his religious belief'.[164] Nonetheless, the interference was found to be justifiable under Article 9(2) of the ECHR.[165] Similarly, a person (while alive) might wish that their organs should be harvested after their death, for purposes of transplantation, anatomical dissection or public display; that sort of pre-mortem decision is enforceable post-mortem under section 3 of the Human Tissue Act 2004.[166]

6 The position of a surviving spouse or civil partner

Where the deceased left no burial directions, or where such directions are not legally or practically enforceable, it is suggested that the law should give primacy to the right of the surviving spouse or civil partner to make decisions relating to burial. The law already does this in the case of intestacy, by selecting the surviving spouse or civil partner as the most favoured person to determine the time, place and manner of burial under section 46 of the Administration of Estates Act and rule 22(1) of the Non-Contentious Probate Rules 1987 which designate persons who qualify as the deceased's next of kin (although for purposes of the law of succession) and rank them in the following order: surviving husband or wife (or civil partner); children; parents; siblings; grandparents; and uncles and aunts. Thus, being entitled to the grant of letters of administration, the surviving spouse or civil partner would be entitled to determine the time, place and manner of burying a deceased partner.

Problems might, however, arise where the deceased died testate but the executor's arrangements for burial conflict with those of the surviving spouse. Under the rule in *Williams*, as emphasised in the Commonwealth cases of *Hunter*

[163] *Ghai*, above n 15, 777. See also *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

[164] *Ghai*, above n 15, 778.

[165] Ibid, 782–5.

[166] In practice, however, organ procurement authorities do respect the contrary wishes of the deceased's living relatives.

v Hunter and *Murdoch v Rhind*,[167] the wishes of the executor as to burial would prevail over those of the surviving spouse or civil partner. However, should such a case of conflict also involve a public authority, the Convention rights of the surviving spouse or civil partner in relation to bereavement under Articles 8 and 9 might be engaged, meaning that priority might be given to the surviving spouse or civil partner instead of to the executor's paramount right of burial under the common law.[168] For example, Article 9 protection of the burial right of a surviving spouse or civil partner was emphasised in *Re Crawley Green Road Cemetery, Luton,*[169] where a humanist was mistakenly buried in a consecrated grave after a humanist funeral. The court permitted his exhumation, but only on the ground that the 'court would…be acting unlawfully if it were to act in a way which is "incompatible" with her [the petitioner-widow's] rights under Article 9'.[170] Human rights apart, intuition suggests that, in the absence of burial instructions from the deceased, decisions regarding funeral and burial should be made by the surviving spouse or civil partner, the deceased's closest kin. Statutorily, this sort of intuition is instantiated by section 27(4)(a) of the Human Tissue Act 2004, which puts the surviving spouse or civil partner at the apex of the hierarchy of persons entitled to give consent for the use of cadaveric tissues. Thus, absent the testator's burial directions, the court should more readily accord priority to the burial arrangements made by the surviving spouse or civil partner over those made by the executor.

7 Enforcement of burial wishes of the deceased

Should there be a change of legal policy, so that burial wishes become legally recognisable and directly enforceable, a few practical and legal difficulties relating to enforcement would need to be addressed. For instance, there is a potential problem of whether giving full effect to the wishes of a deceased person might give free rein to, for example, the sort of eighteenth-century grandiosity highlighted by Gittings in the case of Henry Trigg who devised his house to a beneficiary on the condition that the beneficiary lay Henry Trigg's remains on the rafters of the outhouse.[171] In a more recent case in the US, a deceased's request to be buried wearing valuable jewellery was refused by the court on the

[167] *Hunter v Hunter* [1930] 65 OLR 586; *Murdoch v Rhind* [1945] NZLR 425.
[168] *C v Advocate General for Scotland* [2011] CSOH 124, para 36.
[169] *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308.
[170] Ibid, 311.
[171] Gittings, above n 116, 341.

ground that it would encourage grave-robbing.[172] In the sort of cases above, the court might adopt a framework similar to that applicable in the US where a decedent's burial wishes are upheld unless they are indecent, unlawful or contrary to public policy.[173] There is also the problem of what happens if a testator left some specific directions for burial but, at the time of death, circumstances have changed, making it impossible to comply with the testator's burial directions; for instance, a direction for burial in a particular cemetery that is no longer open. While there may be several approaches to such cases of impossibility, one solution might be to treat the burial direction as void, so that the right of burial goes to the surviving spouse (or civil partner) or, in their absence, to other close family members of the deceased. Alternatively, the problem resulting from a void burial direction could be solved by falling back on the hierarchical structure of burial rights ordained by the common law, which grants the paramount right of burial to the executor.

8 Conclusion

It is important that, whenever possible, the law should recognise and enforce lawful burial wishes because they express a person's identity, personality and fundamental interest in posthumous memorialisation. It is suggested that a person's wishes regarding their funeral and burial might be grounded in certain transcendental expectations, and the execution of such wishes might bring some psychotherapeutic relief to survivors. Thus, social and cultural contexts might affect the recognition and enforcement of a person's burial wishes. The law has made some progress in the protection of a decedent's burial direction by regarding it as one of the special circumstances to be considered under section 116 of the Senior Courts Act and, in cases involving a public authority, such wishes might attract the protection of the Human Rights Act. Therefore, it is suggested that the rule in *Williams* is anachronistic, legally and socially unjustifiable, and has outlived its usefulness. In the case of burial conflicts, therefore, the law should accord priority to the burial wishes of the deceased, provided that such wishes are lawful, reasonable and practicable, and that there is somebody willing to enforce them; it is suggested that such an approach recognises and protects the deceased's

[172] *In the Estate of Meksras*, Pa D & C 2d 371 (1974).

[173] *Thompson v Deeds,* 61 NW 842 (Iowa 1895). For a fuller analysis of the US position, see R N Nwabueze, 'The Concept of Sepulchral Rights in Canada and the US in the Age of Genomics: Hints from Iceland' (2005) 31 *Rutgers Computer & Technology Law Journal* 217–284.

posthumous autonomy. In the absence of the deceased's burial wishes, priority should be given to the right of the surviving spouse or civil partner to determine the time, place and manner of burying the deceased.

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The Effect of War on Law—What happens to their treaties when states go to war?

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War is the ultimate game-changer. It leads to a rupture in the relations between states. This includes, potentially, a disruption of their legal relations as established in treaties (and may even affect those with third states). This was noted for example, by the Eritrea-Ethiopia Claims Commission, established to settle international claims arising from the war between the two states, which pointed out that 'the Parties' bitter international armed conflict [had] fundamentally changed the nature of their relationship…'[1] Many wars have radically realigned the underlying bases of treaties to the extent that their original rationale can no longer be sustained, resulting in their modification or even termination.[2] History also provides examples, as recent as the conflicts of the twentieth century, of states going to war precisely to shrug off the yolk of onerous treaties. For example, Germany initiated the Second World War ostensibly as a consequence of the onerous provisions imposed on it by the Versailles Treaty—and in so doing brought about the demise of the international regime established by that treaty.

Yet, such an outcome (abrogation) has not always been the automatic consequence of the outbreak of war. Some treaties have continued to apply during the armed conflict, owing to their purpose as, for example, in the case of treaties aimed precisely at regulating the conduct of belligerents, such as the Geneva Conventions of 1949, or guaranteeing the rights of neutrals in the case of war.[3] More recently, this has been extended to include treaties

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[1] *Civilians Claims by Eritrea*, Partial Award of 17 December 2004, para 38, XXVI *RIAA* 195, 214.

[2] D O'Connell, *International Law,* vol 1 (2nd ed, 1970) 270.

[3] See 'Codification of International Law' (1935) 29 *Suppl. AJIL* 664, Art 35(a); G Schwarzenberger & E Brown, *A Manual of International Law* (6th ed, 1976) 139.

regulating diplomatic relations.[4] Contemporary international law recognises an intermediate position, whereby treaties between parties to an armed conflict might be automatically suspended for the duration of the conflict,[5] only to be revived afterwards, even if in a modified form, to reflect the new post-conflict *modus vivendi*. For example, the revival of certain pre-war treaties was dealt with (to varying degrees) in some of the peace treaties negotiated following the two world wars,[6] sometimes in a manner favourable to the victorious powers, as in the case of the Italian Peace Treaties following the Second World War.[7]

As a general proposition, states which were previously involved in an armed conflict do not comprehensively regulate the legal outcome of the conflict, or do so only in relation to some of their treaties.[8] Furthermore, while examples exist of courts and arbitral tribunals considering the fate of particular treaties in the wake of a war, they are likewise rare and have, on several occasions, occurred decades after the end of the conflict. For example, the effect of the Second World War on several extradition treaties was only determined by an Italian Court in 1970.[9] Likewise, the question of the legal effect of the War of 1812 on the Jay Treaty of 1794 was the subject of consideration by various courts in the United States of America, including its Supreme Court, well into the twentieth century.[10] For many conflicts, the question of the legal effect on the treaties between the

[4] *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, ICJ Reports 1980 p 3, para 86. Here, the International Court of Justice emphasised the inviolability of diplomatic envoys and premises '[e]ven in the case of armed conflict'.

[5] *The North Atlantic Coast Fisheries case*, Award of 7 September 1910, XI *RIAA* 167, 181. Recent practice has confirmed that bilateral treaties of a political or economic nature would typically be suspended by an armed conflict. See *Economic Loss throughout Ethiopia*, Partial Award of 19 December 2005, para 18, XXVI *RIAA* 445, 455.

[6] Schwarzenberger & Brown, above n 3, 139.

[7] Art 44 of the Peace Treaty concluded on 10 February 1947 between Italy and the Allied Powers, awarding the latter the sole right to declare which pre-war bilateral treaties with Italy survived the war; as between Germany and Italy treaties covering private rights were considered by both countries to have been revived, cited in O'Connell, above n 2, 270. See C Parry, 'The Law of Treaties', in M Sørenson (ed), *Manual of Public International Law* (1968) 175, 237–8.

[8] See H Briggs, *The Law of Nations: Cases, Documents and Notes* (2nd ed, 1953) 943–4, for a discussion of the practice concerning the revival of treaties following the First World War in the context of the Treaty of Versailles.

[9] *In re Barnaton Levy and Suster Brucker*, Court of Appeal Milan (30 October 1970), (1975) 1 Italian YIL 233, cited in *Memorandum of the United Nations Secretariat on the Effects of Armed Conflicts on Treaties*, UN Doc A/CN.4/550, 2005, para 5, in which the example is also provided of a 1977 judgment of a British Court where the effect of the Second World War on a 1927 convention was assessed.

[10] See, e.g. *Karnuth v US* 279 US 231 (1929).

opposing parties has still to be addressed.

Such relative lack of practice has constrained the development of applicable rules of general international law. As recently as 2008, the law on the subject was generally considered to be uncertain.[11] This is compounded by the fact that contracting parties hardly ever expressly provide in the treaty for the possibility of a violent disruption in their relations.[12] The vast majority of treaties registered with the United Nations (at present, numbering in the tens of thousands) are silent as to the possible legal impact of the outbreak of armed conflict between the respective parties. Additional complexity arises from the fact that, in the contemporary international system, treaty relations between states are often established in a multilateral context. This calls for an appreciation of the difference between the effect on treaty relations arising under a multilateral treaty, as opposed to that on the treaty itself. In other words, while an armed conflict may result in the suspension of treaty relations, arising under a multilateral convention, between the parties to the conflict, there is no reason why the armed conflict should equally affect the operation of the treaty between third states parties to the treaty.[13] At the same time, it is conceivable that the armed conflict could affect the treaty relations, arising under the multilateral treaty, between the parties to the conflict and third states. The legal position of third states might likewise be affected in situations of internal armed conflicts where only one state is engaged in an armed conflict (within its borders).

Contemporary reflection on these and other questions pertaining to the effect of armed conflicts on treaties has been relatively sparse. This was not always the case. In the first half of the twentieth century (particularly during the inter-war period) the legal effects of war was frequently considered.[14] This can be explained, in part, by the fact that, up until the 1920s, the default position in international law was that the resort to war was *prima facie* lawful.[15] The

[11] I Brownlie, *Principles of International Law* (7th ed, 2008) 620; A Aust, *Modern Treaty Law and Practice* (2nd ed, 2007) 308.

[12] Briggs, above n 8, 943.

[13] P Daillier, M Forteau & A Pellet, *Droit International Public* (8th ed, 2008) 342.

[14] A de La Pradelle, 'The Effect of War on Private Law Treaties' (1948) 2 *ILQ* 555; H Tobin, *The Termination of Multipartite Treaties* (1933) 22; C Hurst, 'The Effect of War on Treaties' (1921–22) 2 *BYIL* 38; M Politis, 'Effets de la Guerre sur les Obligations Internationales' (1911) *Annuaire de l'Institut de droit International* 200; J Moore, *A Digest of International Law*, vol 5 (1906) 381; A Pillet, *Les Lois Actuelles de la Guerre* (1901) 77.

[15] J Crawford (ed), *Brownlie's Principles of International Law* (8th ed, 2012) 744–5; K Skubiszewski, 'Use of force by states. Collective security. Law of war and neutrality', in Sørenson, above n 7, 739, 741–2.

role of international law was limited to regulating, and sometimes prohibiting, certain methods of warfare, as well as to the treatment of combatants and non-combatants.[16]

The traditional view, prevailing at the time,[17] was that treaties between warring states were automatically abrogated with the outbreak of war. It was for the parties to provide for the revival of pre-war treaties by subsequent agreement, as was done in the peace treaties referred to earlier. This no longer reflects the received view in international law. As is discussed below, by the middle of the twentieth century, a more nuanced understanding of the general position arose, away from a blanket presumption of discontinuity and towards the recognition that the outbreak of armed conflict does not *ipso facto* terminate or suspend the operation of treaties. Whether an armed conflict has such effect will depend on the nature of the treaty and that of the conflict. This has been the approach taken by the International Law Commission (*ILC*) in its recent consideration of the topic.

Such evolution in the law coincided with a broader shift in the international legal order, particularly after the Second World War. Most significantly for the present purposes, the resort to war as an instrument of foreign policy was declared unlawful by the Kellogg-Briand Pact of 1928,[18] and subsequently by the general prohibition on the resort to armed force enshrined in article 2, paragraph 4, of the Charter of the United Nations (except in the exercise of the right to self-defense (article 51)).[19] Such general prohibition, together with the establishment of the collective security system under Chapter VII of the Charter, had the effect of *re-orienting* international law into being more directly concerned with the law of peace,[20] even if it continued to regulate some aspects of warfare, for example, in the context of international humanitarian law. While key questions concerning the use of force, such as the legal definition and consequences of aggression, remained to be resolved, these took a backstage to broader developments in the law pertaining, for example, to the recognition and elaboration of fundamental international human rights norms.

This shift has been accompanied by a change in the nature of international

[16] J Dugard, *International Law: A South African Perspective* (4th ed, 2012) 495, 519–21.

[17] Primarily in continental jurisprudence but less so among the common law jurisdictions; see the discussion in A McNair, *The Law of Treaties* (1961) 699–728.

[18] General Treaty for the Renunciation of War, 27 August 1928, 94 LNTS 57.

[19] Dugard, above n 16, 495–6.

[20] J Brierly, *The Law of Nations: An introduction to the international law of peace* (6th ed, 1963) 408; A Cassese, *International Law* (2nd ed, 2005) 323–6.

law itself. It is increasingly possible to speak of the existence of an international *public* law, rooted in multilateralism and placing greater emphasis on communitarian notions and values.[21] These include the formal recognition of the class of legal obligations owed to the international community as a whole (*erga omnes*)[22] in addition to the legal constraints on the actions of states imposed by peremptory norms (*jus cogens*) of international law.[23] To this can be added the elaboration of structural rules of a secondary nature regulating such issues as validity, breach and the legal consequences of wrongful acts,[24] as well as the emergence of the phenomenon of increased specialisation in international law. In some contexts, international law has become more regulatory in nature, as international action is increasingly taken through (and by) international organisations (including those dedicated to regional economic integration). Entire international legal frameworks, typically anchored in international organisations, have been developed in support of transnational, regional and even global interests, such as free trade, environmental protection, the protection and promotion of human rights, the protection of intellectual property rights and disarmament.[25] It is increasingly difficult to conceive of states opting-out from such a web of legal norms simply as a consequence of their involvement in an armed conflict.

Also different from a century ago, international law is increasingly adjudicated.[26] A standing international court has been in place (in different guises) for most of the last nine decades. Today, the International Court of Justice has a full and diverse docket involving international claims raised by states small and large. The jurisprudence of the court (and its predecessor) has played a key role in the solidification of international law as a distinct body of law. More recently, the number of international courts (typically with specialised jurisdiction) has increased. Furthermore, it is now common for international law rules contained in treaties to be referred to in transnational private litigation, particularly in the

[21] B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217.

[22] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, ICJ Reports 1970 p 3, para 33.

[23] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Art 53 (*VCLT*); A Orakhelashvili, *Peremptory Norms in International Law* (2006) 7–35.

[24] Respectively in the VCLT and in the articles on the responsibility of states for internationally wrongful acts, GA Res 56/83, 12 Dec 2001, Annex.

[25] For an early discussion see W Friedmann, *The Changing Structure of International Law* (1964) 365–81.

[26] Dugard, above n 16, 451–3.

context of commercial arbitrations.[27] Even domestic courts are, in general, more receptive to international rules today. While there certainly may be room for improvement, in comparison to a time when international law was the province of diplomats and academics, it is today increasingly possible to view international law as a transactional discipline. The implication of this is that the question of the legal consequences of an armed conflict may be increasingly the subject of legal adjudication, as opposed to political accommodation.

There has also been a change in the nature of armed conflict itself. War is no longer declared.[28] The legal existence of a state of war is now less a question of the characterisation of specific acts and more that of meeting thresholds of violence.[29] While the classical inter-state conflict is not entirely a thing of the past, it is no longer the most common form of armed conflict.[30] Non-international armed conflict—that is, conflict within a state as opposed to between states, and sometimes not even involving forces representing the state—is more prevalent today.[31] This calls into question the relevance of existing international rules, since much of the practice of states and legal doctrine from which they are drawn is based on the traditional model of inter-state conflict. Contrary to the traditional view of war breaking out at a certain point in time, a conflict may exist *de facto* long before the international legal definition of armed conflict is satisfied. Traditional notions of armed conflict are further challenged by the concepts of 'asymmetric warfare' and the 'global war on terror'.[32] To the extent that it is admitted that all such types of armed conflicts also affect treaties, their existence may potentially have a destabilising effect on the legal relations between states. It is against the background of such developments in the law and in the factual context of armed conflict that contemporary efforts to develop rules on the effects of armed conflicts on treaties are to be understood.

In the post-war period, the question of the effect of armed conflict on treaties

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[27] See generally, M Shaw, *International Law* (6th ed, 2008) 1040–4.

[28] Ibid, 1122.

[29] See the discussion below on the reference to 'protracted armed violence' in *Prosecutor v. Duško Tadić*, International Tribunal for the Former Yugoslavia, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para 70.

[30] Aust, above n 11, 310.

[31] C Gray, 'The Use of Force and the International Legal Order', in M Evans (ed), *International Law* (1st ed, 2003) 589, 598–9; C Greenwood, 'The Law of War (International Humanitarian Law)' in Evans, 789, 814–16.

[32] S Chesterman, 'The United Nations and the Law of War: Power and Sensibility in International Law' (2004–2005) 28 *Fordham ILJ* 531; O Gross & F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006) 365–420.

was first considered, albeit tangentially, during the process of the elaboration of the law of treaties. However, the states participating in the 1968-69 Vienna Conference declined to deal comprehensively with the issue, preferring instead to reserve, in a saving clause in what became article 75 of the VCLT, the legal position so as not to 'prejudge any question that may arise in regard to a treaty from…the outbreak of hostilities between States'. The topic was revisited two decades later (in a private context) by the Institute of International Law, which adopted an influential resolution in 1985.[33] In 2004, the ILC turned its attention to the topic. This was relatively familiar territory since it had developed the preparatory text on the law of treaties, which served as the basis of negotiation at the Vienna Conference. A first reading of a set of draft articles on the effects of armed conflicts on treaties was completed in 2008 on the basis of the proposals of the first Special Rapporteur, Sir Ian Brownlie, following an extensive analysis of applicable state practice and doctrine. The final set of draft articles was adopted, on second reading, in 2011 (*2011 articles*) under the guidance of the second Special Rapporteur, the Swiss jurist Lucius Caflisch.[34]

The underlying premise of the 2011 articles is that, as a matter of principle, war does not *ipso facto* lead to the rupture of legal relations.[35] More fundamentally, war does not, under the contemporary view, exist notionally *outside* of law in the sense that law would only apply to relations between states during times of peace. On the contrary, law is viewed as being able to tolerate war (at least in most cases). As already described, this position can be understood in a historical perspective as a manifestation of the broader shift in the reach of international law, which has taken place over the last century. It is also a function of the fact that the ILC typically errs in favour of the applicability of international law. One of its primary policy concerns in codifying and progressively developing international law has been the need to ensure the stability of treaty relations. This consideration was particularly acute when coming to the legal effect of war on treaties.[36]

The complexity of the topic relates to the multiple dimensions in which it arises. As indicated earlier, war, or 'armed conflict' as it is referred to today, may affect not only the treaty relations between states involved in the conflict but also

[33] (1985) 61(1) *Annuaire de l'Institut de Droit International* 1–27; (1985) 61(2) *Annuaire de l'Institut de Droit International* 199–255.

[34] 'Report of the International Law Commission on its Sixty-third Session', UN Doc A/66/10, 2011, 173ff (*ILC Report*).

[35] Ibid, 183, commentary to Part Two, Ch I.

[36] Ibid, para 1 of commentary to Art 3.

their relations with third parties, even if to a different degree. A similar problem arises when looking at the effect of internal armed conflict, where other states are by definition third states. The ILC admitted that internal armed conflict may also, in some circumstances, have an effect on the treaties to which the state is a party.[37] In doing so, it went beyond the scope of the VCLT, which is limited (in article 1) to treaties between states. A third potential complexity has to do with the question of the impact on treaties with international organisations. While the ILC chose to leave the matter aside,[38] multilateral treaties that have international organisations as parties (in addition to states) are included within the purview of the 2011 articles to the extent that the articles apply to the treaty relations between states, which may be affected by an armed conflict.[39]

In defining armed conflict for purposes of the draft articles, the ILC looked beyond traditional definitions, typically based on the distinction between international and non-international armed conflict found in the Geneva conventions of 1949. It opted for a modified version of the definition formulated by the Appeals Chamber of the International Criminal Tribunal for Yugoslavia in the 1995 *Tadić* decision.[40] The definition looks at armed conflict in functional terms as a 'situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organised armed groups'.[41] The qualifier 'protracted' serves to establish a minimum threshold of violence that needs to be reached before it can be said that an internal armed conflict may legally affect treaty relations.[42] The degree of outside involvement in the internal conflict may also be a factor in ascertaining the potential impact on treaty relations.[43] Such considerations were included to assuage concerns that the very recognition that internal armed conflict may affect treaties with third states was, in and of itself, potentially destabilising as it could call into question numerous treaties to which states undergoing internal strife are parties.[44]

As a matter of law, the notion that treaties may be terminated by armed conflict is implied in the VCLT, which, for example, foresees the invocation of a 'fundamental change of circumstances' as a ground for termination or

[37] 2011 Articles, Art 2(b).
[38] ILC Report, above n 34, 180, para 4 of commentary to Art 1.
[39] 2011 Articles, Art 2(a).
[40] *Prosecutor v Duško Tadić*, above n 29.
[41] 2011 Articles, Art 2(b).
[42] ILC Report, above n 34, 182–3, para 8 of commentary to Art 2.
[43] 2011 Articles, Art 6(b).
[44] ILC Report, above n 34, 188, para 4 of commentary to Art 6.

withdrawal in circumstances, *inter alia*, where 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'.[45] It is conceivable that war too may have such an effect on a treaty (even if it is traditionally considered to be a distinct ground for termination or withdrawal). At the same time, as described earlier, a conceptual shift in the law has occurred over the last century so that it is no longer accepted that war would automatically do so.

The contemporary default position is reflected in article 3 of the 2011 articles which provides that, as a question of general international law, the 'existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties'. It is worth noting that the ILC consciously did not swing the pendulum to the opposite extreme by adopting a general presumption in favour of the *continuity* of treaties. Not only did it feel that such a stance was not (yet) supported in the practice of states, or for that matter in the legal doctrine, it would have meant that its task would have been to establish when such presumption would not apply, i.e. the conditions for discontinuity of treaties—something which would not have been conducive to the stability of treaty relations.[46] Instead, it opted for a general presumption against *discontinuity*, which it took as a nod in favour of treaty stability. The emphasis, therefore, is placed on the conditions for continuity of treaties by providing practical guidance to the law-applier trying to ascertain the perturbative effect of a particular conflict on a particular treaty.

As a general assertion, priority is given to the terms of the treaty itself. If a treaty contains a provision regulating its continuity in the context of an armed conflict, such provision governs.[47] Some treaties are meant to apply in times of armed conflict, as in the case of treaties establishing rules on the conduct of hostilities and the protections under international humanitarian law. Others might do so more indirectly. For example, a number of international human rights treaties anticipate the non-derogation of certain rights even in times of national emergency, presumably including armed conflict.[48] By definition, such rules apply during—as opposed to being displaced by—the armed conflict.[49] It is

[45] VCLT, Art 62.

[46] ILC Report, above n 34, 183–4, para 1 of commentary to Art 3.

[47] 2011 Articles, Art 4.

[48] For example, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art 4(1).

[49] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports 1996, p 226, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004 p 136, para 106.

also recognised that the existence of an armed conflict does not deprive the states involved therein of the capacity to conclude international agreements during the conflict,[50] such as for the exchange of prisoners or pertaining to the establishment of humanitarian safe-havens or passage. Nonetheless, as indicated earlier, the vast majority of treaties are adopted on the assumption of the existence of peaceful relations, and therefore without any provision being made for the event of war.

Nor is it usually feasible to identify an *intention* of the parties at the time of adoption of the treaty, as to the question of what will happen if war were to break out. At most, any such intention is likely to be constructed and would, at any rate, be one of several factors to be considered, even if implicitly. In other words, the treaty would have to be interpreted, in accordance with the existing rules on treaty interpretation so as to draw any relevant inferences as to the legal outcome of war between state parties to the treaty.[51] Articles 31 and 32 of the VCLT provide a toolkit for the law-applier seeking to interpret a treaty. The emphasis is placed less on a subjective approach (implied in assertions of the intention of the parties) and more on the objective *meaning* of the treaty.[52]

If an analysis of the terms and meaning of the treaty itself proves inconclusive then the enquiry shifts to considerations extraneous to the treaty. The ILC identified two sets of factors that may be of particular relevance, the first related to the nature of the treaty and the second to the characteristics of the armed conflict.[53] It should be noted that such factors are presented in a non-exhaustive manner and it is to be understood that which particular factors are relevant, and to what extent, may vary from treaty to treaty and from conflict to conflict.[54]

In considering the 'nature' of the treaty, the law-applier would look at its subject-matter, its object and purpose, its content and the number of parties. To assist with such enquiry, the ILC developed a non-exhaustive list of categories of treaties (contained in an annex to the articles) the subject-matter of which implies that they continue in operation, in whole or in part, during an armed conflict. As already indicated, treaties on the law of armed conflict, including those relating to international humanitarian law, would carry such implication. Other categories identified by the ILC include: those declaring, creating or regulating a permanent regime (including those establishing or modifying land and maritime

[50] 2011 Articles, Art 8(1).
[51] Ibid, Art 5.
[52] M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 426–427 and 435–436; R Gardiner, *Treaty Interpretation* (2008) 141–202.
[53] 2011 Articles, Art 6.
[54] ILC Report, above n 34, 187, para 2 of commentary to Art 6.

boundaries); multilateral law-making treaties; treaties on international criminal justice; those pertaining to friendship, commerce and navigation and including agreements on private rights; treaties for the protection of international human rights and the protection of the environment, international watercourses and aquifers; constituent instruments of international organisations adopted in treaty form; treaties relating to the international settlement of disputes, and treaties concerning diplomatic and consular relations. Some categories were included because it was assumed that they typically would need to continue to operate during an armed conflict (e.g. treaties on diplomatic and consular relations include provisions on the protection of diplomatic and consular property during times of war). Other categories were included more as a matter of general policy, owing to the fundamental interests at stake. These pertained, for example, to the protection of the environment and the legal sanctity of permanent regimes and territorial boundaries.

The second leg calls for a consideration of the armed conflict which requires, *inter alia*, an analysis which would take into account the characteristics of the conflict, including its territorial extent, its scale and intensity, duration, and, in the case of internal armed conflict, the degree of outside involvement.[55] Once again, the law applier is presented with a continuum of possibilities: the more intense and widespread a conflict, the more likely its impact on a treaty, and so on. A further part of the examination pertains to the question of the legality of the conflict under international law. As mentioned earlier, contemporary international law limits the lawfulness of the resort to armed force to a few accepted grounds. The articles recognise that a state acting in exercise of its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations 'is entitled to suspend in whole or in part the operation of a treaty to which it is a Party insofar as that operation is incompatible with the exercise of that right'.[56] Furthermore, the 2011 articles expressly limit the possibility of an aggressor state (as defined under international law) benefiting from any right, arising under the articles, to terminate, withdraw from, or suspend the operation of a treaty owing to the existence of the armed conflict.[57]

Once it is established that an armed conflict has affected a treaty, the question arises as to the extent of such effect. This is to be considered on two levels. First, what exactly is the effect on the treaty? Here, the ILC identified three possible

[55] 2011 Articles, Art 6(b).
[56] Ibid, Art 14.
[57] Ibid, Art 15.

outcomes—termination, withdrawal from or suspension of the operation of the treaty—without providing guidance on when one would be more appropriate than the other. While withdrawal is a unilateral act undertaken voluntarily, the termination and suspension of operation of the treaty may also occur automatically, by operation of law, regardless of any assertions to the contrary. The 2011 articles provide for a procedure (discussed below) to be followed by a state intending to terminate, withdraw from or suspend the operation of a treaty as a consequence of armed conflict, in case the treaty does not itself provide such a procedure.

The second sense in which the extent of the effect of the armed conflict is to be considered pertains to whether the entire treaty is affected, or only parts thereof. The 2011 articles envisage the possibility of the separability of treaty provisions,[58] where the treaty contains clauses that can be separated from the remainder of the treaty without affecting its application and those clauses were not an essential basis for consent of the other parties to be bound by the treaty, and where continued performance of the treaty would not be unjust. In other words, to the three potential outcomes already referred to should be added the possibility that a treaty might continue in operation, albeit in partial form, to the extent that those provisions which were affected by the conflict could validly be severed from the treaty. The provision, which was modeled on its equivalent in the VCLT (article 44), was introduced to moderate the impact of the 2011 articles.[59]

It is possible that a state may, through waiver or estoppel (giving rise to the assumption of acquiescence) lose its right to terminate, withdraw from or suspend the operation of, the treaty as a consequence of an armed conflict.[60] Such possibility was included in recognition that 'a minimum of good faith must prevail even in times of armed conflict'.[61] Conversely, the 2011 articles also admit that, subsequent to the armed conflict, the states involved can regulate, on the basis of an agreement, the revival of treaties that have been terminated or suspended as a consequence of the armed conflict.[62] As alluded to earlier, this has in fact occurred in a number of peace treaties following major wars. Furthermore, even where no such agreement is in place, it is nonetheless envisaged that suspended treaties might resume their operation following the conclusion of the conflict.[63]

[58] Ibid, Art 11.
[59] ILC Report, above n 34, 192–3, para 3 of commentary to Art 11.
[60] 2011 Articles, Art 12.
[61] ILC Report, above n 34, 193, para 1 of commentary to Art 12.
[62] 2011 Articles, Art 13(1).
[63] Ibid, Art 13(2).

It is also worth noting that the 2011 articles are limited in scope to the effect on treaties. Even if their application results in the perturbation of a treaty, this cannot 'impair in any way the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of that treaty',[64] i.e. by operation of customary international law. For example, the Ethiopia-Eritrea Claims Commission considered customary international law, including customary international humanitarian law, to be the applicable law on which to base its decisions.[65] This is not to say that customary obligations are not affected by war, but rather that the 2011 articles simply do not deal with that issue.

While the ILC's primary focus was on developing a set of dispositive rules, which it envisaged being applied equally during and after an armed conflict, it also proposed a notification requirement.[66] Under the terms of the envisaged procedure, a state intending to exercise its right, in accordance with the articles, to terminate or withdraw from a treaty or to suspend its operation, would have to notify the other state party or parties to the treaty of such intention.[67] The notice would, unless it provides otherwise, take effect upon receipt.[68] Any party to the treaty may, within a reasonable time, object to the proposed termination, withdrawal or suspension. This it would do in accordance with the rules of the treaty itself or those of general international law (such as in the VCLT) if no provision is made in the treaty.[69] Once such objection is raised, then the states concerned are to seek a solution through one of the means for peaceful settlement of disputes listed in article 33 of the Charter of the United Nations,[70] namely negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means. No reference is made to timing, since it may be likely that the resort to peaceful settlement might realistically only take place once the conflict has ended.[71] Nonetheless, the ILC took the view that international obligations to resolve disputes peacefully were not *ipso facto* ended by war,[72] even if their performance may be constrained. Accordingly, such obligations would continue to apply also

[64] Ibid, Art 10.
[65] *Prisoners of War*, Partial Award of 1 July 2003, XXVI *RIAA* p 23, 40.
[66] 2011 Articles, Art 9.
[67] Ibid, Art 9(1).
[68] Ibid, Art 9(2).
[69] Ibid, Art 9(3).
[70] Ibid, Art 9(4).
[71] ILC Report, above n 34, 191, para 6 of commentary to Art 9.
[72] 2011 Articles, Art 9(5).

to any legal disputes regarding the effect of the conflict on treaties.[73]

The provision was modeled on its equivalent in the VCLT (article 65). The analogy is, however, somewhat strained: the considerations implied in a requirement that a procedure be followed are different for times of peace than those during armed conflict. It might just not be possible, in the fog of war, for a state to ensure that it has given the proper notice of its intention to terminate, withdraw from or suspend the operation of its treaties to (or, for that matter, to object within a reasonable time to a similar assertion from) its opposing party. Such requirement is arguably more compelling in the case of a state engaged in armed conflict giving notice to a third state (not party to the conflict) that a treaty between them has been affected by the conflict. It is also to be assumed that the provision only has a prospective effect since it can hardly be the case that states that engaged in an armed conflict prior to the adoption of the 2011 articles could be said to have not followed the proposed procedure. What is less clear is what inference to draw if the proposed procedure is not followed. Making the notification procedure a legal requirement would imply the loss of the right to claim if the notification is not given. Yet, non-performance of the notification procedure might not amount to waiver or estoppel under the articles since it does not necessarily constitute express agreement or even acquiescence in the status quo. Even if it were, a loss of a right to claim under such circumstances would deprive the general rule in article 3 of practical effect. Given the context in which the state would be required to act (i.e. war), such outcome would be particularly harsh. All of this seems to point, in the view of the present writer, to the conclusion that the notification procedure is recommendatory in nature, and should be understood within the general rubric of the continuing obligation on states to resolve their disputes by peaceful means.

Upon adopting the articles, the ILC recommended to the General Assembly that it take note of the articles in a resolution to which they would be annexed and decide at a later stage whether to adopt them in the form of an international convention.[74] The General Assembly followed suit and took note of the articles in resolution 66/99 of 9 December 2011, to which they were annexed, and commended them to the attention of governments. The Assembly also decided to return, in 2014, to the question of what form the articles might eventually take. While the articles were formulated in a form suitable for a convention, the likelihood of that step being taken is at present low. Since their scope

[73] ILC Report, above n 34, 191, para 7 of commentary to Art 9.
[74] Ibid, 174.

ratione materiae is broader than that of the VCLT, their suitability as a protocol to that convention is doubted. The relatively obscure nature of the topic makes it also less likely that states will seek to adopt a convention thereon anytime soon. This suggests that the 2011 articles will likely remain, for the foreseeable future, an authoritative statement by the international community detailing, in an expository manner, the rules of general international law on the legal effects of armed conflicts on treaties.

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Ocean Acidification and Protection under International Law from Negative Effects: A Burning Issue amongst a Sea of Regimes?

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Abstract
Ocean acidification is a recently recognised phenomenon and, like climate change, is the consequence of increased anthropogenic carbon dioxide (CO_2) emissions. As the atmospheric concentration of CO_2 rises, the oceans directly assimilate CO_2 and automatically become more acidic. The phenomenon poses a huge concern for calcifying organisms such as shellfish, pteropods and corals. Any negative impacts caused to organisms at this level will have far-reaching consequences for biodiversity, food, employment and economic activity across the globe. The aim of this article is to examine two questions: first, whether the current international regulatory framework can provide adequate protection from the negative effects of ocean acidification, and if not, what can be done to better address this issue? Existing international regimes only tangentially address the issue and this may accordingly lead to suboptimal environmental protection. This paper concludes that a new protocol under the United Nations Framework Convention on Climate Change, that has a twin focus on ocean acidification and climate change, would provide the most appropriate step to avoid the negative effects associated with the phenomenon.

Keywords
Environmental law, law of the sea, climate change

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1 Introduction

While natural systems have complex interactions that defy our attempts to impose crude jurisdictional and substantive boundaries,[1] any ensuing disturbance to these systems can also defy the ambit of regulatory methods in place. This assertion can easily be demonstrated by ocean acidification. The negative effects of this phenomenon are not the exclusive preserve of any particular regime.[2] Instead, different aspects related to ocean acidification are addressed by a multitude of regimes, creating the risk that the issue may easily become sidelined.

