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*Typeset in Crimson and Gentium Book Basic, distributed under the terms of the SIL Open Font License, available at <<http://scripts.sil.org/OFL>>.*

ISSN 2050-1706 (Print)

ISSN 2050-1714 (Online)

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This issue should be cited as (2014) 3(2) CJICL

<http://www.cjicl.org.uk>



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## EDITORIAL

*Daniel Clarry*<sup>\*</sup>*Valentin Jeutner*<sup>†</sup>*Cameron Miles*<sup>‡</sup>

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This is the second regular issue of the third volume of the *Cambridge Journal of International and Comparative Law*. It represents the hard work of a large number of people, who must be thanked before going further. In the first place, the current Editors-in-Chief would like to thank their immediate predecessors, Jasmine Moussa and Bart Smit Duijzentkunst, for passing to them a journal which in a remarkably short period of time has become known for the quality and innovation of the works that appear in its pages. Second, the editors and managing editors of the Journal, who spent countless hours undertaking the initial review of submissions and latterly the copy-editing thereof, are commended for their dedication, accuracy and, on occasion, punctiliousness, without which any academic publication would be unable to function. Third, we express gratitude to the members of the Journal's Academic Review Board for their continued service. Finally, we thank the Senior Treasurer of the Journal, Professor James Crawford AC SC, for his continued support of a publication which, only two years ago, was a mere notion in the minds in the postgraduate community in the Faculty of Law at the University of Cambridge. To quote Lucretius' *De Rerum Natura* (1.135), '*nil posse creari de nilo*' ('nothing can be created from nothing'). Without the efforts of these dedicated individuals, the present publication simply could not exist.

The task of writing a foreword, although superficially simple, is upon closer reflection a complex one. On the one hand, one is enthused by the ideas presented in the papers at one's disposal, but, on the other, one does not wish to ruin the critical perspective of the reader which is so essential to discovering the pieces in their own right. So it is here.

The present issue of the Journal consists of three parts. Part I concerns general articles within the Journal's remit. Amedeo Arena leads off with an

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incisive piece that examines the evergreen question of the extent to which legal systems are prisoners of their intellectual heritage, by examining the effect of the juridical traditions of the US and the EU on the disparate spheres of modern competition law. In an encouraging turn to scholarship, Arena examines the effect that the Harvard and Chicago Schools in the US, and the Freiburg School in the EU, have had on the contemporary realities of competition law, thereby demonstrating the continued relevance of academic debate to the practical work of lawyers.

Similar themes are realised in the work of Marco Benatar, whose paper 'International Law, Domestic Lenses' argues that greater attention should be given to the role of national legal culture in the making and practice of international law. Benatar recognizes the reality of interface between international and domestic law—that municipal law is no better or worse than international law and that certain elements of the former (principally the role of individuals and the structural realities of norm creation in international law) may influence the latter. His views are instantiated in the law and practice of the International Court of Justice, which is given extended treatment.

In John Jupp's piece, we see a departure from the emphasis on legal tradition to legal transplants in the context of post-conflict criminal law reform. Jupp explores the proper place and functioning of legal transplants to bring about change and stability in legal regimes emerging from internecine strife. This is particularly important for criminal legal transplants which Jupp has selected as the prism through which to view these transformations, proposing various evaluative criteria for furthering the rational application of imported precepts of the criminal law.

Finally, Vladislava Stoyanova addresses the issues of slavery, servitude, forced labour and human trafficking and the obligations of states to criminalize such conduct in the context of the European Convention on Human Rights (*ECHR*). In particular, Stoyanova addresses the question of why, despite the omnipresence of such issues in the eyes of politicians and the public, consistent prosecution and conviction of the perpetrators remains an elusive goal. She perceptively discards as a solution the expansive interpretation of statutory provision concerning the definition of the relevant criminal offences, and instead suggests that these crimes need to be better defined and delineated, an avowedly positivist solution that has the benefit of providing a firm hook on which to hang the prosecutorial hat. Thus ends Part I.

Part II is a symposium of five articles arising from the Cambridge Conference on Interpretation in International Law, held in the summer of 2013. Unlike

the collection of essays that emerged from the conference, to be published by Oxford University Press, the pieces here are not geared towards theoretical issues pertaining to interpretation, but focus on the day-to-day realities of interpretation and its role in the practice of international law. The Journal is proud to be able to publish these excellent pieces, and is equally proud to have the benefit of an introduction thereto by the conveners of the original conference, Daniel Peat and Matthew Windsor. We will leave it to them to elaborate.

Part III concerns the traditional terminus of an academic journal—book reviews and case notes. Eirik Bjorge examines Professor James Crawford's *State Responsibility: The General Part*, a book that reflects the most recent contribution by the International Law Commission's Special Rapporteur on a topic that remains relevant to almost every question arising from international law. Bjorge is followed by a review by one of the present Editors-in-Chief of Christian Tams' and Antonios Tzanokopolous' contribution to Hart Publishing's compiled series of relevant documents in international law, *Basic Documents on the Settlement of International Disputes*. The issue is finally rounded-off by two analyses of immediate importance in international law. Paul Mora contributes a case analysis of the recent decision of the European Court of Human Rights in *Jones v United Kingdom*, which is of continued relevance when assessing the right of access to the Court contained in ECHR Article 6(1). Massimo Fabio Lando gives an overview of the recent provisional measures decision of the International Court of Justice in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v Australia)*, in which the Court has advanced its thinking on the role played by unilateral undertakings in the grant of interim relief under Article 41 of the ICJ Statute.

The present issue continues the good work of the previous managers of the *Cambridge Journal of International and Comparative Law*. The Journal continues to go from strength to strength. The Editors-in-Chief consider themselves fortunate to have inherited a publication with such potential and to be given the opportunity to contribute (however modestly) to its growth and establishment in the world of academic legal publishing.

# THE RELATIONSHIP BETWEEN ANTITRUST AND REGULATION IN THE US AND THE EU: CAN LEGAL TRADITION ACCOUNT FOR THE DIFFERENCES?

*Amedeo Arena*<sup>\*</sup>

## **Abstract**

In the US, federal antitrust law may come into conflict both with federal regulation and regulatory schemes enacted by individual states. Similarly, in the EU, tensions can arise between EU antitrust rules, on the one hand, and either EU or member states' regulation, on the other. This paper seeks to examine the role played by legal tradition, in its manifold dimensions, in shaping the relationship between antitrust and regulation on the two sides of the Atlantic. To this end, Sections 2 and 3 will analyse the statutory provisions and doctrines governing the interplay between antitrust and regulation in the US and the EU. Sections 4 and 5 will explore each jurisdiction's legal traditions that may be relevant to the relationship between antitrust and regulation, such as the constitutional and political context of antitrust policy, the role of legal scholarship, and the antitrust enforcement culture. Section 6 will investigate possible connections between the divergences in the antitrust-regulation interface in the two legal systems and their different legal traditions.

## **Keywords**

Antitrust, regulation, legal tradition

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## **1 Introduction**

In February 2009, the Supreme Court of the United States of America held that '[w]hen a regulatory structure exists to deter and remedy anticompetitive harm,

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the costs of antitrust enforcement are likely to be greater than the benefits'.<sup>1</sup> Less than two years later, Advocate General Jan Mazák of the European Court of Justice (ECJ) declared: 'the regulatory framework [...] completes competition law provisions and the two sets of rules should be considered to be complementary'.<sup>2</sup> Those statements epitomise the stark divergence in the conceptualisation of the relationship between antitrust and regulation in the United States (US) and the European Union (EU).

The vertical division of powers in those two legal systems adds another layer of complexity. For instance, while the US Supreme Court in *Parker v Brown* recognised that federal antitrust laws do not prevent states from imposing market restraints 'as an act of government',<sup>3</sup> the ECJ in *Cipolla* squarely held that member states must not 'introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings'.<sup>4</sup>

This paper seeks to analyse the role of legal tradition, in its manifold dimensions, in shaping the relationship between antitrust and regulation in the US and the EU. To this end, sections I and II of this work will analyse the statutory provisions and doctrines governing the interplay between antitrust and regulation on each side of the Atlantic. Sections III and IV will focus on each jurisdiction's unique legal traditions relevant to the relationship between antitrust and regulation, such as the constitutional and political context of antitrust policy, the role of legal scholarship, and the antitrust enforcement culture. Section V, finally, will investigate possible connections between the divergences in the antitrust-regulation interface in the two legal systems and their different legal traditions.

## 2 The antitrust-regulation interface in the US

In the US, two levels of regulation might conflict, or work side-by-side, with federal antitrust: federal regulation and state regulation. This situation calls for rules on integrating or prioritising federal antitrust law with federal and state regulation. As to the horizontal dimension, express statutory exemptions and judge-made antitrust immunities come into play. The vertical relationship

<sup>1</sup> *Pacific Bell Telephone Co v Linkline Communications, Inc*, 555 US 438 (2009) (*LinkLine*).

<sup>2</sup> Case C-280/08 P, *Deutsche Telekom AG v Commission*, Opinion of AG Mazák, [2010] ECR I-09555, para 19.

<sup>3</sup> *Parker v Brown*, 317 US 341, 352 (1943).

<sup>4</sup> See Joined Cases C-94/04 and C-202/94, *Cipolla and Others* [2006] ECR I-11421, para 46 (*Cipolla*).

between federal antitrust and state regulation, instead, is governed by the state action defence and, to a lesser extent, by the doctrine of federal pre-emption.

## 2.1 The horizontal tension: express and implied repeal of antitrust law by regulation

In the US, the cornerstone federal antitrust provisions are laid down in two Acts of Congress: the Sherman Act (1890)<sup>5</sup> and the Clayton Act (1914).<sup>6</sup> Antitrust law has the same rank in the hierarchy of the US system as any other Congressional enactment—including those laying down sectoral regulation. Therefore can repeal or amend the antitrust statutes,<sup>7</sup> giving rise to antitrust immunities or exemptions.<sup>8</sup>

Repeal of a statute by a later one can be either express or implied.<sup>9</sup> As to the former, approximately 20 per cent of the US economic activities are expressly exempted from federal antitrust laws.<sup>10</sup> Federal statutory antitrust exemptions can be divided into ‘full exemptions’, which exempt a given activity from *all* antitrust rules, and ‘partial exemptions’, which grant exemption only from *certain* antitrust rules. Full exemptions were mostly introduced in a period ranging from the 1907 Bankers’ Panic to the mid-1940s. Currently, only five sectors are still exempted: the insurance business,<sup>11</sup> ocean shipping conferences,<sup>12</sup>

<sup>5</sup> 15 USC §1–7.

<sup>6</sup> 15 USC §17.

<sup>7</sup> As in other legal orders, it is a well-established principle in US law that the legislature has the power both to enact new laws and that to repeal existing legislation; see *District of Columbia v John R Thompson Co*, 346 US 100 (1953) and *People ex rel Eitel v Lindheimer*, 371 Ill 367 (1939).

<sup>8</sup> See generally, L Altman & M Pollack, *Callmann on Unfair Competition, Trademarks and Monopolies* (4th edn, 2009) §4:4; W C Holmes, *Antitrust Law Handbook* (2009) ch 8; L A Sullivan & W S Grimes, *The Law of Antitrust: an Integrated Handbook* (2nd edn, 2006) ch XIV.

<sup>9</sup> See Holmes, above n 8, §8:6 (‘In cases such as these [...] the immunity is made express by legislative fiat’). In other cases, the Congress expressly states its intention *not* to repeal antitrust laws by means of specific ‘saving clauses’ included in regulatory instruments. For instance, s 601(b)(1) of the Telecommunications Act of 1996, 110 Stat 56, 143, reads as follows: ‘[n]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws’.

<sup>10</sup> Altman & Pollack, above n 8, §4:4 (the 20 percent figure the authors mention, however, also includes sectors not subject to antitrust laws by judicial exemption).

<sup>11</sup> McCarran-Ferguson Act, c 20, §2–3, 59 Stat 33 (1945) (codified as amended at 15 USC §1012–13 (2006)) (exempting the insurance business insofar as it is regulated by state law and except for acts of boycott, coercion, intimidation, or agreements to that effect).

<sup>12</sup> Shipping Act of 1916, c 451, §15, 39 Stat 728 (current version at 46 USC §40307 (2006)).

agricultural and dairy farmers cooperatives,<sup>13</sup> fishermen's associations,<sup>14</sup> and labour unions.<sup>15</sup> In view of the broad scope of those immunities, in all five instances the legislature provided for oversight of the exempted sectors through a regulatory scheme enforced by a governmental agency, commission, or board.<sup>16</sup> The nineteen partial exemptions currently in force, instead, are not accompanied by regulatory oversight of comparable intensity, as they only authorise specific conducts otherwise prohibited by antitrust law. The typical regulatory scheme set out in those statutes consists in an obligation to submit the agreements eligible for exemption to a regulatory authority.<sup>17</sup>

Turning to implied repeal,<sup>18</sup> the key question is whether Congress, by enacting regulation, had the intention of repealing federal antitrust laws, thus giving rise to implied antitrust immunity.<sup>19</sup> While immunity has consistently been presumed in cases where federal regulation expressly *required* a given conduct,<sup>20</sup> greater uncertainties have arisen when regulation merely *authorised* a firm's behaviour.<sup>21</sup> In the past, courts strongly disfavoured implied repeal unless a 'plain repugnancy' could be shown between federal antitrust and regulation.<sup>22</sup>

<sup>13</sup> Capper-Volstead Act, c 57, 42 Stat 388 (1922) (codified at 7 USC §291–2 (2006)); Clayton Act, c 323, §6, 38 Stat 730 (1914) (current version at 15 USC §17 (2006)); Agricultural Marketing Agreement Act of 1937, c 296, §3, 50 Stat 246 (current version at 7 USC §671 (2006)).

<sup>14</sup> Fishermen's Collective Marketing Act, c 742, §1, 48 Stat 1213 (1934) (codified at 15 USC §521 (2006)).

<sup>15</sup> Clayton Act, above n 13, §6 and 20; Norris-LaGuardia Act, c 90, 47 Stat 70 (1932) (codified at 29 USC §105 (2006)).

<sup>16</sup> For instance, the Shipping Act entrusts the Federal Maritime Commission with oversight of industry conduct and endows it with regulatory powers. Likewise, the National Labor Relations Board has regulatory oversight over the matters exempted by Sections 6 and 20 of the Clayton Act and by Section 5 of the Norris-LaGuardia Act.

<sup>17</sup> For instance, the ICC Termination Act demands that the Surface Transportation Board must approve price-fixing agreements concerning the rates of household moves under a 'public interest' standard. See 49 USC §13703(a)(2) and USC §13703(a)(3).

<sup>18</sup> See generally E C Surrette & G K Harnad, *American Jurisprudence* (2nd edn, 2009) §280.

<sup>19</sup> See generally R M Brunell, 'In Regulators we Trust: The Supreme Court's New Approach to Implied Antitrust Immunity' (2012) 78 *Antitrust LJ* 279.

<sup>20</sup> See *United States v National Association of Securities Dealers Inc*, 422 US 694, 705 (1975) (*National Association of Securities Dealers*) (holding that 'if [the relevant statute] obligates appellees to engage in the practices challenged [then it would] necessarily confer antitrust immunity on them.').

<sup>21</sup> See e.g. *Gordon v New York Stock Exchange Inc*, 422 US 659, 689 (1975) (finding implied immunity because the challenged commission rate practices had 'been subjected to the scrutiny and approval of the SEC'); but see *California v Federal Power Commission*, 369 US 482 (1962) (holding that approval of a merger by a federal agency was no bar to antitrust challenge).

<sup>22</sup> See *US v Philadelphia National Bank*, 374 US 321 (1963); see also *National Gerimedical Hospital & Gerontology Center v Blue Cross of Kansas City*, 452 US 378, 388 (1981) (requiring 'convincing

In *Otter Tail Power Co v US*, for instance, the US Supreme Court considered that the conflict between regulation and antitrust was not sufficient to trigger antitrust immunity.<sup>23</sup> Instead, in *US v National Association of Securities Dealers* the Supreme Court found that the Sherman Act had been displaced by the regulatory scheme established by the Maloney and Investment Company Acts.<sup>24</sup> One of the factors that may account for such diverging outcomes was the different ‘pervasiveness’ of the regulatory schemes in question.<sup>25</sup> More recently, in *Credit Suisse*,<sup>26</sup> the Supreme Court held that securities law implicitly precluded antitrust laws, insofar as the application of the latter to the securities markets would entail a substantial risk of errors and inconsistent results that would disrupt the functioning of the securities market.<sup>27</sup> The Supreme Court also noted that the active enforcement of sector regulation by the Securities and Exchange Commission attenuated the need for antitrust enforcement to address anticompetitive conduct in the securities market.<sup>28</sup>

On other occasions, the Supreme Court limited the scope of antitrust doctrine in cases where regulation was also applicable, even if no implied antitrust immunity could be established. *Verizon Communications v Trinko* is a case in point.<sup>29</sup> A local telephone service customer had sued Verizon, the incumbent local service carrier, for failing to provide adequate access to its network to competing carriers with a view of excluding them from the market. Although Verizon was also subject to access obligations pursuant to federal and state regulation, no implied antitrust immunity could be inferred, because federal regulation contained an express saving clause.<sup>30</sup> Nonetheless, the Supreme Court found that Verizon had no antitrust duty to deal with its competitors under the

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showing of clear repugnancy’).

<sup>23</sup> See *Otter Tail Power Co v US*, 410 US 366 (1973) (*Otter Tail*).

<sup>24</sup> See *National Association of Securities Dealers Inc*, above n 20.

<sup>25</sup> In *Otter Tail*, above n 23, 374, the Court noted the legislative history of the Federal Power Act showed that Congress had ‘rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships’. Cf *National Association of Securities Dealers*, above n 20, 730–3 (‘the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC’).

<sup>26</sup> *Credit Suisse Securities (USA) LLC v Billing*, 551 US 264 (2007) (*Billing*).

<sup>27</sup> *Ibid*, 282.

<sup>28</sup> *Ibid*, 283.

<sup>29</sup> *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398 (2004) (*Trinko*).

<sup>30</sup> *Ibid*, 406 (citing 110 Stat 143, 47 USC §152: ‘nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws’).

relevant precedents and noted that, when a regulatory scheme is in place to deter and remedy anticompetitive harm, antitrust enforcement provides no added benefit to competition.<sup>31</sup> Similarly, in *Linkline*, it held that an incumbent operator subject to regulatory access obligations imposed by the Federal Communications Commission (FCC) was under no antitrust duty to provide its DSL services at prices that would not squeeze the profit margins of its competitors in the retail market.<sup>32</sup>

Moreover, under the ‘filed-rate’ doctrine, antitrust does not apply to tariff-setting agreements approved by (‘filed with’) a federal regulatory agency.<sup>33</sup> Even though the filed-rate doctrine technically is not an antitrust immunity,<sup>34</sup> it shares with the latter the concern that antitrust enforcement could yield outcomes at variance with those resulting from the application of the relevant regulatory scheme or agency decisions.<sup>35</sup>

## 2.2 The vertical tension: the state action and federal pre-emption doctrines

As the US is a federal system, not only Congress, but also state legislatures can enact regulation, which might authorise or require conduct prohibited by federal antitrust laws. Courts have developed two doctrines to resolve those tensions: state action and federal pre-emption.