The consequence of anthropogenic CO_2 emissions on the atmosphere has received much attention. Anthropogenic climate change has been the topic of considerable discussion, and simultaneously, denial. The consequence of CO_2 release on the oceans, on the other hand, has had a shorter history of attention and presents another different yet serious problem known as ocean acidification. This phenomenon constitutes a serious threat to the marine environment. There is little to deny about this straightforward chemical process: as the atmospheric concentration of CO_2 rises, the oceans directly assimilate CO_2 and automatically become more acidic.[3]

This paper will consider two questions. The first question is whether the current international regulatory framework can provide adequate protection from the negative effects of ocean acidification. The second question is: if this regulatory framework does not provide adequate protection, what else can be done to better address the issue?

In considering these questions, this paper does three things. First, it will provide an overview of the science of ocean acidification and the effect it has on marine biology and ecosystems. Secondly, it traces the international law and policy applicable to the issue, and examines the extent that these existing mechanisms can adequately address ocean acidification. Finally, this paper provides suggestions about ways international law could provide better protection from the negative effects of the phenomenon.

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[1] R Barnes, 'Fisheries and Marine Biodiversity' in M Fitzmaurice, D M Ong & Panos Merkouris (eds) *Research Handbook on International Environmental Law* (2010) 542, 543.

[2] 'Regime' has been defined as 'a set of rules which apply to a particular place or activity', see: J R Fox, *Dictionary of International and Comparative Law* (1997) 267.

[3] C Nelleman, S Hain & J Alder, *In Dead Water: Merging of Climate Change With Pollution, Over-harvest, and Infestations in the World's Fishing Grounds* (2008) 36.

2 Ocean acidification

Ocean acidification is a recently recognised phenomenon and, like climate change, is the consequence of increased anthropogenic carbon dioxide (CO_2) emissions. It has been defined as 'a reduction in the pH of the ocean over an extended period, typically decades or longer, caused primarily by the uptake of CO_2 from the atmosphere'.[4] It can similarly be explained as a process whereby seawater becomes more acidic, when increasing amounts of anthropocentric CO_2 from the atmosphere dissolve in seawater to create carbonic acid, which releases hydrogen ions.[5] Measured as lower pH, these hydrogen ions increase ocean acidity and reduce calcium carbonate ion saturation.[6] The crucial result of this process is that when water is under-saturated in relation to calcium carbonate, the seawater becomes corrosive and calcifying organisms (organisms that build shells) will become increasingly prone to dissolution.[7]

At present, the global ocean is a major sink for anthropogenic CO_2 emissions. It is estimated that the surface waters of the oceans have taken up about 25 per cent of the carbon generated by anthropogenic activities since 1800,[8] thereby altering seawater chemistry.[9] The basic chemistry of seawater is changing on a scale unobserved within fossil records over at least twenty million years, and it is happening at 'an unprecedented rate not experienced in the last 65 million years'.[10] In its 2007 report, the Intergovernmental Panel on Climate Change (IPCC) noted that the pH of the surface ocean is already 0.1 units lower than in pre-industrial times.[11] The IPCC also stated that, with projected CO_2 rises through this century, ocean pH could decrease by 0.3 to 0.4 units meaning that ocean acidity could increase by 100 to 150 per cent by 2100.[12]

Buck and Folger note that gases, such as CO_2, are generally less soluble

[4] J Gattuso & L Hansson, 'Ocean Acidification: Background and History' in J Gattuso & L Hansson (eds), *Ocean Acidification* (2011) 2.

[5] E H Buck & P Folger, 'Ocean Acidification' in S E Haffhold, *Encyclopedia of Water Pollution* (2011) 1819, 1819–1820.

[6] United Nations Environment Programme, *UNEP Emerging Issues: Environmental Consequences of Ocean Acidification: A Threat to Food Security* (2010) 2.

[7] Secretariat of the Convention on Biological Diversity, *Scientific Synthesis of the Impacts of Ocean Acidification on Marine Biodiversity* (2009) 19.

[8] Gattuso & Hansson, above n 4.

[9] Buck & Folger, above n 5, 1819.

[10] United Nations Environment Programme, above n 6.

[11] Intergovernmental Panel on Climate Change, *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate* Change (2007) 793.

[12] Ibid.

in warm water than in cold water.[13] Consequently, marine waters 'near the poles have a much greater capacity for dissolving CO_2 than do ocean waters in the tropics'.[14] A recent IPCC Workshop similarly observed that waters of high latitude seas will bear the most impact, and that seasonal aragonite under-saturation in 'surface and shallow subsurface waters over the continental shelves has already been observed in the Chukchi and Bering Seas'.[15]

2.1 The effects on marine ecosystems

The effects of ocean acidification are numerous and far-reaching. As more CO_2 dissolves, calcium carbonate skeletons of many ecologically important groups of marine organisms may actually start to dissolve at or near the ocean surface in some parts of the globe.[16]

Ocean acidification is projected to have huge negative effects on corals and other marine organisms that have a skeleton of calcium carbonate.[17] Many marine organisms use calcium carbonate to form shells and skeletons, including 'crustose coralline algae, some phytoplankton, warm—and cold—water corals, and a range of pelagic and benthic invertebrates, from small pelagic swimming snails (pteropods) to lobsters'.[18]

Ocean acidification poses a significant threat to coral reefs. As the world's oceans become less saturated with respect to calcium carbonate over time, corals are expected to experience reduced survival rates and skeletal growth.[19] This increases their vulnerability to bio-erosion and storm damage.[20] Thus habitat quality, diversity, and the loss of coastal protection functions are also reduced.[21] Ocean acidification will also have serious impacts on the development and survival of cold-water corals. Cold-water coral communities are found throughout the world's oceans at between 200 and 1000 metres depth.[22] They

[13] Buck & Folger, above n 5, 1820.
[14] Ibid.
[15] Intergovernmental Panel on Climate Change, *Workshop of the Intergovernmental Panel on Climate Change Workshop on Impacts of Ocean Acidification on Marine Biology and Ecosystems* (2011) 137. Aragonite is a mineral consisting of calcium carbonate.
[16] Buck & Folger, above n 5, 1820.
[17] Secretariat of the Convention on Biological Diversity, above n 12, 30.
[18] Ibid, 32.
[19] Ibid, 37–38.
[20] Ibid, 37–38.
[21] Ibid, 38.
[22] Ibid.

provide habitat and support high biodiversity and fisheries.[23] Being bathed in waters with naturally high levels of CO_2, the conditions inhabited by cold-water corals are often less conducive for calcification.[24] Thus, cold-water coral communities are likely to be the first to experience degradation from increasing ocean acidity.[25] It is predicted that by the end of this century 70 per cent of known cold-water coral will be affected by corrosive water conditions.[26]

Calcified organisms are major constituents of pelagic ecosystems. They occupy the base of the marine food chain, accounting for the majority of the organic carbon used by organisms in mid and deep-water layers of the oceans, and play a vital role in the 'interactions of the surface oceans with the atmosphere, such as in the exchange of CO_2'.[27] Any variations in the functioning of these organisms as a result of ocean acidification could have significant consequences for ecosystem functioning.[28]

Marine fish and marine mammals are also likely to face adverse effects from ocean acidification. In addition to using calcium carbonate for 'strengthening skeletal structures, the use of calcium minerals in gravity sensory organs is widespread among ocean fauna'.[29] When CO_2 levels are raised in seawater, 'dissolved CO_2 more readily diffuses across animal surfaces'.[30] Acidification of the body tissues, known as acidosis, can occur in a matter of hours in fish and invertebrates.[31] This reduces the oxygen carrying capacity of the blood, and is shown to reduce cellular energy and lower respiratory activity.[32]

3 Ecological impacts

The impacts that ocean acidification will have on ocean ecosystems, despite having only recently been the focus of study, are manifold. The loss of numerous

[23] S C Doney *et al*, 'Ocean Acidification: The Other CO_2 Problem' (2009) 1 *Ann R Marine Sci* 169, 177.
[24] Secretariat of the Convention on Biological Diversity, above n 12, 39.
[25] Doney *et al*, above n 23.
[26] Secretariat of the Convention on Biological Diversity, above n 12, 40. Carbonate saturation generally increases with latitude and depth, above n 12, 39.
[27] Ibid, 43.
[28] Ibid.
[29] V J Fabry *et al*, 'Impacts of Ocean Acidification on Marine Fauna and Ecosystem Processes' (2008) 65 *J Marine Sci* 414, 420.
[30] Ibid.
[31] Ibid, 421.
[32] Ibid.

calcifying organisms to ocean acidification will 'alter predator-prey relationships' and the effects will be spread throughout ecosystems.[33] A loss or change in biodiversity could result in significant ecological disruptions. The issue is especially concerning in polar regions, where saturation states of calcium carbonate are naturally low.[34]

As noted earlier, corals will also be particularly vulnerable to the effects of decreasing carbonate saturation states. Consequently, this will negatively affect their 'continued provision of services such as shelter and food for hundreds of associated species, including commercial fish and shellfish'.[35] Similarly, calcifying pteropods are a key food for carnivorous zooplankton and fish in the polar and sub-polar regions.[36] Thus, any decline of pteropod densities will influence the predator-prey relationships of many species, including cod, pollock, haddock and mackerel.[37] This could also result in greater predation on juvenile fish, such as salmon.[38]

Doney and others explain that even small changes in species' reactions will increase over 'successive generations and could drive major reorganisations of planktonic ecosystems'.[39] These issues are further compounded by the fact that ocean acidification is not occurring on its own. This, combined with other stressors such as climate change, invasive species, and overfishing, magnifies the already complex task of assessing the impacts of ocean acidification.

4 Fisheries, food security and livelihood

Demand for fish products is expected to grow in the coming decades. The Food and Agriculture Organisation of the United Nations *(FAO)* notes that considering the expected population increase, an additional '27 million tonnes of production will be needed to maintain the present level of per capita consumption in 2030'.[40] The FAO estimates that 32 per cent of the world's fish stocks are overexploited, depleted, or recovering from depletion.[41] Of even more concern is that 53 per

[33] Secretariat of the Convention on Biological Diversity, above n 12, 49.
[34] Ibid.
[35] Ibid, 50.
[36] Doney *et al*, above n 23, 180.
[37] Secretariat of the Convention on Biological Diversity, above n 12, 51.
[38] Ibid.
[39] Doney *et al*, above n 23, 180.
[40] Food and Agriculture Organisation Fisheries and Aquaculture Department, *The State of World Fisheries and Agriculture* (2010) 69.
[41] Ibid, 35.

cent have been estimated to be fully exploited, and thus, current catches are at or close to their maximum sustainable productions, with no room for further expansion.[42] These facts are of grave concern considering that around the world, already declining fish stocks now face new threats posed by ocean acidification.

Fisheries 'hotspots' such as some upwelling regions, coral reefs, estuaries, and sub-polar regions often supplying the main protein source for coastal communities are particularly susceptible to ocean acidification.[43] Tropical reefs, for example, provide, *inter alia*, habitat and food for an estimated 25 per cent of known marine fish species.[44] It is important that ocean pH remains at a level for coral reefs to persist. Coral reefs provide many ecosystem services that are vital to human society. This includes building materials, reef-based tourism, nursery functions for fisheries, and the welfare associated with the existence of diverse natural ecosystems.[45]

Marine invertebrates increasingly used in aquaculture, such as molluscs and crustaceans, are also prone to the harmful effects of ocean acidification.[46] For example, ocean acidification is likely to affect the early development of oyster embryos, causing a huge impairment for their survival into adulthood.[47]

The UNEP note that molluscs account for eight per cent of the global marine catch, but are increasingly important in the growing aquaculture industry.[48] Similarly, crustaceans such as prawns, crabs and lobsters currently make up seven per cent of global seafood consumption through both wild and aquaculture species.[49] Such invertebrates are often regarded as 'niche luxury foods but also provide significant income for many poor coastal peoples'.[50] As calcification is impaired by increases in ocean acidity, many of these species will be at risk, making them the 'most vulnerable group in the aquaculture sector'.[51]

In sum, any negative impact that increased acidity will have on ocean life will no doubt negatively affect the provision of food, employment and economic activity across the globe. As Turley and Boot concur, the phenomenon has

[42] Ibid.
[43] Intergovernmental Panel on Climate Change, above n 15, 33.
[44] United Nations Environment Programme, above n 6, 6.
[45] Secretariat of the Convention on Biological Diversity, above n 12, 53.
[46] United Nations Environment Programme, above n 6, 7.
[47] H Kurihara, S Kato & A Ishimatsu, 'Effects of Increased Seawater pCO_2 on Early Development of the Oyster *Crassostrea Gigas*' (2007) 1 *Aquatic Bio* 91, 95.
[48] United Nations Environment Programme, above n 6, 8.
[49] Ibid.
[50] Ibid, 5.
[51] Ibid.

the potential for widespread and significant effects that will have an impact on humans.[52]

5 The international law and policy framework

Just as the effects of ocean acidification are far ranging, so too are the forums that may deal with it. The current international legal machinery in place, that could potentially tackle the problem of ocean acidification, consists of an uncoordinated array of multilateral and regional regimes.

In 2008, 155 scientists from 26 countries, through the Monaco Declaration, called for policymakers to act quickly 'to stabilise atmospheric CO_2 at a safe level to avoid not only dangerous climate change but also dangerous ocean acidification'.[53] The responses to ocean acidification by the international community to date have mainly consisted of non-binding calls for cooperation and further research.[54] For example, the UN General Assembly recently expressed concern as to the effects of ocean acidification and associated negative effects on marine organisms.[55] It encouraged an 'increase of national, regional and international efforts to address levels of ocean acidity and the negative impact of such acidity on vulnerable marine ecosystems, particularly coral reefs'.[56]

VanderZwaag and Powers note that, *inter alia,* fragmented legal and institutional arrangements constitute a major challenge that constrains effective protection of the marine environment from land-based activities.[57] Bodansky similarly observes that 'the lack of coordination between different treaty regimes and international organisations creates the potential for conflicts, gaps, and overlapping, inefficient requirements, or what some have referred to as "treaty congestion"'.[58] In relation to this, Weiss observes that with such a considerable number of inter-

[52] C Turley & K Boot, 'The Ocean Acidification Challenges Facing Science and Society' in J Gattuso & L Hansson (eds), *Ocean Acidification* (2011) 249, 268.

[53] Second International Symposium on the Ocean in a High-CO_2 World *Monaco Declaration* (ISOPRESS, October 2008).

[54] GA Res 66/231, 5 April 2012, op para 134.

[55] Ibid, Preamble.

[56] Ibid, op para 134.

[57] D L VanderZwaag & A Powers, 'The Protection of the Marine Environment from Land-Based Pollution and Activities: Gauging the Tides of Global and Regional Governance' (2008) 23 *Int J Marine & Coastal Law* 423, 437.

[58] D Bodansky, *The Art and Craft of International Environmental Law* (2010) 267-268.

national agreements currently in place, there is large potential for inconsistencies in obligations, and the duplication of goals and responsibilities.[59]

Such observations can be highlighted by the problem of ocean acidification. The challenge of arresting the negative effects of the phenomenon exists not only in itself, but also in addressing and navigating the various overlapping international law and policy pertaining to the issue. The climate change regime, various marine pollution regimes, the Convention on Biological Diversity and some regional arrangements could be applied to ocean acidification, albeit at varying levels. These tools are examined below.

5.1 The climate change regime

Ocean acidification is a problem concurrent to climate change, sharing the same root cause of anthropogenic CO_2 emissions. Reduction of CO_2 emissions is the most obvious and effective mitigation strategy for ocean acidification. The consensus amongst scientists is that the smaller the CO_2 buildup the less the likelihood of dire impacts.[60] Thus, the climate regime, comprising the United Nations Framework Convention on Climate Change (*UNFCCC*)[61] and subsequent Kyoto Protocol to the United Nations Framework Convention on Climate Change (*Kyoto Protocol*),[62] appears as the most appropriate mechanism to mitigate ocean acidification.

Owing to the relatively recent scientific understanding of the phenomenon, ocean acidification was not comprehensively addressed in the scientific literature when either the UNFCCC or Kyoto Protocol were negotiated. The climate change regime as it currently stands is not immediately applicable to ocean acidification. Therefore, limits or stabilisation targets for atmospheric CO_2 based on ocean acidification may differ from those based on surface temperature increases and climate change.[63] Thus, some provisions are inconsonant with the prevention of ocean acidification. Nonetheless, there are still some provisions in both the UNFCCC and Kyoto Protocol that could arguably be applied to

[59] E Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Georgetown LJ* 675, 699.

[60] R Eisler, *Oceanic Acidification: A Comprehensive Overview* (2011) 213.

[61] United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (*UNFCCC*).

[62] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 148 (*Kyoto Protocol*).

[63] D E J Currie & K Wowk, 'Climate Change and CO_2 in the Oceans and Global Oceans Governance' (2009) 4 *CCLR* 387, 392.

ocean acidification, despite the texts containing no express reference to the phenomenon.

The UNFCCC was created to address the problem of climate change on a legal basis. Article 2 sets out that the ultimate objective of the UNFCCC, and any subsequent legal instruments adopted such as the Kyoto Protocol, is to achieve the 'stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[64] The definition of climate system includes 'the totality of the atmosphere, hydrosphere, biosphere, geosphere, and their interactions'.[65] As ocean acidification affects the interactions of all these elements of the climate system, and because climate change will have impacts upon the oceans, it seems logical for ocean acidification to be included within the ambit of the definition of 'dangerous anthropogenic interference' in Article 2. In relation to this, Baird, Simons and Stephens note that 'oceans are part of the hydrosphere, marine organisms are part of the biosphere, and atmospheric concentrations of CO_2 are inextricably linked to the process of ocean acidification'.[66]

In determining whether 'dangerous anthropogenic interference'[67] has occurred, the parties may draw upon the work of the Subsidiary Body for Scientific and Technical Advice[68] and the reports of the IPCC.[69] Thus far, ocean acidification has received some attention in the IPCC Fourth Assessment Report in 2007 and significantly more comprehensive attention in the 'IPCC Workshop on Impacts of Ocean Acidification on Marine Biology and Organisms for the IPCC's Fifth Assessment Report', which is not due however, until 2014.[70] 'Dangerous anthropogenic interference' has been translated as an increase in global average temperature above two degrees centigrade.[71] The growing evidence on the perils of ocean acidification may promote recognition of the fact that dangerous anthropogenic interference to the climate system would also constitute a lowering of ocean pH resulting in increased ocean acidity. Nonetheless, ocean acidification

[64] UNFCCC, Art 2.
[65] UNFCCC, Art 1(2).
[66] R Baird, M Simons & T Stephens, 'Ocean Acidification: A Litmus Test for International Law' (2009) 4 *CCLR* 459, 463.
[67] UNFCCC, Art 2.
[68] UNFCCC, Art 9.
[69] Baird, Simons & Stephens, above n 66, 464.
[70] Intergovernmental Panel on Climate Change, *The IPCC's Fifth Assessment Report (AR5) Leaflet: Completion Dates* (March 2012) <www.ipcc.ch> [accessed 30 March 2013].
[71] C Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic J Int L* 1, 6.

is taking on significance within the climate regime at a slow pace.[72]

In recognition of the practical limitations of the UNFCCC, the Kyoto Protocol was adopted to commit parties by setting internationally binding emission reduction targets. The Kyoto Protocol expands on the UNFCCC process by setting quantified emission limits for each of its member states.[73] The Kyoto Protocol also contains a provision that may help in preventing ocean acidification requiring that parties protect and enhance 'sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol'.[74] This could be interpreted as meaning that ocean sinks must be protected from negative impacts, however the word 'enhance' implies that the uptake of CO_2 by the oceans is to be encouraged. Baird, Simons and Stephens are of the opinion that this means that parties must act to enhance the 'passive' absorption of anthropogenic CO_2 into the oceans.[75]

The climate change regime is still far from the ideal forum to effectively deal with ocean acidification. This conclusion is reinforced by Article 2(1)(iv) of the Kyoto Protocol, which requires states to implement policies and measures such as the 'promotion, development and increased use' of, *inter alia*, carbon dioxide sequestration technologies.[76] Thus, the absorption of CO_2 by the oceans is regarded as part of the solution to climate change in the climate regime, rather than as a concurrent problem in its own right. While deliberate CO_2 sequestration into the oceans may be regarded as a solution for climate change, it may instead worsen ocean acidification. The sustainability of such a provision is questionable. The Secretariat of the Convention on Biological Diversity notes that any geo-engineering or macro-engineering activities that intentionally attempt to enhance CO_2 absorption and sequestration in the oceans will exacerbate ocean acidification.[77] One study also observed that all abundant benthic meiofauna experience high mortality near CO_2 disposal sites, shown by higher percentages of dead individuals at the end of the experiment.[78] In addition,

[72] For example, it is mentioned once in the Cancun Agreements in 2010, as part of a footnote, in which it is listed as one of many 'slow onset events' associated with climate change: Conference of Parties, *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010* FCCC/CP/2010/7/Add.1, 15 March 2011, para 25.

[73] Kyoto Protocol, Art 2.

[74] Kyoto Protocol, Art 2(1)(ii); Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3.

[75] Baird, Simons & Stephens, above n 66, 464.

[76] Kyoto Protocol, Art 2(1)(a)(iv).

[77] Secretariat of the Convention on Biological Diversity, above n 12, 27.

[78] J P Barry *et al*, 'Effects of Direct Ocean CO_2 Injection on Deep-Sea Meiofauna' (2004) 60 *J*

opportunities for generating profitable 'carbon offsets' by using as yet unproven ocean fertilisation technologies in an effort to generate algal blooms that might fix more CO_2 in the ocean are being explored by entrepreneurs.[79] Such measures are inconsistent with Article 3(3) of the UNFCCC, which requires that parties take precautionary actions to prevent or minimise climate change causes.[80]

The solution to climate change envisioned by the Kyoto Protocol is that states reduce 'aggregate anthropogenic carbon dioxide equivalent emissions' of greenhouse gases below specified levels, and requiring industrialised states to reduce these emissions to 'at least 5 per cent below 1990 levels'.[81] It accordingly assigns to each industrialised country an amount of allowable greenhouse gas emissions.[82] Such provisions demonstrate an atmospheric focus and are obviously inadequate in preventing ocean acidification. This is because carbon dioxide is not regulated specifically. The implication of aggregating all six of the main greenhouse gases[83] when setting such allowances is that parties to the Kyoto Protocol are still able to increase their CO_2 emissions, so long as they decrease their emissions of other greenhouse gases, such as methane and nitrous oxide.[84] This demonstrates the fact that ocean acidification is not yet a serious concern of the climate change regime.

The threats associated with ocean acidification, while slowly gaining recognition, have not been fully appreciated by the climate regime. The atmospheric focus of the climate regime makes it limited in dealing with ocean acidification. Currie and Wowk note that consideration 'needs to be given to the necessity of regulating CO_2 emissions directly, separate from their radiative forcing effects and their combination with other greenhouse gases'.[85]

Even if ocean acidification was to be expressly recognised within the climate change regime, the benefits of such recognition would still be limited by the regime's general disadvantages. For example, the emissions control system under the Kyoto Protocol does not cover fast-growing countries such as China,

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Oceanography 759, 764.

[79] D Freestone, 'Problems of High Seas Governance' in D Vidas & P J Schei (eds), *World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (2011) 99, 101-102.

[80] UNFCCC, Art 3(3).

[81] Kyoto Protocol, Art 3(1).

[82] Kyoto Protocol, Art 3(7).

[83] Ibid, Annex A, this includes carbon dioxide, methane, nitrous oxide, hydro fluorocarbons, perfluorocarbons, sulphur hexafluoride.

[84] Baird, Simons & Stephens, above n 66, 464.

[85] Currie & Wowk, above n 63, 392.

India and Brazil.[86] Moreover, Burns observes that even if the Kyoto Protocol were fully adhered to by all industrialised nations as originally drafted, which has not 'proven to be the case to date, it would only constitute a very modest down payment on what ultimately must be done to stabilise atmospheric concentrations of greenhouse emissions'.[87] Babiker and others note that keeping within the Kyoto Protocol emission limits, even with the participation of the US, would only reduce temperatures by some 0.5°C by 2100 and both rising global emissions and atmospheric concentrations will continue.[88]

Overall, the response under this regime, to date, is inadequate. This simply owes to the fact that the climate regime, in its current state, has not been tailored to effectively ameliorate the negative effects of ocean acidification.

5.2 Marine pollution regimes

5.2.1 The United Nations Convention on the Law of the Sea

Forming the basis of environmental protection in marine areas within and beyond national jurisdiction is the United Nations Convention on the Law of the Sea (*UNCLOS*).[89] The treaty outlines guidelines, rights and responsibilities relating to utilisation of the oceans including, *inter alia*, boundary delineation,[90] the rights of each coastal state jurisdiction over fishery resources within an exclusive economic zone (EEZ),[91] and dispute settlement.[92] While the issue of ocean acidification affects waters both inside and outside national jurisdiction, it is highly questionable whether it falls within the remit of UNCLOS.

What may constitute pollution of the marine environment is detailed under Article 1 of UNCLOS as follows:

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[86] This is because of issues over the fact that unfair burdens would be placed upon developing states. Additionally, industrialised countries are primarily responsible for the buildup of greenhouse gases, and have greater financial and technological capacity to address the problem, see: K A Baumert, 'Participation of Developing Countries in the International Climate Change Regime: Lessons for the Future' (2006) 38 *Georgetown Washington Int L R* 365, 366.

[87] W C G Burns, 'Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention' (2006) 2 *McGill Int J Sustainable Development L & Policy* 27, 30-31.

[88] M H Babiker *et al*, 'The Evolution of a Climate Regime: Kyoto to Marrakech and Beyond' (2002) 5 *Env Sci & Policy* 195, 202.

[89] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (*UNCLOS*). To date, 165 nations are parties to UNCLOS.

[90] Ibid, Part II.

[91] Ibid, Part V.

[92] Ibid, Part XV.

> [T]he introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects of harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[93]

Doelle notes that the plain wording of this definition suggests that its ultimate objective is to capture a wide array of potential threats to the marine environment.[94] It has been noted that UNCLOS is not a contract that was 'frozen in the time it was negotiated', as such an approach would 'relegate many international treaties to irrelevance soon after they are negotiated'.[95] Indeed, UNCLOS needs to be interpreted in a dynamic way in order for international treaties to be utilised over time.[96] Thus, despite the fact ocean acidification was not recognised during the time UNCLOS was negotiated, it would be illogical to exclude anthropogenic CO_2 emissions from the ambit of this definition—especially given that this is the direct cause of ocean acidification and because of the harmful effects this may have on marine ecosystems.

Part XII of UNCLOS deals with protection and preservation of the marine environment, and establishes a 'general obligation' on states to protect and preserve the marine environment.[97] On evaluating the provisions of Part XII, McConnell and Gold explain that they are not merely a restatement of existing conventional law or practice, but are of constitutional nature, and provide the first 'comprehensive statement of international law on the issue'.[98]

Article 194(1) of UNCLOS specifies obligations by enshrining a duty upon states to 'prevent, reduce and control pollution of the marine environment *from any source*' (emphasis added).[99] CO_2 emissions, being a source of pollution, would accordingly fit within the purview of this obligation. However, as observed by Kunich, this article is weakened by the proviso that states shall make these

[93] UNCLOS, Art 1(1)(4).

[94] M Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention' (2006) 37 *J Ocean Development & Int L* 319, 322.

[95] Ibid.

[96] Ibid.

[97] UNCLOS, Art 192.

[98] M L McConnell & E Gold, 'The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?' (1991) 23 *Case Western Reserve J Int Law* 83, 84.

[99] UNCLOS, Art 194(1).

efforts using the 'best practical means at their disposal' and 'in accordance with their abilities'.[100] The uncertainty of this proviso undermines the ability of the international community to urge for compliance with the UNCLOS provisions. Under Article 194, UNCLOS further specifies an obligation to prevent pollution from spreading to areas outside of a state's jurisdiction of control,[101] so as to not cause damage by pollution to other states and their environment;[102] and an explicit obligation to protect and preserve rare or fragile ecosystems, and the habitat of species at risk.[103] The latter requirement holds particular relevance, as coral reef ecosystems are particularly vulnerable to ocean acidification. The likely effect of such obligations under Article 194 will be that states will use their discretion in determining what are the best means to achieve such obligations at their disposal.[104] While Article 207(4) goes on to provide that states 'endeavour to establish global and regional rules, standards and recommended practices' for the control of land-based pollution.[105] Birnie, Boyle and Redgewell observe the hortatory nature of this wording, particularly the use of the word 'endeavour'.[106] This suggests that the level of commitment by states is voluntary and may vary. Article 207(4) also allows states to take into account 'characteristic regional features, the economic capacity of developing states and their need for economic development'.[107] They further note that such phraseology demonstrates that states wish to commit themselves to weak international regulation, greater liberty for giving preference to other national priorities, and reliance on regional cooperation as the main level at which international action should occur.[108] Overall, Article 207 as is, does not require states to implement strong or effective measures.[109]

Of further applicability to ocean acidification, UNCLOS covers atmospheric pollution, as it imposes a duty on states to 'adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere'.[110] Doelle accepts that this obligates states to 'prevent or control

[100] Ibid. J C Kunich, *Killing Our Oceans Dealing With the Mass Extinction of Marine Life* (2006) 56.
[101] UNCLOS, Art 194(2).
[102] UNCLOS, Art 194(2).
[103] UNCLOS, Art 194(5).
[104] R Zajacek, 'Measures to Protect the Marine Environment' (1996) 3 *JCULR* 64, 75.
[105] UNCLOS, Art 207(4).
[106] P Birnie, A Boyle & C Redgwell, *International Law and the Environment* (2009) 454.
[107] UNCLOS, Art 207(4).
[108] Birnie, Boyle & Redgwell, above n 106, 454.
[109] Ibid.
[110] UNCLOS, Art 212.

pollution from or through any air space over which a state has jurisdiction'.[111] This clause seems to be precisely relevant to the issue of ocean acidification and places an obligation on the shoulders of states to prevent, reduce and control acidification resulting from CO_2 emissions. In achieving this, states are also required to take into account 'internationally agreed rules, standards and recommended practices and procedures'.[112] The parties are required to act through competent organisations or diplomatic conferences to create measures to 'prevent, reduce, and control such pollution'.[113] Given that the UNFCCC is an international body that deals with reducing carbon emissions, and contributing to the protection and preservation of the marine environment by implication, it appears as the most 'competent organisation' in the context of ocean acidification. However the relevance of the UNFCCC in relation to this issue remains uncertain, as noted earlier, the UNFCCC does not specifically acknowledge the potential impacts of ocean acidification on marine ecosystems. Indeed, any gaps left by UNCLOS in relation to ocean acidification, cannot be filled by reference to the climate change regime in its current state.

Based on first impressions, Part XII of UNCLOS appears as a potentially useful avenue for addressing ocean acidification. Closer analysis, however, casts doubt on its efficacy. The problem, as Ong points out, is that UNCLOS 'in itself does not contain concrete marine pollution standards, nor does it purport to substitute for special agreements'.[114] Its drawbacks are that it is weak in indicating precisely what constitutes a violation, and what consequences flow from this as far as liability is concerned.[115] There are questions that remain unaddressed by this governing international legal framework for addressing marine environmental protection issues.[116] These questions make it uncertain whether marine protection afforded by UNCLOS would be sufficient in curbing the negative effects of ocean acidification. In particular:[117]

1. What threshold of harm needs to be established for 'environmental' damage to be proven?

[111] Doelle, above n 94, 323.
[112] UNCLOS, Art 212(1).
[113] UNCLOS, Art 212(3).
[114] D M Ong, 'The 1982 UN Convention on the Law of the Sea and Marine Environmental Protection' in Fitzmaurice, Ong & Merkouris (eds), above n 1, 567, 571.
[115] Ibid.
[116] Ibid, 573.
[117] Ibid.

2. Assuming that responsibility for such harm can be assigned, whether it is to be assigned to a private or public entity (or both); who or what body can in turn claim on behalf of the 'environment'? and,

3. What kind of legal remedies should be made available to address 'environmental' harm?

This leads to uncertainty as to whether a claim could be made against a state that fails to mitigate ocean acidification, and whether its failure to do so would violate its obligations under UNCLOS. Some writers have already explored the possibility of bringing climate change actions under the dispute resolution procedures established within Part XV of UNCLOS, against parties to the Convention.[118] In situations where disputes connected to the interpretation of UNCLOS arise and cannot be resolved through an exchange of view or conciliation,[119] Part XV of UNCLOS provides four options for dispute settlement: the International Tribunal for the Law of the Sea,[120] the International Court of Justice, an arbitral panel or a special arbitral panel.[121] Resorting to methods outside the climate regime may become necessary. As Burns observes that as the presence of climate change is more apparent now than a decade ago, the prospects for 'adequate responses within the UNFCCC framework appear increasingly remote'.[122] Thus, recourse to the Part XV of UNCLOS could be a useful alternative with regards to ocean acidification, in motivating the major carbon emitting states to act to avoid its harmful effects.

One notable issue in bringing a claim would be attributing causation of harm to a specific state. Applied to the issue of ocean acidification, a claim could potentially be brought against a state with both a high financial ability to address the problem and high historical per capita contribution to carbon concentrations in the atmosphere above accepted levels. Doelle suggests other decisive factors include ratification of the Kyoto Protocol, per capita emissions compared to other states, and whether the state is a party to UNCLOS and the UNFCCC.[123] Smith and Shearman observe that the Kyoto Protocol is generally considered by

[118] See generally Doelle, above n 94; Burns, above n 87.
[119] UNCLOS, Art 279-285.
[120] Ibid, Annex VI.
[121] Ibid, Art 287(1).
[122] W C G Burns, 'Potential Causes of Action for Climate Change Impacts under the United Nations Fish Stocks Agreement' in W C G Burns & H M Osofsky (eds), *Adjudicating Climate Change* (2009) 314, 332-333.
[123] Doelle, above n 94, 325.

the international community as the appropriate response to global warming.[124] Therefore, nations that meet their greenhouse gas emission targets under the Protocol arguably have a strong defense to climate change suits based on the fact that they are doing all the international community requires of them.[125] By comparison, suggesting that the Kyoto Protocol would have bearing on a determination of whether a state has taken sufficient action to mitigate ocean acidification would not be an appropriate benchmark to hold states to in regards to ocean acidification. This is simply because the phenomenon is not currently acknowledged under the Kyoto Protocol, thus, there is currently no express standard under international law to hold states to. Under the climate regime, carbon emission reduction goals to specifically mitigate ocean acidification, or even prevent harm to marine environment, have not yet been espoused.

As coral reefs are likely to experience the negative effects of ocean acidification, a claim could hypothetically be made by island states with coral reefs, who have a high vulnerability to ocean acidification, and whose livelihood is dependent on the food, tourism, ecosystem services, and barrier protection provided by coral reefs. Likewise, as polar regions are likely to be the first to experience the negative effects of ocean acidification, citizens of arctic states whose livelihood is dependent on the health of their marine environment could also be considered. A party to UNCLOS pursuing an action based on ocean acidification would face considerable obstacles, however, such as establishing causation. Indeed, establishing a causal link between ocean acidification and damages to marine resources may prove difficult. Burns notes the example of coral reefs, which are exposed to other threats that may also contribute to their degradation, such as terrestrial runoff, disease, and other sources of pollution.[126] Establishing links of this regard could require extensive and expensive research that could go beyond the capacity of smaller and more vulnerable states.[127] Determining the connection between a party's individual carbon emissions and alleged damages may likewise prove difficult. As mentioned earlier, ocean acidification has only recently gained awareness and was not addressed in the scientific literature during the negotiations of the climate change regime. There will always be legal difficulties in attributing blame for activities that were not envisaged as causing harm at the point carried out. However, in deciding whether a party did not take adequate action to mit-

[124] J Smith & D Shearman, *Climate Change Litigation: Analysing the Law, Scientific Evidence and Impacts on the Environment, Health and Property* (2006) 19.
[125] Ibid.
[126] Burns, above n 87, 49.
[127] Ibid, 50.

igate its contribution to ocean acidification, considerations could, as suggested by Doelle in relation to climate change, include 'how much higher the contribution of that country is relative to other countries, how relevant is the capacity to reduce emissions, and the effect of the historical contribution to the problem'.[128]

Another limitation of using UNCLOS to address ocean acidification is that some states have not ratified it. For example, it has not been ratified by the United States, a nation with high per capita greenhouse gas emissions. Thus, the United States is not at risk of being pursued under the UNCLOS tribunal.[129] Furthermore, even if as commentators have supported, the provisions of UNCLOS form part of customary international law,[130] the United States has withdrawn its acceptance of the compulsory jurisdiction of the International Court of Justice. As such, the United States could not be pursued in that forum either for breaches of such law.[131] Thus, jurisdiction may be an additional hurdle.

Moreover, there is the issue of what reparation would be available for environmental harm caused by ocean acidification. It is doubtful whether reparation in the form of monetary compensation would be the most appropriate solution to ocean acidification. There is also *restitutio in integrum*—a commitment to restore a damaged environment to its former state.[132] It is uncertain however, whether this would be a scientifically achievable option with regards to ocean acidification. A small degree of consolation may be offered by the fact that if regimes such as the climate change regime cannot satisfy in providing adequate prevention from the negative effects arising from ocean acidification, there still exists the additional option of recourse to Part XV for states to pursue. Nonetheless, any remedy provided under the dispute resolution procedures under Part XV of UNCLOS is likely to provide a 'reactive' rather than 'preventative' measure to any potential environmental harm caused by ocean acidification.