The state action doctrine, commonly referred to as an ‘immunity’ from federal antitrust claims, is a judicial determination that, by enacting federal antitrust laws, Congress did not intend to challenge action by private parties

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<sup>31</sup> *Ibid*, 412.

<sup>32</sup> *Linkline*, above n 1.

<sup>33</sup> *Square D Co v Niagara Frontier Tariff Bureau Inc*, 476 US 409, 417 (1986) (dismissing antitrust damages claims brought by private shippers against an association of motor carriers that had collectively set their rates in accordance with joint tariff rates approved by the Interstate Commerce Commission); *Utilimax.com Inc v PPL Energy Plus LLC*, 378 F.3d 303, 306–7 (3d Cir, 2004); *Town of Norwood, Massachusetts v New England Power Co*, 202 F.3d 408, 418 (1st Cir, 2000); *County of Stanislaus v Pacific Gas and Electrical Co*, 114 F 3d 858 (9<sup>th</sup> Cir, 1997).

<sup>34</sup> See *Square D Co v Niagara Frontier Tariff Bureau Inc*, above n 33, 422 (defendants who engage in anticompetitive activities based on filed rates are still ‘subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief.’); see also *Wegoland Ltd v Nynex Corp*, 27 F.3d 17, 22 (2d Cir, 1994) (‘filed rate doctrine does not leave regulated industries immune from suit under the RICO or antitrust statutes.’).

<sup>35</sup> *Texas Commercial Energy v TXU Energy Inc*, 413 F.3d 503 (5th Cir, 2005) (holding that it was up to the relevant governmental agency, rather than to courts, to determine whether the rates were discriminatory or unlawful).

authorised or required by states.<sup>36</sup> The Supreme Court first articulated that doctrine in *Parker v Brown*.<sup>37</sup> An antitrust suit sought to enjoin Brown, an officer of the state of California, from enforcing a state agricultural proration programme. The Court held that a state is not a 'person' who can violate the Sherman Act and that Congress should not be assumed to deprive states of the right to control their agents.

The threshold question in state action cases is the intensity of the link between the natural or legal person invoking the doctrine and the state: the stronger the connection, the lower the burden of proof required for securing antitrust immunity. Accordingly, state legislatures and judiciaries are *per se* exempted from federal antitrust laws, without any further scrutiny. For instance, in *Hoover v Ronwin* the Supreme Court held that a bar testing programme administered by the supreme court of a state plainly qualified for antitrust exemption.<sup>38</sup> Municipalities, local governmental entities and political subdivisions of the state, instead, bear the burden of proving that their conduct was a foreseeable consequence of 'a clearly articulated policy of the State itself,' approved either by a state legislature or by the state supreme court.<sup>39</sup> For instance, in *FTC v Phoebe Putney Health System Inc*, the state action defence failed because Georgia law allowed hospital authorities to acquire hospitals but did not clearly articulate a power to make acquisitions that would substantially lessen competition.<sup>40</sup> When private parties invoke the state action defence, in addition to a link with a clearly articulated state policy, they must also show that their conduct was subjected to 'active state supervision' to ensure consistency with state policy and to prevent abuse.<sup>41</sup> The rationale underlying the higher standard of proof applicable to private parties was clearly illustrated by the Supreme Court in *Town of Hallie v City of Eau Claire*: '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Parker v Brown*, above n 3, 351 ('In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress').

<sup>38</sup> 466 US 558, 104 (1984).

<sup>39</sup> *Southern Motor Carriers Rate Conference Inc v US*, 471 US 48, 63 (1985).

<sup>40</sup> 663 F.3d 1369 (11th Cir, 2011).

<sup>41</sup> *FTC v Ticor Title Insurance Co*, 504 US 621, 631 (1992); *Patrick v Burget*, 486 US 94, 100–101 (1988); *Southern Motor Carriers Rate Conference Inc v US*, 471 US 48, 57 (1985); *California Retail Liquor Dealers Association v Midcal Aluminum Inc*, 445 US 97, 105 (1980) (*Midcal*).

interests of the State.<sup>42</sup> Determining the intensity of the connection between the defendant and a state is sometimes problematic: for instance, the unsolved conundrum in *North Carolina Board of Dental Examiners v FTC*, currently pending before the US Supreme Court, is whether an official state regulatory board created by state law may be regarded as a ‘private’ actor insofar as the majority of its members are also market participants who are elected to their official positions by other market participants.<sup>43</sup>

If the requirements of the state action doctrine are not met, conflicts between federal antitrust laws and state regulatory schemes are solved by recourse to the doctrine of federal pre-emption. That doctrine builds upon the Supremacy Clause set out in the federal Constitution,<sup>44</sup> according to which, in areas where the federal government is entitled to legislate, federal enactments take precedence over competing exercises of law-making power by states when Congress so intends.<sup>45</sup> In direct conflict cases, i.e. when state law either demands (as in *Calvert*)<sup>46</sup> or validates (as in *Midcal*)<sup>47</sup> a conduct prohibited by federal antitrust laws, courts usually follow the ‘general’ pre-emption approach: as for any other federal statute, they will presume that Congress intended to displace state laws.<sup>48</sup> Indirect conflict cases, i.e. when state law has anticompetitive effects but does not clearly contradict federal antitrust law, show some interesting features. According to the ‘general’ pre-emption approach, if a state law stands as an obstacle to the accomplishment of the objectives of a federal statute, Congressional intention to pre-empt that law is presumed.<sup>49</sup> Conversely, in cases involving state laws contrary to federal antitrust laws, the Court held that, unless a direct conflict can be shown, state law is not pre-empted ‘simply because [...] [it] may have an anticompetitive effect.’<sup>50</sup> In *Fisher v Berkeley*,<sup>51</sup> for instance, the Court held that a rent control ordinance authorised by a state statute could

<sup>42</sup> 471 US 34, 47 (1985).

<sup>43</sup> *North Carolina State Board of Dental Examiners v FTC*, Case No 13-534. See also 717 F.3d 359, 370 (4th Cir, 2013) (‘when a state agency is operated by market participants who are elected by other market participants, it is a “private” actor’).

<sup>44</sup> United States Constitution, Art VI §2.

<sup>45</sup> *US v Gillock*, 445 US 360 (1980).

<sup>46</sup> *Schwegmann Brothers v Calvert Distillers*, 341 US 384 (1951).

<sup>47</sup> *Midcal*, above n 41.

<sup>48</sup> *CSX Transportations Inc. v Easterwood*, 507 US 658 (1993).

<sup>49</sup> *Three Affiliated Tribes of Fort Berthold Reservation v Wold Engineering*, 476 US 877 (1986); *Louisiana Public Service Commission v FCC*, 476 US 355 (1986).

<sup>50</sup> *Rice v Norman Williams Co*, 458 US 654, 659 (1982).

<sup>51</sup> 475 US 260 (1986).

not be challenged under federal antitrust law, in spite of its adverse effects on competition. Finally, no conflicts—and, hence, no pre-emption issues—arise when the same conduct is prohibited both by federal antitrust and state laws, even if the latter pursues competition more aggressively than the former.<sup>52</sup>

### 3 The antitrust-regulation interface in the EU

Under EU law, the core antitrust provisions are laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union (*TFEU*),<sup>53</sup> which prohibit, respectively, anticompetitive agreements between undertakings, decisions by associations of undertakings, and concerted practices, as well as abuse of dominant position by one or more undertakings. A number of regulations have been adopted to implement those treaty provisions, including, notably, Council Regulation 1/2003 and Commission Regulation 773/2004/EC.

EU antitrust may come into conflict with EU regulation and national regulation. EU institutions adopt EU regulation in the form secondary legislation. Member states enact national regulation according to their respective constitutional procedures, although in key network industries national regulatory autonomy is significantly constrained by EU regulation adopted to approximate domestic laws.

#### 3.1 Horizontal tensions: primary law exemptions and the coexistence doctrine

EU antitrust enjoys a higher rank in the hierarchy of legal sources than any item of EU regulation. Thus, EU regulation cannot repeal Articles 101 and 102 TFEU to establish express or implied exemptions. Exemptions from EU antitrust rules can only be based upon provisions having the same legal force as Articles 101 and 102 TFEU, viz. provisions of EU primary law.

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<sup>52</sup> 490 US 93 (1989) (dismissing the argument that the federal antitrust principle whereby only first purchasers from the violating monopolist or cartel can recover treble damages pre-empted state statutes conferring a state cause of action for treble damages also on downstream purchasers).

<sup>53</sup> The EU rules on ‘concentrations’, instead, are set out in secondary legislation. Merger control was introduced by *Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings* [1990] OJ L 73/35 and is currently governed by *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)* [2004] OJ L 24/1.

Article 42 TFEU is a case in point. According to that provision, the TFEU rules on competition apply to production of and trade in agricultural products only to the extent determined by the EU legislature.<sup>54</sup> Sector-specific rules were laid down in Regulation 1184/2006 and Regulation 1234/2007, known as the ‘Single Common Market Organization Regulation’, which has recently been repealed in the framework of the reform of the Common Agricultural Policy.<sup>55</sup> The new regulation establishing a common organisation of markets, Regulation 1308/2013, sets out a number of sector-specific provisions concerning the application of competition rules to the agricultural sector.<sup>56</sup>

Similarly, pursuant to Article 305 of the Treaty establishing the European Community (*TEC*), the provisions of that treaty were without prejudice to the Treaty establishing the European Coal and Steel Community (*ECSC*).<sup>57</sup> Accordingly, the coal and steel sector was subject to the specific antitrust provisions set out in the ECSC Treaty. Following the expiry of the ECSC Treaty in July 2002, the Commission issued a communication clarifying that it does not intend to initiate proceedings against agreements previously authorised under the ECSC regime.<sup>58</sup>

Moreover, Article 103(2)(c) TFEU empowers the Council, upon a proposal from the Commission and after consulting the Parliament, to adopt regulations or directives ‘to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102 [TFEU]’. In the field of transport, that provision enabled the Council to adopt Regulation 169/2009, which exempts technical agreements and agreements concerning the constitution and operation

<sup>54</sup> See Case C-311/94, *IJssel-Vliet Combinatie BV* [1996] ECR I-5023, para 31 (‘the common agricultural policy takes precedence over the objectives of the Treaty in the field of competition [...] any application in this field of the Treaty provisions relating to competition is subject to account being taken of the objectives [...] of the common agricultural policy’).

<sup>55</sup> Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products [2006] OJ L 214/7, recital 3; Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [2007] OJ L 299/1, recital 84.

<sup>56</sup> With specific regard to antitrust rules, see Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347/671, Arts 206–10.

<sup>57</sup> See R Mastroianni, ‘Comment to Article 305’, in A Tizzano (ed), *Trattati dell’Unione Europea e della Comunità Europea* (2004) 1367.

<sup>58</sup> Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty [2002] OJ C 152/5, paras 28–9.

of groupings of small and medium-sized undertakings engaging in road or inland waterway transport.<sup>59</sup>

What if an EU regulation requires or allows a conduct that constitutes a violation of EU antitrust provisions? According to an approach based on the hierarchy of legal sources, EU regulatory measures at variance with the treaties should be declared null and void. To date, however, the ECJ has never annulled an item of EU legislation for a breach of Articles 101 or 102 TFEU. In fact, the ECJ has espoused the so-called co-existence doctrine, according to which EU antitrust and regulation apply side-by-side and undertakings must comply with both of them simultaneously.<sup>60</sup>

Some recent rulings will elucidate the application of that doctrine. In *Deutsche Telekom* the ECJ held that the circumstance that a national regulatory authority acting in accordance with EU regulation had encouraged a telecoms operator to charge prices that squeezed competitors' margins did not 'in any way absolve the appellant from responsibility under Article [102 TFEU]';<sup>61</sup> insofar as, in that respect, Article 102 TFEU 'supplement[ed], by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets.'<sup>62</sup> Likewise, in *AstraZeneca* the ECJ held that the fact that EU regulation allowed companies to deregister marketing authorisations for their pharmaceutical products did not rule out the illegality of that conduct under Article 102 TFEU when its sole purpose was that of erecting regulatory barriers to entry against producers of generic drugs.<sup>63</sup> In that connection, the ECJ noted that 'the illegality of abusive conduct under Article [102 TFEU] is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law'.<sup>64</sup> Moreover,

<sup>59</sup> Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway [2009] OJ L 61/1. That regulation replaced Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway [1968] OJ L 175/1, which laid down an analogous exemption from antitrust rules for agreements in the transport sector.

<sup>60</sup> See Case T-37/92, *Bureau Européen des Unions des Consommateurs and National Consumer Council v Commission* [1994] ECR II-00285. See also Case 229/83, *Leclerc v Au Blé Vert* [1985] ECR I; Case 231/83, *Cullet v Leclerc* [1985] ECR 305; and Case T-7/92, *Asia Motor France v Commission* [1993] ECR II-669.

<sup>61</sup> Case C-280/08 P, *Deutsche Telekom AG v Commission* [2010] ECR I-09555, para 84.

<sup>62</sup> *Ibid.*, para 92.

<sup>63</sup> Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v European Commission* (not yet reported), para 154.

<sup>64</sup> *Ibid.*, para 132.

the Commission's Guidance on Article 102 TFEU and its recent decision in *Telefónica* suggest that the existence of a regulatory duty to deal may, under certain circumstances, lower the burden of proof required for the imposition of an obligation to supply under Article 102 TFEU.<sup>65</sup>

### 3.2 Vertical tensions: the boundaries of EU antitrust rules and judicial balancing.

According to the doctrine of primacy of EU law, Articles 101 and 102 TFEU, as well as their implementing regulations, take precedence over national rules,<sup>66</sup> including those of constitutional rank.<sup>67</sup> National courts<sup>68</sup> and administrative bodies<sup>69</sup> are required to construe national law consistently with EU law and to immediately set aside national rules at variance with EU provisions having direct effect, such as Articles 101 and 102 TFEU.<sup>70</sup>

Therefore, national regulation having anticompetitive effects must be set aside if it may render ineffective the competition rules applicable to undertakings.<sup>71</sup> According to the ECJ, that is the case where a member state requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere, or requires or encourages abuses of a dominant position that can jeopardise the full effectiveness of Articles 101 and 102 TFEU.<sup>72</sup> Accordingly, the ECJ ruled that EU antitrust rules

<sup>65</sup> See *Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C 457, para 82; see also *Commission Decision of 4 July 2007 relating to a proceedings under Article 82 of the EC Treaty (COMP/38.784, Wanadoo Espana v Telefónica)*, para 303; Opinion of Advocate General Mázak in Case C-52/09, *Konkurrensverket v TeliaSonera AB* [2011] ECR I-527, para 58.

<sup>66</sup> Case 6/64, *Flaminio Costa v ENEL* [1964] ECR (English Special Edition) 585.

<sup>67</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 3.

<sup>68</sup> Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1962] ECR (English Special Edition) 1.

<sup>69</sup> Case 103/88, *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839.

<sup>70</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, paras 22 and 23.

<sup>71</sup> See *Cipolla*, above n 4, para 46, and Case C-393/08, *Sbarigia* [2010] ECR I-6337, para 31.

<sup>72</sup> Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v SOA Nazionale Costruttori - Organismo di Attestazione SpA* (not yet reported), para 38.

must be interpreted as precluding national provisions associated with agreements between undertakings aimed at fixing air tariffs (*Asjes*),<sup>73</sup> prohibiting the granting of rebates (*Vlaamse Reisbureaus*),<sup>74</sup> establishing marketing and storage quotas (*Aubert*),<sup>75</sup> and fixing business tariffs for customs agents (*Commission v Italy*).<sup>76</sup> Failure to establish a direct connection between the contested national measures and specific anticompetitive conducts by undertakings, however, did not prevent the ECJ from reviewing those measures under the TFEU rules on internal market,<sup>77</sup> which are framed in a way that enables the EU judiciary to strike a balance between the goal of economic integration and the policy objectives pursued by member states.<sup>78</sup> As a matter of fact, on several occasions the ECJ ruled on the compatibility with the internal market rules without being expressly requested to do so by the referring national court.<sup>79</sup>

Articles 101 and 102 TFEU only apply to undertakings that can freely determine their behaviour on the market. Accordingly, firms cannot be held responsible under EU antitrust rules for conduct that is required by national legislation<sup>80</sup> or that results from the exercise of an 'irresistible pressure' by a member state<sup>81</sup> or a non-EU country,<sup>82</sup> such as the threat of measures that would

<sup>73</sup> Joined Cases 209 to 213/84, *Criminal proceedings against Lucas Asjes and others* [1986] ECR 1425.

<sup>74</sup> Case 311/85, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801.

<sup>75</sup> Case 136/86, *Bureau national interprofessionnel du cognac v Yves Aubert* [1987] ECR 4789.

<sup>76</sup> Case C-35/96, *Commission of the European Communities v Italian Republic* [1998] ECR I-3851.

<sup>77</sup> In *Cipolla*, above n 4, paras 55–70, the ECJ held that the practice of law relating to minimum rates set by the Italian legislation was compatible with the rules of competition, but could constitute a restriction on the freedom to provide services. It is worth noticing that on several occasions the ECJ gave a preliminary ruling on whether the internal market rules laid down in the TFEU were reviewed compliance of national anticompetitive regulation with the internal market laid down in the TFEU without being expressly requested to do so by the referring court.

<sup>78</sup> See F Ferraro, 'L'efficacia dei principi comunitari sulla concorrenza' (2005) *Diritto dell'Unione Europea* 669; E Cannizzaro, 'Tecniche di soluzione di conflitti fra politiche dell'Unione' (2013) *Diritto dell'Unione Europea* 689, 693ff.

<sup>79</sup> See Case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v SARL blé vertand others* [1985] ECR I, paras 21–31; Case 231/83, *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECR 305, paras 19–34; Case C-327/12, *Ministero dello Sviluppo economico and Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture v SOA Nazionale Costruttori* (not yet reported).

<sup>80</sup> See Joined Cases C-359/95 P and C-379/95 P, *Commission and France v Ladbroke Racing* [1997] ECR I-6265, para 33.

<sup>81</sup> See Case T-387/94, *Asia Motor France SA and others v Commission* [1996] ECR II-961, para 65.

<sup>82</sup> See Commission, *Third Report on Competition Policy* (1974), para 20.

cause substantial economic harm to the undertaking concerned. The burden of proof for this 'state compulsion' defence is rather high:<sup>83</sup> an undertaking must show that it was 'deprived of all independent choice in its commercial policy'<sup>84</sup> or that the regulatory scheme suppressed 'any margin of autonomy' on its part.<sup>85</sup> Similarly, EU competition rules do not apply to sectors where national regulation eliminates any possibility of competitive activity.<sup>86</sup> Apparently, the only case in which this 'regulatory elimination of competition' defence has been successful is *Suiker Unie*,<sup>87</sup> where Italian law had as its object and effect 'to match supply exactly with demand and thereby remove a vital element of normal competition'.<sup>88</sup>

On other occasions, the ECJ adopted a more nuanced approach to vertical conflicts and was willing to balance the aims of EU antitrust rules against those pursued by national anticompetitive regulation. In *Wouters*<sup>89</sup> and *Meca-Medina*,<sup>90</sup> for instance, the ECJ agreed to take into account the goals pursued by national regulatory measures, such as the protection of consumers, the proper administration of justice and the fairness of sport competition.<sup>91</sup> In addition, in *Metro*, the ECJ held that the stability of the labour market can contribute to 'improving production' within the meaning of Article 101(3) TFEU and can offset the anti-competitive effects of an agreement between undertakings.<sup>92</sup> With reference to

<sup>83</sup> Joined Cases 240/82, 241/82, 242/82, 261/82, 262/82, 268/82 and 269/82, *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831, paras 27–9, and *Asia Motor France*, above n 81, paras 60, 65.

<sup>84</sup> Case T-228/97, *Irish Sugar Plc v Commission* [1999] ECR II-2969, para 129.

<sup>85</sup> See *Asia Motor France*, above n 81, para 63.

<sup>86</sup> See Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73, *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission* [1975] ECR 1663, paras 67–72; Case T-387/94, *Asia Motor France*, above n 81, para 61; Joined Cases C-359/95 P and C-379/95 P, *Ladbroke*, above n 80, para 33; *Irish Sugar Plc* above n 84, para 130.

<sup>87</sup> *Suiker Unie*, above n 86.

<sup>88</sup> *Ibid*, para 67.

<sup>89</sup> See Case C-309/99, *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, with the participation of: Balies van de Raad van de Europese Gemeenschap* [2002] ECR I-01577, para 97 (*Wouters*).

<sup>90</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-06991, paras 42–5.

<sup>91</sup> See *Wouters*, above n 89, para 97 ('[f]or the purposes of application of [Art 101, para 1 TFEU] to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience [...]').

<sup>92</sup> See Case 26/76, *Metro Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para 43. See

Article 102 TFEU, the ECJ has recognised that the ownership of exclusive rights granted by national IP legislation cannot in itself constitute an abuse of a dominant position,<sup>93</sup> albeit the exercise of such rights may be deemed abusive in ‘exceptional circumstances’.<sup>94</sup>

The ECJ also resorted extensively to balancing in connection with Article 106(2) TFEU, which grants a conditional derogation from the rules of the EU treaties to firms entrusted with the operation of Services of General Economic Interest (*SGEIs*) insofar as the application of those rules could obstruct the performance of general interest tasks assigned to those firms. The outcome of judicial balancing between the EU goal of undistorted competition and national policies<sup>95</sup> has often been in favour of member states.<sup>96</sup> Indeed, the ECJ has granted member states a broad discretion to define what services should be considered of general economic interest (the principle of ‘freedom of definition’).<sup>97</sup> In addition, the ECJ has progressively taken a more permissive approach in assessing the proportionality of the measures taken by member states derogating from the rules of competition. In early cases, the ECJ only consented to such measures in cases of absolute incompatibility between the

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also Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole Télévision SA and Italian Television Networks SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission* [1996] ECR II-649, para 118 (‘the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101(3) TFEU]’).

<sup>93</sup> See Joined Cases C-241/91 P and C-242/91 P, *Telefis Radio Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [2005] ECR I-743, para 46.

<sup>94</sup> See Case 238/87, *Volvo AB v Erik Veng (UK) Ltd* [1988] ECR 6211, para 7; Case C-418/01, *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-05039, paras 34–5.

<sup>95</sup> See Case C-202/88, *France v Commission* [1991] ECR I-1223, para 12 (holding that Art 106(2) TFEU ‘seeks to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market’).

<sup>96</sup> See Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751, paras 102–23 (social policy); Case C-266/96, *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop, arl and Others* [1998] ECR I-03949, paras 42–7 (universal mooring service); Joined Cases C-147/97 and C-148/97, *Deutsche Post AG v GZS Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH* [2000] ECR I-825, paras 51–66.

<sup>97</sup> See Case C-157/94, *Commission v Netherlands* [1997] ECR I-5699, para 40 (‘Member States [...] cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings’).

application of the competition rules and the performance of the general interest tasks assigned to firms.<sup>98</sup> More recently, instead, the ECJ has taken the view that, in order to trigger the exemption under Article 106(2) TFEU, it is not necessary to prove that very survival of the company would be threatened<sup>99</sup> and no other conceivable measure—which by definition would be hypothetical—could enable the fulfilment of the mission of general interest under the same conditions.<sup>100</sup>

## 4 Legal tradition in the US

### 4.1 Constitutional and political context of antitrust policy

The Sherman Act and the Clayton Act were not enacted in a legal vacuum. They entered into force in a legal order based on a constitution that was ordained and established by a unitary *demos*, the ‘People of the United States’.<sup>101</sup> The political unity of the American nation and the broad powers conferred by the Constitution on the federal government allowed the creation of a common regulatory framework for essential infrastructures,<sup>102</sup> a common currency,<sup>103</sup> and other conditions that enabled a number of nation-wide corporations to flourish.<sup>104</sup> The increasing concentration of market power,<sup>105</sup> however, began to be perceived as a threat not only to economic order, but also to individual freedom

<sup>98</sup> See Case 155/73, *Giuseppe Sacchi* [1974] ECR 409, para 15; Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, para 24; Case 311/84, *Centre d’études de marché-télémarketing (CBEM) v SA Compagnie de luxembourgeoise Télédiffusion (CLT) and Information publicité Benelux SA (IPB)* [1985] ECR 3261, para 17.

<sup>99</sup> See *Commission v Netherlands*, above n 97, para 43.

<sup>100</sup> *Ibid*, para 58; see also Case C-159/94, *Commission v France* [1997] ECR I-05815, para 101.

<sup>101</sup> See J H H Weiler, ‘Federalism Without Constitutionalism: Europe’s *Sonderweg*’, in K Nicolaidis & R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU* (2001) 53–69. But see M Rosenfeld, ‘The European Convention and Constitution Making in Philadelphia’ (2003) 1 *Int J Const L* 373, 375 (arguing that ‘the people behind the 1787 American constitution were profoundly divided and, for the most part, not yet formed’).

<sup>102</sup> For instance, three years prior to the enactment of the Sherman Act, Congress had passed the Interstate Commerce Act of 1887, c 104, 24 Stat 379, to regulate the railroad industry.

<sup>103</sup> See United States Constitution, Art I §8(5). See also *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819) (holding that Congress may charter banks and endow them with the right to issue circulating notes); *Veazie Bank v Fenno*, 75 US (8 Wall) 533 (1869) (finding that Congress may restrain the circulation of notes not issued under its own authority).

<sup>104</sup> See e.g. V Dagnino, *I cartelli industriali nazionali e internazionali* (1928) 131; L F Pace, *I fondamenti del diritto antitrust europeo* (2005) 9.

<sup>105</sup> See *Standard Oil of New Jersey v United States*, 221 US 1, 50 (1911) (summarising the conditions that led to the enactment of federal antitrust laws).

and democracy.<sup>106</sup> Therefore, just as seventeen states had introduced antitrust laws,<sup>107</sup> Congress resolved to pass legislation designed to attain ‘an organization of industry in small units’ in competition with one another,<sup>108</sup> a goal that was subsequently replaced with that of consumer welfare under the influence of the Chicago School.<sup>109</sup>

The enactment of antitrust laws in the form of federal statutes appeared appropriate to attain those objectives. Antitrust and regulation were alternative instruments in the hands of the federal government to pursue its economic policy. Statutory antitrust exemptions, therefore, have reflected the ebb and flow of governmental intervention and the changing political landscape.<sup>110</sup> During the Great Depression, for instance, in order to create ‘stability’ and to protect national industries, the Congress passed the National Industrial Recovery Act (NIRA), which allowed firms to create ‘codes of fair competition’ that effectively encouraged coordinated conduct in several major industrial sectors (e.g. lumber, steel, oil, mining, and automobiles).<sup>111</sup> In 1935, however, the US Supreme Court struck down the NIRA as unconstitutional and Congress never replaced its provisions.<sup>112</sup>

Also the judicial transition from ‘clear repugnancy’ to ‘soft immunity’ in the area of implied antitrust exemptions reflects, to a degree, the changing political attitude in respect of antitrust. While the Supreme Court initially regarded federal antitrust laws as having quasi-constitutional status<sup>113</sup>—in *Northern Pacific Railway* it even referred to the Sherman act as the ‘charter of economic freedom’<sup>114</sup>—in more recent cases it appeared to consider them just another instance of federal legislation, enjoying no particular prevalence over sectoral regulation.<sup>115</sup>

<sup>106</sup> See H Schweitzer, ‘Parallels and Differences in the Attitudes towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art 82 EC’ (EUI Working Paper No 2007/32) 6.

<sup>107</sup> See G J Stigler, ‘The Origin of the Sherman Act’ (1985) 14 *J Leg Stud* 1, 6 (providing a table of state antitrust laws by year of passage).

<sup>108</sup> See *United States v Aluminium Co of America*, 148 F.2d 416, 429 (2d Cir, 1945).

<sup>109</sup> See H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005) 31.

<sup>110</sup> See C A Varney, Assistant Attorney General, US Department of Justice, ‘Vigorous Antitrust Enforcement in this Challenging Era’, 11 May 2009, 2–5, available at <<http://www.usdoj.gov/atr/public/speeches/245711.pdf>> [accessed 5 April 2014].

<sup>111</sup> Pub L 73–90, 48 Stat 195, enacted 16 June 1933, codified at 15 USC §703.

<sup>112</sup> *Schechter Poultry Corporation v United States*, 295 US 495 (1935).

<sup>113</sup> See *Appalachian Coals Inc v United States*, 288 US 344, 359–60 (1933) (comparing the Sherman Act to a constitutional provision).

<sup>114</sup> See *Northern Pacific Railroad Co v United States*, 356 US 1, 4 (1958).

<sup>115</sup> See *Trinko*, above n 29, 415–16 (2004) (‘The Sherman Act is indeed the “Magna Carta of free

Another key variable in the vertical tension between federal antitrust and state regulation is the American understanding of federalism as a polity in which states retain a residuary and inviolable area of sovereignty.<sup>116</sup> At the beginning of America's federal experience, the US Constitution expressly enumerated the powers granted by the people to the federal government,<sup>117</sup> resulting in a government of limited, enumerated, and delegated powers.<sup>118</sup> Although successive centrifugal and centripetal trends have occurred since the drafting of the Federal Constitution, the words 'to form a more perfect Union' set out in its Preamble emblematically capture a *static* vocation to 'preserve' and 'maintain' a given vertical division of powers.<sup>119</sup>

The relationship between federal antitrust laws and state regulation was profoundly influenced by the need to accommodate the potentially far-reaching scope of federal antitrust laws with a polity based on a model of 'dual federalism'.<sup>120</sup> A formal application of the pre-emption doctrine to federal antitrust laws would have entailed significant risks of encroachment on state sovereignty, as most state enactments, such as those authorising or encouraging concerted pricing practices, either directly clash with federal antitrust laws or stand as an obstacle to the accomplishment of the aims pursued by Congress.<sup>121</sup>

It is thus for the sake of a well-balanced federalism that the Supreme Court in *Parker v Brown* introduced the state action doctrine, paving the way for a broad antitrust exemption covering anticompetitive conducts authorised or required

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enterprise", but 'it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition') (citation omitted).

<sup>116</sup> See United States Constitution, Amendment X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Cf Articles of Confederation, Art II ('Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled').

<sup>117</sup> United States Constitution, Art I § 8.

<sup>118</sup> See e.g. *New York v United States*, 505 US 144 (1992); *Bute v Illinois*, 333 US 640 (1948).

<sup>119</sup> See *Carter v Carter Coal Co*, 298 US 238, 295 (1936) (stating that there can be no loss of autonomy to the states through their union under the Constitution since '[t]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government').

<sup>120</sup> See R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (2009) 5 ('Dual federalism is based on the idea of dual "sovereignty". The Constitution divides sovereignty into blocks of exclusive powers. The federal government and the State governments are co-equals and operate independently in their separate spheres').

<sup>121</sup> See L A Sullivan & W S Grimes, *The Law of Antitrust: An Integrated Handbook* (2006) 800.

by state laws.<sup>122</sup> Moreover, outside the boundaries of state action, the Supreme Court has applied a weaker version of its standard pre-emption analysis, by confining the displacement of state regulation to cases of direct conflict with federal antitrust law.<sup>123</sup>

## 4.2 Legal scholarship and antitrust enforcement tradition

American legal scholarship has significantly influenced the judicial conceptualisation of the antitrust-regulation interface. Harvard School and Chicago School provided three powerful arguments employed by the Supreme Court to justify the retrenchment of antitrust in regulated industries.

First, a Chicago School scholar, Frank Easterbrook, introduced error-cost analysis in antitrust enforcement. He argued that, since antitrust enforcers are often unable to distinguish between anticompetitive and innocuous conduct, they risk identifying false positives, thus ‘chill[ing] the very conduct the antitrust laws are designed to protect.’<sup>124</sup> In his view, false positives are worse than false negatives,<sup>125</sup> which are spontaneously corrected by the market in the long run.<sup>126</sup> The Supreme Court expressly relied upon the risk of false positives as an argument to shrink the scope of monopolisation claims in *Trinko*.<sup>127</sup>

Second, in a frequently cited essay, Harvard School Professor Philip Areeda submitted that courts should not impose antitrust remedies that they cannot monitor, especially when doing so requires courts ‘to assume the day-to-day controls characteristic of a regulatory agency.’<sup>128</sup> Justice Scalia’s opinion for the

<sup>122</sup>See *Parker v Brown*, above n 3, 351 (‘In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress’).

<sup>123</sup>See e.g. *Schwegmann Brothers v Calvert Distillers*, 341 US 384 (1951); *Midcal*, above n 41.

<sup>124</sup>See *Matsushita Electrical Industrial Co v Zenith Radio Corp*, 475 US 574, 594 (1986).

<sup>125</sup>See F H Easterbrook, ‘The Limits of Antitrust’ (1984) 63 *Texas LR* 1, 16 (‘Other things equal, we should prefer the error of tolerating questionable conduct, which imposes losses over a part of the range of output, to the error of condemning beneficial conduct, which imposes losses over the whole range of output.’).

<sup>126</sup>*Ibid*, 15 (claiming that monopoly profits incentivise market entry that may offset the detrimental effects of undetected anticompetitive conduct).

<sup>127</sup>*Trinko*, above n 29, 414 (‘Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. [...] The cost of false positives counsels against an undue expansion of § 2 liability’).

<sup>128</sup>See P Areeda, ‘Essential Facilities: An Epithet in Need of Limiting Principles’ (1989) 58 *Antitrust LJ* 841, 853.

Court in *Trinko* expressly quoted a passage from that essay before reaching the conclusion that an antitrust court would have been unable to enforce the access to the local loop obligations that the respondent had requested.<sup>129</sup> Similarly, in *LinkLine* the Supreme Court conceded that courts would have been unable to correctly assess price-squeeze claims without conducting ‘complex proceedings like rate-setting agencies’.<sup>130</sup>

Last but not least, a former Harvard School scholar, Stephen Breyer, was the Chief Judge of the Court of Appeals (1st Circuit) that handed down the opinion in *Town of Concord*, according to which ‘antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies’.<sup>131</sup> That holding was directly instrumental for the Supreme Court in *Trinko* in reaching the conclusion that antitrust enforcement provides no additional benefit when a regulatory structure is in place.<sup>132</sup> Stephen Breyer also expressly recalled that holding in his concurrence in *LinkLine* as an argument against the recognition of price-squeeze claims under Section 2 of the Sherman Act.<sup>133</sup> Moreover, in *Credit Suisse* the Supreme Court expressly stated that the Security Exchange Commission’s active enforcement of sector regulation made it ‘somewhat less necessary to rely on antitrust actions to address anticompetitive behavior’ in the securities market.<sup>134</sup>

Another factor that might have affected the relationship between federal antitrust laws and federal regulation is the US private antitrust enforcement culture. In order to encourage private parties to enforce antitrust laws, the latter provide powerful incentives such as mandatory treble damages, asymmetric shifting of costs, broad discovery rights, class actions, and jury trials. It is thus no wonder that most claims against dominant firms under Section 2 of the Sherman act have been brought by private plaintiffs rather than by public

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<sup>129</sup>*Trinko*, above n 29, 415 (‘We think that Professor Areeda got it exactly right: “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise” [...] An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations’).

<sup>130</sup>*Linkline*, above n 1, 453.

<sup>131</sup>*Concord v Boston Edison Co*, 915 F.2d 17, 22 (1st Cir, 1990).

<sup>132</sup>*Trinko*, above n 29, 411–12 (‘One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny’).

<sup>133</sup>*Linkline*, above n 1, 459 (Stevens J).

<sup>134</sup>*Billing*, above n 26, 283.

enforcers.<sup>135</sup> Fearing that firms could be over-deterred by the prospect of private actions, but unable to expunge those incentives from the private enforcement system, courts have reacted by applying stricter liability standards so as to reduce private plaintiffs' chances of success.<sup>136</sup> As Hovenkamp put it 'judges respond[ed] to an overly aggressive remedies system by defining substantive violations too narrowly'.<sup>137</sup>

An analogous process of judicial 'equilibration'<sup>138</sup> may have taken place at the antitrust-regulation intersection: as firms could be over-deterred by the concurrent application of antitrust and regulation, courts shrunk the scope of antitrust claims where concurrent regulatory remedies were available. In *Trinko*, for instance, the incumbent local exchange carrier Verizon had already been fined twice by state and federal regulators for its conduct against its competitor AT&T.<sup>139</sup> Accordingly, the majority ruled that, on that occasion, the applicable regulatory regime had been 'an effective steward of the antitrust function'.<sup>140</sup> In *Credit Suisse*, as noted above, the Supreme Court expressly recognised that, because of sector regulation and its active enforcement by the US Securities and Exchange Commission (*SEC*), there was 'a diminished need for antitrust enforcement to address anticompetitive conduct'.<sup>141</sup>

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<sup>135</sup>The Supreme Court heard the first case concerning the interpretation of Section 2 of the Sherman Act involving the federal government as plaintiff as late as in 1973; see *Otter Tail*, above n 23, 366.

<sup>136</sup>See W E Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' in M Andenas et al (eds), *Current Competition Law*, vol 2 (2004) 167; W E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (Speech at the Fifth Annual Antitrust Conference, 2 June 2008), <<http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf>> [accessed 9 October 2013] (claiming that 'judicial fears that the US style of private rights of action [...] excessively deter legitimate conduct have spurred a dramatic retrenchment of antitrust liability standards' for unilateral conduct by dominant firms).

<sup>137</sup>Hovenkamp, above n 109, 76.

<sup>138</sup>See S Calkins, 'Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System' (1986) 74 *Geo LJ* 1065 (applying the concept of equilibrating tendencies to antitrust system's treatment of private treble damage claims).

<sup>139</sup>*Trinko*, above n 29, 413 ('The FCC soon concluded that Verizon was in breach of its sharing duties [...], imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC [...] imposed additional financial penalties and measurements with *daily* reporting requirements').

<sup>140</sup>*Ibid.*

<sup>141</sup>*Billing*, above n 26, 284.

## 5 Legal tradition in the EU

### 5.1 Constitutional and political context of antitrust policy

The EU antitrust rules laid down in the Treaty of Rome (1957) came to the light in a completely different setting from that in which US federal antitrust laws were enacted. As witnessed by the multiple references in that treaty to the ‘peoples’ of Europe, in the 1950s there was no unitary European *demos*.<sup>142</sup> The political discord of the peoples of Europe, which had already caused two world wars, had resurfaced three years earlier when the French parliament refused to ratify the European Defence Community Treaty, thus nipping in the bud the prospect of a European Political Community. It became clear that European integration could not be premised on political grounds.