5.2.2 The dumping regime

While the natural absorption of CO_2 from the atmosphere may potentially fall within the regulatory domain of the climate change regime and UNCLOS, the

[128] Doelle, above n 94, 332.
[129] Ibid.
[130] J M Van Dyke, 'Giving Teeth to the Environmental Obligations in the LOS Convention' in L G Oude Elferink & D R Rothwell (eds), *Ocean Management in the 21st Century: Institutional Frameworks and Responses* (2004) 167.
[131] Burns, above n 87, 45.
[132] Ong, above n 114, 573.

deliberate disposal of carbon wastes in the sea is addressed through the dumping regime. This includes the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (*1972 London Convention*)[133] and the 1996 Protocol to the London Convention (*1996 London Protocol*).[134] The 1996 London Protocol was negotiated to replace the 1972 London Convention. While it has entered into force, the two regimes operate in tandem as it currently has low participation.[135]

Amendments to the 1996 London Protocol were adopted in November 2006 at the First Meeting of Contracting Parties, and were created to permit and regulate the sequestration of CO_2 in sub-seabed geological formations.[136] These amendments were supplemented by 'Specific Guidelines for Assessment of Carbon Dioxide Streams for Disposal into Sub-Seabed Geological Formations'.[137] The guidelines are comprehensive and require that proposals for sub-seabed sequestration undergo thorough assessment and alternative land-based disposal be appropriately considered.[138] One problem with this, as Warner notes, is that while these Guidelines help to prevent the risks of this form of waste disposal at sea, they only apply to the inadequate number of state parties to the 1996 London Protocol, their flag vessels, and activities under their jurisdiction and control.[139] Moreover, the dumping regime can address ocean acidification 'only in so far as it is caused by the dumping of CO_2 wastes at sea'.[140] Consequently, Simons and Stephens observe that this regime 'can only regulate one relatively small potential driver of ocean acidification'.[141]

[133] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, 1046 UNTS 120 (*1972 London Convention*).

[134] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 7 November 1996, 2006 ATS 11 (*1996 London Protocol*).

[135] R Warner, 'Preserving a Balanced Ocean: Regulating Climate Change Mitigation Activities in Marine Areas Beyond National Jurisdiction' (2007) 14 *Aus Int LJ* 99, 111.

[136] IMO, 'New International Rules to Allow Storage of CO_2 under the Seabed' (Press Release, 9 February 2007); IMO, *Resolution on the Amendment to Include CO_2 Sequestration in Sub-Seabed Geological Formations in Annex 1 to the London Protocol*, IMO Res LP.1(1), 2 November 2006.

[137] IMO, *Specific Guidelines for Assessment of Carbon Dioxide Streams for Disposal into Sub-Seabed Geological Formations*, IMO Doc. LC 29/4, November 2007.

[138] Ibid, paras 3–4.

[139] Warner, above n 135, 114. To date 41 nations are parties to the 1996 London Protocol, International Maritime Organisation, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organisation or its Secretary-General Performs Depository or Other Functions* (2012) 500.

[140] M Simons & T Stephens, 'Ocean Acidification: Addressing the Other CO_2 Problem' (2009) 12 *Asia Pacific J Env L* 1, 11.

[141] Ibid, 10.

5.2.3 The 1995 Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities

Ocean acidification largely results from human activity, particularly fossil fuel burning that occurs on land. It would therefore seem reasonable to consider the main international initiative that addresses pollution from land-based activities: the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (*GPA*), adopted by 108 states and the European Commission in 1995.[142] The GPA is not legally binding. It consists of various non-binding (or 'soft') global obligations for land-based marine pollution and activities. It has been created as a 'source of conceptual and practical guidance' to be utilised by national and regional authorities in establishing measures to 'prevent, reduce, control and eliminate marine degradation from land-based activities'.[143] The reason why a binding global treaty was not adopted is that it was believed that the issues were of a regional rather than global nature and that regional differences made a common international approach difficult.[144] Many countries saw stronger international regulation as an intrusion in national matters.[145] Thus, the GPA was designed more as a tool of assistance.

Under the GPA, states are urged to establish national programmes of action to prevent degradation of the marine environment from land-based pollution.[146] The GPA would presumably have a responsibility in facilitating national programmes of action with regard to circumventing ocean acidification; owing to the fact ocean acidification is a type of marine degradation caused by the emission of anthropogenic CO_2—a primarily land-based activity. Chapter V of the GPA puts forward that states set specific targets in relation to nine major sources of concern, including 'sewage, persistent organic pollutants, radioactive substances, heavy metals, oils, nutrients, sediment mobilization, litter and physical alterations'.[147] Nonetheless, carbon emissions currently fall outside of these categories of contaminants acknowledged by the GPA.

VanderZwaag and Powers have similarly observed that the role of the GPA in dealing with 'climate change impacts on coastal and freshwater ecosystems

[142] United Nations Environment Programme, *Global Programme of Action for the Protection of the Marine Environment from Land-based Activities,* UNEP(OCA)/LBA/IG.2/7, 5 December 1995 (*GPA*).
[143] Ibid, para 14.
[144] Birnie, Boyle & Redgwell, above n 106, 465.
[145] Ibid.
[146] GPA, para 19.
[147] Ibid, paras 21(b)-21(c).

remains uncertain'.[148] The UNFCCC is noted under the GPA as a global convention that elaborates upon 'the duty of States to preserve and protect the marine environment'.[149] Atmospheric deposition from transportation, power plants and industrial facilities are also mentioned as a source of degradation,[150] however the GPA does not elucidate what the constituents of such atmospheric deposition are. The GPA is essentially silent on both climate change and ocean acidification. The Beijing Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (*Beijing Declaration*)[151] in 2006 did, nonetheless, acknowledge the vulnerabilities of coastal and island communities to the 'effects on the marine environment of ocean acidification resulting from land-based activities'.[152] However, despite acknowledgement of this, the GPA still has not been revised to have a major role in the issue of ocean acidification. Moreover, the mention of the UNFCCC as a convention that includes principles and approaches that elaborate on the prevention of the degradation of the marine environment[153] suggests that the GPA is leaving the regulation of greenhouse gas emissions to be addressed in the forum of the climate change regime.

Regardless of the fact that carbon emissions fall outside of the nine source categories of land-based marine pollutants, and thus the current major purview of the GPA, the regime is fraught with its own limitations. In particular, the 'soft law' nature of the document,[154] that consequently allows states to retain complete control over the degree of commitment. Moreover, the GPA lacks detailed and enforceable pollution standards,[155] and since its inception, it has struggled to mobilise financial resources to help implement national and regional programmes.[156] Thus, the GPA may not be the most appropriate avenue in which to address the serious impacts of ocean acidification. Because ocean acidification poses a significant issue to global oceans, and as there is already reluctance by

[148] VanderZwaag & Powers, above n 57, at 439.
[149] GPA, para 7.
[150] Ibid, para 21(d)(iii).
[151] United Nations Environment Programme, *Report of the Second Session of the Intergovernmental Review Meeting on the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities*, UNEP/GPA/IGR.2/7, 23 October 2006, Annex V (*Beijing Declaration*).
[152] Ibid, Preamble.
[153] United Nations Environment Programme, above n 142, para 7.
[154] VanderZwaag & Powers, above n 57, 441.
[155] Ibid.
[156] Ibid, 439–440.

states to reduce carbon emissions, it is thus submitted that hard law must form the basis of any solution.

5.3 The Convention on Biological Diversity

A traversal of the main legal instruments addressing the issue of ocean acidification would not be complete without mention of the United Nations Convention on Biological Diversity (*CBD*).[157] Indeed, a wide range of marine organisms and ecosystems are vulnerable to the phenomenon. Oceans cover the majority of the earth's surface and consequently, this phenomenon poses a significant threat to marine biodiversity.

The CBD is the main international agreement that governs biodiversity issues. The aims of the CBD include conserving biological diversity, sustainable use, and fair and equitable sharing of the benefits arising from the use of genetic resources.[158] The CBD expressly includes 'marine and other aquatic ecosystems and the ecological complexes of which they are part' in its definition of biological diversity to be conserved under the Convention.[159] The CBD also contains precautionary undertones, for example, the Preamble provides:

> [T]hat where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.[160]

A lack of full scientific certainty cannot be used as a reason for failing to take suitable action to safeguard biodiversity from the negative effects of ocean acidification. The CBD also directs each party to identify processes and types of activities that have, or are likely to have, major adverse consequences on the conservation and sustainable use of biological diversity, and to monitor their effects.[161] Article 14 also states that notification, consultation, and the exchange of information on activities under their jurisdiction or control 'which are likely to significantly affect adversely the biological diversity of other states

[157] Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (*CBD*).
[158] CBD, Art 1.
[159] Ibid, Art 2.
[160] Ibid, Preamble.
[161] Ibid, Art 7.

or areas beyond the limits of national jurisdiction' are encouraged through the establishment of bilateral, regional and multilateral agreements.[162]

There are an impressive 193 parties to the CBD.[163] Many of the major carbon emitting participants such as China and the European Union are parties to the CBD.[164] This is relevant as, for example, while developing states in transition who have high carbon emissions may evade the emissions control system set out under the climate regime, they still have duties to protect and conserve the marine environment, and thus to avoid ocean acidification under the CBD. This demonstrates that while the myriad regimes relating to ocean acidification may create inefficiencies, they can, on the other hand, supplement and reinforce one another.

Concerns were raised about the impacts of ocean acidification at the Ninth Meeting of the Conference of Parties (*COP*) to the CBD in 2008, leading to a decision to be adopted regarding the phenomenon.[165] This included a request of the Executive Secretary to collect and combine available scientific information on ocean acidification and its consequences on marine biological diversity and habitats.[166] In direct response to this request a Scientific Synthesis of the Impacts of Ocean Acidification on Marine Biodiversity was prepared.[167] This demonstrates that ocean acidification is indeed gaining deserved attention under the CBD.

Another important decision in relation to ocean acidification occurred at the Tenth Meeting of the Conference of Parties to the CBD in 2010. It was requested that the Executive Secretary collaborate with the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization *(UNESCO),* the Food and Agriculture Organisation, the Secretariat of the UNFCCC, the World Conservation Monitoring Centre of the United Nations Environment Programme, the International Coral Reef Initiative, Ramsar Convention, the Arctic Council, and other relevant organisations and

[162] Ibid, Art 14(c).

[163] UN Secretariat, '*Chapter XXVII:8 Convention on Biological Diversity*', Multilateral Treaties Deposited with the Secretary-General, United Nations Treaty Collection <http://un.treaties.org> [accessed 30 March 2013].

[164] The United States is signatory to both the Kyoto Protocol and the CBD but is not a party to either agreement.

[165] Conference of Parties, *Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Ninth Meeting: IX/20 Marine and Coastal Biodiversity*, UNEP/CBD/COP/9/29, May 2008, 114, para 4.

[166] Ibid.

[167] Secretariat of the Convention on Biological Diversity, above n 12.

scientific groups.[168] This was in order to develop a series of joint expert review procedures to monitor and assess the effects of ocean acidification on marine and coastal biological diversity.[169] This would accordingly highlight the importance of the issue to parties, other governments and organisations.[170] This represents a positive step in achieving integration and coordination with regards to the many existing regimes that are related to the matter.

Parties were also 'invited' in accordance with internal circumstances and priorities, to consider the following guidance on conserving and restoring biodiversity and ecosystem services while contributing to climate-change mitigation:

> Identify, monitor and address the impacts of climate change and ocean acidification on biodiversity and ecosystem services, and assess the future risks for biodiversity and the provision of ecosystem services using the latest available vulnerability and impact assessment frameworks and guidelines.[171]

This work by the CBD parties is laudable. However, it is limited by the fact that any decisions made regarding the mitigation of ocean acidification are ultimately reliant on voluntary compliance by states. The CBD cannot regulate the impacts of ocean acidification by any enforceable means, as the CBD does not grant the power to legally bind the contracting parties to the COP.[172] Likewise, Simons and Stephens note that it is doubtful whether any of the provisions of the CBD 'could be used to impose a clearly-defined obligation on states parties to limit their CO_2 emissions by reference to the impact of these emissions on acidity levels in the oceans'.[173]

In summary, there are numerous provisions in widely-accepted regimes that deal with protecting the marine environment. The regime that appears to bear a strong level of applicability to curbing the negative consequences of ocean acidification is the climate change regime. Although it does not expressly

[168] Conference of Parties, *Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting: X/29 Marine and Coastal Biodiversity,* UNEP/CBD/COP/DEC/X/29, October 2010, 229, para 66.

[169] Ibid.

[170] Ibid.

[171] Conference of Parties, *Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting: X/33 Biodiversity and Climate Change* UNEP/CBD/COP/DEC/X/33, October 2010, 271, para 8(a).

[172] A Proelss & M Krivickaite, 'Marine Biodiversity and Climate Change' (2009) 4 *CCLR* 437, 440.

[173] Simons & Stephens, above n 140, 17.

refer to ocean acidification, any reductions in CO_2 instigated by the climate regime, as currently worded, will inadvertently help to reduce ocean acidity. Nonetheless, ocean acidification is not explicitly recognised under this regime, and no stabilisation targets to mitigate the problem have been set.

While it is clear that the provisions set out under the various regimes may be employed to deal with ocean acidification, such provisions are insufficient without clear recognition of the problem. Existing regimes may tangentially, rather than fully, address ocean acidification, leaving the issue in a precarious position.

6 Future directions

While the various regimes examined do provide some, albeit uncertain, degree of protection from the negative effects of ocean acidification, there is much more that needs to be achieved in terms of developing a coherent solution to the problem. Lamirande suggests that an international treaty that specifically addresses ocean acidification is needed,[174] as current international agreements do not contain strict enough requirements for achieving necessary results.[175] The author also argues that unlike the climate change regime, a treaty on ocean acidification would clarify 'the expectations of each country in limiting and reducing its amount of [greenhouse gas] emissions overall'.[176]

While the adoption of a new international treaty appears as an obvious and appropriate solution, it could nevertheless add further complexity, as there a variety of regimes that some commentators have described as 'more or less fixtures in international law'[177] already exist. Accordingly, there is no 'clean slate'[178] in which to draw up a new treaty. Instead, the task should lie in strengthening existing regimes. A sense of integration and coordination amongst existing regimes needs to be achieved. In relation to this, Baird, Simons and Stephens note that the solution lies in the complicated task of 'ensuring that existing regimes are modified where necessary to embrace ocean acidification as a regime focus'.[179]

[174] H Lamirande, 'From Sea to Carbon Cesspool: Preventing the World's Marine Ecosystems from Falling Victim to Ocean Acidification' (2011) 34 *Suffolk Transnat'l LR* 183, 205.
[175] Ibid, 207.
[176] Ibid, 209.
[177] Baird, Simons & Stephens, above n 66, 463.
[178] Ibid.
[179] Ibid, 471.

In navigating the various regimes that could be applied to ocean acidification, it is clear that there are various avenues that could be further modified to address the phenomenon. Adding to the problem is the 'treaty congestion' that already poses as major detraction, and which Weiss also observes, creates extra burdens at the national level in implementing international agreements.[180] Nations require sufficient political, administrative, and economic capacity in order to successfully implement agreements.[181] Thus, negotiating a new convention may add to this 'congestion', create an unnecessary duplication of responsibilities, and effectively prove to be an inappropriate solution.

Ultimately, it makes sense that the solution falls under the focus of one arrangement. This leads to the question: which arrangement is the most appropriate for dealing with ocean acidification? As the reduction of CO_2 emissions, the major contributor of ocean acidification, is already the goal of the climate change regime, it is therefore put forward that this is the most appropriate forum for dealing with the phenomenon.

6.1 Killing two birds with one stone: addressing ocean acidification under the UNFCCC?

While ocean acidification is largely a marine issue, dealing with the problem of ocean acidification under UNCLOS may not be the most appropriate measure as no unequivocal marine pollution standard has been expressed under this regime. As mentioned earlier, potential ocean acidification harms might give rise to action under UNCLOS. This however provides a reactive approach, when a preventative approach is more appropriate and may be better provided for under the UNFCCC.[182]

Reducing and reversing the impacts of acidification could occur under the UNFCCC, as this convention addresses the root cause of the problem. States must commit to marked CO_2 reductions, and the UNFCCC is the appropriate forum to put forward such a request. Placing the issue under the remit of the UNFCCC would allow states to delineate precisely what each party is expected to do to reduce the negative effects of ocean acidification. This is especially important, since the current mechanisms in place lack an overarching directing factor. Support for such a proposal has already been expressed in an inter-agency

[180] Weiss, above n 59, 701.
[181] Ibid, 701-702.
[182] UNFCCC, Art 2.

report for the preparation of the UN Conference on Sustainable Development (Rio+20) in June 2012:

> [UNFCCC] negotiations must consider not only the effect of increased levels of atmospheric carbon dioxide on the radiation balance of Earth but the negative impacts on ocean chemistry and ecosystems. Results of above 'tipping point' analyses should inform the setting of aggressive targets and schedules for [greenhouse gas] reduction through shifts to low carbon energy production.[183]

The UNFCCC allows for the establishment of ongoing regulatory processes, through the establishment of the COP to evaluation of the implementation of the UNFCCC and any associated instruments that the COP may adopt.[184] Of notable relevance, the UNFCCC also requires the COP to:

> Periodically examine the obligations of the parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the *evolution of scientific and technological knowledge*.[185]

Indeed, scientific knowledge has evolved and ocean acidification is gaining increasing understanding within the IPCC.[186] It is therefore reasonable to expect that the climate change regime would be modified to reflect this knowledge. Ocean acidification is a new challenge, and also a new facet of the problem of atmospheric pollution.

Issues remain within the climate change regime that would need to be addressed for it to adequately deal with acidification. These include:

1. ocean acidification is not expressly mentioned under the climate change regime;

2. accordingly, no specific carbon reduction target has been set for states to achieve in order to counteract the phenomenon;

[183] Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific, and Cultural Organisation, International Maritime Organization, Food and Agriculture Organization & United Nations Development Programme, *A Blueprint for Ocean and Coastal Sustainability* (2011) 32.

[184] UNFCCC, Art 7(2).

[185] Ibid, Art 7(2)(a) (empahasis added).

[186] Intergovernmental Panel on Climate Change, above n 15.

3. the climate change regime encourages of the 'promotion, development and increased use' of questionable carbon dioxide sequestration technologies,[187] such as ocean fertilisation;

4. the aggregation of the six greenhouse gases, allowing states to trade off greater reductions in some gases against lesser reductions in others,[188] which allows the level of carbon emissions to stay the same or increase so long as other greenhouse gas levels are decreased.

Rather than adopting a new treaty on the issue, a new protocol to the UNFCCC could be adopted as a useful means to address the aforementioned issues.[189] A new protocol is particularly essential since the first commitment period of the Kyoto Protocol ended in 2012. Accordingly, a new framework is required to be negotiated and ratified that can bring the emission reductions that the IPCC has indicated are needed. This would also provide a timely opportunity to incorporate ocean acidification within this protocol. Article 17 of the UNFCCC provides that the COP may, as they have done for the Kyoto Protocol, at 'any ordinary session, adopt protocols to the Convention'.[190] The inclusion of such a provision highlights a sense of dynamism of the UNFCCC, and that it can respond flexibly to new knowledge and problems.

While extensive negotiations will no doubt be required, a new protocol can reap the benefits of following the UNFCCC and the useful tools and institutional machinery it has already established, for example, its decision-making processes, the IPCC, and its forum for ongoing discussion and negotiation. As Bodansky observes:

> The framework convention-protocol approach allows states to address a problem in a step-by-step manner, rather than all at once. States tend to be willing to join a framework convention because it does not contain stringent obligations. As a result, they can begin to address a problem without waiting for a consensus to emerge on appropriate response measures.[191]

[187] Kyoto Protocol, Art 2(1)(a)(iv).
[188] Ibid, Art 3(1).
[189] This follows what some authors have described as, the 'framework convention-protocol approach', see: Bodansky, above n 58; G Ulfstein, 'International Framework for Environmental Decision-Making' in Fitzmaurice, Ong & Merkouris (eds), above n 1, 26, 31.
[190] UNFCCC, Art 17.
[191] Bodansky, above n 58, 186.

Ideally, a new protocol to the UNFCCC could introduce and define ocean acidification, acknowledge the harmful effects that rising ocean acidity has on marine life and water quality, and specify precise reduction targets for carbon emissions for states to achieve in order to mitigate these effects. Moreover, the new protocol would need to set out strategies for dealing with both ocean acidification and climate change, thus having the dual benefit of mitigating both of these phenomena. It could furthermore provide the architecture to guide existing regimes that touch upon ocean acidification, and also make recognition of its relationship with other regimes. As mentioned earlier, if a state were to bring a claim under Part XV of UNCLOS for climate change damages, the UNFCCC and Kyoto Protocol may have bearing in an overall decision of whether a state has taken sufficient measures to mitigate climate change.[192] By comparison, these treaties may not factor in an overall determination of whether a state has taken adequate measures to mitigate ocean acidification. However, if there were a new protocol that addresses ocean acidification, an express standard under international law to hold states to would then exist. Accordingly, it could be utilised as a criterion to assess the extent of a particular state's commitment to mitigating ocean acidification, if a claim were brought against them under UNCLOS.

With concerns surrounding carbon sequestration technologies in mind, it is submitted that a new protocol must urge states to take a precautionary approach, rather than explicitly encouraging the use of such technologies. The UNFCCC notes that '[p]arties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects'.[193] A new protocol could contain similar phraseology, however with the inclusion of the words 'causes of ocean acidification'.

A new protocol to the UNFCCC needs to be geared towards mitigating the negative effects of ocean acidification, as well as climate change. It is essential that stabilisation targets for atmospheric CO_2 based on ocean acidification be clearly defined in such a protocol, so that the phenomenon does not remain a peripheral concern. Scientists have already noted that atmospheric CO_2 should be stabilised somewhere around 450 parts per million by volume or below in order to avoid the risk of large-scale disruptions in marine ecosystems.[194] Setting out targets in relation to this will provide greater certainty about what needs to be achieved

[192] Doelle, above n 94, 326.

[193] UNFCCC, Art 3(3).

[194] F Joos et al, 'Impact of Climate Change Mitigation on Ocean Acidification Projections' in J Gattuso & L Hansson (eds), *Ocean Acidification* (2011) 272, 288.

by states. The UNFCCC provides the critical forum in which to establish these targets and to reinforce the need to reduce carbon emissions to prevent severe damage from ocean acidification.

In sum, a new protocol to address ocean acidification under the UNFCCC seems the most cogent step to take. The recommendations outlined above have been kept relatively general and no precise stabilisation targets have been clearly detailed. This is because this proposal obviously warrants further research and discussion on how to effectively prevent the negative effects of ocean acidification. Whatever regulatory path the international community decides to take, through a new protocol, the drafting of a new convention or the strengthening of existing regimes, increased actions are required to mitigate the threats that ocean acidification poses. The negative effects of ocean acidification are far too grave to be dealt with under the existing international law and policy framework.

7 Conclusion

This article has described the process and problems associated with ocean acidification. It has shown that the international law and policy applicable to the issue is incomplete and leaves uncertainty as to exactly how ocean acidification is to be prevented.

Returning to the beginning of this article, two important questions were asked. The first question was whether the current international regulatory framework provides adequate protection from the negative effects of ocean acidification. In light of the issues raised and conclusions drawn in Part III, the answer to this is that it does so only marginally. This is because ocean acidification still remains a peripheral concern across the different regimes, and thus, may lead to suboptimal environmental protection. While there is certainly a breadth of regulatory instruments that touch on the issue, they lack the necessary depth to adequately address it. The second question was whether, if these do not provide adequate protection, what else could be done to better address the issue. This paper has put forward that a new protocol under the UNFCCC, with a dedicated focus on ocean acidification, would be the most appropriate step.

Reduction targets for CO_2 emissions need to be clearly set in a new protocol under the UNFCCC, to ensure that states understand precisely what is required of them in order to circumvent the negative consequences of ocean acidification. Such a protocol, with a parallel focus on both ocean acidification and climate

change would provide an appropriate setting to adopt such targets. It would provide a crucial step that should be taken to break away from the 'treaty congestion', and to ensure that the burning issue of ocean acidification does not become lost amongst a sea of regimes.

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Lions under the Throne: the Constitutional Implications of the Debate on Prisoner Enfranchisement

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Abstract

This article considers the constitutional implications of the tenor of the enduring debate on the United Kingdom's compliance with the ruling of the European Court of Human Rights (*ECtHR*) in *Hirst v United Kingdom (No. 2)* [2005] ECtHR 74025/01. Discussion of the enfranchisement of prisoners has been characterised by parliamentary reluctance to engage with the nexus between law and politics, and a strong tendency for concerns about the ECtHR to spill over into reckless denigration of the legal sphere as a whole. As such, the tone of debate on this high-profile issue is liable to erode mutual respect between the legislature and the courts, and to diminish the perceived legitimacy of the legal system. In a nation with an uncodified constitution, the effect of such erosion should not be underestimated. The true danger of the *Hirst* debate, this article contends, is that continued non-compliance will entrench mistrust of law, the rule of law and the judiciary, thereby allowing concerns about the Strasbourg court not only to undermine the UK's international standing, but also to destabilise the constitutional balance closer to home.

Keywords

Prisoner enfranchisement, ECHR compliance, Parliamentary sovereignty, rule of law

In *Hirst v United Kingdom (No 2)*[1] (*Hirst*), the European Court of Human Rights (*ECtHR*) determined that UK legislation rendering the vast majority of prisoners legally incapable of voting was incompatible with the European Convention on

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[1] *Hirst v United Kingdom (No 2)* [2005] ECtHR 74025/01.

Human Rights *(ECHR)*.[2] It might have been expected that the UK, commanding an impressive record of compliance with ECtHR judgments, would have passed legislation to bring the provision in question within the bounds of acceptability outlined in *Hirst* without delay.[3] Yet seven years later, the offending legislation remains on the statute books. Parliament, as it made clear in a vote in February 2011, is staunchly against compliance with the Strasbourg judgment.[4] The legislature is largely opposed to the enfranchisement of prisoners but—crucially—is also of the opinion that 'legislative decisions of this nature should be a matter for democratically-elected lawmakers'.[5] As Gary Streeter MP put it, with only a dash of polemic, '[t]his matter is not really about whether prisoners in this country have the right to vote, but about whether this House has the right to make its own laws for its own people'.[6]

Parliamentary debate and media commentary have largely reduced the *Hirst* question to a battle between the political and the legal. The rule of law, we are told, demands compliance with the Strasbourg judgment, while parliamentary sovereignty dictates that to comply would be to sacrifice the autonomy of the legislature. Parliamentary sovereignty and the rule of law—and politics and law by extension—are pitted against each other as natural enemies. However, this framework of opposition is not only a misrepresentation of, but is also potentially damaging to, the delicate balance of the constitution. Parliamentary sovereignty and the rule of law should not be regarded as rivals vying for pre-eminence. Rather, they operate within a framework of fruitful tension characterised by mutual respect and underpinned by the perceived legitimacy of the executive, legislature and judiciary. It is this mutual respect and perceived legitimacy, so crucial to the stability of the constitution, which the *Hirst* debate threatens to seriously undermine.

This study will unpick the dichotomy which has characterised the debate thus far and advocate compliance with *Hirst* on two interconnected grounds.

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[2] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

[3] For UK compliance records see Equality and Human Rights Commission, 'Research report 83: The UK and the European Court of Human Rights', 143-5 <http://www.equalityhumanrights.com/uploaded_files/research/83._european_court_of_human_rights.pdf> [accessed 1 March 2013].

[4] House of Commons Debates, 10 February 2011, col 584 <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0001.htm#11021059000001> [accessed 1 March 2013]. The motion was passed 234 to 22.

[5] Ibid, col 493.

[6] Ibid, col 505.

First, when the unhelpful political/legal dichotomy is removed, popular arguments against compliance lose their standing and rights-based arguments for enfranchisement prevail. Secondly, compliance would mitigate the constitutional damage already done by the tenor of parliamentary discussion of this issue. Compliance, of course, poses its own legal questions, and this study will conclude by considering the different potential models of compliance in the light of ECtHR judgments, the substantive question and Parliament's wider concerns about the ECtHR.

1 The current situation

The legal provision at the heart of the furore is section 3 of the Representation of the Peoples Act 1983 (UK):

> 1. A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election.

This legislation was challenged when a convicted prisoner sued the UK for denying him the vote. Having failed in the High Court, where the legislation was held to be a legitimate and proportionate interference with the right to vote,[7] John Hirst proceeded to Strasbourg. At the ECtHR, he argued on the basis of a violation of his rights under Articles 10 and 14 of the ECHR and Article 3 of Protocol No 1,[8] claiming just satisfaction under Article 41 of the ECHR. The Grand Chamber held that the right to vote is 'not a privilege' and that therefore 'the presumption in a democratic State must be one of inclusion', but that the right was not absolute and that contracting states must be allowed a margin of appreciation.[9] As the UK ban was deemed 'general, automatic and indiscriminate', it was held to fall outside this margin and violate Article 3 of Protocol No 1,[10] which requires 'free elections at reasonable intervals by secret

[7] *R v Secretary of State for the Home Department, Ex parte Pearson and Martinez; Hirst v Attorney-General* [2001] EWHC Admin 239.

[8] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, 213 UNTS 262.

[9] *Hirst*, above n 1, paras 59-60.

[10] Ibid, para 82.

ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

As the UK has a treaty obligation 'to abide by the final judgment' of the ECtHR in any decision to which it is a party,[11] one might have assumed that there would be little to report from this point; the UK would simply introduce amending legislation without delay. In this exceptional case, however, Parliament has refused to comply. The legislature does not want to enfranchise prisoners and asserts that the ECtHR cannot force its hand. The Court of Appeal in *R (Chester) v Secretary of State for Justice and Another* has held that it is not the business of domestic courts to intervene in these 'delicate and difficult' choices, on the basis that the decision 'is a political responsibility and that is where it should remain'.[12]

On Thursday 10 February 2011, a House of Commons majority passed the following motion proposed by David Davis MP:

> That this House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand.[13]

In November 2012, following much debate on and criticism of the above position, Chris Grayling presented the Voting Eligibility (Prisoners) Draft Bill. This draft bill contains three options: first, a ban for prisoners sentenced to four years or more; secondly, a ban for prisoners sentenced to more than six months; and finally, a restatement of the existing ban. Though proposals have been brought forward there remains much work to be done; the tone of the presentation of the bill can at best be described as grudging, and the government itself is 'unable to say' that the third of the proposed options is ECHR-compliant.[14] Unless and

[11] ECHR, Art 46.

[12] *R (Chester) v Secretary of State for Justice and another* [2011] 1 WLR 1436, para 35 (Laws LJ).

[13] House of Commons Debates, above n 4, col 493.

[14] Explanatory Notes to the Voting Eligibility (Prisoners) Draft Bill, para 88 <http://www.justice.gov.uk/downloads/legislation/bills-acts/voting-eligibility-prisoners/voting-eligibility-prisoners-command-paper.pdf> [accessed 5 May 2013].

until appropriate proposals are enacted, the UK remains in direct defiance of an ECtHR ruling and in breach of Article 46 of the ECHR.

2 Parliamentary sovereignty and the rule of law: a dichotomy reconsidered

Introducing his motion to the House of Commons, David Davis MP claimed it would give Parliament 'the right to assert its own right to make a decision on something of very great democratic importance'.[15] As the debate progressed claims of such importance were repeated many times over, but, as Dr Ed Bates has observed, 'there was very little by way of a mature debate on the merits and demits of prisoner voting'.[16] Nor was there considered debate on the constitutional issue; concepts such as the rule of law and parliamentary sovereignty were regularly invoked with little or no pause to consider their actual meaning or significance. The loudest voices were in staunch defence of parliamentary sovereignty and vehemently opposed to the interference of a 'kangaroo court'.[17] A dissenting few argued that 'we who believe in the rule of law … cannot allow a precedent to be created whereby it is okay to pick and choose which laws we obey'.[18] This juxtaposition has characterised not only debate in the Commons, but the entire discussion of *Hirst*. The media has largely followed the lead of politicians, either championing the rule of law or declaring that 'Euro judges trample UK sovereignty'.[19]

It is ironic that this crude juxtaposition has been so energetically perpetuated when the *Hirst* debate acutely demonstrates the connection between law and politics. A case such as this, where failure to comply with a legal judgment 'sounds at the political level',[20] is a potent reminder that legal decisions are often only complied with because of political impetus and that law itself is only respected because it commands political legitimacy. Indeed, interrelation between the

[15] House of Commons Debates, above n 4, col 493.

[16] E Bates, 'Is the Attorney General right on prisoner votes and subsidiarity?', *UK Human Rights Blog*, 27 October 2011, <http://ukhumanrightsblog.com/2011/10/27/is-the-attorney-general-right-on-prisoner-votes-and-subsidiarity-dr-ed-bates/> [accessed 1 March 2013].

[17] House of Commons Debates, above n 4, col 537 (Phillip Hollobone MP).

[18] Ibid, col 562 (Nick Boles MP).

[19] J Slack, 'Euro judges trample UK sovereignty and insist: You WILL give prisoners the vote', *Daily Mail*, 13 April 2011, <http://www.dailymail.co.uk/news/article-1376350/Prisoner-vote-ban-Euro-judges-trample-UK-sovereignty-dismiss-appeal.html> [accessed 1 March 2013].

[20] *R (Chester) v Secretary of State for Justice and another* [2011] 1 WLR 1436, para 27.

legal and the political lies at the heart of the constitution. As Tom Hickman has noted, the 'subtle and important core' of Dicey's constitutionalism, and the feature which endures to the present day, is 'the way that the branches *interact*',[21] accommodating both society's long-term values and its shorter-term needs. This interaction is facilitated by fruitful tension characterised by mutual respect and not hostile opposition.

When we remove the 'mystical law-politics distinction which elevates law to a suprapolitical plane',[22] the *Hirst* question can be illuminated by a fuller understanding of the true political context. It is clear from the briefest of scans of Hansard that the main source of discontent with *Hirst* is serious concern about the ECtHR, which many consider to be ill-equipped to carry out its role, overwhelmed by its task and—most crucially—overstepping its jurisdiction. One of the main qualms with *Hirst* is the ECtHR's use of the margin of appreciation doctrine, which guarantees states some room for manoeuvre on politically sensitive issues. A vocal critic of the ECtHR's use of the doctrine is Lord Hoffmann, who has argued extra-judicially that:

> [T]he Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States.[23]

Though it is largely uncontroversial that it would be inappropriate for the ECtHR to impose one international standard in these politically and culturally sensitive matters, the question of how widely the margin should be drawn is highly contentious and understandably so. Such concerns are vitally important, and to ignore them is to short-circuit the *Hirst* question.

The real issue at hand, then, is how to give voice to Parliament's concerns about the ECtHR. This question is illuminated by a closer look at the views of Lord Hoffmann. Though his words have been quoted by many arguing for non-compliance, he instead speaks of hope for renegotiation:

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[21] T Hickman, *Public Law after the Human Rights Act* (2010) 81.

[22] D Nicol, 'Law and politics after the Human Rights Act' (2006) *Public Law* 722, 745.

[23] Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009, para 27, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf> [accessed 1 March 2013].

> At some time the Member States of the Council of Europe will have to sit down and decide upon its future. When they do, I hope they will give more serious thought than they did in 1950 to what exactly it is supposed to do.[24]

Reform and renegotiation may well be possible if approached through thoughtful, formal, political discussion. The Council of Europe acknowledged this in the Brighton Declaration, which makes specific provision for long-term reform, articulating that 'a process is needed to anticipate the challenges ahead and develop a vision for the future of the Convention' and anticipating that '[a]s part of this process, it may be necessary to evaluate the fundamental role and nature of the Court'.[25] At present, the UK commands reasonable influence in Europe. To continue to pursue a policy of non-compliance would undermine this influence and thereby reduce Parliament's ability to act upon its wider concerns about the ECtHR.

Compliance with *Hirst*, therefore, is legally sound, politically expedient and the best way in which to give voice to Parliament's wider concerns about the ECtHR. It would be no infringement of sovereignty for Parliament to make a strong statement detailing parliamentary dissatisfaction with the ruling and explaining that legislation complying with *Hirst* will nonetheless be enacted on the basis that Parliament recognises the need to abide by the law and that the influence bestowed by an excellent record of compliance will best equip the UK to affect future reform. As Gary Streeter MP has noted, 'this matter is not really about whether prisoners in this country have the right to vote'.[26] Had his motion been presented to Parliament as two separate questions—the substantive and the constitutional—it would be far clearer that the real issue here is the jurisdiction of the ECtHR. As it stands, it falls to Parliament to overcome the stubborn stalemate of its own creation in order to maximise its potential to bring about real change on the constitutional issue which *Hirst* has come to represent.

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[24] Ibid, para 45.

[25] Council of Europe, High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, 20 April 2012, Arts 30-1, <http://hub.coe.int/en/20120419-brighton-declaration/> [accessed 1 March 2013].

[26] House of Commons Debates, above n 4, col 505.

3 Mutual respect, perceived legitimacy and the need for compliance

The *Hirst* debate has not only misrepresented the delicate balance of the constitution, but has also gone some way towards actively damaging it. To represent parliamentary sovereignty and the rule of law as at continual loggerheads clearly perverts public understanding of the unwritten constitution. However, this debate has also seen parliamentarians displaying an alarming lack of respect for the rule of law and the legal profession as a whole; a tendency that threatens to pervert the balance of the constitution itself.