The European founding fathers thus reverted to the strategy outlined a few years earlier in the Schuman declaration: ‘setting up of common foundations for *economic* development as a first step in the *federation* of Europe’.<sup>143</sup> The Spaak Report of 1956, which is generally regarded as the blueprint of the Treaty of Rome, stated that the merging of national markets into a common market was an ‘absolute necessity’ to reap the benefits of comparative advantage and to allow European companies to exploit economies of scale.<sup>144</sup> To that end, the report recommended a ban on protectionist measures by member states and the introduction of competition provisions directly addressed to undertakings.<sup>145</sup> The competition provisions not only outlawed cartels, which had been a catalyst of the economic rivalries between European nations that had sparked the two world wars, but also prevented European firms from restoring, by way of market-sharing agreements, the insulation of markets pursued by national protectionist policies.<sup>146</sup>

Since undistorted competition was instrumental to the establishment of the common market—which, in turn, constituted the main objective of European integration—the drafters of the Treaty of Rome granted antitrust provisions the status of primary law by including them in the EEC Treaty,<sup>147</sup> along with prohibitions addressed to member states, such as those on custom duties,

<sup>142</sup>See Weiler, above n 101, 53, 66.

<sup>143</sup>Emphasis added.

<sup>144</sup>Intergovernmental Committee of the Messina Conference, *Report of the Heads of Delegation to the Ministers of Foreign Affairs* (1956) 13 (*Spaak Report*).

<sup>145</sup>*Ibid*, 53ff.

<sup>146</sup>See Pace, above n 104, 57; G Strozzi & R Mastroianni, *Diritto dell’Unione Europea* (2013) 2.

<sup>147</sup>See Arts 85 and 86 of the EEC Treaty (currently Arts 101 and 102 TFEU).

quantitative restrictions, discriminatory internal taxation etc.. The task of complementing the general provisions laid down in the EEC Treaty with detailed horizontal or sectoral regulation was entrusted to the Council, which acted upon proposals from the Commission.

The rank of antitrust *vis-à-vis* regulation in the hierarchy of EU legal sources effectively shielded the former from repeal by the latter, thus preventing member states acting within the Council from taking back the competences conferred on the EU ('re-delegation').<sup>148</sup> Indeed, although the momentum for market integration has occasionally faltered and antitrust itself has faced direct political opposition from time to time,<sup>149</sup> the burdensome procedures required for the amendment of the Treaties have enabled antitrust provisions to come through virtually unscathed for over half a century.<sup>150</sup>

Moving from the assumption that the peoples of Europe were separate and diverse, the Treaty of Rome sought to create 'an ever closer union' among them.<sup>151</sup> Rather than envisaging a fixed division of the competences between the Community and its member states, the Treaty laid down a list of Community objectives and the means to pursue them with the cooperation of member states. No area was *a priori* excluded from the purview of European integration. As a matter of fact, a catalogue of EU competences was introduced only fifty years later by the Treaty of Lisbon.

Although member states were required to facilitate the achievement of the Community's objectives,<sup>152</sup> resistance at the national level was expected, insofar as market integration often interfered with rent positions created by national regulation. Accordingly, the drafters entrusted the enforcement of antitrust provisions to the Commission, an independent institution designed to

<sup>148</sup>See M Waelbroeck, 'The Emergent Doctrine of Community Pre-emption—Consent and Redelégation', in T Sandalow & E Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe*, vol 2 (1982) 548–80.

<sup>149</sup>Political opposition by France's President Nicholas Sarkozy to competition policy resulted in the relocation of the goal of undistorted competition from the body of the Treaties to Protocol no. 27 attached to the Treaty of Lisbon.

<sup>150</sup>But see N E Farantouris, 'La fin de la concurrence non faussée après le traité réformateur' (2009) 524 *Revue du Marché commun et de l'Union européenne* 41 (questioning whether the goal of undistorted competition will be referred to in the same way and with the same frequency, following its relocation '*extra muros*'); P Fabbio, 'Funzioni e ancoraggi apicali del diritto antitrust' (2013) 22 *Annali italiani del diritto d'autore della cultura e dello spettacolo* 228–30 (arguing that the establishment of the common market is no longer a 'categorical imperative' of EU competition law).

<sup>151</sup>See recital 1 of the Preamble to the EEC Treaty (currently recital 1 of the Preamble to the TFEU).

<sup>152</sup>See EEC Treaty, Art 5.

advance economic integration without interference from national governments and politics in general.<sup>153</sup> Moreover, they granted the Commission the monopoly over legislative initiative to propose the measures that define the scope of EU antitrust rules<sup>154</sup> and the extent to which they apply to agricultural products.<sup>155</sup>

## 5.2 Legal scholarship and antitrust enforcement tradition

The development of EU antitrust law was deeply influenced by Ordo-liberalism (the so-called 'Freiburg School'), which advocated a polity based on freedom and autonomy of individuals and firms within the framework of a constitutional democracy based upon the rule of law.<sup>156</sup> The experience with *laissez-faire* policies at the turn of the 20th century, however, had shown that market economy left to its own devices would eventually lead to the concentration of economic power in private hands,<sup>157</sup> which constituted a major threat to the free economic order advocated by ordo-liberals.<sup>158</sup>

Freiburg School scholars, therefore, did not regard markets as self-correcting, but rather as fragile creatures<sup>159</sup> to be preserved by vigorous antitrust enforcement and, in the case of natural monopolies, even price regulation.<sup>160</sup> But how could such a far-reaching antitrust intervention be reconciled with the risk of error due to information asymmetries? The EU solution to that conundrum was to shift the burden over to firms, which had easier access to information concerning their own cost structures and market position than public enforcers.<sup>161</sup> In the context of Article 102 TFEU, this model was conceptualised in terms of a 'special responsibility' borne by dominant firms to ensure that their market conduct did not harm competition. In *AstraZeneca* and *Deutsche Telekom*, the ECJ relied upon the 'special responsibility' argument to justify dominant firms' duty

<sup>153</sup> See EEC Treaty, Art 89.

<sup>154</sup> See EEC Treaty, Art 87(2)(c).

<sup>155</sup> See Arts 42 and 43 of the EEC Treaty.

<sup>156</sup> See W Eucken, *Die Grundlagen der Nationalökonomie* (5th edn, 1947) 175–9.

<sup>157</sup> See W Eucken, 'Das Problem der wirtschaftlichen Macht', in *Wirtschaftsmacht und Wirtschaftsordnung* (2001) 9.

<sup>158</sup> *Ibid.*, 22; See also F Böhm, 'Die Idee des Ordo im Denken Walter Euckens', in E J Mestmäcker (ed), *Freiheit und Ordnung in der Marktwirtschaft* (1980) 73–4.

<sup>159</sup> See P Larouche & M P Schinkel, 'Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to Section 2 Sherman Act' (TILEC Discussion Paper 2013-020) 9–10, <<http://ssrn.com/abstract=2293141>> [accessed 6 April 2014].

<sup>160</sup> See W Eucken, *Grundsätze der Wirtschaftspolitik* (7th edn, 2004) 297; L Miksch, 'Die Wirtschaftspolitik des Als-Ob' (1948–1949) 105 *Zeitschrift für die gesamte Staatswissenschaft* 310, 331–333.

<sup>161</sup> Larouche & Schinkel, above n 159, 13–18.

to pro-actively self-assess their conduct, even beyond the requirements of sector regulation.<sup>162</sup>

In spite of recent attempts to encourage the development of private actions,<sup>163</sup> the enforcement of antitrust provisions in the EU has been predominantly carried out by the Commission and by national antitrust authorities. EU courts have not been troubled by over-deterrence concerns and, accordingly, have not felt the need to 'equilibrate' the system by raising the standard of antitrust liability in markets subject to regulation.<sup>164</sup> Moreover, the predominance of public enforcement affords the Commission a substantial first-mover's advantage in determining which cases reach EU courts, thus allowing the Commission to influence the development of the EU jurisprudence on the antitrust-regulation interface.

## 6 Findings and comparative assessment

The analysis of the relationship between antitrust and regulation in the US and in the EU highlights several significant divergences. The first and most apparent one involves express antitrust exemptions. In the US, Congress carved out broad exemptions from federal antitrust laws accounting for as much as 20 per cent of that nation's economy. In the EU, on the other hand, antitrust exemptions must be based on primary law and cover fewer and narrower sectors.

The second point of divergence is the judicial approach to the horizontal tensions between antitrust and regulation. The Supreme Court's holdings in *Trinko*, *Linkline* and *Credit Suisse* show an overall willingness to defer to federal regulation when it intersects federal antitrust laws. Federal antitrust and federal regulation are conceived, in essence, as mutually exclusive legal regimes. In contrast, the ECJ rulings in *Deutsche Telekom* and *AstraZeneca* suggest that EU antitrust and EU regulation are complementary regimes, which apply side-by-side even when the former prohibits conduct authorised by the latter.

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<sup>162</sup>Ibid, 15.

<sup>163</sup>See *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, 11 June 2013, COM(2013) 404; *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* [2013] OJ C 167/19.

<sup>164</sup>See W E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence', in X Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (2009) 326–7.

In fact, the Commission's Guidance on Article 102 TFEU and its *Telefónica* decision suggest that the existence of a regulatory duty to deal may, under certain circumstances, facilitate the imposition of certain antitrust remedies.

The third divergence concerns the judicial approach to the vertical dimension of the antitrust-regulation interface. The US state action doctrine involves a broad and generalised deference to state regulation, so long as a sufficient link can be shown between the defendant and a state policy. Even if the requirements for state action immunity are not met, US courts have appeared willing to allow state regulation having anticompetitive effects to coexist with federal antitrust laws in the absence of direct conflicts between the two regimes. In the EU, on the other hand, firms can escape responsibility under EU antitrust law only if they prove that their conduct was compelled by national regulation or that the latter eliminated competition altogether. Anticompetitive national measures must be immediately set aside if they are linked to a specific conduct by undertakings contrary to competition law; otherwise, national measures having anticompetitive effects can be subject to judicial balancing by the ECJ.

Several factors have been suggested to account for such divergences. The political unity of the American 'people' has enabled federal antitrust to focus exclusively on constraining market power and, at a later stage, on enhancing consumer welfare. Conversely, the division of the European *demos* has induced EU competition law to take on the objective of establishing a common market. Accordingly, while antitrust and regulation in the US were conceived as alternative policy instruments in the hands of the federal government, in the EU competition rules were given the rank of primary law to prevent them from being repealed by regulation enacted by the member states-driven Council. The enforcement of antitrust rules was entrusted to a supranational body, the European Commission, which was also given the exclusive power to submit proposals for measures defining the scope of those rules and the extent to which they apply to production of and trade in agricultural products.

Moreover, while US federal antitrust had to fit into a pre-existing division of competences between the federal and state level, no clear vertical separation of powers existed in EU law, at least until the entry into force of the Treaty of Lisbon. Therefore, while US courts have been unwilling to displace anticompetitive state regulation so as not to upset the federal balance of power, the ECJ faced no similar constraints and, accordingly, had no hesitation in ruling that anticompetitive regulatory measures by EU member states must be set aside if they clash with EU antitrust or internal market provisions.

The role of legal scholarship in shaping the antitrust-regulation interface

cannot be overstated. In the US, the Chicago School and Harvard School have provided many of the arguments underlying the judicial retrenchment of antitrust from regulated industries, such as the risk of false positives in antitrust enforcement, the inability of courts (as opposed to sector regulators) to effectively monitor certain antitrust remedies, and the limited benefits that antitrust could provide in addition to regulation if applied to certain markets. In the EU, instead, the Freiburg School has insisted on the fragility of competitive markets and the necessity of vigorous antitrust enforcement to preserve their competitive structure. This argument has been conceptualised by the ECJ in terms of a 'special responsibility' borne by dominant undertakings, which may be required to pro-actively assess their conduct under competition law even when their actions are in line with sector regulation. The US private enforcement culture, finally, has prompted courts to raise the liability standard for certain antitrust claims, especially in regulated markets, in order to compensate for an overly aggressive remedies system. No similar over-deterrence concerns have arisen in the EU, where antitrust enforcement is predominantly in the hands of public enforcers.

## INTERNATIONAL LAW, DOMESTIC LENSES

Marco Benatar\*

### Abstract

This article makes the case for greater attention to be given to the role of national legal culture in the making and practice of international law. The merits of this contested notion as a tool for gaining new insights are discussed, as is the legal cultural approach embedded in the broader field of study known as “comparative international law”. In an effort to demonstrate the utility of engaging with this concept, the focus turns to the inner legal culture of international law, which is composed of lawyers, judges and other professionals. It is argued that there are two factors of influence which allow for domestic elements to seep into international law. The first relates to individuals, via the inculcation of parochial values, whereas the second takes on a structural dimension, through inter alia the general principles of law and the “equitable geographical representation” requirement found in the statutes of many intergovernmental bodies. This theoretical framework is subsequently applied to the International Court of Justice, a suitable case study on account of it being a meeting place of various juridical traditions. At the individual level, judges and counsel appearing before the ICJ are considered. As regards the structural level, certain institutional features conducive to domestic influences are highlighted. Finally, the article identifies and briefly discusses three themes in the jurisprudence of the ICJ where national legal cultures have left their mark: analogies to municipal law, the manner and style in which the outcome of cases are justified and the debates surrounding the standard of proof.

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## 1 Introduction

Public international law is traditionally viewed as a single corpus of positive law binding upon all states and other entities bestowed with international legal personality.<sup>1</sup> Despite this tenet of universality, a trait common among all legal

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<sup>1</sup> B Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 *EJIL* 265, 267. See also S Dellavalle, ‘Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order’ (2010) 21 *EJIL* 765.

systems,<sup>2</sup> international legal practitioners often disagree with their counterparts hailing from other jurisdictions on the interpretation and content of norms, the best legal solutions to global problems, and other challenges. Where does the source of these discrepancies lie? Legal and political science scholars have gone to great lengths to provide explanations for this phenomenon, ranging from military strength to domestic political structures and regional integration. As compelling as certain of these accounts may be, there is another potential factor that has received less attention in academia: national legal culture. Lawyers, steeped as they are in a given domestic tradition of law,<sup>3</sup> carry an intellectual background and a set of internalized values that they export to the international plane. When engaging with problems pertaining to international law, the desire to think in terms and concepts analogous with their municipal legal systems can be strong. This paper aims to set the stage for a discussion on the role of this hitherto fairly neglected criterion in construing and expounding the building blocks of the global juridical order. I will discuss the notion of legal culture, and offer some methodological thoughts on how it could serve as a useful angle via which to perceive the international legal framework. Thereafter, I will briefly consider certain aspects of the International Court of Justice (*ICJ*) in an attempt to show how the legal culture approach can yield interesting insights.

## 2 A legal cultural approach to international law

### 2.1 A contested notion

#### 2.1.1 *Advantages*

Using legal culture as a lens through which to observe legal phenomena has a sound premise: the focus of analysis should not be restricted to law in the books. Advocates of this research tool argue they are better equipped to scratch beneath the surface so as to reveal the deeper reality. Being at the meeting point of comparative legal studies and legal sociology, the cultural method shows promise in both disciplines. Among comparativists, it is maintained that the cultural paradigm has a decisive advantage over positivists, who neglect non-rule

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<sup>2</sup> P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings LJ* 814, 843–4.

<sup>3</sup> W E Butler, 'International Law and the Comparative Method', in W E Butler (ed), *International Law in Comparative Perspective* (1980) 25, 33.

elements that influence the workings of law in practice.<sup>4</sup> By understanding and embracing differences, they also offer a fresh alternative to functionalists who are in the habit of distilling similarities with a view to promoting the conventional aims of comparative law, such as legislative reform.<sup>5</sup> With respect to socio-legal studies, the cultural paradigm can present novel explanations for the rationale behind the legal system when a logical link is lacking between certain aspects of the law (rules, structures, institutions etc.) and the society in which it operates.<sup>6</sup>

### 2.1.2 Definition

Legal culture thus presents itself as an attractive method, but what does it precisely mean? Defining this concept is a difficult, elusive task. A variety of experts working within the disciplines that gave rise to this term of art are at loggerheads. A suitable starting point is the work of Friedman, credited by many as having introduced this concept into American socio-legal parlance. In his opinion, legal culture is ‘what people think about law, lawyers and the legal order, it means ideas, attitudes, opinions and expectation with regard to the legal system.’<sup>7</sup> This can be contrasted with Nelken’s broader understanding of the notion, which also includes values and ideas but adds to the mix many forms of behavior deemed legally relevant.<sup>8</sup> Offering a quite different conceptualisation, Blankenburg distinguishes between the supply ((para)legal institutions) and demand (uses of the aforementioned institutions) side of law in his analysis of legal culture.<sup>9</sup> Hence, a brief overview of the pertinent literature suffices to conclude that definitions are legion. Despite the discrepancies, as the lowest common denominator, legal culture could be described as a conceptual framework used by the more socio-logically inclined to conduct meaningful research into legal phenomena and their setting in the broader society.

<sup>4</sup> R Cotterrell, ‘Comparative Law and Legal Culture’, in M Reimann & R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 709, 710–11.

<sup>5</sup> H P Glenn, ‘Aims of Comparative Law’, in J M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2006) 57, 60–2.

<sup>6</sup> A Watson, ‘Legal Culture v Legal Tradition’, in M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (2004) 1, 4.

<sup>7</sup> L M Friedman, ‘The Place of Legal Culture in the Sociology of Law’, in M Freeman (ed), *Law and Sociology: Current Legal Issues* (2006) 185.

<sup>8</sup> D Nelken, ‘Using the Concept of Legal Culture’ (2004) 29 *Australian J Leg Phil* 1, 1.

<sup>9</sup> E Blankenburg, ‘Civil Litigation Rates as Indicators for Legal Culture’, in D Nelken (ed), *Comparing Legal Cultures* (1997), 41.

### 2.1.3 Criticisms

A contested notion to say the least, the cultural paradigm is not without its critics. Roughly speaking, detractors can be placed into two categories. The milder bunch acknowledges the merit of this approach, yet disagrees on the specifics.<sup>10</sup> Attempts to develop new paradigms for grasping legal culture will inevitably bring about internal quibbles and turf wars. A more fundamental critique however questions the very utility of referring to legal culture.<sup>11</sup> One of the major points of contention is the manner in which ‘culture’ has been used as an epistemological tool in the social sciences.<sup>12</sup> Not only is the term often described in a vague, over-inclusive style diminishing its analytic usefulness, it can lead to more harmful unintended consequences: viewing one’s own culture as a homogenous unit without any inconsistencies and incommensurable with other cultures, thus leading to unavoidable conflict wherever they meet.<sup>13</sup> Furthermore, although equally engaged in the enterprise of unearthing the correlation between law and society, some scholars prefer seeking recourse to germane concepts and jargon. Examples thereof are ‘legal ideology’, which refers to assumptions and values as manifested through legal doctrine,<sup>14</sup> and ‘legal *mentalité*’, which connotes a type of mindset shared by a given community.<sup>15</sup>

## 2.2 Applying the paradigm

### 2.2.1 An exercise in comparative international law

Before operationalizing the paradigm at the international level, some thought should be given to the place it occupies among the manifold methodologies of international law. It is apparent that taking as our underlying premise the view that legal culture (i.e. a social factor outside of the positive rules)<sup>16</sup> affects behavior will inexorably lead us into the realm of sociology of international law.<sup>17</sup> But,

<sup>10</sup> D Nelken, ‘Legal Culture’, in J M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2006) 372, 373–374.

<sup>11</sup> D Nelken, ‘Comparing Legal Cultures’, in A Sarat (ed), *The Blackwell Companion to Law and Society* (2004) 113, 116.

<sup>12</sup> A Acar, ‘The Concept of Legal Culture’ (2006) 3 *Ankara LR* 143, 147.

<sup>13</sup> H P Glenn, ‘Legal Cultures and Legal Traditions’, in Van Hoecke, above n 6, 7, 15–17. See also W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009) 80–1.

<sup>14</sup> R Cotterrell, *The Sociology of Law: An Introduction* (2<sup>nd</sup> edn, 1992) 115.

<sup>15</sup> P Legrand, ‘European Legal Systems are not Converging’ (1996) 45 *ICLQ* 52, 60–64.

<sup>16</sup> O Corten, *Méthodologie du droit international public* (2009) 33.

<sup>17</sup> M Hirsch, ‘The Sociology of International Law: Invitation to Study International Rules in their Social Context’ (2005) 55 *U Toronto LJ* 891, 893.

more notably, the advocated paradigm can be seen as an attempt to bolster the study of a fairly unfamiliar approach: 'comparative international law' (CIL).<sup>18</sup> The CIL project includes *inter alia* discerning national,<sup>19</sup> regional,<sup>20</sup> and common law vs. civil law<sup>21</sup> approaches to international law, comparing the foreign relations law of countries, and exploring alternative narratives to the classical, Eurocentric understandings of the international legal order originating in other parts of the world.<sup>22</sup>

CIL has received scant attention in the literature.<sup>23</sup> Take for instance the 1998 symposium hosted by the *American Journal of International Law* on the methods of international law. Showcasing a variety of approaches ranging from classical positivism to interdisciplinary IR/IL, the end result was an impressive prospectus of international legal approaches.

Conversely, the comparative method failed to make the cut, receiving brief acknowledgment and relegated to a single footnote reference.<sup>24</sup> This is, to a certain extent, understandable for a couple of reasons. At first blush, both

<sup>18</sup> On the different meanings that have been given to CIL, see: B N Mamlyuk & U Mattei, 'Comparative International Law' (2011) 36 *Brooklyn JIL* 385, 388–9. For a discussion on the various uses of the comparative technique in international law, see: W E Butler, 'Comparative Approaches to International Law' (1985) 190 *RCADI* 9. An alternative understanding of CIL can be found in A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ* 57, 57 (the phenomenon of '[a]cademics, practitioners and international and national courts [...] increasingly seeking to identify and interpret international law by engaging in comparative analyses of various domestic court decisions.').

<sup>19</sup> E.g. L Delabie, *Approches américaines du droit international: entre unité et diversité* (2011); 'Symposium on French and American Perspectives towards International Law and International Institutions' (2006) 58 *Maine LR* 28; 'Diverging Anglo-American Attitudes to International Law' (1972) 2 *Georgia JICL* 1.

<sup>20</sup> E.g. 'Europe and International Law' (2004) 15 *EJIL* 857; H Ruiz Fabri, 'Reflections on the Necessity of Regional Approaches to International Law through the Prism of the European Example: Neither Yes nor No, Neither Black nor White' (2010) 1 *Asian JIL* 1.

<sup>21</sup> E.g. C H Koch, Jr, 'Envisioning a Global Legal Culture' (2003) 25 *Mich JIL* 1. Cf H Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 *BYIL* 31.

<sup>22</sup> E.g. *Leiden JIL's* Periphery Series; A Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 *Harv ILJ* 475.

<sup>23</sup> For a critique of the CIL project, see: I Brownlie, 'Remarks: Comparative Approaches to the Theory of International Law' (1986) 80 *ASIL Proc* 154.

<sup>24</sup> S R Ratner & A M Slaughter (eds), *The Methods of International Law* (2004) 4 (n 13). See similarly R Cryer, T Herve, B Sokhi-Bulley & A Bohm, *Research Methodologies in EU and International Law* (2011) 12, 28–29.

disciplines seem worlds apart.<sup>25</sup> The limited role that internationalists accept for the comparative technique is that of bringing to light the general principles of law<sup>26</sup> and getting a better grasp of concepts and institutions of customary international law, such as *pacta sunt servanda*, *clausula rebus sic stantibus*, *pacta tertiis*, and *abus de droit*, that find their inspiration in domestic systems.<sup>27</sup> The law of treaties has generally been considered one of the more fertile areas for comparative research in this regard.<sup>28</sup> Secondly, in recent years, although several excellent articles have been written on topics that could fall within the remit of CIL, there has not been a distinct school espousing the comparative method in international legal studies.<sup>29</sup> If current developments are an indication, this might change in the future. After several years of relative silence, two articles with 'comparative international law' in their title were published in 2011 calling for renewed interest in the CIL endeavour.<sup>30</sup> To this, one can add a number of workshops dedicated to the same theme.<sup>31</sup>

Within this comparative setting, recourse to juridical culture as advocated in the present paper is not entirely new. Mention should be made of several book-length works that have been published utilizing this perspective in one way or another. The *French Society for International Law* together with the *German Society of International Law* published the proceedings of a colloquium on this very topic.<sup>32</sup> Other tomes have focused on national legal culture as an explanation

<sup>25</sup> D Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) 2 *Utah LR* 545, 633; L A Obiora, 'Toward an Auspicious Reconciliation of International and Comparative Analyses' (1998) 46 *AJCL* 669, 672.

<sup>26</sup> G A Bermann, 'Le droit comparé et le droit international: alliés ou ennemis? La conférence' (2003) 55 *Rev int dr comp* 519, 521; L C Green, 'Comparative Law as a "Source" of International Law' (1967) 42 *Tulane LR* 52.

<sup>27</sup> K Zweigert & H Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> edn, 1998) 7–8; A A Cançado Trindade, 'La méthode comparative en droit international, une perspective européenne' (1977) 55 *RDISDP* 273, 278.

<sup>28</sup> H C Gutteridge, 'Comparative Law and the Law of Nations' (1944) 21 *BYIL* 1, 8–9; P Reuter, 'La nature des vices du consentement dans la Convention de Vienne sur le droit des traités', in E Van Bogaert, *Liber Amicorum Elie Van Bogaert* (1985); C J Mahoney, 'Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties' (2007) 116 *Yale LJ* 824.

<sup>29</sup> For a historical overview of the development of CIL, see: Mamlyuk & Mattei, above n 18.

<sup>30</sup> *Ibid*; M Koskeniemi, 'The Case for Comparative International Law' (2009) 20 *Finnish YIL* 1.

<sup>31</sup> E.g. Toronto Group for the Study of International, Transnational, and Comparative Law, 3<sup>rd</sup> Annual Conference, Panel 'Stories of the Gently Civilized: National Traditions in International Law', 29–31 January 2010, <<http://torontogroup.files.wordpress.com/2009/08/toronto-group-2010-call-for-papers.pdf>> [accessed 1 May 2013].

<sup>32</sup> Société française pour le droit international (ed), *Droit international et diversité des cultures juridiques/International Law and Diversity of Legal Cultures* (2008). See also Société française

for reservations to and the interpretation of human rights treaties,<sup>33</sup> differing perspectives on the use of force,<sup>34</sup> its importance in the jurisprudence of the WTO's Appellate Body,<sup>35</sup> and how it relates to international courts.<sup>36</sup>

### 2.2.2 National legal cultures & the internal world of international law

The goal of this paper is to foster dialogue on the ways to assess the influence that national legal background, traditions, perceptions etc. exert with respect to the international system.<sup>37</sup> The unit of comparison is situated at the meso-level somewhere between the macro-level (e.g. civilisation)<sup>38</sup> and sub-cultures within different areas of law present within a given country.<sup>39</sup> National legal culture is not static. Influences from outside (via imposition, legal transplant or membership of a regional organisation), as much as domestic political, economic and social dynamics transforms its content over time. For this reason, some voice doubt as to the continued existence of distinct national legal cultures in today's ever globalizing world. Nonetheless, differences among nations with respect to legal culture remain tangible. National traditions are known to be tenacious, as a result of which the storied common law-civil law distinction keeps its relevance despite claims to the contrary. Furthermore, the mechanism of local resistance to globalizing forces should not be underestimated.<sup>40</sup>

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pour le droit international & Deutsche Gesellschaft für Völkerrecht (eds), *Les pratiques comparées du droit international en France et en Allemagne/Die Praxis des Völkerrechts im Vergleich zwischen Deutschland und Frankreich* (2012).

<sup>33</sup> S L Bunn-Livingstone, *Juriscultural Pluralism vis-à-vis Treaty Law* (2002).

<sup>34</sup> N Kredel, *Operation "Enduring Freedom" and the Fragmentation of International Legal Culture: Comparing US Common Law and Civil Law Perspectives on the International Use of Force* (2006).

<sup>35</sup> E Menezes de Carvalho, *Semiotics of International Law: Trade and Translation* (2011).

<sup>36</sup> N L Arold, *The Legal Culture of the European Court of Human Rights* (2007); S McLaughlin Mitchell & E J Powell, *Domestic Law goes Global: Legal Traditions and International Courts* (2011).

<sup>37</sup> Of course these are but some objects of diffusion at the international level. For a more expansive list, see: Twining, above n 13, 282. See also D Zartner Falstrom, 'Thought Versus Action: The Influence of Legal Tradition on French and American Approaches to International Law' (2006) 58 *Maine LR* 338, 343–7.

<sup>38</sup> See e.g. Y Ben Achour, *Le rôle des civilisations dans le système international (droit et relations internationales)* (2003); Y Onuma, *A Transcivilizational Perspective on International Law* (2010); H Köchler, 'Civilization and World Order: The Relevance of the Civilizational Paradigm in Contemporary International Law', in S Yee & J Y Morin (eds), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (2009) 65.

<sup>39</sup> M Van Hoecke & M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *ICLQ* 495, 515.

<sup>40</sup> Nelken, above n 11, 120–3.

In an attempt to avoid excessive ambiguity and abstraction, we will narrow our scope down to the *internal* legal culture of international law. The latter is inhabited by lawyers, jurists, judges, and similar actors (professionals) to be differentiated from the external legal culture, which deals with the aggregate perspectives of outsiders on the law (lay persons).<sup>41</sup> One noteworthy effort to catalogue the basic elements comprising the internal world of legal culture led to the following set of characteristics shared by a given professional community: (1) a concept of law; (2) a theory of legal sources; (3) legal methodology; (4) a theory of acceptable argumentation; (5) a theory of legitimation; (6) a basic ideology.<sup>42</sup> Other recurring elements include *inter alia* modes of reasoning and a distinct technical lexicon of terms, which at times differ semantically from ordinary language.<sup>43</sup> Here it is important to note that one would be hard pressed to find a single international legal culture. There seems to be a growing consensus that the many branches of the legal system are giving rise to their own inner cultures shared by their respective professional communities. This holds particularly true for trade-related areas such as international commercial arbitration,<sup>44</sup> investments,<sup>45</sup> and law & development,<sup>46</sup> but it is equally valid for international criminal law.<sup>47</sup>

### 2.2.3 Factors of influence: individual and structural

Focus on practitioners, the individuals that breathe life into norms, is warranted for a number of reasons. The role they play in the development of international law is greater than that of their peers in national systems.<sup>48</sup> Their writings are

<sup>41</sup> L M Friedman, *The Legal System: A Social Science Perspective* (1975) 194, 223. See also Cotterrell, above n 4, 710, who uses the term 'professional juristic realm'.

<sup>42</sup> Van Hoecke & Warrington, above n 39, 514–15.

<sup>43</sup> G Rebuffa & E Blankenburg, 'Culture juridique', in A J Arnaud et al (eds), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (2<sup>nd</sup> edn, 1993) 139.

<sup>44</sup> E.g. Y Dezalay & B G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1998).

<sup>45</sup> E.g. S W Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 *EJIL* 875.

<sup>46</sup> E.g. C Picker, 'International Trade and Development Law: A Legal Cultural Critique' (2011) 4 *L & Develop R* (2011) 42.

<sup>47</sup> E.g. M Bohlander, 'Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice' (2011) 24 *Leiden JIL* 393.

<sup>48</sup> R Jennings, 'International Lawyers and the Progressive Development of International Law', in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century* (1996) 413, 414; C G

formally acknowledged as an aid in determining the rules of law.<sup>49</sup> It is their opinion, operating as a collective, that makes or breaks the persuasiveness of a legal argument.<sup>50</sup> Moreover, they have been subjected to a process of socialisation or enculturation in their respective societies, leading to the internalisation of certain values.<sup>51</sup> They play a significant role in inducing rule compliance,<sup>52</sup> and as norm carriers they export their traditions and values to the international level.<sup>53</sup>

Almost intuitively one surmises that two antagonistic forces are at play within the minds of these professionals. On the one hand, there is a powerful drive to assert distinctiveness. Now we have entered what is deemed by many to be the 'post-ontological' phase of international law,<sup>54</sup> this coming of age goes hand in hand with the emergence of a legal culture in its own right.<sup>55</sup> Schachter memorably encapsulated this sentiment when he spoke of the 'invisible college of international lawyers'.<sup>56</sup> This amorphous, cosmopolitan community of professionals is committed to the advancement of a common intellectual endeavor and boasts diverse membership from all corners of the globe. Its aim is to imbue legal concepts with a sense of justice (*la conscience juridique*).<sup>57</sup>

And still, this cannot be the complete picture. While highlighting the significance of the invisible college, Schachter equally acknowledged the pull of the national. Supporting a national outlook cannot simply be attributed to political gain or reasons of careerism. Rather, an individual is inculcated with values prevalent within his or her country, resulting in what he called 'inherent parochialism'.<sup>58</sup> Some have highlighted the risks associated with such unconscious influences at

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Weeramantry, *Universalising International Law* (2004) 76–83.

<sup>49</sup> Statute of the International Court of Justice, Art 38(1)(d) (*ICJ Statute*).

<sup>50</sup> M Koskeniemi, 'Methodology of International Law', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2008) MN1.

<sup>51</sup> A D Renteln, 'Cultural Bias in International Law' (1998) 92 *ASIL Proc* 232, 233.

<sup>52</sup> E.g. L A Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104 *AJIL* 1.

<sup>53</sup> K T Gaubatz & M MacArthur, 'How International is "International" Law?' (2001) 22 *Mich JIL* 239, 264.

<sup>54</sup> See T M Franck, *Fairness in International Law and Institutions* (1998) 6.

<sup>55</sup> Renteln, above n 51, 236.

<sup>56</sup> O Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern U LR* 217.

<sup>57</sup> *Ibid.*, 225–6. The term derives from the Statutes of the Institute of International Law, Art 1.2.a. For a discussion on its origins and meaning, see: M Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2004) 41, 47–51.

<sup>58</sup> Schachter, above n 56, 219. For a debate on whether international lawyers can be ideologically neutral, see: A Cassese & J H H Weiler (eds), *Change and Stability in International Law-Making* (1988) 137–63. See also G Guillaume, 'Some Thoughts on the Independence of International Judges vis-à-vis States' (2003) 2 *LPICT* 163, 167–8.

the international level which can 'hamper communication [...] and lead to misconceptions [...].'<sup>59</sup>

In addition to unconscious individual influences, structural aspects of the international legal order facilitate the filtering in of domestic legal patterns. The most conspicuous instance can be found in the general principles of law set out in Art 38.1.c of the ICJ Statute, a gateway for municipal concepts and institutions to trickle into the fabric of international law. Another factor is the ubiquitous 'equitable geographical representation' requirement which guides the UN's and other international organisations' hiring and election policies.<sup>60</sup> With respect to the International Law Commission, the UN body whose mission it is to take on the codification and progressive development of international law, this condition is further specified in a manner that advances domestic juridical influences:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.<sup>61</sup>

Besides the uncontroversial features, it is well worth asking whether there are conscious concerted efforts to promote national legal traditions in hammering out regimes, building international institutions etc. In other words, do states (and by extension their citizens in positions of relevance for the making and/or application of international law)<sup>62</sup> enter into competition with one another to push through or even 'sell' their respective model?<sup>63</sup> By way of illustration, after the political decision has been taken to establish a new international court or tribunal, the thrashing out of the legal details ensues.<sup>64</sup> Certain writers have put forward the thesis that once they have entered that phase, states attempt to lock in their preferences in the design of the adjudicatory body. These preferences

<sup>59</sup> L Protz, *The Latent Power of Culture and the International Judge* (1979) 230.

<sup>60</sup> E.g. Charter of the United Nations, Art 101(3).

<sup>61</sup> Statute of the International Law Commission, Art 8. See also S Sucharitkul, 'Legal Multiculturalism and the International Law Commission', in Yee & Morin, above n 38, 301.

<sup>62</sup> F Coulée, 'L'influence française sur le droit international', in *Société française pour le droit international*, above n 32, 9, 11–12.

<sup>63</sup> E Jouannet, 'French and American Perspectives on International Law: Legal Cultures and International Law' (2006) 58 *Maine LR* 291, 300.

<sup>64</sup> D D Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 *Berkeley JIL* 401, 409.

include the absorption of features inspired by domestic legal traditions.<sup>65</sup> This is particularly true in the case of the ICC and *ad hoc* criminal tribunals, which fuse elements of civil and common law procedure, thereby forming 'hybrid' entities.<sup>66</sup>

Others downplay this phenomenon. In 2001, the French *Conseil d'État* (the supreme administrative court) disseminated a study it had commissioned on the influence of French law in the world. The report concluded that 'juridical competition' is by and large absent in international law, as opposed to fields such as private international law and economic law where this dynamic is prevalent.<sup>67</sup>

### 3 The ICJ as a microcosm of legal cultures

The World Court, as a premier meeting place of international legal actors from variegated legal cultures,<sup>68</sup> presents itself as a fitting institution for observing provincial idiosyncrasies. Drawing upon the (embryonic) theoretical thoughts set out in the above paragraphs, we will consider the individual and structural factors of influence and their resulting effect in the ICJ's case law.

#### 3.1 Judges

Does the influence of national background linger in the recesses of many an international judge's mind? It seems hard to believe that adjudicators can leave their intellectual baggage at the doorstep upon entering the Peace Palace. A considerable number of judges have refuted or minimized the impact of domestic traditions on judicial behavior and ratiocination. *A fortiori* some of them have called into question the ability to reproduce their thought patterns.<sup>69</sup> A stark illustration of this tendency is the following interview with former Judge Singh (India):

<sup>65</sup> J M Thouvenin, 'Cultures juridiques et procédures judiciaires', in Société française pour le droit international, above n 32, 387, 390.

<sup>66</sup> W W Burke-White, 'International Legal Pluralism' (2003) 25 *Mich JIL* 963, 974; G P Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law', in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (2009) 104.

<sup>67</sup> Conseil d'État – Section du rapport et des études, *L'influence internationale du droit français* (2001) 32–33.

<sup>68</sup> See J G Merrills, *International Dispute Settlement* (5<sup>th</sup> edn, 2011) 145 (noting that the ICJ does not have a single legal culture).

<sup>69</sup> M Bedjaoui, 'Expediency in the Decisions of the International Court of Justice' (2000) 71 *BYIL* 1, 6–8.