Anti-legal polemic has been rife throughout discussion of *Hirst*. Such was their zeal to assert the sovereignty of Parliament against the pernicious legal system that many parliamentarians openly declared their mistrust of the profession during the Commons debate. Steve McCabe MP prefaced his speech with 'I am not a lawyer. I am just a humble Back Bencher doing his best to represent his constituents'.[27] Claire Perry MP began 'I am of course not a lawyer, so I speak, I hope, the language of common sense'.[28] Ian Davidson MP, in fear that '[w]e are in danger of turning this debate, which is about basic, simple questions, into a lawyers' talkfest', felt the need to declare that:

> Not only am I not a lawyer, I have never been a lawyer, and I have no intention of ever becoming a lawyer. As far as I am aware, no one in my family unto the nth generation has ever been a lawyer.[29]

Throughout the debate a lack of legal training was worn as a badge of honour, the implication being that the whole issue of prisoners' voting rights is a storm in a teacup brewed by 'lawyers … circling like vultures, waiting for convicted men and women to make financial gain from this farce'.[30]

Two recent extra-judicial observations of Lord Neuberger illuminate the problems such pronouncements may cause. In the Second Lord Alexander of Weedon Lecture, the Master of the Rolls observed that 'perceived legitimacy is of the essence where there is no written constitution'.[31] In another recent lecture, he stressed the importance of mutual respect:

[27] Ibid, col 541.
[28] Ibid, col 552.
[29] Ibid, col 563.
[30] Ibid, col 581 (Richard Drax MP).
[31] Lord Neuberger of Abbotsbury, Master of the Rolls, 'Who are the Masters now?', Second Lord Alexander of Weedon Lecture, 6 April 2011, para 16, <http://www.judiciary.gov.uk/Res

> Mutual respect between the judges and the politicians is essential … [I]f they slang each other off in public, members of the judiciary and members of the other two branches of government will undermine each other, and, inevitably, the constitution of which they are all a fundamental part, and on which democracy, the rule of law, and our whole society rests.[32]

Having allowed its criticisms of the ECtHR to spill over into what, at times, can only be termed vilification of the entire legal profession, Parliament has undoubtedly gone some way down this path towards constitutional destabilisation. The lack of respect demonstrated for the legal profession as a whole surely at least equals the 'barrage of hostile criticism'[33] levelled at the ECtHR, for which the debate has been heavily criticised, and undermines the perceived legitimacy of the legal sphere.

Further opposition to the judgment, or the enactment of the third option in the draft bill, is unlikely to light the touchpaper of a constitutional crisis. It would, however, consolidate the irresponsibly negative representation of the legal sphere already perpetuated, undermining the mutual and perceived legitimacy which is so crucial to the constitution in the longer term. Compliance with *Hirst* would counter this dangerous tendency towards destabilisation by sending a message that even when it disagrees with the law, even when it may technically be able to shirk away from the law, Parliament will obey the law and respect the constitutional importance which it commands.

4 Towards a model of compliance

There must, then, be some form of compliance. What exactly this means, however, is complicated by the line of cases following *Hirst*. For a measure to be proportionate, and therefore acceptable, *Hirst* held there must be 'a discernible and sufficient link between the sanction and the conduct and circumstances of the

ources/JCO/Documents/Speeches/mr-speech-weedon-lecture-110406.pdf> [accessed 1 March 2013].

[32] Lord Neuberger of Abbotsbury, Master of the Rolls, 'Where Angels Fear to Tread', Holdsworth Club 2012 Presidential Address, 2 March 2012, para 37, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf> [accessed 1 March 2013].

[33] M O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12 *German Law Journal* 1862, 1862.

individual concerned'.[34] *Frodl v Austria* (*Frodl*), following *Hirst*, stated that '[u]nder the *Hirst* test … it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions'.[35] In the later case of *Greens and MT v United Kingdom*, considering the UK's ongoing non-compliance, the ECtHR distanced itself from the interpretation of *Hirst* given in *Frodl*, clarifying that 'the Grand Chamber in *Hirst* declined to provide any detailed guidance as to the steps which the United Kingdom should take' and that 'a wide range of policy alternatives are available to the Government'.[36] As Sophie Briant has cogently argued, this distancing was strictly correct; *Hirst* in fact held that judicial decision-making was desirable, not obligatory, and did not specify where the 'discernible and sufficient link' would be present.[37]

How, then, should the government proceed? It is submitted that Parliament should legislate to implement the *Hirst* test as interpreted in *Frodl.* By this model, prisoners would be disenfranchised by judicial decision when their offences are linked to 'issues relating to elections and democratic institutions'.[38] Dr Eric Metcalfe's suggestion that Guy Fawkes would have been a good candidate for disenfranchisement, his offence 'striking against the democratic order',[39] indicates how rare such cases would be. This form of compliance commands two distinct advantages: it is underpinned by a coherent ideological approach to the substantive issue at hand, and it minimises the chance of further legal challenge. As such, it is the model which would allow Parliament to counter the constitutional damage which has already been done and finally move on from *Hirst*.

The alternative course of action would be to enact legislation on the basis of a looser reading of the *Hirst* test, by which not only electoral crimes hold a 'discernible and sufficient link' to disenfranchisement.[40] Rather, particularly severe crimes would be deemed discernibly and sufficiently linked to the sanction.

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[34] *Hirst*, above n 1, para 71.

[35] *Frodl v Austria* [2010] ECtHR 20201/04, para 34.

[36] *Greens and MT v United Kingdom* [2010] ECtHR 60041/08 and 60054/08, paras 113–14.

[37] S Briant, 'The requirements of prisoner voting rights: mixed messages from Strasbourg', (2011) 70 *CLJ* 279, 281. See *Hirst*, above n 1, paras 71–2.

[38] *Frodl*, above n 35, para 34.

[39] Political and Constitutional Reform Committee, 'Voting by convicted prisoners: summary of evidence: Fifth Report of Session 2010-11', 9 February 2011, at Ev 14 (Q38), <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/776/776.pdf> [accessed 1 March 2013].

[40] *Hirst*, above n 1, para 71.

This alternative, adopted by the government in the first and second options proposed in the draft bill, has the advantage of popularity; it would appease those politicians and publications that worry that the *Hirst* affair will see 'rapists, paedophiles and murderers' enfranchised.[41] However, it poses two serious difficulties.

First, the substantive basis underpinning the motivation for this looser reading is decidedly shaky. It is often claimed that the convict 'has broken their contract with society to such a serious extent that they have lost all these rights: their liberty, their freedom of association and their right to vote'.[42] The notion of the social contract, indeed, is used in the introduction to the draft bill itself (paragraph 9). Behind this notion is the idea that 'when people are convicted and sentenced to imprisonment, they lose the moral authority to vote'.[43] These arguments from social contract and moral authority are entirely unconvincing. This distorted social contract theory ignores the fact that society has obligations towards the individual that are not conditional: a highly dangerous message and one which is patently incorrect. The argument from moral authority is similarly unsound: in a democracy with universal suffrage the votes of all—even those who might be considered morally lacking—count equally.

Secondly, a model of compliance based on a loose reading of the *Hirst* test also falls down on pragmatic grounds. Sophie Briant is surely correct to argue that 'challenges are particularly likely if … legislative proposals fall short of *Frodl*'s interpretation of *Hirst*'.[44] Were the UK to concede to comply with *Hirst* in order to restore faith in the legal system and maintain the UK's bargaining position, it would be entirely counterproductive to implement legislation which would take the nation back to the ECtHR in a few months' time. Further, it is quite possible that if new legislation were to be challenged in Strasbourg, the ECtHR would take a view akin to that held in *Frodl*. Though *Frodl* was perhaps overzealous in its reading of *Hirst*, it surely presents the natural conclusion to the reasoning of the case; where voting is considered a right, and the presumption is accordingly against disenfranchisement, the test for a 'discernible and sufficient link' will be a stringent one.

[41] House of Commons Debates, above n 4, col 529 (Michael McCann MP).
[42] Ibid, col 494 (David Davis MP).
[43] Ibid, col 547 (Rehman Chishti MP).
[44] Briant, above n 38, 282.

5 Concluding thoughts

The *Hirst* debate, then, is one of serious constitutional import. If non-compliance continues, Parliament will firmly establish the negative view of the rule of law and the legal sphere which has already been purveyed, undermining the mutual respect and perceived legitimacy central to the unwritten constitution. If the government seeks to appease the ECtHR by introducing legislation in line with the draft bill on the basis of a loose reading of the *Hirst* test, ideas of 'moral authority' and 'social contract' will have been introduced into the law, quite contrary to human rights and the principle of universal suffrage. However, if the government were to take the perhaps unlikely step of calling Parliament to legislate in line with *Frodl*, the *Hirst* debate could be turned around to restore mutual respect between legal and political powers and restore perceived legitimacy for the rule of law. The question of prisoners' voting rights may not be a constitutional crisis but it will surely be a constitutional turning point, for better or for worse.

The distinguished lawyer and politician Francis Bacon once counselled:

> [A]nd let no man weakly conceive that just laws and true policy have any antipathy; for they are like the spirits and sinews, that one moves with the other. Let judges also remember, that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne …..[45]

The *Hirst* debate has been characterised by parliamentarians' refusal to accept this interconnection between 'just laws and true policy' which is the lifeblood of the body politic. Understandable concerns about the ECtHR have been allowed to engulf the issue and spill into reckless denigration of the legal sphere as a whole. This has doubtlessly already affected public perceptions, undermining the rule of law and thus recklessly swaying the delicate balance of the unwritten constitution. The draft bill, limited and grudging as it is, will do nothing to remedy the situation. Debate on the proposals put forward is likely simply to involve more of the fruitless and damaging point-scoring which has characterised discussion of the *Hirst* question so far, and the strength of any legislation born of such debate is likely to be questionable at best. The true danger of the *Hirst* debate, however, is that continued non-compliance will entrench mistrust of law, the rule of law and the judiciary, thereby allowing concerns about the ECtHR

[45] F Bacon, 'Of Judicature' (1612), reprinted in *Essays or Counsels, Civil and Moral* (1992) 170, 174.

to destabilise the constitutional balance in this country. The government must now put an end to this stubborn stalemate. If it does otherwise, the judiciary will remain under the throne but, as their perceived legitimacy erodes further, may not be lions for long.

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Precedent in International Criminal Courts and Tribunals

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Abstract

This article examines the use of precedent in international criminal adjudication and engages with the 'theory of precedent' suggested by Daniel Terris, Cesare P R Romano and Leigh Swigart. The article considers the inapplicability of the doctrine of binding precedent in this area. It also examines the principle of judicial comity, discussing instances in which international criminal courts and tribunals have appeared to depart from the findings of external judicial decisions. It further considers the reliance of such courts and tribunals on judicial decisions from both generalist and specialist international courts, as well as from national courts, examining the process of transposition associated with such reliance. It finds that the approaches of international criminal courts and tribunals to the use of external judicial decisions have generally been multiple, incoherent and, in some cases, contradictory. In this respect, the article finds little evidence for the view that it is possible to distil any consistent 'theory of precedent' from the practice of such courts and tribunals.

Keywords

Precedent, International Criminal Courts and Tribunals, Sources of Law, Jurisprudence

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1 Introduction

Legal scholarship often characterises the use by courts and tribunals of judicial decisions from other courts and tribunals ('external judicial decisions')[1] as a sort of inter-judicial dialogue. For instance, L'Heureux-Dubé, a former justice of the Supreme Court of Canada, uses the word 'dialogue' to describe the practice of national courts citing, analysing, relying on, or distinguishing the decisions of foreign and supranational tribunals.[2] This interaction, however, remains a 'messy process' according to Slaughter, taking place across, above and below borders.[3] She observes that '[t]he activities of the many different types of courts involved in this process do not conform to a template of an emerging global legal system in which national and international tribunals play defined and coordinated roles'.[4]

While there are many levels of judicial interaction, this article focuses on the interaction of international criminal courts and tribunals, an under-explored area in the literature. Terris, Romano and Swigart observe that '[t]he role of precedent across international courts has not yet been thoroughly studied, since it is only recently that the number of international rulings of most courts has become sizeable'.[5] Similarly, Romano notes that '[t]he role of precedent across international courts is still a largely unmapped territory. While most literature to date has focused on the treatment by courts of their own precedents, there have been very few studies about the treatment of precedent across international courts'.[6]

In the sphere of international criminal law, the question of interaction was flagged as early as 1995, when the *Tadić* Trial Chamber asked whether the ICTY is 'bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context'.[7] In that case, the judges

[1] This article makes use of the phrase 'external judicial decisions' instead of the more encumbered notion of 'precedent'. For a discussion of this point, see N Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', (2002) 15 *Leiden Journal of International Law* 483, 489.

[2] C L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Journal* 15, 24. See also 'Developments in the Law: International Criminal Law' (2001) 114 *Harv Law Review* 1943, 2049.

[3] A M Slaughter, 'Judicial Globalization', (2000) 40 *Virg JIL* 1103, 1104.

[4] Ibid.

[5] D Terris, C P R Romano & L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007) 120.

[6] C P R Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 *International Law & Politics* 755, 760.

[7] *Prosecutor v Dusko Tadić (aka 'Dule')*, Decision on the Prosecutor's Motion Requesting Protective

found the lack of guidance on this subject in the Report of the Secretary-General to be 'particularly troubling because of the unique character of the International Tribunal'.[8] Yet almost two decades later there remains a relative scarcity of normative guidance with respect to the use of external judicial decisions. For instance, in 2009 the ICTY, in conjunction with the United Nations Interregional Crime and Justice Research Institute, developed a *Manual on Developed Practices*, prepared as part of a project to preserve the legacy of the ICTY. Although this *Manual* runs into over 240 pages and aims to provide a 'blueprint of [the ICTY's] practices for use by other international and domestic courts', relatively little is said therein about the ICTY's practices with respect to the use of external judicial decisions.[9] In this respect, Terris *et al* have observed that any official directives or policies concerning the use of external judicial decisions, where they exist, are 'always tacit, never explicit', and may vary from court to court.[10]

Against the backdrop of the scarcity of normative guidance on this subject, Terris, Romano and Swigart have found that a 'theory of precedent' may be emerging.[11] Their research, conducted between 2004 and 2006, is primarily based on qualitative interviews with international judges from various courts and tribunals, including international criminal courts and tribunals. According to Terris *et al*, it is possible to identify some consistent, systematic and general approaches, on the part of international and regional courts and tribunals, to the use of external judicial decisions.

This article sets out to 'test' Terris *et al*'s 'theory of precedent' with particular reference to the practice of international criminal courts and tribunals. In particular, it aims to determine whether it is possible to distil any method or 'theory of precedent' from such practice; that is, whether any systematic and general approaches to the use of external judicial decisions are emerging from the practice of the international criminal courts and tribunals. In this respect, the article is based on a qualitative analysis examining some of the final judgments of five international criminal courts and tribunals, namely:

1. the International Criminal Tribunal for the former Yugoslavia (*ICTY*);

2. the International Criminal Tribunal for Rwanda (*ICTR*);

Measures for Victims and Witnesses, Case No IT-94-1-T, 1995, 17.

[8] Ibid, 19.

[9] ICTY & United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices* (2009) 1.

[10] Terris *et al,* above n 5, 120.

[11] Ibid.

3. the Special Court for Sierra Leone (*SCSL*);

4. the Extraordinary Chambers in the Courts of Cambodia (*ECCC*); and

5. the International Criminal Court (*ICC*).

The specific judgments which constituted the primary sources for this analysis have been listed in Annex I. The primary units of analysis were instances of use of external judicial decisions in the judgments. With respect to the SCSL, the ECCC and the ICC, in view of the relatively low number of final judgments delivered by the cut-off date (18 May 2012), all final judgments have been included. With respect to the ICTY and ICTR, the criteria for the selection of the final judgments were: (1) the date of delivery of the judgments; and (2) the judgments had to make, at least, some use of external judicial decisions.[12]

This article considers, first, the elements of the 'theory of precedent,' as elaborated in Terris *et al*'s book. It then sets out to 'test' this theory on the basis of the practice of international criminal courts and tribunals. It examines the inapplicability of the doctrine of binding precedent and discusses the principle of judicial comity, considering instances in which international criminal courts and tribunals have departed from the findings of external judicial decisions. The article makes the point that there is a growing expectation, in the field of international criminal adjudication, that such courts and tribunals ought to take express account of relevant external judicial decisions, even if contradictory. The article proceeds to consider the formal nature of the judicial acts that may be relied on by international criminal courts and tribunals, considering that such courts and tribunals have relied not only on final judgments and decisions, but also, *inter alia*, on advisory opinions and the submissions of advocates-general. The article then considers international criminal courts and tribunals' reliance on judicial decisions from generalist and specialist courts and tribunals. In particular, it discusses the use by such courts and tribunals of jurisprudence from the International Court of Justice (*ICJ*), as well as human rights courts. The article also considers international criminal courts and tribunals' reliance on judicial decisions from national courts and the process of transposition associated with such reliance. It concludes by outlining some possible areas for further research.

[12] In this context, minimal use was made of tables of authorities annexed to some of the judgments because such annexes did not always portray an accurate picture of the external judicial decisions actually used in the judgment.

2 A 'theory of precedent'

In their extensive study of international adjudication, Terris *et al* argue that, although the role of precedent across international courts has not yet been thoroughly studied, it seems that elements of 'a sort of "theory of precedent" are gradually emerging'.[13] In this respect, the authors proceed to sketch out the elements of such a 'theory of precedent', which include:

1. No international judge seems to feel bound by the jurisprudence of another court. The jurisprudence of other courts is taken into consideration only when one's own court has no useful precedents. Although some judges might be more willing than others to cite, citing is generally done sparingly, selectively, and grudgingly.[14]

2. If, on a given point of law, judges of one court feel differently than those of another court, out of judicial comity they will simply omit to take cognizance of judgments that do not support the reasoning chosen. Judges avoid citing to say that 'they got it wrong'—this is severely frowned upon.[15]

3. The formal nature of a judicial finding does not matter. Judges consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, nonbinding advisory opinions, or anything else. They look at the jurisprudence rather than the specifics of the case; what ultimately matters is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive.[16]

4. In the judges' minds, international courts seem to be divided between generalists, like the ICJ, and specialists (all others), and between regional courts and the so-called universal courts, that is to say, those whose jurisdiction is not restricted to any particular geographic area. This means that specialised courts will consider, quote, and defer to the ICJ on matters of general public international law. Arguably, this should also imply that the ICJ will defer to specialised tribunals concerning matters over which they have special knowledge or competence.[17]

[13] Terris *et al,* above n 5, 120.
[14] Ibid.
[15] Ibid, 120-121.
[16] Ibid, 121.
[17] Ibid.

5. 'Universal' courts might consider, but will refrain from quoting regional courts. This stems from the perceived need not to attribute particular value to the jurisprudence of certain regions in determining the content of rules of international law that have universal reach. Moreover, relying on the jurisprudence of national courts seems even more problematic. Much like the case of international rulings, they are a documentary source that can be used to provide evidence of a rule generated by one of the primary sources. Yet, their impact on substantive international law is limited by several factors.[18]

Against the backdrop of these elements, this article proceeds to examine whether any coherent and systematic general approaches to the use of external judicial decisions may be said to be emerging from the practice of international criminal courts and tribunals. In this context, a notable difference between Terris *et al*'s study and the present research is that the former was not confined to international criminal courts and tribunals only. In their study, Terris *et al* included interviews not only with serving judges from the ICTY, the ICTR, the SCSL and the ICC, but also with judges from other international and regional courts and tribunals, such as the ICJ, the European Court of Human Rights, the International Tribunal for the Law of the Sea and the World Trade Organization Appellate Body.[19] However, given that their 'theory of precedent' is not qualified or restricted to any specific type of court, and is expressed in language that is all-encompassing, it appears to also be applicable to international criminal courts and tribunals. This article considers whether Terris *et al*'s 'theory of precedent' provides an appropriate framework for analysing the judicial practice of these international criminal courts and tribunals.

3 No precedent for the 'theory'

From the qualitative analysis of the judgments of international criminal courts and tribunals considered in this research, two general elements may be distilled. These elements feature consistently in the approaches of such courts and tribunals to the use of external judicial decisions, namely:

[18] Terris *et al*, above n 5, 121.

[19] Ibid, xvi, and Appendix B ('Judges Interviewed for This Book').

1. As Terris *et al* observe, international criminal courts and tribunals do not feel bound by the jurisprudence of other courts and tribunals.[20]

2. International criminal courts and tribunals, with some exceptions, consistently approach external judicial decisions as 'subsidiary means' for the determination of rules of law, in accordance with the doctrine of sources.

However, any consistency in the approaches of international criminal courts and tribunals to the use of external judicial decisions stops there. Beyond these two elements, the research for this article has overwhelmingly demonstrated that it is *not* possible to identify any consistent and systematic approaches to the use of external judicial decisions. It would, therefore, be premature to speak of a coherent 'theory of precedent' along the lines of the one suggested by Terris *et al.* On the contrary, the practice of the international criminal courts and tribunals analysed in this article has been characterised by multiple, incoherent and, in some cases, contradictory approaches to the use of external judicial decisions.

This article does not aim to provide an explanation for the incoherence. Grover finds that the main reasons underlying the *ad hoc* Tribunals' inconsistent approaches to interpretation include the vagueness of their statutes, as well as the scarcity of normative guidance on the subject. She observes that this state of affairs 'opened the door for judges to develop their own methods which were perhaps inspired by their legal training and/or understanding of international criminal law's normativity'.[21] These observations inform the following analysis of the inconsistent approaches of international criminal courts and tribunals to the use of external judicial decisions.

4 The first element: jurisprudence of other courts and tribunals

The first element of the 'theory of precedent', as suggested by Terris *et al,* is that 'no international judge seems to feel bound by the jurisprudence of another court'.[22] According to the authors, this is unsurprising given the fact that 'courts are not hierarchically organised, and all are, with few exceptions, self-contained jurisdictions. However, this also seems to stem from a certain sense of pride

[20] Ibid, 120.

[21] L Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *EJIL* 543, 547.

[22] Terris *et al*, above n 5, 120.

and defence of one's own judicial turf'.[23] In the context of international criminal adjudication, international criminal courts and tribunals have consistently held that external judicial decisions have no binding force, but may bear persuasive value.[24] Yet rather than stemming from a sense of pride, as Terris *et al* suggest, or from a desire to defend one's own judicial turf, the view that external judicial decisions have no binding force in international criminal adjudication is based on three grounds: a rigorous application of the doctrine of sources of international law; the respect for the principle of legality; and the protection of individual rights in criminal law. In this context, Cassese emphasises the specificity of international criminal proceedings, which require greater circumspection and a strict interpretation of the applicable rules.[25] Similarly, in *Duch*, the ECCC Supreme Court Chamber underscored that, in light of the protective function of the principle of legality, external judicial decisions are non-binding and are not, in and of themselves, primary sources of international law.[26]

Similarly, the ICTY Trial Chamber in *Tadić* stated that 'the International Tribunal is not bound by past doctrine',[27] and in *Kupreškić et al* it held that '[t]he Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes'.[28] In *RUF*, the SCSL Trial Chamber underscored that it was 'not bound by decisions of the ICTY Appeals Chamber'[29] and in *Lubanga*, the ICC Trial Chamber noted that 'decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute'.[30]

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[23] Ibid.

[24] See R Dixon and K A A Khan, *Archbold on International Criminal Courts: Practice, Procedure and Evidence* (3rd edn, 2009) 16. In this context, however, one of the judges interviewed in the Terris *et al* study intimated that 'I'm not certain that there is great practical difference between a decision that is binding, and one that is not binding but persuasive;' see Terris *et al,* above n 5, 121.

[25] A Cassese, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in S Yee and T Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001) 49.

[26] *Kaing Guek Eav (alias 'Duch')*, Appeal Judgment, Case File/Dossier No. 001/18-07-2007-ECCC/SC, 2012, 97.

[27] *Prosecutor v Dusko Tadić (aka 'Dule')*, Judgment, Case No IT-94-1-T, 1997, 654.

[28] *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka 'Vlado')*, Judgment, Case No IT-95-16-T, 2000, 540.

[29] *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Judgment, Case No SCSL-04-15-T, 2009, 295.

[30] *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, Case No

Thus, in the majority of cases, international criminal courts and tribunals use external judicial decisions to determine rules of law, in accordance with the doctrine of sources. However, in some cases these courts and tribunals rely heavily—at times exclusively—on legal findings of external judicial decisions, with little or no effort to conduct a first-hand examination of the rule of law in question. Moreover, they occasionally use such decisions uncritically and fail to follow the two-tiered procedure to ensure that such decisions are relied on merely as subsidiary means.[31] This approach could be characterised as 'equivocal' because the judgment may not indicate whether the court or tribunal considered the external judicial decisions as a means of determining antecedent rules of law or as direct sources of the rules in question.[32]

Moreover, in two cases, the court or tribunal expressly found that none of the recognised sources provided an applicable rule, and proceeded to use legal notions or findings from external judicial decisions that had not emanated from one of the formal sources of international law. In effect, therefore, the external judicial decisions containing such legal notions or findings constituted the original source.[33]

In their discussion of this first element of the 'theory,' Terris *et al* observe that 'jurisprudence of other courts is taken into consideration only when one's own court has no useful precedents'.[34] With respect to international criminal

ICC-01/04-01/06, 2012, 603.

[31] The use of external judicial decisions as subsidiary means generally comprises the following two-tiered procedure: (1) the court or tribunal satisfies itself that the legal notions or findings of a given external judicial decision are grounded on a rule of law derived from one of the recognised sources (international conventions, international customary law, or general principles of law); and (2) the court or tribunal uses such legal notions or findings for guidance in the verification of the existence or interpretation of such a rule of law (i.e. for the determination of a rule of law).

[32] For instance, in the *CDF* case, in clarifying the meaning of 'widespread and systematic' in the context of crimes against humanity under Article 2 of the SCSL Statute, the SCSL Trial Chamber failed to undertake any first-hand interpretation of the meaning of this phrase. Rather, it relied almost exclusively on external judicial decisions from the ICTY, in many instances simply adopting or subscribing to the ICTY's views uncritically. See *Prosecutor v Moinina Fofana and Allieu Kondewa*, Judgment, Case No SCSL-04-14-T, 2007, 112.

[33] The first case concerns Judge Li's famous dissent in *Erdemović* on the question whether duress could be a complete defence to the massacre of innocent civilians at international law. See *Prosecutor v Dragen Erdemović*, Judgment, Separate And Dissenting Opinion Of Judge Li, Case No IT-96-22-A, 1997, 1 *et seq*. The second case is the ECCC Supreme Court Chamber's decision in *Duch*, where the ECCC Supreme Court Chamber had to determine the appropriate test for regulating adjudication of a multiplicity of offences for the same conduct (*'concursus Delićtorum'*). See *Kaing Guek Eav (alias 'Duch')*, above n 26, 289 *et seq.*

[34] Terris *et al,* above n 5, 120.

adjudication, the present research has found that, although the degree of reliance on external judicial decisions is somewhat dependent on the state of development of the internal case law of the referring court or tribunal, this observation applies to those issues that are relatively settled and uncontroversial in the court or tribunal's internal jurisprudence. Indeed, where specific issues are relatively well-settled in a court or tribunal's internal jurisprudence, a gradual shift in the locus of reference from external judicial decisions to the internal jurisprudence of the referring court or tribunal may, in some cases, be observed. For instance, although, in order to ascertain the customary international law status of Common Article 3 of the Geneva Conventions, the earlier judgments of the ICTY relied on the holdings of the ICJ,[35] as this issue became relatively more settled in the internal jurisprudence of the ICTY, a gradual shift in the locus of reference from external judicial decisions of the ICJ to the internal jurisprudence of the ICTY began to take place, and the later judgments of the ICTY began to rely exclusively on internal jurisprudence with respect to this matter.[36]

Conversely, with respect to issues which remain unsettled and controversial in the internal jurisprudence of a referring court or tribunal, or with respect to novel issues (which continue to crop up throughout the lifespan of international criminal courts and tribunals),[37] such courts and tribunals have, generally, continued to have recourse to external judicial decisions.

Finally, with respect to this element, Terris *et al* assert that '[a]lthough some judges might be more willing than others to cite, citing is generally done sparingly, selectively, and grudgingly'.[38] While the present research has not, as such, addressed the question of selectivity, it may be safely said that, in the context of international criminal adjudication, citing has certainly been done neither 'sparingly' nor 'grudgingly'. Indeed, international criminal courts and tribunals make frequent and varied use of external judicial decisions. This happens both

[35] See, for instance, *Prosecutor v Dusko Tadić (aka 'Dule'),* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-T, 1995, 98; and *Prosecutor v Zejnil Delalić, Zdravko Mucić (aka 'Pavo'), Hazim Delić, Esad Landžo (aka 'Zenga'*), Judgment, Case No IT-96-21-T, 1998, 303.

[36] See, for instance, *Prosecutor v Naser Orić*, Judgment, Case No IT-03-68-T, 2006, 261; and *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Judgment, Case No IT-04-84-T, 2008, 34.

[37] For instance, over a decade after the ICTY was established, the *Blaškić* Appeals Chamber noted that the Tribunal had not yet 'had the occasion to pronounce' on the question of the necessary *mens rea* in relation to ordering under Article 7(1) of the ICTY Statute. See *Prosecutor v Tihomir Blaškić,* Judgment, Case No IT-95-14-A, 2004, 33.

[38] Terris *et al,* above n 5, 120.

directly, to derive guidance from the legal notions or findings of a given external judicial decision, with a view to verifying the existence or interpretation of a particular rule of law; and indirectly, in order to borrow a review of state practice and *opinio juris* in the context of customary international law, or a survey of national jurisdiction in the context of general principles of law ('reviews and surveys').

With respect to the direct use of external judicial decisions, Judge Shahabuddeen noted in his declaration in *Furundžija* that in interpreting a rule of international law, international criminal courts and tribunals may 'see value in consulting the experience of other judicial bodies with a view to enlightening [themselves] as to how the principle is to be applied in the particular circumstances before [them]'.[39] In *Stakić*, the ICTY Trial Chamber noted that 'when interpreting the relevant substantive criminal norms of the Statute, the Trial Chamber has used previous decisions of international tribunals', including the external judicial decisions of the ICTR and the Nuremberg and Tokyo Tribunals.[40] The ECCC Supreme Court Chamber, in *Duch*, noted that the ECCC 'relied heavily' on international human rights case law.[41] The *Kupreškić et al* Trial Chamber went even further, emphasising that 'judicial decisions may prove to be of *invaluable* importance for the determination of existing law'.[42]

In the literature, Cryer notes that '[t]he ICTY and the ICTR have had reference to domestic, as well as international, case law'.[43] Cassese finds the *ad hoc* Tribunals have, on occasion, 'drawn upon Strasbourg case law in order to clarify concepts that are ambiguous or unclear in international law'.[44] Moreover, with respect to the ICTY's use of external judicial decisions from national courts, Nollkaemper states that the ICTY 'has made extensive use of national case law in interpreting and applying its Statute and Rules of Procedure and Evidence and in determining points of general international law'.[45] Furthermore, Nerlich observes that 'the decisions of the [ICC] Chambers often contain references to the jurisprudence of

[39] *Prosecutor v Anto Furundžija*, Judgment, Case No IT-95-17/1-A, 2000, 258 (Declaration Of Judge Shahabuddeen).

[40] *Prosecutor v Milomir Stakić,* Judgment, Case No IT-97-24-T, 2003, 414.

[41] *Kaing Guek Eav (alias 'Duch')*, above n 26, 431.

[42] *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka 'Vlado')*, above n 28, 541. Emphasis added.

[43] R Cryer *et al, An Introduction to International Criminal Law and Procedure* (2nd edn, 2010) 12.

[44] Cassese, above n 25, 31.

[45] A Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in G Boas and W Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (2003) 277.

the two *ad hoc* Tribunals of the United Nations'.[46]

With respect to the indirect use of external judicial decisions, international criminal courts or tribunals have used such decisions to borrow their reviews or surveys. Such borrowed reviews or surveys could serve to supplement the referring court or tribunal's own review or survey on the same or similar issue and, indeed, may save the referring court or tribunal from having to undertake it from scratch.[47] Cryer points out that '[a]fter all, where cases contain a detailed review of State practice and/or *opinio juris*, it is far simpler to refer to the relevant case than repeat the discussion it contains'.[48] For instance, in both the *CDF* and *RUF* cases, the SCSL Trial Chambers relied on the *Strugar* Trial Judgment's review of 'case law developed by the military tribunals in the aftermath of World War II' to enumerate the factors that a chamber may take into account in determining whether a superior has discharged his duty to prevent the commission of a crime.[49]

While the advantages of the indirect approach to the use of external judicial decisions are apparent—in terms of efficiency gains and avoiding the duplication of efforts—it is also clear that this approach has to be adopted with caution, as relying on a review or survey which was undertaken by another court or tribunal, founded on a different statutory framework, carries certain risks. These risks may include the danger of such reviews or surveys being defective or incomplete and, particularly with respect to reviews or surveys undertaken by *trial*-level courts or tribunals, their liabiliy to appellate modification. Nevertheless, the analysis of a referring court or tribunal which engages with and scrutinises the reviews or surveys from an external judicial decision is likely to be more thorough and rigorous.

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[46] V Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings Before the ICC', in C Stahn & G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 305-306.

[47] Peil makes a similar point with respect to the use of the teachings of publicists, namely, '[w]here a publicist has conducted a thorough review of State practice and concluded that the threshold for a rule of customary international law has (or has not) been met, judges frequently rely upon those teachings, rather than citing directly to primary evidence of State practice'. See M Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1 *CJICL* 136, 153.

[48] R Cryer, 'Neither Here Nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders', in K H Kaikobad and M Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009) 184.

[49] *Prosecutor v Moinina Fofana and Allieu Kondewa*, above n 19, 248; and *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, above n 16, 315.

5 The second element: judicial comity

The second element identified by Terris *et al* is that 'if, on a given point of law, judges of one court feel differently than those of another court, out of judicial comity they will simply omit to take cognizance of judgments that do not support the reasoning chosen. Citing to say 'they got it wrong' is generally avoided, even severely frowned upon'.[50] In the context of international criminal adjudication, the present research has found that instances in which international criminal courts and tribunals adopt a conciliatory approach towards external judicial decisions (i.e. distinguishing decisions which appear relevant) far outnumber instances in which such courts and tribunals adopt a competitive approach (i.e. departing from external judicial decisions that appear to interpret the same, or a substantially similar rule of law, without distinguishing the matter). In this context, Simma holds that the principle of comity, that is, of respect for the competence of other courts and tribunals, could 'be considered an emerging general principle of international procedural law'.[51]

However, it has been observed that 'the effort, however admirable, to serve the cause of law through the art of distinguishing has its limits'.[52] In a number of instances, international criminal courts and tribunals have, in the words of Terris *et al,* cited to say 'they got it wrong'. In particular, the present research has identified instances in which courts and tribunals have departed from external judicial decisions that, in their view, have been made in error ('*per incuriam*') or that are not in the interests of justice.[53] In some cases, however, departures from external judicial decisions remain cryptic. For instance, in *Furundžija*, the ICTY Trial Chamber departed obliquely from the Constitutional Court of Colombia's holding that 'the Geneva Conventions and the Additional Protocols passed into customary law in their entirety', without providing any justification.[54]

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[50] Terris *et al,* above n 5, 120.

[51] B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *EJIL* 265, 285–287.

[52] M Shahabuddeen, *Precedent in the World Court* (1996) 126.

[53] For instance, in *Čelebići*, in the context of superior responsibility, the ICTY Appeals Chamber departed from a finding by the ICTR Trial Chamber in *Kayishema et al,* that 'powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility,' because, according to the ICTY Appeals Chamber, this finding was 'based on a misstatement' and, therefore, had to be accorded 'no weight'. See *Prosecutor v Zejnil Delalić, Zdravko Mucić (aka 'Pavo'), Hazim Delić, and Esad Landžo (aka 'Zenga')*, Judgment, Case No IT-96-21-A, 2001, 265.

[54] *Prosecutor v Anto Furundžija*, Judgment, Case No IT-95-17/1-T, 1998, 137.

In other cases, international criminal courts and tribunals appear reluctant to 'acknowledge that a change has occurred'.[55] For instance, in *Muhimana*, the ICTR Trial Chamber adopted a somewhat ambivalent stance with respect to the appropriate definition of rape. It averred that the broad, conceptual definition of rape articulated in *Akayesu* and the narrower, mechanical definition put forward by *Furundžija*/*Kunarac* 'are not incompatible or substantially different in their application'.[56] Yet, the conceptual definition of rape articulated in *Akayesu* is undoubtedly broader in scope, and may encompass additional acts and omissions, than the narrower, mechanical definition of *Furundžija*/*Kunarac*. The holding in *Muhimana* thus appears not accurate.

Moreover, with respect to Terris *et al*'s suggestion that judges could simply 'omit to take cognizance of judgments that do not support the reasoning chosen',[57] there is a growing expectation that international criminal courts and tribunals ought to take express account of relevant external judicial decisions, even if contradictory, particularly in view of the duty of circumspection and the principle of legality. Due to the lack of formal structures and lines of communication across courts and tribunals, this expectation may entail significant difficulties. However, the present research has found that where international criminal courts and tribunals have failed to take express account of relevant external judicial decisions, their judgments are—at least in academic writing—considered to be less persuasive and are subject to intense criticism.[58]

6 The third element: substance over form

With respect to the third element, Terris *et al* observe that:

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[55] Shahabuddeen, above n 52, 130.

[56] *Prosecutor v Mikaeli Muhimana*, Judgement and Sentence, Case No ICTR- 95-1B-T, 2005, 550.

[57] Terris *et al,* above n 5, 120.

[58] Consider, for instance, the criticism levelled at the ICC Trial Chamber in *Lubanga*, for simply adopting the 'overall control' test as articulated in *Tadić*, without taking into express account the 'effective control' test as enunciated in *Nicaragua*: see T R Liefländer, 'The Lubanga Judgment of the ICC: More than just the First Step?' 1 *CJICL* (2012) 191, 193. See also the heavy criticism levelled at the ICTY Appeals Chamber, in *Kunarac et al,* in its consideration of the legal ingredients of crimes against humanity, for taking into account three Canadian cases that supported the Chamber's reasoning, while failing to take into express account the leading Canadian case on crimes against humanity, namely *Finta*: see L van den Herik, 'Using Custom to Reconceptualize Crimes Against Humanity', in S Darcy & J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (2010) 93.

> the formal nature of a judicial finding does not matter. Judges consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, nonbinding advisory opinions, or anything else. What they look at is the jurisprudence rather than any specific case; what ultimately seems to matter is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive.[59]

In the context of international criminal adjudication, this observation is largely supported by the findings of the present research. International criminal courts and tribunals have relied not only on final judgments and decisions, but also, *inter alia,* on advisory opinions[60] and the submissions of advocates-general.[61]

With respect to the SCSL, for instance, Article 20(3) of the SCSL Statute states that, in hearing appeals, '[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda'.[62] Although Article 20(3) of the SCSL Statute only mentions the Appeals Chamber, the SCSL Trial Chamber subsequently found 'as a matter of course, the provision equally applies to triers of fact at first instance'.[63]

While international criminal courts and tribunals rely on various types of judicial findings, the present research has found that, when relying on *first* instance decisions, they do not always take full account of the fact that such decisions are subject to reversal on appeal. In *Kunarac et al,* the ICTY Appeals Chamber had to verify whether the existence of a plan or policy (the 'policy requirement') was a legal ingredient of crimes against humanity under Article 5 of the ICTY Statute.[64] In its analysis, the Appeals Chamber relied, *inter alia*, on the Kosovo District Court case of *Trajkovic*,[65] which appeared to

[59] Terris *et al,* above n 5, 121.

[60] For instance, *Kaing Guek Eav (alias 'Duch')*, above n 26, 646.

[61] For instance, *Prosecutor v Anto Furundžija*, above n 54, 201.

[62] See Article 20(3) of the *Statute of the Special Court for Sierra Leone*, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

[63] *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Judgment, Case No SCSL-04-16-T, 2007, 630 (n 1269).

[64] *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković,* Judgment, Case No IT-96-23&IT-96-23/1-A, 2002, 98.

[65] *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001.

support its interpretation that no policy requirement for crimes against humanity was required at international law.[66] However, about six months before the ICTY Appeals Chamber delivered its judgment, the Supreme Court of Kosovo overturned the *Trajkovic* decision in a manner material to its use by the ICTY Appeals Chamber.[67] Nevertheless, the *Kunarac et al* Appeals Judgment made no express mention of this turn of events, and it continued to rest, in part, on the reasoning of the *Trajkovic* first instance decision that had been overturned.

7 The fourth element: unity and fragmentation

The fourth element of the 'theory of precedent' outlined by Terris *et al* holds that:

> In the judges' minds, international courts seem to be divided between generalists (like the ICJ) and specialists (all others), and between regional courts and the so-called universal courts, that is to say, those whose jurisdiction is not restricted to any particular geographic area. This means that, fourth, specialized courts will consider, quote, and defer to the ICJ on matters of general public international law. … Arguably, this should also imply that the ICJ will defer to specialized tribunals concerning matters over which they have special knowledge or competence, but, to date, the ICJ has not done so.[68]

Although the UN Charter does not formally endow the ICJ with 'exclusive jurisdiction'[69] Schwarzenberger asserts that the ICJ, and its predecessor the PCIJ, have to be accorded 'pride of place in the hierarchy of the elements of law-determining agencies'.[70] In this respect, it has been noted that well reasoned and strongly supported decisions of the ICJ 'will be powerfully influential for other tribunals deciding questions of international law, even though there is no

[66] Van den Herik, above n 58, 92.

[67] *In re Trajkovic*, Supreme Court of Kosova in Prishtina, AP.nr.145/2001, 30 November 2011. See also Opinion of Michael E. Hartmann, International Prosecutor for the Office of the Public Prosecutor of Kosovo, PP.Nr.68/2000, PPP.Nr._/2001, K. 31/99, 30 November 2001.

[68] Terris *et al,* above n 5, 121.

[69] D Anderson, 'The 'Disordered Medley' of International Tribunals and the Coherence of International Law', in K H Kaikobad and M Bohlander (eds), above n 35, 392.

[70] G Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 *Harv LR* 539, 553.

formal *stare decisis* effect'.[71] In the context of international criminal adjudication, international criminal courts and tribunals have, indeed, by and large considered, quoted and deferred to the ICJ on matters of general public international law. For instance, in *Čelebići*, the ICTY Trial Chamber acknowledged that a particular decision of the ICJ 'constitutes an important source of jurisprudence on various issues of international law'[72] and, in *Aleksovski*, the ICTY Appeals Chamber emphasised that the decisions of the ICJ may be accorded considerable weight 'due to their perceived status as authoritative expressions of the law'.[73]

Yet, there have been a small number of cases in which international criminal courts and tribunals have come to a different conclusion from the ICJ, the most prominent of these being the collision between the ICJ in *Nicaragua* and the ICTY in *Tadić*.[74] However, as one commentator observes, '[a]mong the tribunals vested with international criminal jurisdiction, the ICTY has made such ample use of ICJ jurisprudence that the divergence in the *Tadić* judgment has to be seen in perspective'.[75]

With respect to the second leg of this element, namely that the ICJ may itself defer to specialised tribunals, it has been noted that the ICJ has 'hardly ever openly referred to other international courts and tribunals'.[76] However, in the *Genocide* case the ICJ did attach 'the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it',[77] which could be seen to reflect the ICJ's respect for the ICTY's specialist competence in this field.

In addition to relying on the generalist competence of the ICJ, international criminal courts and tribunals regularly rely on the specialist external judicial decisions of other courts and tribunals operating within different branches of international law, in particular human rights courts. For instance, in *Kunarac et al,* the ICTY Trial Chamber held that '[b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights

[71] J I Charney *et al,* 'The "Horizontal" Growth of International Courts and Tribunals: Challenges or Opportunities?', 96 *AJIL* (2002) 369, 370.

[72] Referring to *Nicaragua*. See *Prosecutor v Zejnil Delalić, Zdravko Mucić (aka 'Pavo'), Hazim Delić, Esad Landžo (aka 'Zenga')*, above n 35, 230.

[73] *Prosecutor v Zlatko Aleksovski,* Judgment, Case No IT-95-14/1-A, 2000, 96.

[74] Simma, above n 51, 279.

[75] Ibid, 283-284.

[76] Ibid, 287.

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007 p 43, 170.

law'.[78] The decisions of international and regional human rights courts have been accorded highly persuasive value, particularly when the issue before the international criminal courts and tribunals was one of due process.

8 The fifth element: universal criminal courts?

The fifth element put forward by Terris *et al,* namely that universal courts 'might consider, but will refrain from quoting regional or national courts',[79] would not appear to be directly applicable to the specific context of international criminal adjudication. In this respect, the definition of 'universal' courts adopted by the authors is courts 'whose jurisdiction is not restricted to any particular geographic area'.[80] It should be noted, first, that with reference to the specific context of international criminal adjudication, this is not a particularly felicitous definition, as courts and tribunals which would normally be regarded as international, would not be considered 'universal' under this definition. Indeed, of the five international criminal courts and tribunals covered by the present research, only one—the ICC—falls within the definition of a 'universal' court. The jurisdictions of the others—namely the ICTY, the ICTR, the SCSL and the ECCC—are all restricted *ratione loci* and cannot, therefore, be considered 'universal' according to this definition. Given that, at the time of writing, the ICC had only delivered one final judgment, namely *Lubanga*, it would be difficult to assess how frequently this court would quote decisions of regional or national courts. In *Lubanga*, the ICC Trial Chamber relied extensively on judicial decisions from sister international criminal courts and tribunals, such as the ICTY[81] and the SCSL.[82] It also referenced two judicial decisions of the European Court of Human Rights, primarily because these had been cited in the Defence submissions.[83]

With respect to the use of judicial decisions from national courts, Terris *et al* observe that '[d]omestic courts rarely pronounce themselves on rules of international law; they are rather a more useful source when it comes to searching for general principles of law. Additionally, they seem to be considered

[78] *Prosecutor v Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, Judgment, Case No IT-96-23-T& IT-96-23/1-T, 2001, 467.
[79] Terris *et al,* above n 5, 121–122.
[80] Ibid, 121.
[81] *Prosecutor v Thomas Lubanga Dyilo*, above n 30, 533.
[82] Ibid, 603.
[83] Ibid, 581.

a last resort, to be looked at only when international sources do not help'.[84] In line with this observation, international criminal courts and tribunals have generally considered that they should first 'explore all the means available at the international level before turning to national law',[85] and that national judicial decisions should only be used as a last resort. Indeed, an order of natural selection appears to have developed in the practice of international criminal courts and tribunals, which indicates that relevant *international* judicial decisions are preferred over *national* judicial decisions. For instance, in *Furundžija* the ICTY Trial Chamber considered that the decisions of courts and tribunals applying national law were 'less helpful'.[86] And in *Kupreškić et al,* the ICTY Trial Chamber stated that national judicial decisions 'would carry relatively less weight'.[87]

Cassese notes that, when using national judicial decisions, international criminal courts and tribunals sometimes adopt a 'wild' and mechanical approach.[88] For instance, in order to determine whether the Tribunal had respected the accused's right to be promptly informed of the charges against him, the ICTR Appeals Chamber in *Barayagwiza* had to determine whether the period during which the accused was held in custody in Cameroon at the ICTR Prosecutor's request should be counted, even though the accused was not yet under the physical control of the Prosecutor.[89] After citing external judicial decisions from the United States and Singapore, the *Barayagwiza* Appeals Chamber determined that 'Cameroon was holding the Appellant in constructive custody for the Tribunal'.[90] Conspicuously absent from the Chamber's analysis, however, was any express attempt to transpose the findings of decisions from these two national jurisdictions to the specificities of international criminal law and the context of international criminal proceedings.[91]

The dangers of a mechanical reliance on national judicial decisions may be especially pronounced with respect to decisions that appear to be interpreting international law but that, in reality, are solely based on particular interpretations of national law and that could therefore be misleading ('red herring' decisions).

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[84] Terris *et al,* above n 5, 122.

[85] *Prosecutor v Drazen Erdemović,* Judgment, Case No IT-96-22-A, 1997, 3 (Separate and Dissenting Opinion of Judge Cassese).

[86] *Prosecutor v Anto Furundžija*, above n 54, 195-196.

[87] *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka 'Vlado'),* above n 28, 541.

[88] Cassese, above n 25, 22.

[89] *Jean-Bosco Barayagwiza v The Prosecutor*, Decision, Case No. ICTR-97-19-AR72, 1999, 56.

[90] Ibid, 61.

[91] Cassese, above n 25, 22.

For instance, a succession of ICTY Trial Chambers mechanically relied on the expansive interpretation of 'civilians', as articulated in the French case of *Barbie*[92] (while rarely referring to the specific national circumstances that gave rise to this expansive interpretation) to find that the term 'civilians', for the purposes of crimes against humanity, included those who were members of a resistance movement and former combatants.[93] However, this expansive interpretation of 'civilians' was subsequently rejected by the ICTY Appeals Chambers, *inter alia*, in *Blaškić*,[94] *Kordić et al*,[95] and *Galić*,[96] in favour of a narrower interpretation. Conspicuous in its absence from the findings of these ICTY Appeals Chambers was any explicit reference to the *Barbie* case.[97]

In other cases, however, international criminal courts and tribunals have adopted a more reflective approach, which implies 'a rigorous legal conception of the role and functions of international tribunals and the sources of law from which they may draw'.[98] This was the case, for instance, with respect to the *Kupreškić et al* Trial Judgment.[99] In particular, this research found that the reflective approach requires international criminal courts and tribunals to ensure that any legal notions or findings derived from external judicial decisions: (1) are appropriately transposed in light of the specificities of international criminal law and the context of international criminal proceedings; (2) take into account the inter-temporality of rules of international law; and (3) are in consonance with international law.

From the above, it is clear that international criminal courts and tribunals have adopted a plethora of approaches to the use of external judicial decisions. Therefore, it is premature to speak of general and systematic approaches to the

[92] The major decisions of the Criminal Chamber of the Court of Cassation in this case are the *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie*, Judgment of 6 October 1983 and Judgment of 20 December 1985, Cass. crim, 1986 J.C.P. II G, No. 20, 655, 1986 *Journal Du Droit International*, as well as Judgment of 3 June 1988, Cass. crim. 1988 J.C.P. II G, No. 21, 149 (Report of Counselor Angevin). See L N Sadat, 'The Nuremberg Paradox' (2010) 58 *AJ Comp L* 151, 180.

[93] See, *inter alia*, *Vukovar Rule 61 Decision* of 3 April 1996, at 29; *Prosecutor v Dusko Tadić (aka 'Dule')*, above n 14, 641; and *The Prosecutor v Tihomir Blaškić*, Judgment, Case No IT-95-14-T, 2000, 212.

[94] *Prosecutor v Tihomir Blaškić*, above n 37, 113.

[95] *Prosecutor v Dario Kordić and Mario Čerkez*, Judgment, Case No IT-95-14/2-A, 2004, 97.

[96] *Prosecutor v Stanislav Galić*, Judgment, Case No IT-98-29-A, 2006, 144.

[97] Rather, these Appeals Chambers consistently made reference to Article 50(1) of Additional Protocol I for the purposes of interpreting the term 'civilian' in Article 5 of the ICTY Statute.

[98] Cassese, above n 25, 20.

[99] *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, (aka 'Vlado')*, above n 28, 542.

use of external judicial decisions or, indeed, of any 'theory of precedent' along the lines of the one suggested by Terris *et al.* International criminal courts and tribunals ought to more expressly specify their approaches to the use of external judicial decisions in their judgments. In addition, more research in this area is required, to attain specific normative guidance on this subject. These measures may, to varying extents, all contribute to promoting greater coherence in the approaches of courts and tribunals to the use of external judicial decisions.

9 Concluding remarks

As noted in the Introduction, according to Terris *et al,* '[t]he role of precedent across international courts has not yet been thoroughly studied, since it is only recently that the number of international rulings of most courts has become sizeable'.[100] While this observation was made with respect to international adjudication generally, it also applies to international criminal adjudication, where the existing literature has tended to confine itself to studying the use of external judicial decisions from one or more specific sources (such as decisions of human rights courts or of national courts).[101] Even within this confined perspective, however, it has been noted that this subject 'has received only limited scholarly attention'.[102] This article has aimed to provide a first step in the study of the approaches of international criminal courts and tribunals to the use of external judicial decisions. It is hoped that this brief article may serve as a basis for further research in this area. For instance, as the body of judgments rendered by the ICC becomes more sizeable, it may be important to study how the approaches of the chambers of the ICC to the use of external judicial decisions would compare to the approaches of the *ad hoc* Tribunals and/or the internationalised courts. Moreover, in the same manner as the judicial decisions of the *ad hoc* Tribunals' predecessors, namely the Nuremberg and Tokyo Tribunals, played a crucial role in the development of the former's jurisprudence, it would be significant to examine the contribution of judicial decisions of *ad hoc* Tribunals and internationalised courts to the jurisprudence of the ICC.[103] Finally, although

[100] Terris *et al,* above n 5, 120.

[101] See, for instance, Cassese, above n 25, 19 and Nollkaemper, above n 45, 277.

[102] Nollkaemper was writing specifically with regard to the approach of the ICTY to external judicial decisions from national courts. See Nollkaemper, above n 45, 278.

[103] Naturally, the *ad hoc* Tribunals and the ICC are based on very different statutory frameworks and it would be unwise for the ICC to rely on, or borrow mechanically from, the jurisprudence of the former. As Grover notes, '[t]he jurisprudence of the *ad hoc* tribunals is so rich that it is

the ICC Trial Chamber did provide some indication of its approach to the use of external judicial decisions in *Lubanga*,[104] it would be interesting to consider whether other chambers of the ICC specify, in a more direct and detailed manner, their approaches to the use of external judicial decisions in future judgments.

Annex I – List of Sources

The following is a list of the final judgments which constituted the primary sources for this research:

ICTY

1. Prosecutor v Erdemović, Sentencing Judgement, IT-96-22-T, ICTY Trial Chamber, 29 November 1996.

   Prosecutor v Erdemović, Judgment, IT-96-22-A, ICTY Appeals Chamber, 7 October 1997.

2. Prosecutor v Tadić (aka 'Dule'), Judgment, IT-94-1-T, ICTY Trial Chamber, 7 May 1997.

   Prosecutor v Tadić, Judgment, IT-94-1-A, ICTY Appeals Chamber, 15 July 1999.

3. Prosecutor v Delalić, Mucić (aka 'Pavo'), Delić, & Landžo (aka 'Zenga'), Judgment, IT-96-21-T , ICTY Trial Chamber, 16 November 1998.

   Prosecutor v Delalić, Mucić (aka 'Pavo'), Delić, and Landžo (aka 'Zenga'), Judgment, IT-96-21-A, ICTY Appeals Chamber, 20 February 2001.

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perhaps tempting for those working at the [International Criminal] Court, many of whom spent time working at the tribunals, to transpose familiar legal approaches wholesale, which would be mistaken'. See Grover, above n 21, 550.

[104] For instance, with respect to the crime of conscription, enlistment and use of children under the age of 15, the ICC Trial Chamber stated that 'the jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the [Rome] Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute'. See *Prosecutor v Thomas Lubanga Dyilo*, above n 30, 603.

4. Prosecutor v Furundžija, Judgment, IT-95-17/1-T, ICTY Trial Chamber, 10 December 1998.

   Prosecutor v Furundžija, Judgment, IT-95-17/1-A, ICTY Appeals Chamber, 21 July 2000.

5. Prosecutor v Jelisić, Judgment, IT-95-10-T, ICTY Trial Chamber, 14 December 1999.

   Prosecutor v Jelisić, Judgment, IT-95-10-A, ICTY Appeals Chamber, 5 July 2001.

6. Prosecutor v Kupreškić, Kupreškić, Kupreškić, Josipović, Papić, & Šantić (aka 'Vlado'), Judgment, IT-95-16-T, ICTY Trial Chamber, 14 January 2000. Prosecutor v

   Kupreškić, Kupreškić, Kupreškić, Josipović, & Šantic, Judgment, IT-95-16-A, ICTY Appeal Chamber, 23 October 2001.

7. Prosecutor v Kunarac, Kovač, and Vuković, Judgment, IT-96-23-T & IT-96-23/1-T, ICTY Trial Chamber, 22 February 2001.

   Prosecutor v Kunarac, Kovač and Vuković, Judgment, IT-96-23& IT-96-23/1-A, ICTY Appeals Chamber, 12 June 2002.

8. Prosecutor v Kordić and Čerkez, Judgment, IT-95-14/2-T, ICTY Trial Chamber, 26 February 2001.

   Prosecutor v Kordić and Čerkez, Judgment, IT-95-14/2-A, ICTY Appeals Chamber, 17 December 2004.

9. Prosecutor v Stakić, Judgment, IT-97-24-T, ICTY Trial Chamber, 31 July 2003.

   Prosecutor v Stakić, Judgment, IT-97-24-A, ICTY Appeals Chamber, 22 March 2006.

10. Prosecutor v Brđanin, Judgment, IT-99-36-T, ICTY Trial Chamber, 1 September 2004.

    Prosecutor v Brđanin, Judgment, IT-99-36-A, ICTY Appeals Chamber, 3 April 2007.

11. Prosecutor v Halilović, Judgment, IT-01-48-T, ICTY Trial Chamber, 16 November 2005.

Prosecutor v Halilović, Judgment, IT-01-48-A, ICTY Appeals Chamber, 16 October 2007.

12. Prosecutor v Martić, Judgment, IT-95-11-T, ICTY Trial Chamber, 12 June 2007.

    Prosecutor v Martić, Judgment, IT-95-11-A, ICTY Appeals Chamber, 8 October 2008.

13. Prosecutor v Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, & Pandurević, Judgment, IT-05-88-T, ICTY Trial Chamber, 10 June 2010.

14. Prosecutor v Haradinaj, Balaj, & Brahimaj, Judgment, IT-04-84-T, ICTY Trial Chamber, 3 April 2008.

    Prosecutor v Haradinaj, Balaj, & Brahimaj, Judgment, IT-04-84-A, ICTY Appeals Chamber, 19 July 2010.

15. Prosecutor v Gotovina, Čermak, & Markač, Judgment, IT-06-90-T, ICTY Trial Chamber, 15 April 2011.

ICTR

1. Prosecutor v Akayesu, Judgment, ICTR-96-4-T, ICTR Trial Chamber, 2 September 1998.

   Prosecutor v Akayesu, Judgment, ICTR-96-4-A, ICTR Appeals Chamber, 1 June 2001.

2. Prosecutor v Kayishema and Ruzindana, Judgment, ICTR-95-1, ICTR Trial Chamber, 21 May 1999.

   Prosecutor v Kayishema and Ruzindana, Judgment, ICTR-95-1-A, ICTR Appeals Chamber, 1 June 2001.

3. Prosecutor v Rutaganda, Judgment, ICTR-96-3-T, ICTR Trial Chamber, 6 December 1999.

   Rutaganda v Prosecutor, Judgment, ICTR-96-3-A, ICTR Appeals Chamber, 26 May 2003.

4. Prosecutor v Musema, Judgment, ICTR-96-13-T, ICTR Trial Chamber, 27 January 2000.

Musema v Prosecutor, Judgment, ICTR-96-13-A, ICTR Appeals Chamber, 16 November 2001.

5. Prosecutor v Bagilishema, Judgment, ICTR-95-1A-T, ICTR Trial Chamber, 7 June 2001.

   Prosecutor v Bagilishema, Judgment, ICTR-95-1A-A, ICTR Appeals Chamber, 3 July 2002.

6. Prosecutor v Ntakirutimana and Ntakirutimana, Judgment and Sentence, ICTR-96-10 & ICTR-96-17-T, ICTR Trial Chamber, 21 February 2003.

   Prosecutor v Ntakirutimana and Ntakirutimana, Judgment, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, ICTR Appeals Chamber, 13 December 2004.

7. Prosecutor v Semanza, Judgment, ICTR-97-20-T, ICTR Trial Chamber, 15 May 2003.

   Semanza v Prosecutor, Judgment, ICTR-97-20-A, ICTR Appeals Chamber, 20 May 2005.

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    Nahimana, Barayagwiza, & Ngeze v Prosecutor, Judgment, ICTR-99-52-A, ICTR Appeals Chamber, 28 November 2007.

11. Prosecutor v Ntagerura, Bagambiki, & Imanishimwe, Judgment, ICTR-99-46-T, ICTR Trial Chamber, 25 February 2004.

    Prosecutor v Ntagerura, Bagambiki & Imanishimwe, Judgment, ICTR-99-46-A, ICTR Appeals Chamber, 7 July 2006.

12. Prosecutor v Simba, Judgment and Sentence, ICTR-01-76-T, ICTR Trial Chamber, 13 December 2005.

    Simba v Prosecutor, Judgment, ICTR-01-76-A, ICTR Appeals Chamber, 27 November 2007.

13. Prosecutor v Nchamihigo, Judgment and Sentence, ICTR-01-63-T, ICTR Trial Chamber, 12 November 2008.

    Nchamihigo v Prosecutor, Judgment, ICTR-2001-63-A, ICTR Appeals Chamber, 8 March 2010.

14. Prosecutor v Bikindi, Judgment, ICTR-01-72-T, ICTR Trial Chamber, 2 December 2008.

    Bikindi v Prosecutor, Judgment, ICTR-01-72-A, ICTR Appeals Chamber, 18 March 2010.

15. Prosecutor v Setako, Judgment and Sentence, ICTR-04-81-T, ICTR Trial Chamber, 25 February 2010.

    Setako v Prosecutor, Judgment, ICTR-04-81-A, ICTR Appeals Chamber, 28 September 2011.

SCSL

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    Prosecutor v Fofana and Kondewa, Judgment, SCSL-04-14-A, SCSL Appeals Chamber, 28 May 2008.

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    Prosecutor v Sesay, Kallon, & Gbao, Judgment, SCSL-04-15-A, SCSL Appeals Chamber, 26 October 2009.

4. Prosecutor v Taylor, Judgment, SCSL-03-01-T, SCSL Trial Chamber, 18 May 2012.

ECCC

1. Kaing Guek Eav (alias 'Duch'), Judgment, 001/18-07-2007/ECCC/TC, ECCC Trial Chamber, 26 July 2010.

   Kaing Guek Eav (alias 'Duch'), Appeal Judgment, 001/18-07-2007-ECCC/SC, ECCC Supreme Court Chamber, 3 February 2012.

ICC

1. Prosecutor v Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, ICC Trial Chamber, 14 March 2012.

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Nicaragua v Colombia at the ICJ: Better the Devil You Don't?

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On 19 November 2012, the ICJ issued its decision in the case *Territorial and Maritime Dispute* (*Nicaragua v Colombia*).[1] Nicaragua had requested the Court to determine sovereignty over several maritime features in the Caribbean Sea and to carry out a maritime delimitation of the continental shelf between Nicaragua and Colombia. The Court carried out a maritime delimitation unlikely to have been predicted, departing slightly from what had become an expected methodology. The decision was not well received by Colombia. This note briefly outlines the history of the case before analysing some of the issues raised by the decision. It also considers the possible impact of the decision on future maritime delimitation cases and on the role of the ICJ as a jurisdiction for maritime delimitation.

1 Procedural history of the dispute

The case began with the institution of proceedings by application of Nicaragua in December 2001. Nicaragua claimed that the ICJ had jurisdiction on two grounds namely: (a) under Article XXXIV of the American Treaty on Pacific Settlement 1948 ('the Pact of Bogotá'); and (b) on the basis of declarations made by both Nicaragua and Colombia accepting the compulsory jurisdiction of the Court in accordance with Article 36(2) of the Statute.[2] Article XXXI of the Pact of Bogotá provides that the parties 'recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto* … in all disputes of a juridical nature that arise among them'.[3] Colombia objected at the preliminary stage to jurisdiction on both grounds, arguing that the maritime boundary between the two countries had been settled by the 1928 Barcenas-Esguerra Treaty, and thus fell outside the scope of the compulsory jurisdiction provided for in the Pact

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[1] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment of 19 November 2012 (*Nicaragua v Colombia*).

[2] Memorial of the Government of Nicaragua, 28 April 2003, para 3.

[3] American Treaty on Pacific Settlement, 30 April 1948, 30 UNTS 84, Art XXXI.

of Bogotá.[4] Colombia argued that the 82nd meridian referred to in the 1930 Protocol to the Treaty was a line of maritime delimitation.[5] The relevant article of the Protocol provided that the 'San Andrés and Providencia Archipelago … does not extend west of the 82nd degree of longitude west of Greenwich'.[6] In December 2007 the Court issued a decision on preliminary objections, finding that the 1928 Treaty and its Protocol did not effect a general delimitation of the maritime boundary and that accordingly, the Court had jurisdiction to determine the maritime boundary.[7] The Court further held that the 1928 Treaty granted sovereignty over the islands of San Andrés, Providencia and Santa Catalina to Colombia but that the Treaty did not settle the question of the scope and composition of the rest of the San Andrés Archipelago or the issue of sovereignty over the features of Roncador, Quitasueño, and Serrana.[8]

Following the decision on preliminary objections, Nicaragua revised its request to the Court. Nicaragua had initially requested the Court to delimit a single maritime boundary of the Exclusive Economic Zone (*EEZ*) and the continental shelf.[9] As the EEZ cannot extend beyond 200nm, the continental shelf claim of Nicaragua delimited by a single maritime boundary would have been limited to a maximum 200nm limit.[10] In its Reply and during oral proceedings, Nicaragua requested that the Court only delimit the continental shelf (including areas beyond 200nm of the Nicaraguan coast, comprising the outer continental shelf).[11] Article 76 of UNCLOS provides that the continental shelf extends either to the outer edge of the continental margin or to a distance of 200nm where the natural edge of the margin does not extend to that distance.[12] It its Reply, Nicaragua claimed an extended continental shelf based

[4] Preliminary Objections of the Government of Colombia, July 2003, para 31.

[5] Ibid, para 38, 40.

[6] Protocol of Exchange of Ratifications, 5 May 1930, 105 LNTS 337.

[7] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Preliminary Objections, ICJ Reports 2007, p 832, para 116 (*Nicaragua v Colombia, Preliminary Objections*).

[8] Ibid, paras 97, 104.

[9] Application Instituting Proceedings, Territorial and Maritime Dispute (*Nicaragua v Colombia*), 6 December 2001, para 8; Memorial of the Government of Nicaragua, above n 2, para 3.3.

[10] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Art 57 (*UNCLOS*).

[11] Reply of the Government of Nicaragua, 18 September 2009, para 26.

[12] UNCLOS, Art 76(1): 'The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

on natural prolongation and requested the Court to delimit the overlap between Nicaragua's 'natural' continental shelf and Colombia's 200nm distance-based shelf.[13] Colombia argued that this revision in fact amounted to a new claim and was therefore inadmissible.[14]

2 The decision of the Court

The case before the Court had two main components namely, the determination of sovereignty over certain maritime features (including Quitasueño, Roncador and Serrano) and a maritime delimitation based on the findings on sovereignty. Nicaragua claimed sovereignty over all maritime features off her Caribbean coast not proven to be part of the San Andrés Archipelago.[15] Colombia, for its part, claimed sovereignty over all the maritime features in dispute between the parties, which it described as forming part of the San Andrés Archipelago.[16] The Court held that sovereignty over all the features in dispute resided with Colombia.[17]

2.1 Admissibility of a revised claim

The Court then considered the admissibility of the Nicaraguan revised claim, finding that the extended continental shelf delimitation requested was formally a new claim.[18] However, the Court considered that the claim to an extended continental shelf arose directly from the delimitation dispute defined by Nicaragua in its Application.[19] The revised claim by Nicaragua still concerned the continental shelf, but on different legal grounds (that is on the basis of natural prolongation rather than distance) and was admissible. Judge Owada in his Dissenting Opinion found that Nicaragua's revised claim constituted a radical transformation of the subject matter of the dispute and should have been declared inadmissible. He distinguished jurisprudence where new claims had been added to an initial claim, including the *Diallo* case cited by the Court in its decision,[20] from cases such as

[13] Reply of the Government of Nicaragua, above n 11, para 3.48.
[14] Rejoinder of the Republic of Colombia, 18 June 2010, paras 4.14-4.35.
[15] Reply of the Government of Nicaragua, above n 11, paras 1.96-1.97.
[16] Counter-Memorial of the Republic of Colombia, 11 November 2008, para 2.32.
[17] *Nicaragua v Colombia*, para 103.
[18] Ibid, para 108.
[19] Ibid, para 111.
[20] *Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of the Congo*), ICJ Reports 2010 p 639.

the one at hand, where the initial claim was replaced by a different claim.[21] The most relevant case in that regard was *Société Commerciale de Belgique*, where the PCIJ had considered a different request to that set out in the applicant's Memorial, noting the 'special circumstances', particularly the lack of objection of the respondent.[22] While the admission of a substantially revised claim over the objection of the respondent may appear problematic, in practice, the Court avoided any potential issues related to the admissibility of the new claim at the next stage of the judgment.

2.2 Treatment of the outer continental shelf

In considering the delimitation of the outer continental shelf as requested by Nicaragua two key questions arose, namely (a) the customary law nature of UNCLOS rules on the continental shelf; and (b) the capacity of the ICJ to delimit the outer continental shelf. Regarding (a), as Colombia is not a party to UNCLOS, the case had to be decided in accordance with customary international law. The parties disagreed on the customary law nature of rules regarding the continental shelf beyond 200nm. During oral proceedings Judge Bennouna asked both parties whether the rules set out in Article 76 of UNCLOS could be considered as customary law rules. Nicaragua submitted that Article 76(1)–76(7) had the status of customary law while Colombia submitted that while 76(1) was customary law, there was no evidence that 76(4)–76(9) had customary law status. The Court held that Article 76(1) of UNCLOS (which defines the continental shelf as extending to the outer edge of the continental margin) constituted customary international law and that it need not decide on the status of the other paragraphs of that Article (which define the outer edge of the continental margin and how it should be determined).[23] While it is clear that the Court was concerned with its capacity to delimit the outer continental shelf in a case where one of the parties was not a party to UNCLOS, and thus chiefly concerned with whether the definition of the continental shelf in Article 76(1) was a rule of customary law, the finding is somewhat curious. The Court seems to have chosen a half-way stance—stating that while the rule that the continental shelf extends to the outer edge of the continental margin has the status of customary international law, the methods of establishing the edge of the margin may not necessarily be so. It is difficult to imagine that state practice could have coalesced around Article 76(1) but not

[21] Dissenting Opinion of Judge Owada, para 5.
[22] *Société Commerciale de Belgique* (1939), PCIJ Ser A/B No 78, 173.
[23] *Nicaragua v Colombia*, para 118.

around 76(4), that is, could states be said to agree that the shelf extends to the edge of the continental margin if there is no agreement on how the outer edge of the margin is to be measured?

As for the capacity of the Court to delimit the outer continental shelf, the ICJ was presented with a substantially different situation to that before ITLOS in the *Bangladesh/Myanmar* case.[24] In *Bangladesh/Myanmar* both states were parties to UNCLOS and had made full submissions to the Commission on the Limits of the Continental Shelf ('CLCS'). ITLOS drew a delimitation line that extended beyond the 200nm continental shelf until it reached an area where the rights of third states might be affected.[25] In contrast, Nicaragua had only submitted preliminary information on the extent of its continental shelf to the CLCS. The 'preliminary information' procedure was created in part to allow developing countries more time to prepare their submissions to the CLCS.[26] Under Article 4 of Annex II to UNCLOS, a state intending to establish the limits of the outer continental shelf is required to submit supporting data to the CLCS within ten years of entry into force of the Convention in that state. SPLOS/183 provides that this time limit can be satisfied by the submission of preliminary information indicative of the outer limits of the continental shelf as well as the intended date of full submission.[27] The preliminary information submitted by Nicaragua describes preparation for full submissions as 'well advanced' but does not give an intended date for the full submission.[28] The Court was therefore not presented with definitive evidence on the extent of Nicaragua's continental shelf. Nicaragua requested the Court to indicate a boundary line drawn with reference to the outer edge of its shelf, with the edge to be determined at a later stage when the CLCS had issued its recommendations.[29]

The Court held that, as Nicaragua had not established that its continental

[24] *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS, Judgment of 14 March 2012 (*Bangladesh/Myanmar*).

[25] Ibid, para 462.

[26] *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of Annex II to the Convention, as well as the decision contained in SPLOS/72, paragraph (a)*, UN Doc SPLOS/183, 20 June 2008 (*SPLOS/183*).

[27] Ibid, para 1(a).

[28] Republic of Nicaragua, '*Preliminary information indicative of the outer limits of the continental shelf and description of the status of preparation of making a submission to the Commission on the Limits of the Continental Shelf*', August 2009, para 24, <http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm> [accessed 29 March 2013].

[29] Verbatim Record of Public Sitting held on Tuesday 1 May 2012, CR 2012/15 Corr, paras 24-9.

margin extended to overlap with Colombia's 200nm continental shelf entitlement, it would not delimit the continental shelf boundary between Nicaragua and Colombia's mainland coast. However the judgment suggests that it was not only the lack of scientific evidence that prevented the Court from delimiting the boundary as requested by Nicaragua. Referring to the fact that both parties in *Bangladesh/Myanmar* had made full submissions to the CLCS, and to its finding in the *Nicaragua v Honduras* case (that any claim to the outer continental shelf must be reviewed by the CLCS) the Court stated '[g]iven the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76'.[30] Taken as a whole, paragraphs 125–127 of the decision suggest that an UNCLOS party must make a full submission to the CLCS and receive its recommendations before any delimitation of the outer continental shelf, even if the delimitation involves a non-UNCLOS party.

Judge Donoghue, in her Separate Opinion, emphasised the distinction between the establishment of the outer limits of the shelf and a delimitation involving the outer continental shelf.[31] While she agreed with the Court's finding on the basis that Nicaragua had not established the extent of its continental margin, she regretted the reaffirmation of the finding in the *Nicaragua v Honduras* case, and the suggestion that the Court would never delimit the continental shelf beyond 200nm in the absence of CLCS recommendations, even if one of the parties to the delimitation was not an UNCLOS party.[32] Judge *ad hoc* Mensah also emphasised that the Nicaraguan claim should have been rejected on lack of evidence and not because Nicaragua had not made full submissions to the CLCS or because the CLCS had not made recommendations.[33] Judge *ad hoc* Cot expressed scepticism that Nicaragua was bound vis-à-vis Colombia to make submissions to the CLCS.[34]

2.3 Delimitation methodology

Having found sovereignty over the relevant maritime features to reside with Colombia, and that Nicaragua had not established the existence of its continental shelf beyond 200nm, the Court then proceeded with a maritime delimitation

[30] *Nicaragua v Colombia,* para 126.
[31] Ibid, Separate Opinion of Judge Donoghue, para 19.
[32] Ibid, paras 2, 25-6.
[33] *Nicaragua v Colombia*, Declaration of Judge *ad hoc* Mensah, para 9.
[34] *Nicaragua v Colombia*, Declaration of Judge *ad hoc* Cot, para 19.

of the continental shelf and EEZ between the Nicaraguan mainland coast and adjacent islands and the Colombian islands. An analysis of the contribution of the judgment as a whole to delimitation jurisprudence, including the identification of relevant coasts and the rock/island distinction under UNCLOS Article 121(3) is beyond the scope of this note. However, a notable aspect of the delimitation that will be analysed is the methodology used in arriving at a line of delimitation, in particular the weighting of basepoints and the introduction of latitude lines.