Question: Fifteen countries are represented at the Court, some of them from radically different legal systems. Do you ever have difficulties in the value-orientation, the approaches of the judges, the fact that they come to the court with different national perspectives?

Answer: No. We all administer international law, which is the expertise of all these judges. We do not administer national laws, and I am glad to state international law is now a well established regional branch of law to govern inter-state relations.

Question: Has your coming from a country like India—with its great diversity, its population, its problems—helped you as a judge of the International Court?

Answer: Most certainly, because the world is full of diversity. It has different cultures, different languages, different religions, and in India you get in miniature what you see in the whole world. So it is an advantage for me to be well aware that these facts exist. They have to be reconciled and they have to be accepted. You cannot do anything to brush them aside. If you do, then you are working against reality. In any case, these differences are of no avail in the administration of international justice. They do not count.<sup>70</sup>

In other interviews, or even in separate opinions,<sup>71</sup> fellow members of the bench have overwhelmingly asserted their freedom from parochial peculiarities. There is more than one explanation for this trend, however the most plausible reason is sending a clear signal of independence as well as impartiality.<sup>72</sup> Without these indispensable qualities, the widely held assertion that initiating proceedings against another state is not an inimical act would be undermined.<sup>73</sup>

<sup>70</sup> G Sturgess & P Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (1988) 453; Renteln, above n 51, 242–3.

<sup>71</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, ICJ Reports 1986 p 158, 158–60 (Judge Lachs, sep op).

<sup>72</sup> On the independence/impartiality distinction, see: Institute of International Law, *Resolution: The Position of the International Judge*, 9 September 2011; J Malenovský, 'L'indépendance des juges internationaux' (2010) 349 *RCADI* 9, 29–30.

<sup>73</sup> See GA Res 3232(XXIX), 12 November 1974, op para 6: '[The UN General Assembly] [r]eaffirms that recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States' (emphasis original); M Kdhir, 'La méthode de travail du juge international', in M Bedjaoui et al, *La méthode de travail*

From an institutional perspective, this issue harks back to the perennial problem of the ICJ, the lack of compulsory jurisdiction. In order to convince states to submit their disputes to the Court, its members need to believably demonstrate they are unbiased. Accusations of this ilk were especially widespread in the aftermath of the symbolic case *Nicaragua v US*.<sup>74</sup> In past years, scholars have added to this slew of writings, providing more refined studies for detecting biases among the World Court's judges.<sup>75</sup> Despite these understandable concerns, the odd admission of domestic influence has surfaced. The most candid instance to our mind is a dissenting opinion written by an *ad hoc* judge in the *Anglo-Iranian Oil Co* case:

It is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Court is to be representative of 'the main forms of civilization and of the principal legal systems of the world'(Statute, Article 9), and the Court is to apply 'the general principles of law recognized by civilized nations'. (Statute, Article 38(1)(c)).<sup>76</sup>

In addition, some who have served at the ICJ have cautiously acknowledged that certain legal concepts emblematic of a given legal tradition can prove quite divisive among their peers. Judge Jennings, a former President of the Court from the UK, noted:

The only time, in the writer's experience, when a difference of legal culture seems to appear is when a counsel trained in the common

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*du jure international* (1997) 9, 31. See also N Singh, *The Role and Record of the International Court of Justice* (1989) 30 (reporting the general perception that states sometimes drag their adversaries before the Court as part of a political ploy to get them to negotiate).

<sup>74</sup> E.g. E Gordon, 'Observations on the Independence and Impartiality of the Members of the International Court of Justice' (1987) 2 *Connecticut JIL* 397. This was, however, not the first time that members of the Court were accused of anti-Western bias (see E McWhinney, *The International Court of Justice and the Western Tradition of International Law* (1987) 137–139) nor the last (see G I Hernández, 'Impartiality and Bias at the International Court of Justice' (2012) 1 *CJICL* 183, 203–204 (on Judge Elaraby and the 2004 *Israeli Wall* Advisory Opinion)).

<sup>75</sup> E.g. E Posner & M de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 *J Leg Stud* 599; A M Smith, "'Judicial Nationalism'" in *International Law: National Identity and Judicial Autonomy at the ICJ* (2005) 40 *Texas ILJ* 197; E Voeten, 'The Politics of International Judicial Appointments' (2009) 9 *Chicago JIL* 387.

<sup>76</sup> *Anglo-Iranian Oil Co (UK v Iran)*, ICJ Reports 1952 p 151, 161 (Judge Levi Carneiro, diss).

law begins to cross-examine a witness; a procedure which one's colleagues from a different legal tradition often find odd and even embarrassing.<sup>77</sup>

Judge Guillaume, a French former ICJ President, recently observed that 'whenever the Court discusses estoppel or the word is uttered, all judges turn to their British colleague'.<sup>78</sup>

A cursory overview of judges' attitudes teaches us that, yet again, the above-mentioned tension between the global (the need to claim universality for the sake of safeguarding the position of the ICJ) and the parochial (the inevitability of national legal culture playing a role whatever its significance) is ever-present in the thought processes of those sitting on the World Court's bench.

### 3.2 Litigators

To grasp the legal reasoning of a court in its entirety, one is well-advised to equally study counsel acting on behalf of the parties.<sup>79</sup> Their impact on the outcome of the case is not to be neglected.<sup>80</sup> Creative and convincing arguments could bring the Court to render a pioneering decision. In doing so, lawyers can implicitly contribute to the international law-making process.<sup>81</sup> This international bar has been pithily described by one of their American doyens as consisting of:

<sup>77</sup> R Y Jennings, 'An International Lawyer Takes Stock' (1991) 1 *U Miami YIL* 1, 14–15. See also S Rosenne, *The World Court: What it is and How it Works* (1995) 131: '[A] general practice resembling the Anglo-American procedure is emerging, with its three phases of examination-in-chief, cross-examination and re-examination, although the rules of evidence in international procedure are less strict and formalistic than in common-law countries.'

<sup>78</sup> G Guillaume, 'Discutant' (2011) 115 *RGDIP* 417, 420 (own translation).

<sup>79</sup> O Spiermann, *International Legal Argument in the Permanent Court of International Justice* (2005) 129; C B Picker, 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction' (2008) 41 *Vanderbilt J Transnat L* 1083, 1116 (n 184); C P R Romano, 'The Americanization of International Litigation' (2003) 19 *Ohio State J Dispute Res* 89, 91–2; K Highet, 'Book Review [of T D Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v United States Dispute* (1989)]' (1992) 86 *AJIL* 400, 400: 'For a full understanding of practically any case one must go further, and read at least the key passages of the written pleadings and the high points of the oral arguments in the case. As with the proverbial iceberg: seven-eighths of the content of a case can be understood only if one dives beneath the frigid waters of the decision and tries to view the underlying shape of the litigation as a whole.'

<sup>80</sup> T D Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v United States Dispute* (1989) 328–337 (analysing the effects of strategy and tactics on the outcome of *Nicaragua v US*).

<sup>81</sup> A Boyle & C Chinkin, *The Making of International Law* (2007) 291.

[T]hose international lawyers who have practiced and who continue to practice as oral advocates before the Court, who represent a variety of foreign states other than their own governments, who are well-known to the Judges and Registrar of the Court, who know how things work out in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade.<sup>82</sup>

As regards this professional elite, the juridical competition thesis (see above) might have currency. Gaubatz & MacArthur have studied the composition of ICJ litigation teams in an effort to understand the dissemination of knowledge of international norms around the globe. Having crunched the numbers, their article concludes that the strong reliance of non-OECD states on Western lawyers<sup>83</sup> for representation before the World Court is indicative of limited legal knowledge diffusion and local capacity.<sup>84</sup>

But even within the Western tradition, opinions diverge as to which legal cultures holds more sway. Looking back at a number of their oral and written submissions, as well as those of their predecessors, veteran ICJ lawyers Crawford & Pellet have concluded that traces of common law and civil law can be found in pleading practices.<sup>85</sup> To this they add that, while differences exist, they are not insurmountable and generally are fairly nuanced.<sup>86</sup> The relative weight to be attributed to oral and written submissions in persuading the Hague Court can arguably be seen as a clash between quintessential Anglo-Saxon and continental

<sup>82</sup> K Highet, 'A Personal Memoir of Eduardo Jiménez de Aréchaga: Doyen of the Invisible Bar of the International Court' (1994) 88 *ASIL Proc* 577, 578–579.

<sup>83</sup> See Rosenne, above n 77, 119–20 (noting that ICJ counsel and advocates are often seasoned members of their respective national bars and tend to come from a small group of countries, namely Belgium, UK, France, Italy, Switzerland and the US); A Pellet, 'The Role of the International Lawyer in International Litigation', in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (2000) 147, 149.

<sup>84</sup> Gaubatz & MacArthur, above n 53, 253.

<sup>85</sup> See also Gill, above n 80, 48 (claiming that World Court litigators do not share a common legal culture in contradistinction to their domestic counterparts).

<sup>86</sup> J Crawford & A Pellet, 'Anglo Saxon and Continental Approaches to Pleading Before the ICJ / Aspects des modes continentaux et anglo-saxons de plaidoiries devant la CIJ', in I Buffard, J Crawford, A Pellet & S Wittich (eds), *International Law between Universalism and Fragmentation—Festschrift in Honour of Gerhard Hafner* (2008) 831, 867. Combining both traditions can have clear advantages in pleadings, see: A Pellet, 'The Anatomy of Courts and Tribunals' (2008) 7 *LP ICT* 275, 278: 'I believe that the opportunity to address the International Court of Justice in both a language that constitutes a natural vehicle for common law and on the other hand one that is more linked to the particulars of Roman law is a source of complementary and mutual enrichment'.

characteristics respectively. Some argue that the written aspect of litigation is 'predominant',<sup>87</sup> whereas others hold that the written submissions are in fact 'subordinate to the oral proceedings'.<sup>88</sup>

Finally, Romano has detected potential patterns of Americanization in ICJ litigation. He attributes the developing trend of adversarial legalism, in particular mega-litigation (e.g. the sheer volume of pleadings in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*), and tactics of attrition (e.g. the prolific requests for provisional measures and formulations of counter-claims in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*) in part to the pressures of US influence.<sup>89</sup>

### 3.3 Structure

There are (at least) three key design features that militate in favor of domestic cultural influences within the Court. With respect to the selection of judges, we should call attention to the requirement that 'at every election, the electors shall bear in mind [...] that in the body as a whole the representation of the main forms of civilisation and of the principal legal systems of the world should be assured'.<sup>90</sup>

Indeed, when it comes to the selection of international judges, states are keen on recognizing the existence and importance of cultural diversity.<sup>91</sup> Read in conjunction with Art 38 of the ICJ Statute, which acknowledges general principles as a formal source of law, this provision can be viewed as an encouragement to draw upon municipal legal traditions in fashioning international jurisprudence. In all fairness, this antiquated interpretation of the term 'principal legal systems of the world' has taken a backseat in light of the tremendous rise in volume and scope of customary norms, conventions and case law since the framing of the aforementioned rule.<sup>92</sup>

<sup>87</sup> Gill, above n 80, 89–91 (asserting that written proceedings, as is the case in civil law jurisdictions, play a significant role, whilst according considerable importance to oral pleadings in requests for provisional measures).

<sup>88</sup> Highet, above n 79, 402; Rosenne, above n 77, 129.

<sup>89</sup> Romano, above n 79, 96–103.

<sup>90</sup> ICJ Statute, Art 9.

<sup>91</sup> G de Lacharrière, 'Le point de vue du juriste: la production et l'application du droit international dans un monde multiculturel', in R J Dupuy (ed), *L'avenir du droit international dans un monde multiculturel/The Future of International Law in a Multicultural World* (1983) 67, 74.

<sup>92</sup> B Fassbender, 'Article 9', in A Zimmermann, C Tomuschat & K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (2006) 261, 275.

The blueprint of the ICJ can be viewed as encapsulating domestic legal traits.<sup>93</sup> In their recent book, McLaughlin Mitchell & Powell have developed a rational legal design theory for explaining the linkage between a state's legal traditions and its behaviour towards creating ('the originators') and adhering to ('the joiners') international courts and tribunals. Central in this approach is the contention that states are eager to lock in their preferences, in the form of beneficial rules and procedures, so as to enhance the predictability of adjudicators' behaviour. National legal traditions can serve as indispensable clues for making such predictions, hence the incentive to mimic domestic adjudicatory aspects.<sup>94</sup>

A cautionary note is in order. Viewing a court's anatomy in legal cultural terms certainly produces interesting results. At the same time, it would be counter-factual to attribute every aspect of the ICJ's blueprint to domestic influences. *Realpolitik* can trump tradition. A marked case in point is the decision not to establish a system of *stare decisis*. It would seem logical to assume that the absence of binding precedent derives from the preponderant sway of the civil law experts entrusted with the task of setting up the Permanent Court of International Justice (PCIJ) (the Advisory Committee of Jurists), which in turn laid the groundwork for the ICJ. Yet the *travaux préparatoires* tell another story: the drafters were above all fearful of endowing international judges with the power to make law. It is equally telling in this regard that the British experts of the Committee agreed on this matter.<sup>95</sup>

### 3.4 Case law

Having determined the factors of influence within the ICJ, the next step consists in demonstrating how these variables manifest themselves in the outcome of the World Court's judicial process. Textual analysis of the rulings of the Court and concomitant inferences can only paint a partial picture of how the domestic

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<sup>93</sup> H Ascencio, 'La notion de juridiction internationale en question', in Société française de droit international (ed), *La juridictionnalisation du droit international* (2003) 163, 166 (asserting that international jurisdictional bodies are transposed from domestic law albeit with adaptations to fit their new social setting, i.e. the international community).

<sup>94</sup> McLaughlin Mitchell & Powell, above n 36, ch 3. See also L Lloyd, "A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice' (1985) 79 *AJIL* 28, 37 (detailing the UK's successful efforts to prevent the PCIJ from having compulsory jurisdiction out of fear that a continental dominated bench would be pernicious to its interests).

<sup>95</sup> G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 *JIDS* 5, 8.

element seeps into decision-making. We are insufficiently knowledgeable of the laborious internal process (redrafting, confidential meetings, the role of the secretariat's staff, etc.) that churns out the case law with which internationalists are so familiar. The literature on this topic is quite scarce.<sup>96</sup>

Not that this has prevented several publicists from reading legal culture into the jurisprudence of the Court. Areas in which the municipal effect is felt are *inter alia* the judge's perception of his or her social responsibilities (in particular, re-making positive law in response to changes in the international community as opposed to doing individual justice *inter partes*),<sup>97</sup> the style of writing,<sup>98</sup> the implementation of the adversarial principle,<sup>99</sup> and the judicial activism/restraint dichotomy.<sup>100</sup> There are two specific issues with regard to which the culture factor is substantial: resorting to analogy and the justification of decisions.

### 3.4.1 Analogies

Analogical reasoning is met with a fair amount of reluctance in classical doctrine if used to make a legal argument, because this could entail extending the application of a rule to a new situation without the consent of states to be bound.<sup>101</sup> Despite theoretical trepidation, a great number of ICJ judges have found wisdom in analogies to domestic legal cultures.<sup>102</sup> Such references can be

<sup>96</sup> R Y Jennings, 'The Internal Judicial Practice of the International Court of Justice' (1988) 59 *BYIL* 31, 36–47; M Bedjaoui, 'La "fabrication" des arrêts de la Cour internationale de Justice', in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991) 87.

<sup>97</sup> E McWhinney, *Judicial Settlement of International Disputes* (1991) 19–20.

<sup>98</sup> G Guillaume, 'Cultures juridiques et délibéré judiciaire', in *Société française pour le droit international*, above n 32, 399; J A R Nafziger, 'Some Remarks on the Writing Style of the International Court of Justice', in T Buergenthal (ed), *Contemporary Issues in International Law: Essays in Honour of L B Sohn* (1984) 325; L Protz, 'The Style of Judgment in the International Court of Justice' (1970) 5 *Australian YIL* 75.

<sup>99</sup> E Jouannet, 'Remarques conclusives', in H Ruiz Fabri & J M Sorel (eds), *Le principe du contradictoire devant les juridictions internationales* (2004) 177, 188–94.

<sup>100</sup> E McWhinney, 'The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy' (2006) 5 *Chinese JIL* 3; E Jouannet, 'Remarques conclusives', in H Ruiz Fabri & J M Sorel, *Indépendance et impartialité des juges internationaux* (2010) 271, 298–9. See also Koch, above n 21, 42–3 (arguing that deciding a *non liquet* could be viewed as reflecting constraint for lack of a sound legal source, which in turn is telling of the civil law tradition).

<sup>101</sup> S Vöoney, 'Analogy in International Law', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2008) MN18–22.

<sup>102</sup> But cf *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949 p 205, 211 (Judge Badawi Pacha, diss).

categorized into two types:<sup>103</sup> resort to private law<sup>104</sup> and comparative law.<sup>105</sup> While it is understandable that analogies allow a practitioner to ‘feel more at home’,<sup>106</sup> the outcome of excessive usage is not always benign. The danger lies in importing one’s preferred legal concepts wholesale into international law under the guise of general principles.<sup>107</sup> As stated by a former Soviet Judge on the Court, Korovin: ‘[l]ong ago there were warnings against the danger of an unreserved transference of the principles of civil law and process into international (public) law and into the procedure of international courts.’<sup>108</sup>

Judge Weeramantry appealed to the readers of his separate opinion to ‘draw upon the world’s diversity of cultures’ in the making of international legal norms.<sup>109</sup>

This phenomenon is not as pervasive as it used to be. Especially in the time of the PCIJ, frequent recourse to domestic juridical concepts was necessary in constructing the building blocks of international law.<sup>110</sup> As international law

<sup>103</sup> Protz, above n 59, 212–16; Butler, above n 18, 39–41.

<sup>104</sup> E.g. *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, ICJ Reports 1966 p 325, 386–8 (Judge Jessup, diss) (*South West Africa*) (on standing to secure judicial review); *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)*, ICJ Reports 1970 p 114, 117–18 (Judge Tanaka, sep op) (*Barcelona Traction*) (on the characteristics of corporations).

<sup>105</sup> E.g. *Northern Cameroons (Cameroon v United Kingdom)*, ICJ Reports 1963, p 150 (Judge Badawi, diss) (a comparative overview of declaratory judgments); *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco*, ICJ Reports 1956 p 123, 132–4 (Vice-President Badawi, diss) (a comparative overview of *détournement de pouvoir* doctrine in several legal systems); *Barcelona Traction*, ICJ Reports 1970 p 267, 273, 285 (Judge Gros, sep op) (citing examples of bankruptcy legislation).

<sup>106</sup> H Thirlway, ‘Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning’ (2002) 294 *RCADI* 265, 405. Even when an international and a municipal legal notion are quite different, analogy can allow for a better delineation between the two, thereby sharpening conceptual understanding, see: M Shahabuddeen, ‘Municipal Law Reasoning in International Law’, in A V Lowe & M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 90, 99–102.

<sup>107</sup> H Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1927) 84–5; L B Wehle, ‘Comparative Law’s Proper Task for the International Court’ (1950) 99 *U Penn LR* 13, 19 (explaining that prior to the PCIJ, international law mainly drew upon Roman-Civil concepts); J Ellis, ‘General Principles and Comparative Law’ (2011) 22 *EJIL* 949, 955ff.

<sup>108</sup> *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, ICJ Reports 1966 p 239, 242 (Judge Koretsky, diss).

<sup>109</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997 p 88, 96 (Vice-President Weeramantry, sep op).

<sup>110</sup> L Ferrari-Bravo, ‘International and Municipal Law: The Complementarity of Legal Systems’, in R St J Macdonald & D M Johnston (eds), *The Structure and Process of International Law: Essays in*

grew exponentially in quality and quantity, the need to seek refuge in analogies grew less acute.

### 3.4.2 *Justificatory practices*

Giving reasons is an intrinsic quality of judicial decisions.<sup>111</sup> This is not only of concern to the parties, but the wider audience that the Court has to convince.<sup>112</sup> Depending on the issues at stake and the potential political/economic impact of the outcome, reasons are important for persuading the citizens of the litigating states as well as other countries and their peoples.<sup>113</sup> How a judge goes about justifying his or her verdict is intimately connected to legal culture. Within the ICJ, the common law and civil law approaches to judicial motivation are in some instances at odds. The clash is exacerbated by the relative vacuum in which the bench must operate: Art 56 of the Statute provides that '[t]he judgment shall state the reasons on which it is based' and Art 95.1 of the Rules of the Court stipulate that 'the judgment [...] shall contain [...] the reasons in point of law' without elaborating further on this important issue.<sup>114</sup>

The meeting of the legal cultures clearly comes to the fore with respect to the format of legal reasoning. In the Anglo-Saxon tradition, the adjudicator is more amenable to adapting the ruling to the social context (legitimacy) and aims to win over the parties and the public at large (pedagogical), resulting in decisions that answer to the parties' contentions and that adopt a style known to be somewhat prolix and conversational.<sup>115</sup> Continental judges however are more intent on applying written codes, work on the basis of deductive syllogisms and aim to express what they deem is the 'legal truth' without feeling obligated to address all proffered arguments.<sup>116</sup> How does this play out at the ICJ? Vasseur notes that

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*Legal Philosophy, Doctrine and Theory* (1983) 715, 724.

<sup>111</sup> P M Juret, 'Observations sur la motivation des décisions juridictionnelles internationales' (1960) 64 *RGDIP* 516, 519; R Y Jennings, 'Judicial Reasoning at an International Court', in G Ress (ed), *Vorträge, Reden und Berichte aus dem Europa-Institut* (1991) 1, 2.

<sup>112</sup> G Cahin, 'La motivation des décisions de la Cour internationale de justice', in H Ruiz Fabri & J M Sorel, *La motivation des décisions des juridictions internationales* (2008) 9, 81.

<sup>113</sup> G A Alvarez & W M Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (2008) 2; L Prott, 'The Justification of Decisions in the International Court of Justice', in C Perelman & P Foriers (eds), *La motivation des décisions de justice* (1978) 331, 333–4.

<sup>114</sup> See also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980 p 125, 125 (Judge Mosler, sep op).

<sup>115</sup> A Vasseur, 'L'influence des traditions juridiques nationales sur la motivation des décisions de la Cour internationale de justice' (2007) 40 *RBDI* 474, 485.

<sup>116</sup> *Ibid.*, 485–6.

in a first period the bench was willing to answer the litigating states' arguments in detail, including the underlying rationale behind them, however a shift occurred with the Court becoming less inclined to engage with the parties' submissions.<sup>117</sup>

Can this seeming *rapprochement* to civil legal thought be counted as a win for continental-style international lawyers? Not quite. While national legal culture certainly explains this occurrence in part, there are other factors that have brought about this result. One explanation is that the Court writes a majority opinion, trying to get as many judges on board. Consensus-building automatically leads to a watered down and more laconic decision.<sup>118</sup> Following a strategic logic, it could also be argued that the ICJ, lacking compulsory jurisdiction, does not want to openly and in a detailed fashion tear apart a state's arguments for fear of scaring away potential parties, and thus limits itself to the bare essentials.<sup>119</sup>

### 3.4.3 Standard of proof

Due to patently capacious rules in its Statute and Rules, the Court enjoys a great deal of leeway in assessing evidentiary materials.<sup>120</sup> Precisely because of this juridical vacuum, the members of the bench have felt compelled to hammer out their own approach to dealing with facts in individual cases without much textual guidance.<sup>121</sup> An area where this has induced a culture clash of sorts is the standard of proof, i.e. the degree to which a claimant must demonstrate to a tribunal's satisfaction that the assertion holds true.<sup>122</sup> This predicament was intelligibly framed by former President Higgins in an address to the Sixth Committee of the UN General Assembly:

[T]he Court has [...] been reluctant to specify the standard of proof, even for a particular case. [...] Part of this reluctance to be specific is caused by the gap between the explicit standard-setting approach

<sup>117</sup> Ibid, 488. See also H Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations' (2006) 5 *Chinese JIL* 15, 26–27.

<sup>118</sup> Guillaume, above n 98, 401. See also Cahin, above n 112, 20.

<sup>119</sup> Vasseur, above n 115, 489. Cf Cahin, above n 112, 53–6.

<sup>120</sup> C Brown, *A Common Law of International Adjudication* (2009) 87. This discretion extends to both admission and assessment of evidence. See G Niyungeko, *La preuve devant les juridictions internationales* (2005) 239ff, 322ff.

<sup>121</sup> M Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (2010) 512ff.

<sup>122</sup> C F Amerasinghe, *Evidence in International Litigation* (2005) 232.

of the common law and the “*intime conviction du juge*” familiar under civil law; the ICJ naturally has judges from both of these traditions on its Bench.<sup>123</sup>

As a result of this impasse, a fair number of judges, often of common law heritage, have handed down individual, separate or dissenting opinions in which they lament the majority’s inability to establish a sound methodology<sup>124</sup> and/or set the standard they believe should apply in the contentious case before them.<sup>125</sup> Here cultural sway, despite its acknowledged relevance in the field of evidence law,<sup>126</sup> should be somewhat nuanced. Firstly, the background of judges is not the only factor of influence determining to what degree facts must be established. Other indicators are the nature of the dispute at hand (e.g. sorting out competing maritime/territorial claims as opposed to findings of state responsibility for internationally wrongful acts), the seriousness of the allegations and the phase of proceedings (e.g. merits or incidental).<sup>127</sup> Secondly, it has been pointed out that a judge will not always be inclined to follow the evidentiary approach of his or her country of origin.<sup>128</sup>

<sup>123</sup>H E Judge Rosalyn Higgins, President of the International Court of Justice, ‘Speech to the Sixth Committee of the General Assembly’, 2 November 2007, 4–5, <<http://www.icj-cij.org/press-com/files/3/14123.pdf>> [accessed 1 May 2013]. Cf *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, 9 (Judge Lucky, diss): ‘It would appear from its case law that the ICJ adopts the civil law method’.

<sup>124</sup>*Oil Platforms (Iran v US)*, ICJ Reports 2003 p 225, 233–5 (Judge Higgins, sep op).

<sup>125</sup>*Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010 p 14, 230 (Judge Greenwood, sep op).

<sup>126</sup>B Simma, ‘The International Court of Justice and Scientific Expertise—Fact-Finding in Interstate Disputes’ (2012) 106 *ASIL Proc* 230, 230 (referring to a ‘clash of (legal) civilizations’); C Greenwood, ‘Some Challenges of International Litigation’ (2012) 1 *CJICL* 7, 17–18 (stating the limited relevance of legal tradition save procedural matters such as evidence).

<sup>127</sup>K Del Mar, ‘The International Court of Justice and Standards of Proof’, in K Bannelier, T Christakis & S Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the “Corfu Channel” Case* (2012) 98.

<sup>128</sup>A Riddell & B Plant, *Evidence before the International Court of Justice* (2009) 37. See *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999 p 1045, 1233 (Judge Rezek, diss) (a Brazilian judge referring to ‘preponderance of evidence’, a standard of proof that is not part of civil law systems of evidence).

## 4 Conclusion

The aim of this paper has been to open up a discussion on the merits and pitfalls of adopting a legal cultural approach to international law. Possibilities abound and many methodological aspects are still untapped. By way of illustration, an in-depth comparative study of the teaching of international law<sup>129</sup> would offer fascinating insights, legal training being paramount in the shaping of professional culture.<sup>130</sup> Such a venture would moreover raise a host of questions on how to go about it. One could certainly imagine that scrutinizing educational practices would involve comparative textbook analysis<sup>131</sup> and a closer look at the manner in which international law courses are integrated into the wider curriculum.<sup>132</sup>

Other than these methodological queries, there are deeper issues worthy of consideration. To what extent does the absorption of municipal elements in the global legal order enhance political acceptability and compliance pull of the system?<sup>133</sup> Why should we study international law in comparative perspective and what are we aiming to demonstrate?<sup>134</sup> Even if we acknowledge the existence of municipal influences on judges in their decision-making, have they created an institutional legal culture of their own that transcends the parochial and what can be said of its constitutive elements?<sup>135</sup> In any event, novel scholarship in this field will enable us to move from the educated hunch that national legal culture

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<sup>129</sup> Koskenniemi, above n 30, 3.

<sup>130</sup> Based on the findings, suggestions could be made to counter insularity in international legal education. See J A Cohen, 'Ethnocentrism and the Teaching of International Law', in R St J Macdonald (ed), *Essays in Honour of Wang Tieya* (1994) 191.

<sup>131</sup> L Mälksoo, 'International Law in Russian Textbooks: What's in the Doctrinal Pluralism?' (2009) 1 *Goettingen JIL* 279; A Toublanc, 'Concerning French International Law *Manuels*: A Critical Review of the Principal French Textbooks in Public International Law' (2006) 58 *Maine LR* 587.

<sup>132</sup> See E D Brown, 'The Teaching of International Law in the United Kingdom', in B Cheng (ed), *International Law: Teaching and Practice* (1982) 167; J Dutheil de la Rochère, 'The Teaching of Public International Law in France', in *ibid*, 183; J Klabbers & M Sellers (eds), *The Internationalization of Law and Legal Education* (2008). See also: International Law Association (ILA), Teaching of International Law Committee (1998–2010).

<sup>133</sup> Cf Burke-White, above n 66, 978–9 with Spiermann, above n 79, 404.

<sup>134</sup> Cf Mamlyuk & Mattei, above n 18, 393–4 (embracing difference, understanding but not transforming extant approaches to international law, matching coterminous projects in international and comparative legal studies) with Picker, above n 79, 1086–9 (improving international rules and institutions based on lessons from comparative law).

<sup>135</sup> 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) 65 (referring to this institutional culture as 'the united approach to justice'); M Lachs, 'A Few Thoughts on the Independence of Judges of the International Court of Justice' (1987) 25 *Columbia JTL* 593, 595.

matters in international law to thoroughly substantiated claims.

# LEGAL TRANSPLANTS AS TOOLS FOR POST-CONFLICT CRIMINAL LAW REFORM: JUSTIFICATION AND EVALUATION

John Jupp\*

## Abstract

The criminal law frameworks of countries that have been the subject of international peacekeeping operations and military interventions often reveal an urgent requirement for reform. The promotion of fair and effective justice systems, the rule of law and transition from conflict to peace frequently necessitates the introduction of new state legislation. Legal transplants have been employed as a legislative tool to bring about post-conflict legal change. However, the use of transplanted law in these situations has been controversial and has raised concerns about the justification for adopting it. This paper examines the justification for employing legal transplants to develop new post-conflict criminal laws by assessing their practical utility and the motivational rationale for employing them. It reviews theoretical perspectives on transplant feasibility and reflects on the experience of previous criminal law legal transplants. The article concludes by proposing an evaluative test for prior application to post-conflict criminal legal transplants to assess their prospects of success and to gauge the necessity for later change and adaptation.

## Keywords

comparative law, post-conflict, criminal justice, legal transplants

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## 1 Introduction

The legal frameworks of countries seeking to transition from conflict to peace are often subject to extensive reform following international intervention. The United Nations Assistance Mission in East Timor (*UNTAET*), for example, passed 71 legal regulations during its four year mandate.<sup>1</sup> In Kosovo, 257 regulations were passed between 1999 and 2004,<sup>2</sup> and in Afghanistan 188 new laws were enacted between 2003 and 2007.<sup>3</sup> Many of these new laws were

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<sup>1</sup> UNTAET regulations. Available at: <<http://www.unmit.org/legal/index-e.htm>> [accessed 23 April 2014]

<sup>2</sup> UNMIK regulations. Available at: <<http://www.unmikonline.org/regulations/index.htm>> [accessed 23 April 2014]

<sup>3</sup> Data presented at the IV Joint Co-ordination and Monitoring Board Meeting, Berlin, 30 January 2007. Available at: <<http://www.moj.gov.af/?lang=en&lang=en&p=events&nid=177>> [accessed 23 April 2014]

introduced in order to improve local criminal legislation and facilitate the development of functioning criminal justice systems, regarded as central to post-conflict rule of law development.<sup>4</sup> The intent, according to the United Nations (UN), is that these systems should be equipped with operational courts, police, prosecution, judiciary and defence services, supported by government ministries and guided by procedural and substantive legislation.<sup>5</sup> Achieving this ideal, however, presents an immense challenge in post-intervention states. The infrastructure and institutions necessary for the implementation of criminal justice are frequently damaged and limited in capacity.<sup>6</sup> Existing domestic law, according to the UN, 'often show accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards.'<sup>7</sup> The experience of criminal justice in states attempting to emerge from conflict is that domestic substantive and procedural law may fall short of sufficiently criminalising activities, allowing them to be committed with impunity and resulting in a weakening of efforts to establish the rule of law. In Angola, money laundering and corruption became endemic because they were not recognised as a criminal activity in any domestic law.<sup>8</sup> Similarly, until the legal framework was amended by the special representative of the Secretary-General in 1999, kidnapping had been a common occurrence in Kosovo as the Kosovo Criminal Code failed to define it as an offence.<sup>9</sup> In Afghanistan, poppy cultivation increased from 200 to 3,400 metric tons in the year following the removal of the Taliban from power in 2001. By 2003, the opium economy was valued at an estimated \$2.2 billion and it was financing destabilising armed factions. This prompted the passage of a Counter Narcotics Law<sup>10</sup> (CNL) in the drive to establish an 'anti-drugs legislative

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<sup>4</sup> According to the UN, the rule of law 'requires the protection of effective criminal justice measures': ECOSOC Res 2005/21; UNODC, *The Criminal Justice Assessment Toolkit* (2006). Available at: <[http://www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/CJAT\\_Toolkit\\_full\\_version.pdf](http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/CJAT_Toolkit_full_version.pdf)> [accessed 23 April 2014]

<sup>5</sup> Ibid.

<sup>6</sup> J Stromseth, D Wippman & R Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) 247.

<sup>7</sup> *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc 5/2004/616, 23 August 2004, para 27.

<sup>8</sup> C Rausch (ed), *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners* (2006) 41.

<sup>9</sup> Ibid, 41–2.

<sup>10</sup> Email correspondence, International Drugs and Development Adviser, 13 December 2008.

system that meets international standards.<sup>11</sup>

The frequent necessity for new criminal law in post-conflict states has resulted in a huge expansion of international interest and involvement in programmes designed to promote legal change through legislative reform in these environments.<sup>12</sup> In addition to the UN, foreign assistance agencies such as the United Kingdom's Department for International Development and Germany's Agency for Technical Assistance have provided technical support for legislative drafting programmes in transitional states. Similar initiatives have been undertaken by non-governmental organisations such as the American Bar Association Central European and Eurasian Law Initiative (*ABA/CEELI*), the International Development Law Organisation and the International Legal Assistance Consortium, all of which have developed reform programmes and provided actors offering expertise in drafting legislative frameworks.<sup>13</sup>

While the development assistance these organisations provide demonstrates exemplary good will, the expanding practice in criminal law reform is indicative of a trend towards opportunism, noticeable during the post-conflict period, that is bent on changing the legislative status quo to ensure conformity with international human rights and due process standards. The critical period following the immediate cessation of conflict is, according to UN guidance, the perfect time for international legal advisors to 'set virtuous cycles in motion',<sup>14</sup> and develop effective criminal law frameworks conducive to establishing the rule of law.<sup>15</sup> If this is indeed the case, it is vital to consider how legal change should be brought about.

The assumption by the international community of a central role in legislative reform in these states is a consequence of its custodianship of a new rights

<sup>11</sup> Transitional Islamic State of Afghanistan, *National Drug Control Strategy*, 18 May 2003, annex, v. Available at:

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[http://www.afghandata.org:8080/xmlui/bitstream/handle/azu/4328/azu\\_acku\\_pam-phlet\\_hv5801\\_n385\\_2003\\_w.pdf](http://www.afghandata.org:8080/xmlui/bitstream/handle/azu/4328/azu_acku_pam-phlet_hv5801_n385_2003_w.pdf) [accessed 23 April 2014]

<sup>12</sup> C T Call, *Constructing Justice and Security after War* (2007) 17.

<sup>13</sup> D Tolbert & A Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies' (2006) 19 *Harvard HRJ* 29, 55–6.

<sup>14</sup> United Nations, *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict*, UN Doc A/63/881-S/2009/304 (11 June 2009) 1.

<sup>15</sup> S N Carlson, *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study* (2006). Available at: <[http://www.unrol.org/files/Legal%20and%20judicial%20RoL%20work%20in%20multi%20dimensional%20pKping%20operations%20\\_Lessons%20Learned%20Study.pdf](http://www.unrol.org/files/Legal%20and%20judicial%20RoL%20work%20in%20multi%20dimensional%20pKping%20operations%20_Lessons%20Learned%20Study.pdf)> 1–4, 18. [accessed 23 April 2014]

framework, developed from transformations in human rights law and international criminal and humanitarian law since the Second World War, which has provided international actors with a perceived legitimacy in determining the normative content of required laws.<sup>16</sup> Nevertheless, this legitimacy, and indeed the legitimacy of international interventions and consequent legislative reform programmes to establish the rule of law, is likely to be measured against the effectiveness of the laws and frameworks that are subsequently introduced. While the international interventions of the 1990s and 2000s were ostensibly motivated by humanitarian and national as well as international security concerns, their legitimacy in the eyes of local populations, judged against criticisms of invasion, imperialism and colonialism, can be dependent on the success of resulting new legislative reform that promotes the rule of law.

Any legitimacy risks being seriously undermined when mistakes are made. Delays by the UN Mission in Kosovo (*UNMIK*) in identifying an acceptable body of criminal law have been criticised for leading to violations of human rights norms and impairment to the credibility and legitimacy of international efforts to promote the rule of law in Kosovo.<sup>17</sup> Care is needed in contemplating how criminal law reform should properly be conducted and received by local populations, requiring reflection on the most effective means of promoting legal change.

Recycling pre-existing criminal law may be an attractive solution. It is cost-efficient and may enhance much-needed legitimacy for a new government amongst the local population during difficult periods of transition and change.<sup>18</sup> Difficulties can be encountered, however, when identifying existing criminal law, leading to confusion in application, a problem encountered in Afghanistan following 23 years of civil war and the destruction of legal texts by the Taliban regime. It may also be problematic locating suitable criminal codes capable of local acceptance. *UNMIK*'s stipulation that the Serbian Criminal Code was to be applied in Kosovo was rejected by the Kosovar judiciary. In East Timor, the Timorese were dissatisfied with *UNTAET*'s insistence on applying pre-existing

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<sup>16</sup> K Boon, 'Legislative Reform in Post-Conflict Zones: *Jus Post Bellum* and the Contemporary Occupant's Law-Making Powers' (2005) 50 *McGill LJ* 285, 299.