The jurisprudence of the ICJ and arbitral tribunals carrying out maritime delimitations can be described by a narrative beginning with the equitable principles/relevant circumstances approach and moving towards the acceptance of the equidistance/relevant circumstances approach as standard practice.[35] Since the *Jan Mayen* case in 1993, delimitation practice has consolidated, for the most part, around a three-step approach.[36] The three-step approach involves (i) the establishment of a provisional equidistance line; (ii) the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust or shift the provisional equidistance line in order to achieve an equitable result; and (iii) an examination of the proportionality between the ratio of coastal lengths and the ratio of allocated maritime areas. In 2009, the ICJ in the *Romania/Ukraine* case confirmed that this three-step approach was the standard delimitation methodology used by the Court for the delimitation of the continental shelf.[37] This was also the approach taken by ITLOS in the *Bangladesh/Myanmar* case. In the present case, the ICJ held that notwithstanding arguments related to the geographical context of the case, it would proceed according to its standard method, starting with the construction of a provisional median line.[38] The Court confirmed that it would apply the three-step approach, however, the manner in which the second step was carried out, that is the adjustment of the provisional median line to take relevant circumstances into account, was somewhat unexpected. The Court had identified two major relevant circumstances calling for adjustment of the median, namely the disparity in coastal lengths and the relevant geographic context. The overlapping entitlements of Nicaragua and the Colombian islands to the east and west called for an adjustment of the median line to avoid cutting off either

[35] See Tanaka, who describes the shift from a 'results based equity approach' to 'corrective equity approach': Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2006) 4-5.

[36] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, ICJ Reports 1993, p 38 (*Jan Mayen*).

[37] *Maritime Delimitation in the Black Sea* (*Romania v Ukraine*), ICJ Reports 2009, p 61, paras 115-122.

[38] *Nicaragua v Colombia*, para 199.

party from the areas onto which its coast projected.[39] Up to this point, the case appeared to be one of standard application of the three-step approach.

The Court then proceeded to adjust the median line through the weighting of basepoints, using a 3:1 ratio between Nicaraguan and Colombian basepoints to adjust the line, then reducing the turning points to produce a more simplified line. This line was only applied in an area roughly stretching from north of Providencia to south of Alburquerque cays. The Court considered that the extension of this line further to the north or south would not lead to an equitable result. In an unusual move the Court held that relevant circumstances in these areas would properly be given weight 'by continuing the boundary line out to the line 200 nautical miles from the Nicaraguan baselines along lines of latitude'.[40] The features of Quitasueño and Serrana were then enclaved to avoid a disproportionate effect on the boundary.[41] This delimitation was not dissimilar to the delimitation proposed by Nicaragua during the final round of oral proceedings before the Court.

It is questionable whether the introduction of parallel lines can really be described as an 'adjustment' or 'shifting' of the provisional median line. Previous cases where the equidistance line was 'shifted' to take relevant circumstances into account involved moving the line, or a section of the line, laterally for example in *Jan Mayen* and *Libya/Malta*.[42] The introduction of parallel lines in the present case is a more radical adjustment. Although the line drawn by the Court was agreed upon by a majority of judges, the methodology used, or described as being used, by the Court generated significant commentary in separate opinions and declarations. Judge Xue in her Declaration emphasised that she did not disapprove of the concurrent use of enclaving and latitude lines, but questioned whether the three-step process was necessary in the present case.[43] She further questioned whether the weighting of basepoints was in fact a shifting of the provisional line or whether it constituted the construction of a new line with a 3:1 ratio between basepoints.[44] Judge Abraham, in his Separate Opinion noted that while the Court described itself as following the three-step approach, in reality it departed from it significantly. He questioned the description of the two

[39] Ibid, para 229.
[40] Ibid, para 236.
[41] Ibid, para 238.
[42] *Jan Mayen*, ICJ Reports 1993, p 38; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985, p 13.
[43] *Nicaragua v Colombia*, Declaration of Judge Xue, para 9.
[44] Ibid, para 6.

latitudinal parallels as representing an 'adjustment' or 'shifting' of the median line, while acknowledging that the Court had reached the most reasonable solution.[45] In his view, the median line approach was inappropriate due to the geographic circumstances of the case.[46] Judge Keith in his Declaration essentially agreed with the maritime boundary drawn by the Court but considered that it could have been arrived at more directly by an approach using a number of different methods to achieve an equitable result in the unusual geographic context.[47] Judge *ad hoc* Cot described the methodology as 'overly complicated', the weighting of basepoints as 'bizarre' and the resulting line as a 'strange sinusoid'.[48]

3 Impact of the decision

3.1 Colombian reaction

As a result of the introduction of two parallel lines, enclosing the large Colombian islands, and the enclaving of Quitasueño and Serrana, Colombia was granted significantly fewer maritime entitlements than it had claimed. The Colombian government made its dissatisfaction with the ICJ judgment clear in several public statements. In November 2012, Colombia withdrew from the Pact of Bogotá.[49] While this withdrawal will not have any effect on the binding nature of the decision in the *Nicaragua v Colombia* case, it will mean that in future, the ICJ will not have jurisdiction to hear disputes involving Colombia, unless by special agreement. The Colombian and Nicaraguan governments have been in contact regarding implementation of the decision.[50] Nicaragua has stated it will respect Colombia's historic fishing rights and on 22 February 2013 Nicaragua reportedly proposed the creation of a special fishing zone so that fishermen in the San Andrés peninsula could continue to access fishing grounds.[51]

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[45] *Nicaragua v Colombia*, Separate Opinion of Judge Abraham, para 32.

[46] Ibid, para 34.

[47] *Nicaragua v Colombia*, Declaration of Judge Keith, para 10.

[48] Declaration of Judge *ad hoc* Cot, paras 14-15.

[49] 'Presidente Santos confirma que Colombia denunció el Pacto de Bogotá', *Press Release of the Office of the President*, 28 November 2012, <http://wsp.presidencia.gov.co/Prensa/2012/Noviembre/Paginas/20121128_01.aspx> [accessed 29 March 2013].

[50] 'An Islet for a Sea', *The Economist*, 8 December 2012.

[51] N Buckley, 'Nicaragua proposes solution in maritime border dispute', *Colombia Reports*, 22 February 2013, <http://colombiareports.com/colombia-news/news/28265-nicaragua-govt-proposes-solution-in-maritime-border-dispute.html> [accessed 29 March 2013].

Dissatisfaction with a maritime delimitation decision is on some level to be expected when issues of access to resources are at stake. In the *Fisheries Jurisdiction* case, the ICJ ruled that Iceland's unilateral extension of its exclusive fishing area to 50nm was invalid and that the UK had fishing rights outside the 12nm limit.[52] Iceland refused to comply with the decision and continued to prevent UK boats from fishing in the area following the decision. The matter was eventually settled by agreement between the UK and Iceland in June 1976. Guinea-Bissau also settled its maritime boundary with Senegal through negotiation, having previously objected to an award of an arbitral tribunal relevant to a maritime delimitation. Guinea Bissau claimed the award was invalid and instituted proceedings before the ICJ, seeking to have the award declared inexistent. The ICJ rejected the objections of Guinea-Bissau in its decision of November 1991, upholding the validity of the arbitral award.[53] Although Guinea-Bissau had filed an application with the Court, instituting a maritime delimitation case as 'a totally separate matter', the two countries entered into negotiations on the delimitation, resulting in an agreement in 1995 and the withdrawal of the maritime delimitation case from the Court's docket.[54]

While pursuing negotiations with Nicaragua, the Colombian government has also announced the hiring of an international law firm to review the decision.[55] Article 61 of the Statue of the Court only allows for the revision of a judgment on the basis of discovery of a new decisive fact, unknown at the time of the judgment. In the absence of such facts, Colombia could still request an interpretation of the judgment from the Court, though the location of the boundary line itself is unlikely to be considered subject to interpretation.[56]

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[52] *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)*, ICJ Reports 1974, p 3.

[53] *Arbitral Award of 31 July 1989* (*Guinea-Bissau v Senegal*), ICJ Reports 1991 p 53.

[54] Application Instituting Proceedings, *Maritime Delimitation between Guinea-Bissau and Senega*l, 12 March 1991; T Daniel, 'African Maritime Boundaries', in J Charney, D Colson, L Alexander & R Smith (eds), *International Maritime Boundaries* (2005) 3429, 3431.

[55] 'Firma Inglesa Volterra Fietta Será La Encargada De Estudiar El Fallo De La CIJ' Canciller María Ángela Holguín, *Press Release of the Ministry of External Relations*, 20 December 2012, <http://www.cancilleria.gov.co/newsroom/news/firma-inglesa-volterra-fietta-sera-la-encargada-estudiar-fallo-la-cij-canciller-maria> [accessed 3 April 2013]

[56] Statute of the International Court of Justice, Art 60.

3.2 The Pact of Bogotá

The Pact of Bogotá has been the basis of jurisdiction for numerous cases at the ICJ, including the maritime boundary dispute between Honduras and Nicaragua.[57] Of the ten cases currently on the Court's docket, the Pact of Bogotá is cited as a source of jurisdiction in four cases, namely: *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica*), *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*), *Aerial Herbicide Spraying* (*Ecuador v Colombia*) and the *Maritime Dispute* (*Peru v Chile*). The decision in *Nicaragua v Colombia* and the Colombian reaction to it, may give state parties to the Pact of Bogotá reason for reflection. While the decision may not lead to further withdrawals from the Pact, it certainly highlights the advantages of bilaterally negotiated boundary settlement, rather than the perceived imposition of a boundary from an external source. It may encourage Pact states to work harder on negotiated settlement of disputes, particularly as Article II of the Pact limits recourse to the dispute settlement procedures therein to cases which 'cannot be settled by direct negotiations through the usual diplomatic channels.'[58]

3.3 Future delimitations

The next maritime delimitation case on the ICJ's docket is the *Peru v Chile* case. Oral proceedings were held in December 2012 and the case is currently under deliberation. Like *Nicaragua v Colombia*, the case concerns one UNCLOS party (Chile) and one non-UNCLOS party (Peru). A key element of the case is whether there is a maritime boundary already in existence. Peru maintains that there is no pre-existing maritime boundary between the parties, either arising from a treaty or other agreement, or resulting from a *de facto* line.[59] Chile submits that the parties delimited their maritime boundary by point IV of the Santiago Declaration of 1952 and that the boundary is the parallel of latitude of the point where their land boundary meets the sea.[60]

Regarding delimitation methodology, Peru has requested the application of the three-step approach and in oral argument cited the Court in *Nicaragua*

[57] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, ICJ Reports 2007 p 659.
[58] Pact of Bogotá, Art II.
[59] Memorial of the Government of Peru, 20 March 2009, Chapter IV, 83.
[60] Rejoinder of the Government of Chile, 11 July 2011, para 1.5.

v Colombia describing the approach as the 'méthode de référence'.[61] The submissions did not make any reference to the manner in which the three-step approach was applied in *Nicaragua v Colombia*. As Chile argues that the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement, it made no submissions on an eventual delimitation methodology to be used by the Court in the case it found no maritime boundary to exist. If the Court does proceed to effect a maritime delimitation in *Peru v Chile*, it is unlikely that it would carry out an adjustment of the median line similar to that of *Nicaragua v Colombia*. The geographic context in *Peru v Chile* is different to the more complicated scenario presented in *Nicaragua v Colombia* and consists of a reasonably straightforward delimitation of adjacent continental shelves. It has been suggested elsewhere that the finding of the Court at the preliminary objections stage of *Nicaragua v Colombia*, to the effect that the 82nd meridian was not a delimitation line could have an impact on further maritime delimitations involving lines of allocation.[62] It is submitted that the use of a line of latitude or longitude in an agreement regarding territorial or maritime boundaries has no impact on whether the line was intended as a line of maritime delimitation or a line of allocation. The Court at the preliminary objections stage of *Nicaragua v Colombia* found that the reference to the 82nd meridian in the Protocol to the 1928 Treaty was not a line of maritime delimitation, not because this was a pre-UNCLOS line, or a line of longitude but because the evidence did not suggest that the parties at the time considered the 1928 Treaty and Protocol to effect a maritime delimitation.[63]

4 Conclusion

Each maritime delimitation takes place in a different set of geographic circumstances and the flexibility at the heart of the three-step approach allows these circumstances to be taken into account. At the same time, the significant consequences that result from a maritime boundary delimitation mean that states seek

[61] Verbatim Record of Public Sitting held on Monday 3 December 2012, in the case concerning the Maritime Dispute (*Peru v Chile*), CR 2012/27, 25.

[62] P Bekker, 'The World Court Awards Sovereignty Over Several Islands in the Caribbean Sea to Colombia and Fixes a Single Maritime Boundary between Colombia and Nicaragua' (2013) 17 *ASIL Insights* 1. On the distinction between a boundary line and a line of allocation see N M Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of Political Process* (2003) 7-8.

[63] *Nicaragua v Colombia* (*Preliminary Objections)*, ICJ Reports 2007 p 832, para 116.

a certain amount of predictability before submitting delimitation to a dispute settlement body. The ICJ has now decided 13 maritime delimitation cases and it is possible to trace the emergence of a reasonably standard delimitation methodology.[64] In contrast, ITLOS has so far only carried out one maritime delimitation in the case of *Bangladesh/Myanmar*. As ITLOS is composed of judges specialised in the law of the sea and has less cases on its docket than the ICJ, it would appear to be the obvious choice for a state seeking a maritime delimitation. However, prior to the *Bangladesh/Myanmar* case, the approach of ITLOS towards the maritime delimitation jurisprudence methodology set out by the ICJ and arbitral tribunals was unclear. In the *Bangladesh/Myanmar* case, ITLOS made it clear that it would follow previous delimitation jurisprudence and the decision was generally well received.[65] ITLOS could be considered to be under greater pressure to produce predictable results so as to establish itself as a reliable delimitation jurisdiction. On the other hand, state parties to the Pact of Bogotá can compel fellow Pact states to appear before the ICJ whereas the Pact does not provide for compulsory dispute settlement before ITLOS. The ICJ has a further advantage as a maritime delimitation jurisdiction in that in can also settle territorial disputes antecedent to any maritime delimitation. In comparison, the jurisdiction of ITLOS is limited to disputes concerning the application or interpretation of UNCLOS or international agreements related to the purposes of UNCLOS.[66]

This brings us to *Nicaragua v Colombia*, a delimitation involving complex geographic circumstances with no obvious linear equitable solution. The solution arrived at by the Court could be described as creative, and perhaps unpredictable. It is possible that states who felt that the ICJ was the maritime delimitation devil they knew, will be given pause for thought by the *Nicaragua v Colombia* judgment. The decision in *Peru v Chile* is likely to be highly anticipated in this regard (if the Court, in fact, proceeds to a maritime delimitation). The Pact of Bogotá offers state parties ease of access to the jurisdiction of the ICJ, in that consent of Pact states to the adjudication of a particular dispute is not required. Following the decision in *Nicaragua v Colombia*, it is likely that Pact of Bogotá states will examine whether such ease of access is still in their best interests.

[64] See Tanaka, above n 35; J Shi 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9 *Chinese JIL* 271.

[65] *Bangladesh/Myanmar*, paras 238-40. For academic reaction to the case see R Churchill 'The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation' (2012) 1 *CJICL* 137; C Schofield & A Telesetsky 'Grey Clouds or Clearer Skies Ahead? Implications of the Bay of Bengal Case' (2012) 3 *Law of the Sea Reports.*

[66] UNCLOS, Art 288.

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The Year 2012 in International Criminal Courts and Tribunals: A Retrospect

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2012 was a vintage year for international criminal law. After ten years in existence, the International Criminal Court (*ICC*) rendered the first two judgments of its history, as well as a decision spelling out the principles governing reparations to victims. Former President of Liberia Charles Taylor was convicted by the Special Court for Sierra Leone (*SCSL*), marking the first time a former head of state was convicted by an international tribunal since Nuremberg.[1] Judgments delivered by the International Criminal Tribunal for the former Yugoslavia (*ICTY*), now on the verge of reaching the end of its mandate, gave rise to fierce controversy. The legitimacy of the Special Tribunal for Lebanon (*STL*) was—unsuccessfully—challenged. Not to be outdone, the Extraordinary Chambers in the Courts of Cambodia (*ECCC*) concluded their first cases against former members of the Khmer Rouge regime.

These important decisions have already been, or will undoubtedly be, abundantly commented upon.[2] Rather than superficially touching upon what others have analysed, or will analyse in extensive depth, this short note selectively focuses on specific issues. It identifies and comments on dominant themes in the past year's decisions—threads running through the case law which, by their nature, reflect the controversies, orientations, and evolutions that have nourished the field since its earliest developments. This note will accordingly discuss three main points. The first is partly political in nature: it concerns the diverse forms of criticism and challenges that international criminal tribunals faced in 2012. The second is more substantive: it considers how the concept of reasonable doubt

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[1] Karl Dönitz, who became the German Head of State on 1 May 1945 after Adolf Hitler's suicide, was sentenced to ten years of imprisonment by the International Military Tribunal.

[2] See e.g. on the *Lubanga* judgment, K Ambos, 'The First Judgment of the International Criminal Court (*Prosecutor v Lubanga*): A Comprehensive Analysis of the Legal Issues' (2012) 12 *ICLR* 115; T R Liefländer, 'The *Lubanga* Judgment of the ICC: More than Just the First Step?' (2012) 1 *CJICL* 191.

was applied by judges. The third is a matter of normative discourse: it considers the extent to which international human rights law was used as a yardstick for reviewing and developing norms in international criminal proceedings.

1 Challenges to the legitimacy of international criminal jurisdictions

In 2012, international criminal courts and tribunals were not spared controversies, either legal or political. Criticism was voiced not only by outsiders, but also by actors involved in cases, to question the legality of these institutions' existence, the rigour of their legal reasoning as well as their prosecutorial policy.

1.1 Challenges to the legality and jurisdiction of the STL

On 27 July 2012, the STL rendered its Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal.[3] The defence sought to challenge the legality of the STL's creation, arguing *inter alia* that the UN Security Council acted *ultra vires* in establishing the Tribunal and violated the sovereignty of Lebanon by imposing a draft agreement which had not been ratified by the Lebanese Parliament. Not surprisingly, the STL, carefully sticking to the precedent established by the ICTY Appeals Chamber's decision on jurisdiction in *Tadić*,[4] rejected the defence motions. Being 'purely a creature of a Security Council Resolution,'[5] it declined to review the legality of the action of the Security Council.[6]

1.2 Controversies and judicial shortcomings at the ICTY

A series of ICTY judgments in late 2012 provoked an unusually vehement backlash. On 16 November, the ICTY Appeals Chamber overturned the convictions entered against Croatian generals Ante Gotovina and Mladen Markač for their alleged role in Operation Storm in 1995.[7] Scenes of jubilation were reported in

[3] *Prosecutor v Salim Jamil Ayyash et al*, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, Case No STL-11-01, 2012.

[4] See *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1, 1995.

[5] *Ayyash et al*, above n 3, para 53.

[6] Ibid, in particular paras 55 and 71.

[7] *Prosecutor v Ante Gotovina and Mladen Markač*, Appeals Judgment, Case No IT-06-90, 2012.

Zagreb, where Ante Gotovina was welcomed by thousands of people. Serbia, for its part, denounced the judges' decision, accusing the Tribunal of 'open[ing] old wounds'[8] and showing political bias in its approach to the conflict in the former Yugoslavia. A few days later, a trial chamber delivered its judgment in the retrial of Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj for crimes allegedly committed, *inter alia*, against Serbs in Kosovo,[9] acquitting the defendants on all counts and thereby fuelling perceptions of bias in Serbia. As the judges of the STL put it, '"selectivity" is part of the history of international criminal jurisdictions, and an inevitable consequence of establishing an international criminal court or tribunal'.[10]

Beyond political controversies, the legal reasoning of the ICTY Appeals Chamber in *Gotovina and Markač* attracted much criticism. Two of the five judges on the bench indeed expressed their dissent in the most radical terms. At the core of the dissent was the way in which the majority of the Appeals Chamber reviewed the Trial Chamber's analysis of the lawfulness of artillery attacks. To cut a long story short, the Trial Chamber had ruled that all impacts situated within 200 metres of an identified military objective were to be deemed lawful, while all those falling beyond had to be considered indiscriminate and hence unlawful. This arbitrary standard was unanimously rejected by the Appeals Chamber. All judges agreed that no evidence on the record, including testimonies of several artillery experts, could reasonably lead to the conclusion that 200 metres was an appropriate estimate.[11] Consensus, however, ended here. Unfortunately, the majority did not define the appropriate standard for assessing the lawfulness of the attacks, thus failing to apply the norm of review enunciated at the beginning of the judgment: 'Where the Appeals Chamber finds an error of law in the trial judgment arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.'[12] The majority thus simply dismissed the Trial Chamber's analysis and failed to review *de novo* the evidence, taking questionable analytical shortcuts to make the entire trial judgment fall apart like a house of cards.[13] Regrettably, by attributing a disproportionate significance to

[8] J Borger, 'War Crimes Convictions of Two Croatian Generals Overturned', *The Guardian*, 16 November 2012, <http://www.guardian.co.uk/world/2012/nov/16/war-crimes-convictions-croat-generals-overturned> [accessed 2 March 2012].

[9] *Prosecutor v Haradinaj et al*, Retrial Judgment, Case No IT-04-84, 2012.

[10] *Ayyash et al*, above n 3, para 87.

[11] See the discussion of the Trial Chamber's analysis in *Gotovina and Markač*, above n 7, paras 52–61.

[12] Ibid, para 12.

[13] See *Prosecutor v Ante Gotovina and Mladen Markač*, Dissenting Opinion of Judge Carmel Agius,

the question of the 200 metres standard, the Appeals Chamber did not address in sufficient detail equally important issues. Ante Gotovina and Mladen Markač spent years in detention and suffered the stigma of being labelled war criminals, eventually to be found not guilty. They deserved, at the very least, a more rigorous judgment. So did the victims of the crimes committed by the Croatian Army during Operation Storm.

1.3 Criticism of prosecutorial policy

Another notable development of the year was the ICC Trial Chamber's critique of the way in which the Prosecutor handled the *Ngudjolo* case. The judges unanimously acquitted Mathieu Ngudjolo Chui, who had been charged with war crimes and crimes against humanity as indirect co-perpetrator for his alleged role in the attack on the village of Bogoro in the Ituri Province of the Democratic Republic of Congo in February 2003. Whilst the Trial Chamber found that crimes such as murder, plunder, and rape had undoubtedly been committed against civilians during the attack (including by child soldiers), it was not in a position to determine the role played by the accused at the time.[14]

The Trial Chamber did not sanction the Prosecutor for having changed his argument regarding the position of the accused in different armed groups, since the modification did not alter, in substance, the charges as confirmed by the Pre-Trial Chamber.[15] The judgment, however, contains a section specifically dedicated to listing the shortcomings of the investigation conducted by the Office of the Prosecutor. Although the Trial Chamber acknowledged the difficulty of investigating this case, it blamed the Prosecutor for having failed to call potentially important witnesses and to analyse certain points in sufficient depth.[16] What is more, contradictions, lies, and suspicious behaviour marred the testimony of many witnesses and cast significant doubts on their credibility. As a result, the testimony of several key witnesses in the Prosecutor's case was entirely dismissed by the Trial Chamber.

This judgment sheds light on the challenges faced by the Office of the Prosecutor in investigating and prosecuting wartime atrocities. It is difficult to

paras 3–4.

[14] *Prosecutor v Mathieu Ngudjolo Chui*, Trial Judgment, Case No ICC-01/04-02/12, 2012. One may regret that the Trial Chamber did not express its view on the law applicable to indirect co-perpetration and on the import of German criminal law doctrine, as Judge van den Wyngaert did in her Separate Opinion.

[15] Ibid, paras 350–1.

[16] Ibid, paras 115–23.

assess how it will reflect on the Court's image and whether it will improve its legitimacy. If the Prosecutor is deemed incapable of building a strong case against one middle-ranking accused for a very narrow set of facts, how can he/she be expected to deal with large-scale cases involving high-level political and military leaders?

The question of prosecutorial discretion was addressed by the ECCC Supreme Court Chamber in the case against Duch, former director of the Khmer Rouge S-21 security centre.[17] Responding to the appellant's argument that the ECCC lacked jurisdiction to try him because he was not one of the 'senior leaders of Democratic Kampuchea and those who were most responsible', the Supreme Court Chamber rejected the argument as being essentially a matter of prosecutorial policy. Interestingly, however, referring to precedents, the judges ruled that they had 'the power to review the discretion of the Co-Investigating Judges and the Co-Prosecutors on the ground that they allegedly exercised their discretion […] in bad faith or according to unsound professional judgment'.[18] That being said, this power of review remains 'extremely narrow in scope'.[19]

2 Reasonable doubt as an instrument of judicial reasoning

An interesting feature of recent cases is the recurrent emphasis on the standard of reasonable doubt, with the purpose of either exculpating the accused or distinguishing between different forms of liability.

2.1 Doubts exculpating the accused

As pointed out above, the acquittal of Mathieu Ngudjolo was due to a lack of evidence. The *Ngudjolo* judgment is entirely built around the notion of reasonable doubt. As the judges rightly recalled, the fact that an allegation is not

[17] *Kaing Guek Eav alias Duch,* Appeal Judgment, Case No 001/18-07-2007/ECCC, 2012. In this case, the Supreme Court Chamber continued the ECCC's delicate task of ascertaining the contours of customary law in the time before the creation of the *ad hoc* tribunals (see *Khieu Samphan et al*, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, Case No 002/19-09-2007-ECCC, 2010, paras 53–88). The Supreme Court Chamber thus held that in 1975–1979 rape did not constitute a crime against humanity under customary international law (see paras 168–213).

[18] Ibid, para 80.

[19] Ibid.

proven beyond reasonable doubt does not necessarily imply that the allegation is unfounded. It only means that the available evidence was not sufficient, or not reliable enough, to verify its truthfulness. As a result, a verdict declaring the accused not guilty does not necessarily mean that the accused is innocent. It merely means that the evidence presented at trial was insufficient to convince the Court beyond any reasonable doubt.[20]

In the view of the Trial Chamber, the evidence on the record established that the accused enjoyed a rising social status owing to his recognised military expertise and that he had become a key local actor in the time following the attack of Bogoro. However, the Trial Chamber could not determine precisely what role, if any, Mathieu Ngudjolo played in the attack. Although the Trial Chamber could not rule out the possibility that the accused might indeed have had authority over the armed militia responsible for the attack, in the absence of reliable information it was not convinced beyond a reasonable doubt that this was the case.[21] The Trial Chamber sent a strong message: it recalled that international criminal trials are, if not only, at least primarily about judging the responsibility of a person.

The concept of reasonable doubt was also central to Judge Nyambe's dissent in *Tolimir*. On 12 December 2012, the ICTY found Zdravko Tolimir, former Assistant Commander for Intelligence and Security of the Bosnian Serb Army, guilty of genocide and sentenced him to life imprisonment for his participation in a joint criminal enterprise (*JCE*) to murder the able-bodied Bosnian Muslim men from the enclave of Srebrenica.[22] In her dissenting opinion, Judge Nyambe insisted on the 'benefit of the doubt' to systematically reject evidence she believed did not meet the required threshold of persuasiveness.[23]

2.2 Doubts drawing the line between modes of responsibility

Whilst, in the cases presented above, the concept of reasonable doubt was invoked in support of the accused's acquittal, in the SCSL judgment of 18 May 2012 in the case against Charles Taylor, it served the purpose of distinguishing between different forms of liability. The judges first dismissed the Prosecutor's allegation that the accused acted as member of a JCE pursuant to 'a common purpose to terrorize the civilian population of Sierra Leone'.[24] The Trial Chamber concluded

[20] *Ngudjolo*, above n 14, para 36.
[21] Ibid, para 501.
[22] *Prosecutor v Zdravko Tolimir*, Trial Judgment, Case No IT-05-88/2, 2012.
[23] Ibid, Dissenting and Separate Concurring Opinions of Judge Prisca Matimba Nyambe.
[24] *Prosecutor v Charles Ghankay Taylor*, Trial Judgment, Case No SCSL-03-01, 2012, paras 6895–6.

that 'th[e] evidence clearly shows that the Accused and the RUF [Revolutionary United Front of Sierra Leone] were military allies and trading partners, but it is an insufficient basis to find beyond reasonable doubt that the Accused was part of any JCE'.[25]

Then, however, when assessing the responsibility of the accused under other modes of liability, the Trial Chamber found the accused guilty not only of aiding and abetting, but also of planning crimes alleged in the indictment. According to the judges, the accused, together with the leadership of the RUF, 'intentionally designed a plan for the [invasion of Freetown]' which 'substantially contributed to the RUF/AFRC [Armed Forces Revolutionary Council] military attacks' involving the commission of crimes, and intended, or was aware of the substantial likelihood of such crimes being committed.[26]

At first glance, the findings of the SCSL might seem confusing. It is indeed difficult to see where the judges drew the line between the common criminal purpose required for JCE liability, and the act of designing the (potentially) criminal conduct required by responsibility for planning. Even though there is, in abstract legal terms, little difference between these two material elements, the difference, as a matter of fact, is not negligible in this case. The plan for which the accused was found guilty was much narrower in scope than the alleged common criminal purpose. Whilst evidence demonstrated the existence of a plan to invade Freetown, it did not establish beyond reasonable doubt the existence of a common criminal purpose in the form of a generalised campaign of terror aiming at controlling the population and territory of Sierra Leone and pillaging its resources. The concept of reasonable doubt was thus used as a means of delineating the exact responsibility of the accused based on the available evidence.

3 The influence of international human rights law

It is striking that recent decisions make abundant references to international human rights law. Human rights instruments as well as the jurisprudence of human rights courts and treaty bodies have been substantially relied upon to evaluate and develop the law applicable to international criminal trials.

[25] Ibid, para 6899.
[26] Ibid, paras 6954–71.

3.1 Normative evaluation of procedural safeguards

In response to the defence's argument that the tribunal had not been 'established by law', the STL, following *Tadić*, undertook to assess whether its Statute and Rules of Procedure and Evidence met the standards of international human rights law with respect to fair trial rights.[27] Yet although the Trial Chamber considered that applicable human rights standards included those laid down by the United Nations Human Rights Committee, the European Court of Human Rights (*ECtHR*), the Inter-American Court of Human Rights (*IACtHR*), and the African Court of Human Rights,[28] in fact it carried out a relatively superficial survey of international human rights law, merely referring to the major international human rights treaties and citing a couple of cases from the ECtHR and the Human Rights Committee. The STL did not really push its analysis further than the ICTY did in *Tadić*.[29]

3.2 Detention of the accused and fitness to stand trial

On 13 September 2012, the ECCC ruled again on Ieng Thirith's fitness to stand trial.[30] Repeated expert assessments had concluded that Ieng Thirith, former Social Action Minister of Democratic Kampuchea, was suffering from significant cognitive impairments probably caused by Alzheimer's disease, and that no further treatment would be likely to improve her condition. The Trial Chamber, in assessing whether the accused could still validly be kept in detention while unfit to stand trial, applied standards developed by the ECtHR and the IACtHR[31] to conclude that 'the continued detention of an Accused who is unfit to stand trial can only be justified where there is a substantial likelihood that he or she may become fit to stand trial in the foreseeable future (and thus, where there is a reasonable prospect of that individual being tried without undue delay)'.[32] The judges ordered the immediate release of Ieng Thirith.

[27] *Ayyash et al*, above n 3, paras 73–88.
[28] Ibid, para 74.
[29] See *Tadić*, above n 4, paras 45–7.
[30] *Ieng Thirith*, Decision on Reassessment of Accused's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, Case No 002/19-09-2007/ECCC, 2012.
[31] Ibid, para 22.
[32] Ibid, para 23.

3.3 Victims' participation and reparation

In *Duch*, the ECCC Supreme Court Chamber further ruled on the law governing the participation of victims as civil parties. In determining the standard of proof required to grant a civil party application, it embarked on a relatively detailed analysis of reparation proceedings before the ECtHR and the IACtHR,[33] reaching the conclusion that 'legal precepts of regional human rights mechanisms do not necessarily provide guidance for civil actions in criminal cases'.[34] In short, the Trial Chamber considered that regional human rights courts 'operate under a different legal framework and are animated by different policies'.[35]

The issue of victims' rights in international criminal proceedings was also extensively addressed by the ICC in *Lubanga*. After its 2008 Decision on Victims' Participation,[36] on 7 August 2012 the Trial Chamber ruled on the principles applicable to reparations.[37] In addition to referring to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[38] the Court held that 'general concepts relating to reparations which have been established through the jurisprudence of [regional human rights] courts can provide useful guidance to the ICC'.[39] The Court thus relied heavily on international human rights instruments as well as on the jurisprudence of the ECtHR and the IACtHR to determine the principles governing the modalities of reparations, in particular with respect to compensation and the definitions of harm, rehabilitation, and causation.[40]

4 Conclusion

The developments of the case law in 2012 analysed here are not in themselves groundbreaking. They are, however, emblematic of what international criminal law is about, and tell us something about its future. Whether expectations for the

[33] *Duch,* above n 17, paras 431–5, 516–19.
[34] Ibid, para 435.
[35] Ibid, para 431.
[36] *Prosecutor v Thomas Lubanga Dyilo*, Decision on Victims' Participation, Case No ICC-01/04-01/06, 2008.
[37] *Prosecutor v Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, Case No ICC-01/04-01/06, 2012.
[38] UN General Assembly, UN Doc. A/RES/60/147 (2006).
[39] *Lubanga*, Decision on Reparations, above n 37, 67 (n 377).
[40] Ibid, paras 229–50.

ICC will be met also depends on the rigour, coherence, and intellectual honesty of the judges' rulings, and on the way in which they incorporate the normative heritage of the discipline.

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Enforcing Democracy at the Regional Level: Paraguay's Suspension before the Mercosur Court

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Keywords
International trade, regional trading agreements, Mercosur, democracy enforcement

Inaugurated in 1991 as a regional trade agreement between Argentina, Brazil, Paraguay and Uruguay (M4), the Common Market of the South (Mercosur) followed an increasingly familiar pattern, serving as an institutional framework for harmonisation of wider economic and social policies between its members. In 1998, following allegations of an attempted coup in Paraguay, the M4, Chile and Bolivia agreed on a Protocol on Democratic Commitment in Mercosur (*Ushuaia Protocol*),[1] whose Article 5 empowers parties to regional agreements, acting by consensus, to respond to a 'breakdown of democracy' in one of them by suspending the latter's rights under the relevant agreements.

On 29 June 2012, following a hasty deposition of Paraguay's President by the country's Congress, the presidents of Argentina, Brazil and Uruguay (M3) decided to suspend Paraguay's rights to participate in Mercosur decision-making. Paraguay responded by initiating a dispute before Mercosur's Permanent Review Court (Mercosur Court), invoking the emergency procedure provided for in Article 24 of the 2002 Olivos Protocol for the Solution of Controversies in the Mercosur *(Olivos Protocol)*.[2] Paraguay claimed that its suspension was null and void and, more importantly, that one of its consequences—the accession of Venezuela to Mercosur—should be reversed as a result. In less than two weeks,

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[1] Ushuaia Protocol on Democratic Commitment in the Mercosur, the Republic of Bolivia and the Republic of Chile, 24 July 1998, 2177 UNTS 375.

[2] Olivos Protocol for the Solution of Controversies in the Mercosur, 18 February 2002, 2251 UNTS 244.

the Court issued an award (*Award 1/2012*)[3] which, despite not having examined the merits of the case, clarified some relevant institutional matters in Mercosur law. If Paraguay takes the case forward, the Court may be required to determine the extent of its powers of judicial review over political decisions of members.

1 Background

On 21 and 22 June 2012, President Fernando Lugo of Paraguay was impeached by the Paraguayan Congress. On 21 June, the Chamber of Deputies formulated and approved, by 76 votes to 1, an accusation against the President for 'bad performance of his functions' (a reason for impeachment under Article 225 of the Paraguayan Constitution).[4] The next day the Senate took up the case. Lugo and his lawyers had less than 24 hours to examine the indictment and prepare the defence. A trial was conducted by the Senate and, within five hours, Lugo's impeachment was approved by 39 votes to 1. The Vice-President, Federico Franco, took office immediately.

On 24 June, the M3, plus the five Mercosur associate states (Bolivia, Chile, Colombia, Ecuador and Peru) and Venezuela (then in accession process), condemned the 'breakdown of democracy' in Paraguay. In a Mercosur summit held on 28 and 29 June (*Mendoza summit*), the M3 presidents invoked the Ushuaia Protocol and suspended Paraguay from its participation in Mercosur decision-making (*Mendoza decision*).[5] The Mendoza decision specifically suspended in relation to Paraguay the provision, in Article 40(ii) of the Protocol on the Institutional Structure of the Mercosur *(Institutional Protocol),*[6] that all members must incorporate a Mercosur norm into their domestic legal order before it enters into force. As a consequence, pursuant to Article 40(iii) of the same protocol, Mercosur norms would enter into force 30 days after their incorporation in the domestic legal orders of the M3.[7]

[3] *Laudo No 01/2012 (Award 1/2012),* Tribunal Permanente de Revisión del Mercosur, 21 July 2012, <http://www.mercosur.int> [accessed 1 March 2013].

[4] Constitución Política de la República de Paraguay, 20 June 1992, http://www.senado.gov.py/leyes [accessed 1 March 2013].

[5] *Decisión sobre la Suspensión del Paraguay en el Mercosur en Aplicación del Protocolo de Ushuaia sobre Compromiso Democrático,* MERCOSUR/CMC/DEC. No 28/12, 29 June 2012 (*Mendoza decision*).

[6] Additional Protocol to the Asunción Treaty on the Institutional Structure of Mercosur (Ouro Preto Protocol), 17 December 1994, 2145 UNTS 300. To facilitate the reading for non-specialists, the terminology used in this article will at times be at variance with the Mercosur tradition of referring to the various instruments by the name of the city where they were signed.

[7] Mendoza decision, Art 2.

Venezuela's accession, decided by unanimity by the M4 in 2006, had been approved domestically by the M3 but not by Paraguay. Following the Mendoza decision, the M3 presidents issued a declaration acknowledging the accession of Venezuela to Mercosur and calling a Mercosur meeting for the formal accession to take place (*Mendoza declaration*).[8] In response, on 9 July 2012 Paraguay filed a claim with the Mercosur Court against the M3, challenging the validity of the Mendoza decision and of the Mendoza declaration.

2 Decision of the Court

Three questions were posed before the Mercosur Court: (i) whether the Court had jurisdiction to examine Paraguay's challenge of the Mendoza decision and Mendoza declaration; (ii) whether the emergency procedure could be invoked by Paraguay in the circumstances; and (iii) whether the Mendoza decision and Mendoza declaration were valid.

2.1 Jurisdiction of the Court

The defendants argued that the dispute was not a commercial but a political one, as the Mendoza decision concerned the issue of democracy. Decisions under the Ushuaia Protocol, they claimed, were not decisions of Mercosur organs and fell outside the jurisdiction *ratione materiae* of the Mercosur dispute settlement system. Members had 'exclusive authority' to interpret the meaning of 'breakdown of democracy', and a court of law had no 'aptitude' to second-guess decisions of the members on political issues.[9]

The Court dismissed these arguments. It noted that pursuant to Article 1.1 of the Olivos Protocol, Mercosur dispute settlement concerns disputes 'regarding the interpretation, application or breach of' the Mercosur Constitutive Treaty (*Constitutive Treaty*),[10] its side agreements and protocols thereto, as well as decisions, resolutions and directives issued by Mercosur organs.[11] Nowhere in the Olivos Protocol is the jurisdiction of the Court restricted to trade matters.

[8] Declaración sobre la Incorporación de la República Bolivariana de Venezuela al Mercosur, 29 June 2012, Art 1–2.

[9] *Award 1/2012*, para 27.

[10] Treaty Establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 26 March 1991, 2140 UNTS 257.

[11] *Award 1/2012*, paras 34–5.

Furthermore, the preamble as well as the provisions of the Ushuaia Protocol make explicit reference to this protocol's integration within the Mercosur legal system. The Court stated that the rules of the Ushuaia Protocol are a matter for Mercosur dispute settlement, 'to the extent that they affect or may affect the rights and obligations of members'.[12]

2.2 Use of the emergency procedure

The emergency procedure under which Paraguay filed its claim was based on Article 24 of the Olivos Protocol. Ordinarily, Mercosur dispute settlement procedure is initiated by recourse to *ad hoc* arbitral tribunals, against whose awards members may then appeal to the Mercosur Court. Article 24, however, merely empowers the Common Market Council (Mercosur's highest decision-making body) to create special procedures. The only procedure created by the Council, through *Decision 23/04,*[13] concerns disputes relating to perishable or seasonal goods—allowing for these disputes direct recourse to the Mercosur Court. The only other possibility for the Mercosur Court to hear a dispute directly is, pursuant to Article 23 of the Olivos Protocol, by agreement of the parties to the dispute. The defendants explicitly rejected direct recourse to the Court. Arguing that its suspension from political bodies prevented it from having recourse to the ordinary procedure, Paraguay nonetheless filed its claim directly with the Mercosur Court, requesting use by analogy of the emergency procedure.

The Court rejected the analogy. It felt unable to 'substitute its will for that of the members manifested in the requirements provided for in *Decision 23/04*, which limit the jurisdiction of the Mercosur Court in relation to the special emergency procedure'.[14] Furthermore, the Court noted that Paraguay had not formally requested direct negotiations prior to initiating the dispute—a requirement under Article 4 of the Olivos Protocol. While acknowledging that the resulting delay could be prejudicial to Paraguay's interests and even to 'the legal-institutional stability in the region', the Court found that it could not place itself above the text of the Olivos Protocol.[15]

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[12] Ibid, para 40.

[13] *Procedimiento para atender los casos excepcionales de urgencia, a que hace referencia el artículo 24 del Protocolo de Olivos para la Solución de Controversias en Mercosur*, MERCOSUR/CMC/DEC. No 23/04, 7 July 2004.

[14] *Award 1/2012*, para 52.

[15] Ibid, paras 58–9.

Against this, a minority opinion argued for a teleological interpretation of Mercosur law. The minority agreed that Paraguay could not have had recourse to the emergency procedure by analogy.[16] However, it reasoned that the purpose of Mercosur dispute settlement is to solve disputes between members arising out of Mercosur law, observing that the Olivos Protocol provides for the possibility of exceptional and urgent measures in case of irreparable damage. The minority concluded that direct recourse to the Court should be permitted when other procedures are not available to a member because it has been excluded from Mercosur organs.[17]

2.3 Merits of the dispute and future of the claim

Having found that the procedure chosen by Paraguay was not adequate for the dispute, the Mercosur Court concluded that it had no jurisdiction to examine the merits of the case. The Court nonetheless considered some substantive aspects of the dispute. First, it understood that Paraguay's suspension from decision-making did not affect its right to have recourse to Mercosur dispute settlement, and recognised the Minister of Foreign Affairs appointed by Paraguay's new President as that member's rightful representative.[18] Second, the Court explicitly left open the possibility of recourse by members to other means within Mercosur law to resolve the dispute.[19] These findings, together with the Court's determination that it has jurisdiction *ratione materiae*, provided Paraguay with assurances that it may proceed with its case.

The subsequent presentation by Paraguay of formal protests to the M3 may indicate a willingness to push the case forward.[20] However, these protests fail to comply with the requirements the Mercosur Court held indispensable for a communication leading to the establishment of a Mercosur dispute.[21] In particular, Paraguay's protest does not include a proposed date and place for direct negotiations with its addressees.

Another possibility could be for Paraguay to shift fora and file a claim before the International Court of Justice (*ICJ*). One problem with this option would be to

[16] Minority opinions in Mercosur law are anonymous.
[17] Ibid, paras 61–5.
[18] Ibid, paras 6 and 28.
[19] Ibid, para 4.
[20] Ministry of Foreign Affairs, 'Presentación de protesta dirigida a los Gobiernos de Argentina, Brasil y Uruguay', <http://www.mre.gov.py/v1/Noticias/175-presentacin-de-protesta-dirigida-a-los-gobiernos-de-argentina-brasil-y-uruguay.aspx> [accessed 1 March 2013].
[21] *Award 1/2012*, para 60 n 6.

find grounds for jurisdiction. Brazil and Uruguay, as well as Paraguay, are parties to the Pact of Bogotá,[22] which provides for compulsory jurisdiction under Article 36(2) of the Statute of the ICJ between its signatories.[23] Argentina and Venezuela, however, signed but never ratified the Pact. Even though Paraguay could enter claims against Brazil and Uruguay only, it is unlikely that the ICJ will agree to adjudicate on the matter. In order to do so, the ICJ would be required to rule on the lawfulness of Argentina's conduct, as well as on the rights of Venezuela under Mercosur law. The ICJ has often refused to adjudicate when it found that a non-party's legal interests 'would form the very subject-matter of the decision'.[24] Unless some other grounds for jurisdiction can be found, then, Mercosur dispute settlement appears to be the sole means available for Paraguay to have its claim heard.

3 The legality of the suspension

This section considers the merits of Paraguay's allegations. Paraguay alleged, first, that the M3 presidents were not competent to make a decision having effect upon Mercosur law. It also argued that, under the Ushuaia Protocol, any such decision should have been preceded by consultations. Finally, Paraguay claimed that Article 20 of the Constitutive Treaty specifically provides that approval of requests for accession requires unanimity among existing members.

3.1 The competence of the M3 presidents

Paraguay challenged the competence of the M3 presidents to issue the Mendoza decision, arguing that joint presidential decisions are not sources of Mercosur law. A list of sources is provided for in Article 41 of Mercosur's Institutional Protocol. These include: (i) the Constitutive Treaty, its protocols and additional or complementary instruments; (ii) agreements entered into within the framework of the Constitutive Treaty and its protocols; and (iii) decisions of the Common

[22] American Treaty on Pacific Settlement (Pact of Bogotá), 30 April 1948, 30 UNTS 55. Paraguay and Uruguay have also independently accepted the Court's compulsory jurisdiction under Article 36(2), *vis-à-vis* other states also accepting this compulsory jurisdiction.

[23] Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993, Art 36(2).

[24] There is nonetheless margin for debate, especially if the claim is framed in terms of responsibility instead of legality. Contrast *Certain Phosphate Lands in Nauru (Nauru v Australia)*, ICJ Reports 1992 p 243, 259-261, with *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, para 43.

Market Council, resolutions of the Common Market Group and directives of the Mercosur Trade Commission. Paraguay's argument appears to be that only organs mentioned in item (iii) may make binding decisions under Mercosur law.[25] This, however, overlooks the possibility of decisions being lawfully made under the treaties, protocols and agreements referred to in items (i) and (ii). The Mercosur Court determined in *Award 1/2012* that the Ushuaia Protocol is part of Mercosur law for the purposes of its jurisdiction. It would seem contradictory for the Court to later determine that an express provision in the same protocol cannot serve as a valid basis for a decision under Mercosur law. Article 5 of the Ushuaia Protocol explicitly authorises 'the other States parties to this Protocol' to consider which measures to take in case of a breakdown of democracy in one of the members. Article 6 specifies that the state targeted by the measures 'shall be notified of them but shall not participate in the process of their adoption'.[26]

Even if this were not specifically provided for, it would be difficult to argue that a unanimous decision by all members except for an alleged violator does not produce any effects. Under general international law, a violation of a multilateral treaty may lead to the effective expulsion of a party from the treaty, or to suspension of its rights under it. Article 60(2)(a) of the Vienna Convention on the Law of Treaties (*VCLT*),[27] ratified by all M4, provides that a 'material breach' of a multilateral treaty allows 'the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it', either entirely or between themselves and the violator only.

A material breach is defined as a 'violation of a provision essential to the accomplishment of the object and purpose of the treaty'.[28] Although originally a trade bloc, Mercosur has developed over two decades into a multi-dimensional integration process, involving coordination of economic and social policies between its members, as well as political commitments. If the maintenance of democracy is in fact an 'indispensable condition for development of the process of integration', as Article 1 of the Ushuaia Protocol puts it, a breakdown of democracy constitutes a material breach, allowing the other members to suspend, and even terminate, the Mercosur treaties with regard to the violator.

As *lex specialis*, the Ushuaia Protocol in fact limits the rights of other members to react to a breakdown of democracy in one of them. The measures which Article 5 warrants range from 'suspension of the right to participate in various

[25] *Award 1/2012*, para 12.
[26] Ushuaia Protocol, Art 6.
[27] Vienna Convention on the Law of Treaties, 23 May 1969, 115 UNTS 331.
[28] Ibid, Art 60(3)(b).

bodies of the respective integration processes' to 'suspension of the rights and obligations resulting from those processes'. Other members may not, it would seem, terminate the relevant treaties, or expel the violator, as would be permitted under the VCLT. Additionally, Article 7 provides that the suspension must end as soon as democracy is re-established.

3.2 Was the Mendoza decision illegal? Formal and substantive aspects

The other arguments raised by Paraguay concern the form and substance of the Mendoza decision. First, Paraguay claims that the Ushuaia Protocol conditions the taking of Article 5 measures upon prior consultations with the alleged violator. Second, it argues that the Mendoza decision could not have overridden Article 20 of the Constitutive Treaty, which specifically provides that approval of requests for accession 'shall be the subject of unanimous decision by the members'.

The success of both arguments, of course, rests on the premise that the Mendoza decision is subject to review by Mercosur courts. Judicial review of decisions of 'political' organs has sometimes been contentious, in particular for the ICJ in relation to the UN Security Council.[29] However, the Mercosur Court determined without hesitation that there is a 'right to have recourse to the system' held by any member that considers that its rights under Mercosur law have been violated, adding that its jurisdiction 'encompasses the norms of the Ushuaia Protocol insofar as these norms affect or may affect rights and obligations of any members'.[30] Even if the M3 presidents do not formally constitute a Mercosur organ, then, it seems that the Mercosur Court is willing to review, in light of Mercosur law, both the legality of their decisions and the extent of the effects they may lawfully produce upon Mercosur treaty rights.

3.3 The duty to consult and the formal legality of the measure

Paraguay's argument regarding the formal illegality of the Mendoza decision is based on Article 4 of the Ushuaia Protocol, which provides that, in the event of a breakdown of democracy in a party, other parties 'shall promote

[29] *Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, ICJ Reports 1998 p 115, 129–34.

[30] *Award 1/2012*, para 40.

the relevant consultations among themselves and with the State concerned'. Article 5 conditions the taking of further measures to such consultations being unsuccessful. Paraguay argued that pertinent consultations never took place, while the defendants rebutted that (i) no formal requirements attach to the duty to consult, as it is political in character; and (ii) they did in fact consult with 'various Paraguayan political actors' before making the decision.[31]

Having affirmed, in *Award 1/2012*, broad powers of judicial review in Mercosur, the Mercosur Court is unlikely to accept the argument that the 'political' character of consultations shields them from judicial oversight. More weight may be given to the argument that no particular forms or time frames attach to consultations under the Ushuaia Protocol. Article 4 of the Ushuaia Protocol provides that consultations must be 'relevant'—they must specifically refer to the obligations under the protocol—and must include 'the State concerned'. Arguably, both requirements were met by the presence in Paraguay, on the critical days of the impeachment, of a delegation of representatives of the Union of South American Nations (*UNASUR*), including all three M3 Ministers of Foreign Affairs. This delegation held meetings with then President Lugo and senators, as well as with members of the Paraguayan military. If the new executive is not recognised by the other members, it would seem that the legislature and the military constitute rightful representatives of the Paraguayan state, and—especially when their position is of support for the new executive—may be consulted with in order to assess the existence of a breakdown of democracy.

Additionally, the Mendoza decision was made in a scenario in which all three branches of government in Paraguay supported the impeachment. The decision was issued four days after Paraguay's Supreme Court dismissed the appeal lodged by (former) President Lugo against his impeachment. The main grounds for the Supreme Court's decision were: (i) that the Senate was exercising a 'political judgement' and was acting within its constitutional competences; (ii) that, since the procedure that was 'not technically speaking jurisdictional', judicial guarantees apply 'not in an absolute but in a relative manner'; and, strikingly, (iii) that, since the procedure to which it applied was over, 'the challenged resolution lost its legal utility, to which attaches the dismissal *in limine litis* of the claim'.[32] Lugo's successor formed his government on the same day, and the President of

[31] Ibid, paras 22–3.

[32] Corte Suprema de Justicia del Paraguay, *Acción de Inconstitucionalidad No 874*, 25 June 2012. The Supreme Court reaffirmed its position on 20 September 2012 (*Acción de Inconstitucionalidad No 960*).

Congress declared the change of government 'irreversible'. No further remedies existed within the Paraguayan legal system capable of reversing Lugo's ousting.

The ICJ has consistently held that treaty clauses requiring previous negotiations do not pose an obstacle to international action if negotiations 'have failed or become futile or deadlocked'.[33] This jurisprudence refers to negotiations that must precede the filing of a claim with the ICJ, but the principle that an obligation to negotiate rests on the premise that a negotiated solution is feasible applies to political fora as well.[34] If Lugo's removal from office effectively constituted a breakdown of democracy, this series of events would seem to prevent any consultations from being successful, thus permitting the taking of Article 5 measures by other members.

3.4 Constitutional limitations on the reach of collective decisions

Even if the Mendoza decision were formally valid, Paraguay argued, it could not have suspended the requirement of unanimity for the acceptance of new members into Mercosur. Article 20 of the Constitutive Treaty specifically provides that approval of requests for accession 'shall require unanimous decision' of Mercosur members. The respondents rebutted this by distinguishing between the decision to accept the accession of a new member and the conditions for this decision to enter into force. Article 20, they argued, applies only to the former; Venezuela's Accession Protocol,[35] approved unanimously in 2006, would enter into force 30 days 'after the date of deposit of the last instrument of ratification by the non-suspended parties'.[36]

This argument by the respondents appears weak. Article 12 of Venezuela's Accession Protocol in fact provides that the protocol should enter into force on the 30th day 'from the date of deposit of the fifth instrument of ratification'. This may be interpreted as poor drafting, but seems to confirm the general principle that decisions in Mercosur, especially decisions as relevant as the incorporation of a new member, should be unanimous. As the Mercosur Court explained in

[33] *Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (*Georgia v Russian Federation)*, Judgment of 1 April 2011, paras 156–61.

[34] It is beyond the scope of this article to discuss the distinction between obligations of 'negotiation' and 'consultation'. Arguably, the latter are less stringent than the former.

[35] Protocolo de Adhesión de la Republica Bolivariana de Venezuela al Mercosur, 4 July 2006, <http://www.mercosur.int> [accessed 1 March 2013].

[36] *Award 1/2012*, para 26.

Award 1/2012, the Mercosur legal framework 'does not create a supranational legal order capable of substituting the sovereign will of its component states'.[37] In this regard, it would be difficult to argue that a decision may affect Paraguay without its full consent. Despite corresponding to the text of the Constitutive Treaty, the distinction made by the M3 between the quora for approval and for ratification seems artificial. It is also contradicted by the signature, on 7 December 2012, of Bolivia's Accession Protocol by the M3, Venezuela and Bolivia,[38] with Article 13 providing that 'other signatories to the Constitutive Treaty' may later adhere to the protocol.

There are, however, two sides to the Court's dictum. The will of members 'manifests itself … in the international treaties to which they subscribe and in the decisions subsequently adopted'.[39] Paraguay gave its sovereign consent to the Ushuaia Protocol as much as to the Constitutive Treaty. The former is *lex posterior*, and arguably also *lex specialis*. A breakdown of democracy allows other parties to respond by suspending a variety of rights, including 'the rights and obligations deriving from' the various integration processes existing among the parties to the Ushuaia Protocol. More generally, if Mercosur can be considered to have evolved from a one-dimensional trade bloc into a comprehensive integration process, having as one of its pillars the democratic stability of its members, it seems logical to allow the suspension of a member following a breakdown of democracy to have broad effects.

4 Conclusion: Should Mercosur courts review the substance of the Mendoza decision?

On the merits, if Paraguay pushes its case forward, Mercosur courts seem to have two options: they may either fully accept the validity of the Mendoza decision or consider that, although generally valid, the decision may not override the unanimity requirement in Article 20 of the Constitutional Treaty. In the latter case, the Mendoza declaration would be without legal effects and Paraguay's consent would be required for Venezuela to accede to Mercosur. Such a decision would also render Bolivia's Accession Protocol, signed on 7 December 2012 under protests by Paraguay, devoid of legal effects pending Paraguay's acceptance.

[37] Ibid, para 42.

[38] Protocol de Adhesión del Estado Plurinacional de Bolivia al Mercosur, 7 December 2012, <http://www.mercosur.int> [accessed 1 March 2013].

[39] *Award 1/2012*, para 42.

It does seem in accordance with the spirit of Mercosur law to prevent some members from introducing new elements into the bloc taking advantage of a momentary suspension of one of them. In case of a more durable breakdown of the democratic process, however, should Article 20 bar all further expansion of Mercosur? In this situation, the sole possibility left for members to go forward with the integration process of Latin America (an explicit objective of the Constitutive Treaty) would be to acknowledge the failure of Mercosur sanctions and to use their residual right under general international law to expel the non-democratic member.[40] This would run contrary to the contemporary belief that engaging with violators, especially in the case of human rights norms, is more effective than excluding them from the relevant legal framework.[41] The Court would nonetheless be protecting the principle of unanimity in Mercosur, in line with the bloc's non-supranational character.

Much seems to turn on whether one considers that the events in Paraguay constituted a 'constitutional coup' or whether they were a lawful—if not particularly orderly—application of Paraguay's Constitution. Paraguay's post-ousting government was composed as provided for in the Constitution, and appears willing to hold elections in 2013 as scheduled, triggering a relatively quick readmission to full participation in the trade bloc. On the other hand, Article 17 of the Paraguayan Constitution provides for a series of 'procedural rights' applicable to any 'procedure … from which a penalty or sanction may derive', some of which were admittedly not respected due to the 'political' character of Lugo's trial.[42] But may Mercosur courts look beyond the formal validity of the Mendoza decision, determining whether the terms of the suspension were proportional to the gravity of the breakdown of democracy? Undertaking such a review would not only demand a complex examination of the impeachment under Paraguayan law and human rights standards (international or Mercosur-specific); it would also require an important change in mindset from a Court which just rejected a request for teleological interpretation, emphasising the absence of supranationality in Mercosur law.

A less daring option would be for Mercosur courts to affirm a wide margin of appreciation for members on political issues, while safeguarding the courts' ultimate ability to override clearly disproportional uses of Ushuaia Protocol

[40] B Simma & D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *EJIL* 483, 492–3.

[41] B Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).

[42] Corte Suprema de Justicia del Paraguay, *Acción de Inconstitucionalidad No 874*, 25 June 2012, para 3.

sanctions. Save for cases of obvious abuse, it is difficult to fashion clear legal standards on what constitutes a breakdown of democracy: the decision is by definition political. In uncertain situations, second-guessing the consensual decision of the governments of all members (assuming they are themselves democratic) could be a thorny task for an international court.

The most virulent criticisms addressed at the Mendoza decision, in fact, do not concern the merits of this particular decision but rather the inconsistency in the formulation and application of the so-called 'democratic clause' provided by the Ushuaia Protocol. The clause, it is argued, is under-inclusive, as it fails to address situations of 'democracy erosion' by charismatic leaders and domination of other branches of government by the executive—phenomena common in some of the South American 'Bolivarian' Republics. Additionally, the application of the clause against Paraguay would have more to do with the political inclinations of the toppled (left-wing) and instated (centre-right) governments than with the preservation of democracy itself.

Similar claims of inconsistency are often addressed to political organs on all levels (starting with the UN Security Council and General Assembly). The terms of the Ushuaia Protocol are broad enough to encompass both traditional coups and erosion of democracy. It would perhaps be more productive, if one's intention is to protect democracy, to take the case of Paraguay's suspension as a precedent, and to call for similar application of Ushuaia Protocol sanctions to like cases in the future, than to demand that the clause not be applied at all. In a region that has all too often succumbed to non-democratic 'waves', a mechanism whereby democratic governments may support each other—and sanction breakdowns of democracy in their peers—should in principle be preserved and allowed to function.

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Book Review

CRAWFORD, JAMES, *Brownlie's Principles of Public International Law, 8th Edition* (Oxford University Press, 2012). 888 pages; £44.99 (paperback).

Samuel Wordsworth QC[*]

1 Introduction

As Professor Warbrick noted at the official launch of the 8th edition of *Brownlie's Principles of Public International Law* in Cambridge last October (2012), reviews of textbooks are presumptuous and perhaps redundant affairs. That must be right. The users of the textbook—which in the case of Brownlie's will cover a range from students to courtrooms—will soon enough work out for themselves what the merits of the given textbook are. The minimal function that could be served by the review, which would be to say that the textbook would be best left on the bookshop shelf, is unlikely ever to operate when one comes to an 8th edition, and certainly not when the classic textbook of one great figure of the international law world is, following his tragic death, taken up by another great figure of that world.

In the case of this 8th edition of *Brownlie's Principles of Public International Law*, there is of course scope for important questions on whether or how a classic textbook can or should be passed on from one author to another.[1] However, these are questions that are unlikely to trouble most users of the book, who will be distant from its origins. For a while, students or legal practitioners may and indeed should wonder whether they are referring to the views of Sir Ian Brownlie or Professor Crawford when they cite this work, but in a broad brush way they are likely to consider that they are getting the best of both worlds, a conclusion that may also be derived from reading Professor Crawford's Preface. As explained there, despite the various changes, the text of the 8th edition is essentially Brownlie's, albeit that Professor Crawford has assumed ownership of the text. That may appear uncomfortable or contradictory at certain levels, but at

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[1] See especially C Warbrick, 'Brownlie's Principles of Public International Law: An Assessment' (2000) 11 *EJIL* 621.

a pragmatic level the project has been very successful. And while the emphasis at the official launch was very much on the authorship of Sir Ian Brownlie and the preservation of his heritage—and correctly so—the day-to-day practitioner will welcome the fact that *Brownlie's Principles of Public International Law* has received a very positive and effective overhaul by an author of particular distinction.

2 A few highlights of the new edition

Brownlie's Principles of Public International Law now contains what it has always, and curiously, lacked—an introductory chapter. This is entirely consistent with the overall scheme of the book, which has always been to present international law as a system of law interacting in various ways with the domestic sphere. Indeed, it is notable that in the 1962 proposal for the very first edition of *Brownlie's Principles of Public International Law*, there was to be an introduction that would have touched on many of the themes in the short but highly informative chapter now drafted by Professor Crawford. This takes Keats ('On First Looking into Chapman's Homer') as a starting point to get across the central point that international law is a system of law, or rather laws, and that this is an exciting world for those who choose to inhabit it.[2] This is a message that, like this new Introduction and other user-friendly aspects of this new edition, will hopefully make *Brownlie's Principles of Public International Law* more accessible to those coming to international law for the first time, which is a pool of readers that extends well beyond first year undergraduates. And, for the first time, these readers will benefit from a consideration, albeit succinct, of international law as law.

The remainder of Part I, Preliminary Topics, covers the same themes of sources of law and the relations (now plural) of international and domestic law as in previous editions. A good example of the way these preliminary chapters have been brought up to date is the section (in Chapter 3) on 'International law in the common law tradition'. This develops the previous work of Brownlie in what has become an area of great importance in domestic courts, in circumstances where armed action in Iraq and Afghanistan and also detention and treatment at Guantanamo have led to numerous claims in English and other courts. The consideration of the application of treaties in English courts has been greatly expanded, while the question of what could be meant by 'incorporation'

[2] J Keats, 'On First Looking into Chapman's Homer' (1816): 'Then felt I like some watcher in the skies, When a new planet swims into his ken...'.

of customary international law is now examined in detail with reference to the recent case law and the important scholarship of O'Keefe[3] and Sales and Clement.[4]

These updates are from Crawford; they will be of great value to practitioners, and they fit readily within the scheme and also the spirit of the work devised by Brownlie. The same can be said for the largely new passages on non-justiciability and act of state (although given the pace of development in this area there are already further cases to be added and considered when it comes to the next edition),[5] and also the very helpful new section on 'International law in the civil law tradition'. The reviewer is not aware of any other textbook source of an equivalent and useful overview of how customary international law and treaties are applied in the civil law tradition, and likewise whether or how the doctrine of non-justiciability applies.

The remainder of the book largely follows the general structure of the 7th edition, the changes including the helpful re-casting of the three chapters covering admissibility, dispute settlement and use of force into a new Part (Part XI) devoted to Disputes. This new Part is broader in scope, but at the same time more focused on the specific areas that are likely to be of interest to the contemporary reader. Thus, Chapter 31 on 'The Claims Process' leads straight into new sections offering a succinct distinction between the concepts of jurisdiction and admissibility and an up-to-date (if not uncritical) description of the approach of international tribunals to requirements such as the existence of a dispute and the obligation to negotiate or exchange views. A greater weight is placed on claims between states and private parties, and this is reflected all the more in the following chapter on judicial settlement. In previous editions, the equivalent chapter has been focused largely on the ICJ, but Professor Crawford has enlarged the scope to include new sections on dispute settlement under UNCLOS, the WTO mechanisms and investment treaty arbitration.

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[3] R O' Keefe, 'The Doctrine of Incorporation Revisited' (2008) 79 *BYIL* 7.

[4] P Sales and J Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 *LQR* 388.

[5] For e.g., on act of state, *Yukos Capital SARL v OJSC Rosneft Oil Co* [2012] EWCA Civ 855. With respect to the section on non-justiciability, it might also be thought that the reference to *R v Secretary of State for the Home Department, Ex parte Launder* [1997] 3 All ER 971, line of authorities pays insufficient weight to the views expressed by Lord Brown and others in *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, and taken up in e.g. *R (ICO Satellite Limited) v The Office of Communications* [2010] EWHC 2010 (Admin)—to the effect that it may be sufficient that a decision-maker comes to a tenable view when making an administrative decision by reference to an unincorporated treaty.

This is all to the good, and the new focus on investment treaty arbitration reflects its current importance to students and practitioners, and also picks up from the more developed sections on the relevant substantive protections that are to be found in what is now Chapter 28 (The International Minimum Standard: Persons and Property). To complete the Part, the Chapter on use of force has remained the same length, but now covers considerably more ground through cutting out most of the lengthy quotations from primary source material (all now readily accessible on the internet). This leaves more and welcome space for commentary and views, for example, on the legality of use of force in Iraq or self-defence against the attacks of non-state actors.

The Part on the Law of Responsibility (Part IX) has benefited from a thorough re-working to take account of the ever-wider acceptance of the International Law Commission's (*ILC*) 2001 Articles on Responsibility of States for Internationally Wrongful Acts (*ARSIWA*) as *Brownlie's Principles of Public International Law* now invites us to call them—an acronym which seems unlikely to receive the same acclaim as the Articles themselves). Consistent with the scheme of the ILC's Articles, the question of attribution is dealt with largely up-front, and certain passages here could be approached as useful updates to the ILC's 2001 Commentaries, for example with respect to the passages on attribution of the acts of armed forces, which takes full account of recent cases at the International Court of Justice (*ICJ*), the European Court of Human Rights and domestic courts.[6] One particularly useful feature of this Part is the revised section on peremptory norms, pointing to the ILC's 'authoritative synopsis' of their content, the ICJ's important observations on the need for consent to establish jurisdiction regardless of the character of a norm and, perhaps most important, confirming that Article 41 of the ILC's Articles on State Responsibility

[6] See *Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, ICJ Reports 2005 p. 168; *Behrami and Behrami v France and Saramati v France, Germany and Norway* [GC], no. 71412/01 and no. 78166/01, Judgment 2 May 2007 and also *Case of Al Jedda v The United Kingdom* [GC], no. 27021/08, Judgment 7 July 2011; and the judgment of the Court of Appeal of The Hague in *Mustafić and Nuhanović v the State of the Netherlands* District Court The Hague, case nos. 265618 and 265615, Judgment 10 September 2008. Notably, Professor Crawford states his agreement with the conclusions in this last case that multiple entities may have effective control over forces, and that effective control by a state makes the conduct of these forces attributable to the state regardless of the legal form taken by the operation. Such reasoning, which appears consistent with the further work of the International Law Commission, will no doubt be deployed in future cases to support the contention that the European Court of Human Rights decision on attribution of acts to the UN in *Behrami and Saramati* should be confined to its own particular facts.

on consequences of a serious breach of a peremptory norm is 'probably as much progressive development as codification'.[7]

3 Conclusion

The two lines of Keats that now introduce *Brownlie's Principles of Public International Law* appear particularly apt, and not just as a means of suggesting to the new reader that there is scope for fascination in discovery of the world of international law. The inspiration behind Keat's sonnet was his discovery of a new take on the works of an old master—in the form of Chapman's 1616 translation of Homer—and Keat's verse shows just how productive such new takes may be.[8] It is of course the case that *Brownlie's Principles of Public International Law* could have ended with the 7th edition, with this left 'to rust unburnished, not to shine in use'.[9] It could likewise be said that there is now no dearth of good textbooks. But *Brownlie's Principles of Public International Law* has established itself as a book of real value and authority for students, academics and practitioners, and Professor Crawford's rigorous work preserves and, in this reviewer's opinion, extends the underlying quality of this classic work.

[7] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012). See 598; cf 579, which seems less clear.

[8] One might also note that the footnotes of the previous edition have benefited from the 'eagle eyes' of Professor Crawford and those who have assisted in the vital task of bringing these up to date. Keats use of the idiom in 'On First Looking into Chapman's Homer' was rather less prosaic, of course: 'Then felt I like some watcher of the skies, When a new planet swims into his ken; Or like stout Cortez when with eagle eyes He stared at the Pacific—and all his men Look'd at each other with a wild surmise— Silent, upon a peak in Darien.'

[9] A Tennyson, 'Ulysses': 'How dull it is to pause, to make an end, To rust unburnished, not to shine in use!'

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Implementing Innovations in International Law

Book Review

Cassese, Antonio (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012). 728 pages; £95 (hardback).

Matthew Hoisington[*]

Taking innovations to market is difficult in any discipline—perhaps most especially this of ours. Despite their omnipresence in scholarly journals and other forms of published work, public international law does not lend itself naturally to the implementation of radical projects. Formally speaking, the system, which exists largely to pacify the divergent interests of sovereign equals while trying to stitch them together in a universally applicable order, advertises stability as its competitive advantage. Each new instrument adopted represents the standard against which subsequent actions will be judged—a notch where later ideas are braced. Settled, stable expectations are the goal. Amendments are infrequent and require substantial effort. Each new customary rule applies until it is replaced or superseded. Change is slow and incremental. Judgments of international tribunals bind the parties and, despite the formal absence of *stare decisis*, will often be used as powerful argumentative devices in other contexts. When the rules are clear and well-entrenched, the system is widely considered to be effective. True innovation springs to life and gains acceptance only in the aftermath of crisis. It was long ago that positivism, that paradigm of clarity and objectivity—notwithstanding its uneasy relationship with reality—replaced the messier tenets of naturalism as the predominant form of international legal practice.

While this characterisation of present-day public international law may be true—and most in the mainstream would accept the general characterisation, if not the implication—it nonetheless fosters considerable frustration among pioneering international jurists. Those seeking to innovate through new ideas encounter major, and sometimes insurmountable, obstacles within a system that

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prefers the incessant recitation of the *status quo*. In order to be taken seriously in their creative pursuits, they must tread lightly, careful not to unduly disturb the formal stability of the order that they inherit. To do otherwise is to risk professional ostracism or, even worse, to be ignored altogether.

The late (and great) Antonio Cassese's edited volume represents an excellent example of the restlessness that accompanies such dissonance. Wedged between the inescapable constraints of the real world and the untapped, unrealised possibilities of radical ideas, it tries to create for itself a defensible middle-position. In a telling introductory chapter, Cassese recalls the words from Aldous Huxley's *Proper Studies*, where Huxley, writing in the early part of the twentieth century, drew a distinction between different categories of sociologists. First, there were the 'Technicians' who are inclined 'to accept all too complacently the main framework of the structure whose details they are trying to improve' and '[accept] things as they are, but too uncritically; for along with the existing social institutions, they accept the conception of human nature which the institutions imply'.[1] A second category is made up of 'Utopians' who 'are too preoccupied with what ought to be to pay any serious attention to what is. Outward reality disgusts them; the contemporary dream is the universe in which they live. The subject of their meditations is not man, but a monster of rationality and virtue …'.[2] In between these two extremes lay the 'judicious reformer' who 'wants to know what direction reform should take and what are its limits'[3] and to which the Technician and the Utopian 'have little or nothing to say'.[4]

It is with the 'judicious reformer' that Cassese attempts to draw a connection to his project. In his view what is needed in the field of international law, and the charge he has given to his contributors to find, is a proper balance of 'imaginative power' and 'clarity'.[5] The 'judicious reformer' of international law knows how to use 'the traditional tools of jurisprudence' and is also 'alert to the present—to its merits but also to its pitfalls—and suggests realistic and viable avenues in order to avoid, at least to some extent, those pitfalls encountered when trying to build a better path'.[6] This latter characteristic of awareness might be the prevailing element of Cassese's projection of Huxley's 'judicious reformer'

[1] A Huxley, *Proper Studies* (1929) at ix.
[2] Ibid, x.
[3] Ibid, xi.
[4] Ibid.
[5] A Cassese, 'Introduction' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (2012) xvii, xxi.
[6] Ibid, xvii-xviii.

onto the work of the international jurist. Awareness of the ways the system works and does not work; awareness of the cracks and crevices that can be exploited or filled (as well as those that must be left alone); awareness of the futility of idealism in the face of power; awareness of the stubborn steadfastness of constitutional orders; awareness of the responsibilities of governance; awareness of the self-perpetuating motives of international institutions; awareness, perhaps most of all, of the subservient role that the international jurist is forced to play to other professional headliners in the making of international life.

Cassese's method for the volume, and the way in which he introduces the work of the other contributors, raises a number of questions about the place of the discipline and the jurist in the international system. It is a book of substance, but it tells us more about the style to which the authors are willing to adhere than it does about any one set of programmatic prescriptions. Instead of lone voices calling out into the wilderness (or, as Cassese terms it, 'wild speculation')[7] what we have is an attempt to speak in sober, modest, gently progressive terms. The justification of this is '… to avoid the extremes of both blind acquiescence to present conditions and the illusion of being able to revolutionize the fundamentals'.[8] In framing the challenge before him, the editor also accepts the two 'apparently irreconcilable assumptions of law' articulated by Sir Robert Jennings.[9] We are, Cassese recalls, stuck in Jennings' dilemma of certainty and change. Both are needed but neither is perfectly attainable. Antiquated laws that lose touch with reality risk devolving into an 'empty corpus', while at the same time the 'machinery' for the reform of public international law neither exists nor is likely to emerge in the near future.[10] The best way to unshackle international law is to engage in the hard work of incremental progress. We must, he writes, '… look not at the stars, but closer to home, to the planets that turn around the earth … [and] charg[e] our intellectual weapons with relatively short-range ammunition'.[11]

Despite this nod to the necessity of judicious, self-aware, and realistic conduct—not to mention geocentric astronomy—we nonetheless find assembled in Cassese's collection contributions from some of the discipline's most celebrated outliers. There is Martti Koskenniemi in his familiar role as 'crit', searching in earnest for an elusive 'oceanic feeling' (chapter 1). Nehal Bhuta, as well, does an admirable turn in analysing epochal shifts, particularly as they might

[7] Ibid, xxi.
[8] Ibid, xvii.
[9] Ibid, xviii.
[10] Ibid.
[11] Ibid, xxii.

relate to international legal personality (chapter 6). Additional interventions of note include José Alvarez's assertion of the enduring indispensability of State Sovereignty (chapter 3), Philip Alston's lamentations on the prospects of United Nations reform (chapter 4), Bardo Fassbender's sober appraisal of the UN Security Council's progressive potential (chapter 5), W. Michael Riesman's prospectus on the future of investment law and arbitration (chapter 22), and Judge Abdulqawi Yusuf's discursus on the evolving right to economic, social and cultural self-determination (chapter 30). Included as well are subject matter essays (chapters 28–43) by a vast array of prominent and well-respected international jurists on issues as diverse as trade, the environment, the *jus ad bellum*, terrorism, the *jus in bello*, genetic manipulation, and cyberspace. This is, to say the least, an impressive bunch.

Lording over them all is the editor himself. The author or co-author of no less than seven thematic chapters on a broad range of topics, including modern sovereignty, *jus cogens*, the International Court of Justice, the domestic implementation of international rules, institutional fact-finding, and internal armed conflict, the multitalented Cassese—distinguished first president of both the International Criminal Tribunal for the former Yugoslavia and the Special Tribunal for Lebanon—undertakes a tremendous effort to push his reformist agenda across the spectrum of public international law. Those familiar with his academic and professional achievements, which are innumerable and proverbial, will recognise the enthusiasm, verge, literacy, humour, stubbornness and intelligence that made him a central participant in some of the late twentieth and early twenty-first century's most famous international legal epochs. They might also recognise in his writings certain signatures, such as the commitment to see the law through the lens of humanity, the hope that customary law will evolve to meet the challenges and gaps in the existing order, and the ability to confront complex legal questions in a fair, straightforward and accessible manner.

In light of the prodigious talents of Cassese and his contributors, what does it say about the discipline of international law when some of our most brilliant, original thinkers feel duty-bound to subject themselves to the role of 'judicious reformer[s]'? While prudence has its virtues, certainly such deference is not the rule in other disciplines, where creativity enjoys a more prominent role. The drivers of development and innovation at technology corporations, for instance, do not voluntarily subject themselves to restrictions on their ideas. Rather, they do everything within their power to foster such activities. Google famously maintains a secret lab, with the moniker Google X, where speculative, futuristic projects such as space elevators and a 'web of things', are currently being imagined

and tested.[12] The Google X model follows-on from the precedent of Xerox Palo Alto Research Center (PARC)—whose charter was to 'create the office of the future'[13]—where the personal computer was invented, and Lockheed Martin's Advance Development Programs (better known by its other name—Skunk Works), where the first US jet was conceived and built in 143 days.[14] Governments have also welcomed the use of innovative institutional models. The US Defense Advanced Research Projects Agency (DARPA), the primary innovative arm of the US Department of Defense, which seeks revolutionary advantages for the US military, is responsible for the creation of the Internet and the technology behind global positioning systems (GPS).[15] The list goes on.[16] Are international jurists not capable of adopting similar approaches? Can they not be the creative engineers and 'skunk workers' of the international system?

Comparing international law and international jurists to professionals in the technology, aeronautics or defense industries may strike many as unfair or fanciful, but a great deal can be learned from the way professionals in other disciplines are able to foster their innovative ideas and take them to market. In Cassese's volume, the issue of implementation is addressed in the usual methods, mainly through the interplay between international and domestic law (chapters 15–16), judicial review (chapters 19–23), and fact-finding induced pressure (chapters 24–27). According to this view, international law exists on one level, dominated largely by states, and it must be brought into effect by its adoption, internalisation and use domestically. This corresponds to the introduction of products into the market and their subsequent adoption or

[12] C C Miller and N Bilton, 'Google's Lab of Wildest Dreams', *The New York Times*, 13 November 2011 <http://www.nytimes.com/2011/11/14/technology/at-google-x-a-top-secret-lab-dreaming-up-the-future.html?pagewanted=all&_r=0> [accessed 5 May 2013].

[13] See 'Parc Today', *Parc. A Xerox Company*, <http://www.parc.com/about/> [accessed 3 April 2013].

[14] See 'Skunk Works®', *Lockheed Martin*, <http://www.lockheedmartin.com/us/aeronautics/skunkworks.html> [accessed 3 April 2013].

[15] See generally DARPA, *Fifty Years of Bridging the Gap* (2008) at 54-55 and 78-85, <http://www.darpa.mil/about/history/first_50_years.aspx> [accessed 3 April 2013].

[16] The DARPA model was recently applied to the U.S. Department of Energy in the form of the Advanced Research Projects Agency - Energy (ARPA-E), which focuses on, among other things, '… creative "out-of-the-box" transformational energy research'. See Advanced Research Projects Agency—Energy, <http://arpa-e.energy.gov/?q=arpa-e-site-page/about> [accessed 3 April 2013]. The United States Central Intelligence Agency also implores its analysts to pursue innovative thinking through its 'CIA Red Cell', which 'has been charged by the Director of Intelligence with taking a pronounced "out-of-the-box" approach that will provoke thought and offer an alternative viewpoint on the full range of analytic issues'. See *Central Intelligence Agency*, <https://www.cia.gov/offices-of-cia/intelligence-analysis/history.html> [accessed 3 April 2013].

purchase by market participants. The problem with the implementation of new ideas in international law is that they are stunted at the first level and sclerotic at the second. Because of existing processes that limit international lawmaking, new rules rarely get the chance to be tested domestically, even where they are needed. In sum, international law suffers from a dearth of vigorous, bold and imaginative research and development. To make matters worse, there are few, if any, institutional arrangements that allow for the introduction and beta-testing of new and innovative ideas.

The limits of the analogy are also worth noting. The incentives are certainly different. For one, international law is not *per se* interested in production. Whether more law is better, or whether the old law must be replaced by something new and innovative depends to a very large extent on the situation. Moreover, it should go without saying that international law's objectives are very different than, for instance, the technology or defense industry's. The preamble to the Charter of the United Nations states the determination, among other things, 'to save succeeding generations from the scourge of war'.[17] Meanwhile, Google's 2012 mission statement is 'to organize the world's information and make it universally accessible and useful',[18] while DARPA's avowed purpose is '…to maintain the technological superiority of the US military and prevent technological surprise from harming our national security by sponsoring revolutionary, high-payoff research bridging the gap between fundamental discoveries and their military use'.[19] There is an element of humanity and responsibility inherent in the practice of international law that is not necessarily reflected in enterprises, such as Google or DARPA, where innovation has enjoyed more widespread success. (Even national defense, with its avowed high-minded purposes, often involves the breaking-down, rather than the building-up of humanity.) Finally, new ideas must be 'tested' quite differently in the international legal context than in other areas. Because international law cuts so close to the vital interests and lives of its subjects, those seeking to innovate must carefully avoid unintended consequences.

Despite these clear differences, commonalities, such as the need to constantly challenge what already exists and the necessity of innovation-friendly institutional arrangements do apply, and international jurists, as the rightful engineers of the international order, can and must do a better job of creating conditions

[17] Charter of the United Nations and Statute of the International Court of Justice, Preamble.

[18] See 'Company', *Google*, <http://www.google.com/about/company/> [accessed 3 April 2013].

[19] See *Defense Advanced Research Projects Agency*, <http://www.darpa.mil/about.aspx> [accessed 3 April 2013].

conducive to innovative change. This, in turn, will give life to their transformative intellectual projects.

The first part of the solution, which is something Cassese and his contributors unfortunately do not address, is that the international jurist need not fall neatly into one category or another. Rather, in his or her work, he or she may vacillate between different roles. The academic who enters public service knows this well, but the full-time practitioner could use some lessons. The key, paradoxically, is to retain the same sort of hyper self-awareness that led Cassese to call his contributors to the 'judicious reformers' camp in the first place. The effort it takes to innovate and experiment can take place alongside the performance of more mundane professional tasks. The expert and experienced international jurist will know full well when he or she is in the mode of innovator/utopian as opposed to technician, 'judicious reformer' and so on.

A second part of the solution, which is also not addressed sufficiently in *Realizing Utopia*, is to institutionalise systems that not only create outlets for innovative projects but also offer ready-set processes for their implementation. This kind of effort is not easy. It requires a shift in focus from end results to processes. It is largely true, as Cassese writes, that '… international law lacks an efficient international mechanism for the abolition of outdated legal rules and the formation of more modern and adequate prescriptions'.[20] Even where such processes exist in a formal sense, they ultimately require the added elements of favourable informal practices and bold personalities in order for ideas to be carried into execution. Building up these informal practices and identifying the right people to carry out the tasks involved takes experience, leadership and persistent effort. Subsequent dilemmas arise. When good processes fail, what happens? Think of the International Law Commission or, better yet, the *Ad hoc* Committee established pursuant to United Nations General Assembly resolution 51/210 of 17 December 1996. Fuelled by strong institutional linkages and mandates, both bodies have contributed to major successes in public international law—the Vienna Convention on the Law of Treaties and the Rome Statute of the International Criminal Court, for the former, or, for the latter, a number of sectoral conventions on international terrorism—but they have also encountered challenges—such as the Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts for the former, and the Draft Comprehensive Convention on International Terrorism for the latter—which have proven difficult to overcome. In such cases, additional elements beyond

[20] Cassese, above n 5, xviii

the existing processes, including better means for handling disputes or breaking deadlock, and not mere reforms, are required.

Finally, it should be recalled that while reform is always an option, it should not exclude alternative possibilities. If the current processes that exist do not work, then in some circumstances they need to be cast aside and reinvented completely. To accept the limitations of existing processes as given, and internalise and entrench the distance between the present and the perfect, is to self-impose a restriction. Plenty of difficulties and challenges exist in the discipline without their reification by international jurists. Little is gained by walking to the base of a wall and staring up in learned recognition of its sheer fortitude. Contrary to the general approach adopted in *Realizing Utopia*, some barriers need to be smashed to bits rather than deconstructed brick-by-brick.

Whatever the method for its creation, application—and destruction—the ultimate test of international law will remain its effectiveness. But in order to determine what is effective, the international jurist must be able to empirically test new ideas and hypotheses. Perhaps the most pressing problem with the current international order is that it suppresses such activities out of a near-theological allegiance to stability. Laws are etched in stone rather than written in ways that allows for their continuous renewal and reinvention. To recall Sir Robert Jennings' 'irreconcilable assumptions' once again, in the current order certainty almost always trumps change, and change has no natural pathway to implementation. This creates a self-defeating paradigm. How will we ever know whether a new law or system of rules might function better than the current order if it never gets the chance to operate? The devotion to stability only makes sense if it is assumed that the incorporation of divergent projects creates trade-offs, whereby the benefits of stability are sacrificed to create space for new ideas. This assumption is categorically false. Innovative pursuits can easily take place alongside the routine, baseline functions of organisations. Moreover, such efforts need not detract from existing resources. The industries and disciplines mentioned previously have all found ways to execute on new ideas without sacrificing core competencies.

In the final analysis, Cassese's final book is about *realising* Utopia, not imagining it. And to this noble goal, he and his cadre of able jurists have aptly applied their considerable talents. The idea of a realistic Utopia is, Cassese admits, an oxymoron; however, as he writes in the volume's conclusion:

> We have offered in this book a vast panoply of suggestions aimed at promoting reform and progress of the international society over

> the next two to three decades … it is now for diplomats, politicians, national and international lawmakers, but also for NGOs and national and international public opinion to decide … whether they are worth being implemented on the ground, or are nothing more than stillborn dreams.[21]

Cassese's final message is a challenge. The position taken here is to welcome it. It is now up to us. In order to avoid the fate of 'stillborn dreams' we must take concerted and focused action. In carrying out this charge, however, it might not hurt to lean a little more toward Utopia and a little less toward the realistic than Cassese suggests.

[21] A Casese, 'Gathering Up the Main Threads' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (2012) 645, 683–84.

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Book Review

Bunn, Isabelle, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart Publishing, 2012). 368 pages; £62 (hardback).

Avidan Kent[*]

The 25 years that have passed since the adoption of the United Nations Declaration on the Right to Development (*UNDRD*) have seen significant advances in the regulation of the international economy: the creation of the WTO; the unprecedented growth in international regional economic integration; the ascent of international investment law as well as the backlash against this field;[1] the significant increase in the global attention granted to the (rather 'soft') law related to corporate social responsibility, and the increased scrutiny of the field of international finance.[2] All of these are inherently related to the implementation of the right to development. Isabella Bunn's evaluation of the right to development in light of international economic law could not, therefore, have been more timely.

As suggested by the title of this book, Bunn provides a thorough review of the right to development's legal and moral/ethical dimensions. She touches upon issues such as the history, the development, the substance and the ethical grounds of the right to development, and evaluates these issues against several aspects of the emerging global economy, such as international trade, finance, and corporate responsibility.

Bunn's analysis of the moral aspects of the right to development draws mainly on sources related to Christianity. Indeed Bunn's background as an international lawyer and a theologian who specialised in Christian social ethics promises a highly interdisciplinary study. While most interdisciplinary work related to development and international law is performed from an economic perspective, Bunn's choice to bring religious, in particular Christian, sources into this debate is both refreshing and enlightening.

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[1] See e.g. 'Public Statement on the International Investment Regime', <http://www.osgoode.yorku.ca/public_statement> [accessed 2 April 2013].

[2] See for example *The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights,* GA Res 20/10 UN GAHRC 20th Session, UN Doc. A/HRC/RES/20/10 (18 July 2012).

One of Bunn's fundamental claims is that religious (Christian) sources have influenced many dimensions of the right to development. In fact, Bunn claims that the notion of the right to development was first raised in Catholic teaching. In order to demonstrate these claims, Bunn presents the reader with a myriad of statements and declarations made by prominent Catholic figures and other Christian writings that preceded, or took place at the same time as global events related to the right to development. Furthermore, Bunn finds ethical support in Christian sources for terms related to the right to development, such as 'solidarity' (the Good Samaritan story, which illustrates the duty to provide assistance not only to those closest (i.e. family, neighbours, fellow countrymen), but also to strangers who do not share affinities of race, geographical location, etc.)[3] and 'foreign aid' (Aquinas' notion of the term 'property', which includes not only the *right* to property, but also the *duty to use* property in a manner which is in line with God's intentions). Bunn's work in this respect is valuable, academically enriching and highly original.

While, at least academically, the connection made between Christian sources and the right to development is indeed fascinating, from a practical point of view one must ask what kind of contribution can the religious perspective make to the ongoing debate over the right to development and the global economy. As an answer to this question, Bunn cites Denis Goulet: '[d]evelopment specialists now belatedly acknowledge the central role religious beliefs and normative values play in conferring upon Third World population a sense of identity, cultural integrity and meaningful place in the universe.'[4] Bunn also adds several answers of her own. She claims, for example, that the integration of morality and economic law is necessary, as a 'cleavage' between economics and ethics have developed during the years: 'as economics developed as a 'science', its connection to moral values grew even more tenuous'.[5]

But while the importance of religious beliefs cannot be doubted, one may question the wisdom and the practicality of bringing the contentious baggage of religion into the already highly contested debate over the field of development. Put simply, is religion really the influence lacking from this debate? Especially in light of growing religious fundamentalism, it is doubtful whether arguments based on one set of religious values or another may serve as a conciliatory and

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[3] I Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (2012) 60-61.

[4] D Goulet, 'Means and Ends in Development' in *The Moral Dimensions of International Conduct: The Jesuit Lectures 1982* (1983); See in Bunn, above n 3, 97.

[5] Bunn, above n 3, 293.

balancing force. Furthermore, as Bunn notes, the starting point of such a linkage must be the determination of what is 'good' and 'just', on which the search for a 'fair' economy may be pursued.[6] By opening the door to an overt religious discourse on such terms, one may doubt whether a consensus on such terms can ever be achieved or whether the religious perspective will not in fact frustrate some of the goals that are inherent to the right to development, such as gender equality.

Bunn's choice to search for moral grounding and inspiration for the right to development in Catholic sources, as well as her treatment of the Catholic Church as a source of morality, both deserve another brief comment. Bunn presents her Catholic sources in a non-critical light, and as often aligned with goals affiliated with the right to development. Undoubtedly, the Catholic Church has positively influenced the global debate over such issues. However, Bunn ignores the fact that the stance of the Catholic Church on certain issues could, arguably, directly frustrate the implementation of the right to development. The Catholic Church's view on contraception, for example, has negatively influenced a variety of issues such as gender equality, personal freedoms and health.[7]

But besides religion, morality and ethics, this book also promises a legal analysis of the right to development and international economic law. Bunn's legal analysis of the right to development is comprehensive and clear. Bunn has been highly successful in describing the dynamics and the historical context in which the right to development has been created, starting from the post-war era, the New International Economic Order (*NIEO*), the north-south struggle, and the different channels in which the formulation and the implementation of this right have taken place. The author does not shy away from critical issues related to the right to development such as its vague content (and the difficulties that this implies for its implementation), and its unstable/undetermined status in international law (not yet a human right, not yet a part of customary international law, and doubtfully a 'legal' right in general). The connection that Bunn makes between the legal formulation of this right and moral/ethical arguments, as mentioned above, is especially fascinating,

Nevertheless, some comments concerning the legal aspects of this book seem appropriate. First, a word of caution to the potential reader is due. In my view, the book's title 'The Right to Development and International Economic Law'

[6] Bunn is referring here to Wogaman. See Bunn, ibid.

[7] See for example Pope Benedict XVI statement on condoms and AIDS, <http://www.msnbc.msn.com/id/29734328/ns/world_news-africa/t/pope-condoms-not-answer-aids-fight/#.UHwd8G_A-TV> [accessed 2 April 2013].

is highly misleading. The book promises to address 'international economic law', a field in which the balances embedded in the right to development are most evident. The first 200 pages of this book, out of a total of 300 pages, however, address almost exclusively the right to development, with no reference to economic law whatsoever. Furthermore, in the last three chapters of this book (which supposedly deal with economic law), while Bunn addresses economic *institutions,* or *policies,* she hardly addresses economic *law*.[8] The chapter on international trade for instance, does not include even one reference to a specific Article from the GATT, neither does it provide any assessment of trade rules and their relevance to development, or how accepted legal tools (such as the legal exceptions embedded in the GATT for example[9]) may be utilised. Equally, Bunn completely ignores WTO/GATT jurisprudence, or the role that WTO jurisprudence may have in the implementation of the UNDRD (or at least some elements of the right to development). This oversight is regrettable as genuine attempts to integrate issues related to morality and development within WTO Law have indeed been made both in practice[10] and in academic literature.[11]

Bunn's lack of engagement with economic law is especially noticeable in the conclusion of the book. For example when calling for the 'activation' of the right to development, Bunn does not elaborate on which laws should be changed (if any), or what kind of an economic regulatory framework should be adopted (beyond the general statement that such a framework should include respect for human rights and other aspects of the right to development). This is not to say that Bunn's analysis of the right to development and aspects related to the global

[8] Perhaps with the exception of the part dedicated to corporate social responsibility.

[9] Howse, for example, argues that GATT Article XX can be utilised in cases related to human-rights: R Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) *EJIL* 651–9, 656.

[10] One such example for a legal mechanism adopted by the WTO with respect to human rights and development can be found in the 'waiver' granted for trade measures taken under the Kimberley Process Certification Scheme on 'blood diamonds'. See <http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm> [accessed 2 April 2013]. Paul Collier connects violent conflicts with development, see P Collier, *The Bottom Billion* (2008) 17.

[11] Authors such as Robert Howse have indeed written on such aspects of the right to development and trade law: R Howse & R Teitel, "Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization" (2007) *Geneva Occasional Paper* <http://library.fes.de/pdf-files/iez/global/04572.pdf> [accessed 2 April 2013]; see also *Mainstreaming the right to development into international trade law and policy at the World Trade Organization: Note by the Secretariat* ESC Res 2, UN ESC, 56th Session, Agenda Item 4, UN Doc. E/CN.4/Sub.2/2004/17 (9th June 2004), <http://daccess-ods.un.org/TMP/4919726.25255585.html> [accessed 2 April 2013].

economy is not valuable on its own (it is). It is only to say that if one is expecting a legal assessment of economic law, perhaps this is not the book one should open.

Another element that may disappoint some readers is Bunn's complete disregard of the field of international investment law and its relevance to the right to development. This emerging field has been fiercely opposed by NGOs, academics and increasingly also by states, due to alleged conflicts it may have with issues relating to the right to development.[12] In my view, any contemporary evaluation of the right to development and international economic law should at least assess the arguments made against aspects related to international investment law, even if only to determine whether there is any ground for further discussion on this interaction.

My final few remarks concern Bunn's conclusions. Bunn mentions the words of Philip Alston, who argued that aspects of the free-market, such as deregulation, privatization, etc., have trumped respect for human rights, and in fact 'have acquired the status of values in and of themselves'.[13] Bunn asks how such trends can be restricted. She mentions the connection of the right to development to the concept of self-determination (which according to some includes the people's 'right to choose freely its economic and social system without outside interference or constraint of any kind')[14] and concludes that the right to development therefore 'may bolster the claims of developing countries for greater regulatory and policy "space" in the face of global pressures for economic liberalisation'.[15]

It is difficult to refute Bunn's arguments as they are rather general and it is not clear against which part of the global economy they are directed (the world trading system? Or perhaps to the 'conditionality' imposed by financing institutions?). But in my view Bunn is following, uncritically, two assumptions. The first is that the free-market theory, according to which the international trading system is designed, is deeply flawed. Bunn ignores the fact that in the last 25 years, hundreds of millions (mostly in Asia) have risen above the poverty line due to this international economic system. Whether we call free-trade a 'value' or a 'tool', it cannot be doubted that in reality it has promoted many aspects of the right to development. In fact, authors such as Paul Collier explain that a *reduction*

[12] See for example Public Statement above n 1; M C Cordonier Segger, M Gehring & A Newcombe, *Sustainable Development in World Investment Law* (2010); M Waibel *et al* (eds), *The Backlash Against Investment Arbitration* (2010).

[13] Bunn, above n 3, 291.

[14] Ibid.

[15] Ibid.

of trade barriers should be a part of the 'bottom billion' states' policies, rather than adding restrictions on trade.[16] Admittedly, the trading system requires much refining and adjustment especially in respect of 'bottom billion' states. Its significant achievements however, cannot be so easily overlooked.

The second assumption which must be questioned in Bunn's analysis concerns the power of the concept of self-determination to 'buy' a state more policy space. This assumption too is difficult to address head-on, as again, it is not clear to which part of the global economy it is referring. But if this assumption addresses international trade law and the restrictions it imposes on states, this claim is obviously controversial as it is essentially being argued that the concept of self-determination can be used as an additional 'excuse', or 'exception' against the fulfilment of international obligations, beyond the exceptions already embedded in the WTO legal framework. It should be remembered, in this respect, that any form of international law implies restrictions on a state's right to regulate, and that such restrictions do not automatically amount to a violation of a state's right to self-determination. In my view, it would have been constructive at this point if Bunn had explained exactly how she conceives the conflict between the concept of self-determination and the restrictions imposed by economic law, and what kind of role self-determination is expected to play in this clash. For example, does she envision the concept of self-determination to play a role similar (although much wider) to that of the general exceptions stipulated in GATT Article XX (i.e. a state may excuse itself from specific obligations where such are conflicting with its right to self-determination)? Or does she refer to the possibility of completely withdrawing from the WTO regime, where such framework is no longer consistent with states' right to self-determination? Both possibilities carry wide implications and further, deeper discussion would have been useful.

Notwithstanding such criticisms, Bunn's work is highly interesting and is undoubtedly a valuable contribution to knowledge in the field of development. Her well-written book takes a multi-dimensional approach to a complicated subject, and asks difficult questions of both opponents and proponents of the right to development. I would therefore commend it to anyone with an interest in the field of development.

[16] Collier, above n 10, 160.

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Minding the Gap between Scholarly Discourse and State Practice in International Humanitarian Law

Book Review

Wilmshurst, Elizabeth (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012). 568 pages; £85 (hardback).
Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012). 696 pages; £95 (hardback).

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One wishes that the fate of war victims would be as promising as that of the scholarship on the law that ostensibly protects them, international humanitarian law (*IHL*). The two excellent books under review contribute significantly to the already flourishing academic IHL discourse[1] in a manner that engages rather than discards that scholarship's 'nemesis': state practice. The need to enrich the IHL discourse with state practice has already been suggested by Adam Roberts:

> The laws of war are strange not only in their subject matter, which to many people seems a contradiction in terms, but also in their methodology. There is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice … In short, the study of law needs to be integrated with the study of history: if not, it is inadequate.[2]

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[1] To name just a few books published in recent years: E Benvenisti, *The International Law of Occupation* (2nd edn, 2012); W H Boothby, *The Law of Targeting* (2012); O Ben–Naftali (ed), *International Humanitarian Law and International Human Rights Law* (2011); C Ford & A Cohen (eds), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2011); E Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010); A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010); N Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (2010); N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010).

[2] A Roberts, 'Land Warfare: From Hague to Nuremberg', in M Howard, G J Andreopoulous & M R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (1994) 117.

Indeed, both books take an even greater step in bridging the gap between discourse and practice by taking account of the positions of states and the increasingly important positions of armed groups involved in the various armed conflicts the authors discuss.

Such contribution is in and of itself a good enough reason for any IHL scholar to read these books. There are more.

The Law of Non-International Armed Conflict is only the second recent book fully dedicated to examining applicable law in non-international armed conflicts (*NIACs*).[3] *International Law and the Classification of Conflicts* is the only book, so far, that offers an in-depth examination of conflict classification under IHL.

The Law of Non-International Armed Conflict offers a critical examination of the content, application and enforcement of the law of NIAC. Incorporating the views of parties to armed conflicts, both states as well as non-state armed groups, strengthens the analysis.

The book is divided into three sections. The first section examines how NIACs have been regulated by international law. The great merit of this section is the novel approach it takes in examining less traditional sources of the law of NIAC such as instructions, codes of conduct, internal regulations and domestic legislation. The second section focuses on the substantive law of NIAC. It examines when a given NIAC can be said to exist; discusses the distinction between NIACs and international armed conflicts (*IACs*); the notion of transnational armed conflicts; and examines the scope of application of the law, the substantive rules that apply with regard to the protection of civilians and persons *hors de combat* and with regard to the conduct of hostilities. It concludes by examining the implementation and enforcement of the law of NIAC. The third section advances different proposals relative to the development of the law of NIAC in terms of substance, implementation, enforcement, and formation.

This is a rich and lengthy book (696 pages, including index and bibliography). It is also courageous: Sivakumaran does not shy away from discussing some of the most debatable issues in IHL such as the classification of transnational armed conflicts and the internationalisation of NIACs due to involvement of foreign states. Because the richness of sources and variety of arguments do not allow for a comprehensive discussion, I will address only the latter issue, and further relate it to the second book under review.

The concept of internationalisation has been defined as 'transformation of a *prima facie* NIAC into an IAC, thereby applying to this conflict the more compre-

[3] L Moir, *The Law of Internal Armed Conflict* (2002).

hensive IAC legal regime'.[4] Sivakumaran summarises the leading tests for internationalisation in relation to indirect military intervention, the 'effective control' and the 'overall control' tests established by the ICJ and ICTY respectively,[5] rejects them,[6] and advances a novel argument as to what kind of relations the foreign state needs to have with the non-state group in order to internationalise the NIAC between the non-state group and the territorial state. He proposes that it is the 'notion of a proxy that transforms what seems to be a conflict that is fought between a state and an armed group into a conflict that is actually being fought between states'.[7] This proposition, while intriguing, is not devoid of difficulties. I shall sketch three of them.

First, while Sivakumaran provides important indicators for proxy relations between the foreign state and the non-state group that would generate the internationalisation of the armed conflict between the territorial state and the non-state group (e.g. the sharing of forces and financing, and the shared military objectives and strategies of the outside state and the armed group), these indicators do not really differentiate between close allies and a proxy (i.e. close allies can and in practice do share forces and provide financial support to each other). More importantly, these indications cannot provide a substitute for a clear test. Both the 'effective control' and the 'overall control' tests deserve skepticism but they do provide much needed clarity in an otherwise confusing arena.

Second, the proxy approach shares with the 'effective control' and the 'overall control' tests the 'real time' problem: the list of indications for proxy relation can usually be assessed only *ex post* a given armed conflict. This is particularly troubling because the actors in the battlefield cannot be expected to obey the law of IAC if they still believe they are engaged in a NIAC.

Third, although Sivakumaran successfully combines state practice and opinions of the parties to armed conflicts in most parts of the book, he does not state any relevant state practice in the section on internationalisation due to indirect military intervention.[8] This lacuna is partially filled in *International Law and the Classification of Conflicts*.

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[4] On internationalisation in general, see M Milanović & V Hadži-Vidanović, 'A Taxonomy of Armed Conflict', in N White & C Henderson (eds), *Research Handbook on International Conflict and Security Law* (2013) (forthcoming).

[5] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, ICJ Reports 1986 p 14, 54-5; *Prosecutor v Tadić*, Appeal Judgment, Case IT-94-1-A, 15 July 1999, para 130–7 (*Tadić*).

[6] S Sivakumaran, *The Law of Non-International Armed Conflict* (2012) 225-8.

[7] Ibid, 227.

[8] Ibid, 225-8 (this section is titled 'State control over an armed group').

International Law and the Classification of Conflicts comprises a collection of chapters divided into three sections: the first deals with basic IHL concepts and legal questions in general and with conflict classifications in particular; the second examines armed conflicts that involve complex legal issues pertaining to classification of armed conflicts; the third synthesizes the findings of the different authors of the second section with the analytical insights contained in the first section.

The editor's choice to initiate readers into the subject matter through Steven Haines' *The Nature of War and the Character of Contemporary Armed Conflict* is commendable. By intentionally excluding the topic of the law that regulates hostilities from the scope of the discussion, Haines introduces us to notable literature from disciplines such as military history and war studies. Such focus is particularly warranted given that every legal text derives meaning from its context and that much IHL scholarship does not otherwise benefit from an interdisciplinary approach to the study of war. Dapo Akande's chapter on the *Classification of Armed Conflicts: Relevant Legal Concepts* examines the distinction between IACs and NIACs and a variety of derivative legal questions and advances novel arguments regarding internationalisation of NIACs and the classification of transnational armed conflicts between states and non-state groups as IAC under particular circumstances. Jelena Pejic's *Conflict Classification and the Law Applicable to Detention and the Use of Force* focuses on the rules governing the deprivation of liberty of persons, the transfer of detainees and the use of force under the law applicable in IAC and NIACs. In addition to an analysis both concise and comprehensive of complicated questions relative to targeting and 'direct participation' in hostilities, this chapter further canvasses the vast literature on the relationship between IHL and international human rights law (*IHRL*) in the context of internment and the use of force in NIACs. Pejic persuasively highlights the shortcomings of solely relying on IHRL as a legal basis for internment in NIACs, a reliance that ignores the critical differences between war and peace and the legal and practical limits of applicability of IHRL to non-state groups in NIACs.

The second section revolves around case-studies of hostilities that took place in Northern Ireland (1968-1998); The Democratic Republic of the Congo (1993-2010); Colombia (the 1960s onwards); Afghanistan (2001-2010); Gaza (2000-2011); South Ossetia (2008); Iraq (2003 onwards); and Lebanon (2006). In addition, the conflict against Al-Qaeda is also thoroughly analysed. There is also a brief description and analysis of the recent armed conflict in Libya (2011) and

the fighting against organised cartels in Mexico.[9] The second section contains a notable contribution by Michael N. Schmitt that examines the classification of future battle-fields, including cyber warfare, transnational terrorism and complex battle-spaces.

Each case-study is structured in a similar format: it provides a short historical review of the relevant conflict; an identification of the different actors and their positions regarding the conflict's classification; and a substantive analysis of the classification, which includes an assessment of the impact of the conflict classification on two pertinent issues: application of force and detention of individuals in hostilities.

Understandably, the book could not cover all modern armed conflicts that involved challenging conflict classification questions, but it does an excellent job in raising some of the most interesting and pressing legal questions (e.g. conflict classifications in cases of direct and indirect foreign intervention, classification of NIACs with changing intensity, classification of transnational armed conflict). The concise factual explanation of these conflicts is most helpful and interesting and the substantive analysis of issues relative to conflict classification is excellent. Most notably, the authors include the otherwise neglected area in scholarly writing on classification of armed conflicts, that is the views of the different actors in the conflict relative to its proper classification. It is plausible that such views are hardly ever discussed partly because, with the exception of recognition of belligerency,[10] conflict classification is not contingent on the views of the actors and partly because of practical difficulties in ascertaining these positions.[11] These positions are, however, of great importance, not least because they disclose the wide gap between legal discourse and practice. To the extent that the discourse minds the gap, as I think it should, a study of the positions of the relevant actors is a good starting point. In this regard, this book is not only refreshing but further makes an invaluable contribution to the IHL discourse.

The third section summarises the findings of the different case studies from the second section in light of the discussions presented in the first section. It highlights the difficulties different authors encountered studying the different cases, and draws conclusions relative to both the consequences of conflict

[9] E Wilmshurst (ed), *International Law and the Classification of Conflicts* (2012), chapter 2 and chapter 15.

[10] On the doctrine of belligerency and its applicability in contemporary international law, see D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Wilmshurst (ed), above n 9, 49–50 and I Scobbie, 'Gaza', ibid, 301–5; See also Sivakumaran, above n 6, 9–20.

[11] On these practical difficulties, see Wilmshurst (ed), above n 9, 479.

classifications and the law.

It is interesting to note a potential complementarity between the two books under review: *The Law of Non-International Armed Conflict* focuses on the concept of internationalisation but does not include a study of the positions of the relative actors on this issue, while the case-studies in *International Law and the Classification of Conflicts* examine these positions in practice, but do not develop the concept of internationalisation in the light of this practice, settling instead for either the effective control or the overall control tests.[12]

This potential complementarity should be construed as an invitation for future scholarship. Given that conflicts that have been considered internationalised by tribunals, scholars, IGOs and NGOs have rarely been conceived as such by their participants, future scholarship may well narrow the gap between discourse and practice.[13] Three further points are worth making in this context.

First, the notion of internationalisation generated much judicial and academic excitement. Alas, it has failed to elicit a similar response from states and other relevant actors. This observation is exacerbated by the fact that, unlike other IHL concepts that states involved in armed conflicts also tend to refrain from acknowledging,[14] 'internationalisation' does not have any clear treaty or customary law basis. This may undermine its validity as legal doctrine in international law.

Second, even if the notion of internationalisation can be explained as an interpretation of treaty law,[15] it is still questionable whether it is wise to

[12] Even when some scholars offered different tests for internationalisation, they did not try to ground their suggestions in state practice. See Akande above n 10, 57–62 and F Szesnat & A R Bird, 'Colombia', in Wilmshurst (ed), above n 9, 223–4.

[13] For example, the ICTY in the *Tadić* case decided that the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina was internationalised and therefore classified it as IAC (*Tadić*, Case IT-94-1-A, 15 July 1999, para 162). The parties to the conflict at that time, however, perceived it as NIAC (see *Prosecutor v Tadić,* Trial Judgment, Case IT-94-1-T, 7 May 1997, para 583). A more recent example is the armed conflict in Libya (2011). In Libya, the non-state group (NTC) that fought against the Government (led by Gaddafi) was assisted by foreign states. The NTC classified the conflict as NIAC. Similarly, Gaddafi, despite the fact that he accused the NTC as being comprised of foreign agents, did not classify the conflict as IAC. Nevertheless, some scholars argued that this conflict was internationalised. See, for example, K A Johnston, 'Transformations of Conflict Status in Libya' (2012) 17 *Journal of Conflict & Security Law* 81. Nevertheless, it should be stressed that classification of conflicts by the belligerent parties should not be accepted uncritically. See I Scobbie, 'Lebanon' in Wilmshurst, (ed) above n 9, 400–2.

[14] For example, states are often reluctant to acknowledge situations of internal violence as NIACs. See Wilmshurst (ed), above n 9, 479.

[15] The most convincing explanation would be that at the moment that a non-state group is

interpret the Geneva Conventions without trying to ascertain the position of states to such an important issue. When states needed to express their opinion on a related notion—internationalisation in cases of direct military intervention—they strongly rejected it. They argued that if this notion would become part of international law;

> … then as soon as a foreign State sent its troops over the border to help the rebels, thereby trespassing to begin with on the territorial rights of the neighbouring State, the State which suffered such aggression would have to treat its own rebels as prisoners of war and its local population as that of an occupied territory. … *No government could accept that*.[16]

Granted, this position is no longer dominant. Nevertheless, it indicates that the suggestion that a conflict should be considered international just because an outside state assumed a relationship of control or co-ordination with the rebels may not be accepted by governments.

Third, internationalisation has a direct impact on the applicable law (e.g. whether the members of the non-state group may be entitled to POW status). The fact that the notion of internationalisation has rarely been assimilated by belligerent parties means that, at least when it comes to internationalisation, IHL remains a theoretical concept with no bearing on the fighting forces. It is, of course, possible to dismiss this fact and argue that states that are involved in these armed conflicts do not acknowledge internationalisation due to political reasons and that the impact of internationalisation should be assessed *ex post* a given armed conflict via international criminal law. It is equally possible and, to the extent that we would like IHL to impact the behaviour of actors, perhaps even desirable, to develop the concept of internationalisation in a manner that will be accepted and implemented by states during armed conflicts.

The two books under review are an excellent contribution to IHL scholarship, not least because both, in focusing on relevant state practice, highlight the need to bridge word and deed, discourse and practice. In so doing they have paved a

controlled by a foreign state then the non-state group is just an organ of the foreign state and not an independent actor. Therefore the armed conflict between the territorial state and the non-state group should be classified as IAC according to Common Article 2 of the Geneva Conventions that stipulates that conflicts between two or more states are international.

[16] ICRC, 'Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May–12 June 1971: Report on the Work of the Conference' (1971) 51, para 301(1) (emphasis added).

road yet to be taken towards the development of a concept of internationalisation that converses with and therefore carries greater weight over state practice.