<sup>17</sup> W S Betts, S N Carlson & G Givold, 'The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law' (2000–1) 22 *Michigan JIL* 371, 375.

<sup>18</sup> R Z Sannerholm, *In Search of a User Manual: Promoting the Rule of Law in Unruly Lands* (2007). Available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1068781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1068781)> 8 [accessed 23 April 2014].

Indonesian law.<sup>19</sup> Applicable law may also be completely inadequate for domestic requirements, as was the case in Cambodia where the criminal law at the time of the establishment of the UN Transitional Authority in Cambodia (*UNTAC*) consisted of only one decree containing 12 brief articles.<sup>20</sup>

Legal transplants may offer an alternative solution.<sup>21</sup> International experts have supported the transplantation of criminal law in the early stages of post-conflict reform,<sup>22</sup> and the UN has recommended the development of interim criminal codes for temporary application in generic post-conflict environments pending further reform.<sup>23</sup> Transplanting law, moreover, may help to meet the requirements placed on occupying powers by Articles 43 and 64 of the Hague and Geneva Conventions to scrutinise and, if necessary, modify the legislation of occupied territories. Yet legal development involving the transplantation of foreign-designed law has also been criticised for embracing a technocratic ‘one size fits all’ policy that fails to sufficiently take into account important local legal traditions and socio-political influences.<sup>24</sup> The controversy surrounding the use of legal transplants reflects a lack of certainty amongst the actors taking part in post-conflict reconstruction about their role in reform. This is epitomised in the contrasting recommendations of the 2000 UN Brahimi Report and the Rule of Law report published only four years later. While the former confidently advocated dependence on ‘foreign models and foreign-conceived solutions,’ the latter cautioned reformers to ‘eschew one-size-fits-all formulas and the importation of foreign models.’

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<sup>19</sup> V O'Connor, ‘Rule of Law and Human Rights Protections through Criminal Law Reform: Model Codes for Post-Conflict Criminal Justice’ (2006) 13(4) *International Peacekeeping* 517, 523.

<sup>20</sup> D A Donovan, ‘Cambodia: Building a Legal System from Scratch’ (1993) 27 *The International Lawyer* 445, 448.

<sup>21</sup> I employ the term legal transplant as a metaphor for the act of creating by means of borrowing, adopting, copying or imposing a legal institution, rule, law or legal norm established in one country and transplanting it into the legal system of another country. I use the words ‘implanting’, ‘importing’, ‘borrowing’, ‘adoption’, and ‘legal transplantation’ to refer to the same phenomenon. For terminology generally see E M Wise, ‘The Transplant of Legal Patterns’ (1990) 38 *Am J Comp L (Supplement)* 1.

<sup>22</sup> J Dobbins, S G Jones, K Crane & B C De Grasse, *The Beginner’s Guide to Nation-Building* (2007) 77–9.

<sup>23</sup> *Report of the Panel on United Nations Peace Operations: Comprehensive Review of the Whole Question of Peacekeeping Operations in All Its Aspects* (‘Brahimi Report’) UN Doc A/55/305–S/2000/809 (21 August 2000), para 83. This advice supported the development of the Model Codes for Post Conflict Criminal Justice, a set of template criminal codes for legislative inspiration and transplantation.

<sup>24</sup> R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002), 72.

In spite of all the numerous attempts by international organisations to promote the rule of law and develop new legal frameworks since the 1990s, there remains insufficient knowledge and understanding about how legal change can effectively be facilitated.<sup>25</sup> If international actors are drafting new laws to revise the criminal legal frameworks of states seeking to emerge from conflict as part of a general rule of law promotion agenda, they must consider how legal change can most effectively be achieved and, to that extent, whether there is any justification for adopting legal transplants.

This article considers this issue—*transplant justification*—in the context of post-conflict criminal law reform. It reviews the contribution of legal transplants to this field of law and the rationale for adopting them. It also examines academic literature on legal transplant feasibility and their limitations as tools for legal development. It finds that the motivational pull of legal transplants and their historical popularity provide justification for employing them as mechanisms for promoting legal change. It suggests that this justification is, nevertheless, dependent on the potential for any proposed transplanted law being successful, requiring clarity on the conditions for its success. Following a review of theoretical perspectives on the determinants of successful transplantation and the experience of previous criminal law transplants, this article concludes by proposing an evaluative test to determine the prospects of successful transplant reception and therefore the justification for employing the transplant mechanism to develop criminal law in post-conflict states.

## 2 Legal Transplants and Criminal Law

Following an examination of the transplantation of criminal evidence law from Anglo-American to continental jurisdictions, Mirjan Damaska concluded that ‘in seeking inspiration for change, it is perhaps natural for lawyers to go browsing in a foreign law boutique.’<sup>26</sup> Legislators, it appears, frequently turn to legal transplants to solve legislative difficulties when creating new law. This is evident from the contribution of legal transplants to legal development across many legal disciplines and jurisdictions, including criminal law. The remarkable influence of the Napoleonic *Code d’Instruction Criminelle (CIC)* illustrates the power of the

<sup>25</sup> K Samuels, *Rule of Law Reform in Post-Conflict Countries. Operational Initiatives and Lessons Learnt* (2006). Available at: <[http://siteresources.worldbank.org/INTCPR/Resources/WP37\\_web.pdf](http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf)> 3. [accessed 23 April 2014]

<sup>26</sup> M Damaska, ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’ (1997) 45 *Am J Comp L* 839, 852.

legal transplant phenomenon as an instigator for legal development in this field.<sup>27</sup> Within 60 years of its passage in 1808, versions of it were transplanted into most of the criminal jurisdictions of continental Europe and it has served as a pervasive precedent for criminal justice reform around the world.<sup>28</sup> The Italian criminal codes of 1808 and 1848 were heavily influenced by it, as were codes in Prussia in 1851, Russia in 1864 and Holland in 1867.<sup>29</sup> Beyond Europe, its provisions were borrowed by Japan in 1882,<sup>30</sup> and it was a significant influence on criminal procedural reform during the 19<sup>th</sup> and 20<sup>th</sup> centuries in a number of Muslim countries.<sup>31</sup>

Legal transplants have also been employed as mechanisms to reform inquisitorial criminal justice systems by introducing adversarial procedures. In a wave of post-revolutionary liberal idealism inspired by the French Revolution, a host of countries with inquisitorial traditions transplanted adversarial procedures during the 19<sup>th</sup> century in order to introduce jury trials based on the English trial system into their own criminal systems. Jury trials were imported into French criminal procedure in 1789, and imported into Spain in 1820, Portugal in 1830, Germany in 1848, Italy in 1860 and Russia in 1864. In the 20<sup>th</sup> century, they were re-introduced by means of legal transplantation in Russia in 1991 following considerable US influence, and in Spain in 1995 where the Anglo-American model was adopted.<sup>32</sup> Italy also radically reformed its inquisitorial system by adopting significant adversarial procedures based on the Anglo-American model in its 1989 Code of Criminal Procedure.<sup>33</sup> Similarly, Russia's Criminal Procedure Code 2001 borrowed models from western Europe and the United States,<sup>34</sup> and incorporated Italy's plea-bargaining procedures.<sup>35</sup> In addition, a number of eastern

<sup>27</sup> R Vogler, *A World View of Criminal Justice* (2005) 59.

<sup>28</sup> *Ibid.*, 58–9.

<sup>29</sup> *Ibid.*

<sup>30</sup> A Watson, 'Legal Transplants and Law Reform' (1976) 92 *LQR* 79, 82.

<sup>31</sup> The Ottoman Empire introduced a Penal Code in 1858 based on the CIC and a later procedural Code (1879) represented a translation of the French code. Persia's 1912 Criminal Code was also based on the CIC and Egypt's first criminal code (1882) was similarly dependent on it: see Vogler, above n 27, 115–18.

<sup>32</sup> *Ibid.*, 233–53.

<sup>33</sup> L Marafioti, 'Italian Criminal Procedure: A System Caught Between Two Legal Traditions', in J Jackson, M Langer & P Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Damaska* (2008) 81.

<sup>34</sup> See generally L Orland, 'A Russian Legal Revolution: The 2002 Criminal Procedure Code' (2002) 18 *Connecticut JIL* 133.

<sup>35</sup> W Burnham, P B Maggs & G M Danilenko, *Law and Legal System of the Russian Federation* (2004) 531.

European countries have instigated or are currently in the process of undertaking similar reforms of their procedural codes to adopt adversarial procedures. Croatia, Bosnia and Herzegovina, Moldova and Georgia have all recently transplanted adversarial trial elements into their criminal procedures.<sup>36</sup> Similar criminal procedure 'revolutions' have taken place in several Latin American jurisdictions over the last 20 years, assisted by legal transplantation. In 2003, Jonathan Hafetz estimated that 80 per cent of Latin American countries were involved in criminal procedure reform to replace their inquisitorial systems with adversarial ones.<sup>37</sup> New criminal codes importing Anglo-American adversarial procedures by transplantation were introduced, for example, in Venezuela in 1998–1999, Chile in 2000, Ecuador and Bolivia in 2001 and Nicaragua and Honduras in 2002.<sup>38</sup>

Transplantation has also been prevalent in the context of criminal justice reform in post-conflict states, most recently in Afghanistan. The 98 articles of Interim Criminal Procedure Code 2004 (*ICPC*), for example, were largely sourced from the Italian Criminal Procedure Code 1988 and the provisions of both the 2003 and 2005 Counter Narcotics Laws were transplanted from UN 'model' laws. Moreover, Model Codes for Post Conflict Criminal Justice have been developed,<sup>39</sup> comprising a compendium of draft laws and procedures for key elements of the criminal justice system—the courts, police and prisons—that are available for immediate transplantation in post-intervention states. This is an innovation that suggests that the way forward for criminal law reform in these environments is the transplantation of readily available foreign-designed codes.<sup>40</sup>

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<sup>36</sup> D Krapac, 'Some Trends in Continental Criminal Procedure in Transition Countries of South-Eastern Europe', in Jackson, Langer & Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context* (2008) 119, 134; C Alkon, 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?' (2010) 19 *Transnational Law and Contemporary Problems* 355, 371.

<sup>37</sup> J Hafetz, 'Pretrial Detention, Human Rights, and Judicial Reform in Latin America' (2003) 26 *Fordham ILJ* 1754, 1754–5.

<sup>38</sup> Vogler, above n 27, 172.

<sup>39</sup> The Codes were developed from a project spearheaded by the United States Institute of Peace (*USIP*) and the Irish Centre for Human Rights in cooperation with the Office of the High Commissioner for Human Rights and the UNODC. They are divided between three volumes: volume I consists of a draft penal code, the Model Criminal Code; volume II a draft procedure code, the Model Code of Criminal Procedure; and volume III, the Model Detention Code and the Model Police Powers Act. The criminal procedure code contains more than 225 articles covering a range of issues from the investigation of crimes to trial and appeal proceedings as well as additional matters such as witness protection. See Stromseth, Wippman & Brooks, above n 6, 198.

<sup>40</sup> V O'Connor, 'Traversing the Rocky Road of Law Reform in Conflict and Post Conflict States:

Legal transplants are indeed popular tools for developing criminal law. But their prevalence alone cannot fully explain why international actors engaged in post-conflict criminal law reform might have a 'natural' professional inclination for relying on them. There must be cogent reasons for their deciding to conduct reform in this way.

### 3 Motivations for Transplanting Law

Prestige, cost-saving, international harmonisation and modernisation are all important motivations for relying on legal transplants to develop law. According to Alan Watson, the motivation for borrowing foreign law—and indeed the prospects of the transplant being successful—is related to the degree of prestige that the new law carries.<sup>41</sup> The prestige attached to a foreign import can satisfy that demand and the authority of a new law is less likely to be questioned if it has been borrowed from a foreign country where it has been successfully applied.<sup>42</sup> In a similar vein, Watson has argued that transplanted law enhances the authority of those who administer it.<sup>43</sup> The authority enhancing effect of transplanted law is a significant motivation for the borrowing of law. Michele Graziadei notes the influence of prestige on the recent adoption of German criminal law thinking among US scholars and concludes that 'prestige motivates imitation.'<sup>44</sup> The prestige attached to a law, which may relate to the particular legal system from which it derives,<sup>45</sup> or to the perceived global importance of the law, provides it with the vital ingredient of legitimacy.<sup>46</sup>

There are, in addition, 'cost-saving' motivations for transplanting foreign law. They represent cheap and easy solutions to legislative problems that have occurred elsewhere. Legal transplants were notably welcomed as representing 'an easy, fast and cheap fix' during the optimism of the law and development move-

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Model Codes for Post Conflict Criminal Justice As A Tool Of Assistance' (2005) 16 *Criminal Law Forum* 231, 247–55.

<sup>41</sup> See generally A Watson, 'Aspects of Reception of Law' (1996) 44 *Am J Comp L* 335.

<sup>42</sup> H Kanda & C Milhaupt, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 *Am J Comp L* 889, 890–1.

<sup>43</sup> Watson, above n 41, 335.

<sup>44</sup> M Graziadei, 'Transplants and Receptions', in Jackson, Langer & Tillers, above n 33, 458.

<sup>45</sup> R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)' (1991) 39 *Am J Comp L* 343, 398–9.

<sup>46</sup> J deLisle, 'Lex Americana?: United States Legal Assistance, American legal Models and Legal Change in the Post-Communist World and Beyond' (1999) 20 *U Pa J Int'l Econ L* 179, 280–1.

ment in the 1970s.<sup>47</sup> In the context of post-conflict criminal law reform, where there is often an urgent requirement for new legislation, their practical utility makes them attractive as means of quickly developing law. This motivation was acknowledged in the UN Brahimi Report in its recommendation for readily-available interim criminal code templates for deployment by 'quick response' legal teams.<sup>48</sup> According to the Report, the application of an off-the-shelf 'interim legal code to which mission personnel could have been pre-trained' would have been beneficial to peacekeepers in Kosovo and East Timor.<sup>49</sup> Afghanistan's transplanted ICPC was drafted in a short period of time in response to recommendations in international reports in 2003 that the procedural code required urgent reform.<sup>50</sup> Similarly, the 2005 CNL was prepared quickly with minimal local consultation to provide measures considered essential to counter the rapidly expanding illicit drug trade. According to a former Head of the UK Rule of Law team based in Afghanistan, the law was necessary 'in order to deal with the drugs problem, which was an immediate threat to security and stability in the country. Something needed to be fast-tracked in order to allow that to happen.'<sup>51</sup>

Globalisation is also a significant motivational force for post-intervention criminal law transplants. Just as globalisation facilitates the expansion of transnational crime such as drug trafficking, at the same time it can guide the development of legislative processes to tackle it. Post-intervention states lacking suitable preventative law risk becoming safe havens for organised criminal and terrorist activity. The content of new law created to counter threats of this nature can be steered by the requirements of multilateral conventions, instruments and bilateral treaties that promote legislative similarity between signatory countries to enhance international co-operation in the investigation and prosecution of transnational criminal activity. The consequent drive for global legislative uniformity can be usefully accommodated by legal transplantation.

In addition, outdated laws in post-intervention states may need to be replaced by more 'modern' legislation equipped with tools to deal with contemporary criminal realities. UNTAC drafted a new criminal law for Cambodia, enacted by the Supreme National Council in 1992, to replace inadequate domestic

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<sup>47</sup> L Nader, *The Life of the Law: Anthropological Projects* (2002), 48.

<sup>48</sup> Brahimi Report, above n 23, para 83.

<sup>49</sup> *Ibid*, para 81. See also M Plunkett, 'Re-establishing Law and Order in Peace-Maintenance', in J Chopra (ed), *The Politics of Peace Maintenance* (1998) 69.

<sup>50</sup> Amnesty International, *Afghanistan: Re-establishing the Rule of Law* (14 August 2003). Available at: <[www.amnesty.org/en/library/info/ASA11/021/2003](http://www.amnesty.org/en/library/info/ASA11/021/2003)> para 7.5. [accessed 23 April 2014]

<sup>51</sup> Interview, senior member of the UK Rule of Law team, 29 February 2008.

legislation.<sup>52</sup> Bosnian criminal law lacked definitions for relevant crimes, such as corruption and money laundering, and failed to provide mechanisms to restrict these activities, such as the confiscation of profits, necessitating legal changes by a new criminal procedural code.<sup>53</sup> Afghanistan's ICPC replaced a code that was nearly 40 years old and was designed, according to its drafter, to ensure that the country's criminal procedure system could be aligned 'with those of advanced democratic countries.'<sup>54</sup> In a similar manner, Afghanistan's CNL was designed to introduce modern investigative procedures into Afghanistan's criminal law framework in order to tackle increasingly sophisticated illicit drug production and trafficking.<sup>55</sup>

Whether prestige, cost-saving, globalisation or modernisation are implicated, one of the key objectives of employing legal transplants to facilitate criminal law reform in conflict states has been the necessity of ensuring compliance with international due process and human rights standards. The development since WWII of areas such as international criminal law, transitional justice and human rights law has created a globally recognised rights framework which influences the normative content of new domestic criminal law. New law must be consistent with internationally approved fair trial standards, such as those provided for in the International Covenant on Civil and Political Rights (*ICCPR*). This can be realised by transplanting provisions from foreign laws that already conform to these requirements.<sup>56</sup> In East Timor, the UNTAET revoked sections of the existing Indonesian Criminal Code in 1991 that failed to comply with international human rights standards and later promulgated a more appropriate criminal law into which were transplanted provisions in tune with international human rights expectations.<sup>57</sup> Similarly, in addition to modernising Cambodia's criminal justice system by providing new rules for detention, substantive law and procedure, UNTAC's new 1992 criminal code ensured the protection of citizens' human rights.<sup>58</sup> Moreover, the ICPC was designed to provide a uniform criminal procedure for Afghanistan and at the same time guarantee compliance

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<sup>52</sup> O'Connor, above n 19, 523.

<sup>53</sup> Call, above n 12, 250–3.

<sup>54</sup> IDLO, *Criminal Law and Procedure in Afghanistan: Focus on Gender Issues* (2007). Available at: <[http://afghantranslation.chechiconsulting.com/documents/training/GenderAndCriminalJusticeTrainingMaterials\\_Dari\\_.pdf](http://afghantranslation.chechiconsulting.com/documents/training/GenderAndCriminalJusticeTrainingMaterials_Dari_.pdf)> [accessed 23 April 2014]

<sup>55</sup> Islamic Republic of Afghanistan, Counter Narcotics Drug Law [Afghanistan] 17 December 2005. Available at: <<http://www.refworld.org/docid/4c1f343b2.html>> [accessed 23 April 2014]

<sup>56</sup> Boon, above n 16, 299.

<sup>57</sup> UNTAET Regulation no. 2000/30; O'Connor, above n 40, 240.

<sup>58</sup> O'Connor, above n 19, 524.

with its international legal and human rights obligations. The development of these laws was facilitated by the adoption of legal transplants, highlighting their motivational attraction to legislators intent on ensuring that new criminal law in post-intervention states complies with international human rights and due process standards.

The variety of reasons why legal transplants are attractive mechanisms for legal development and the historical frequency with which they have been responsible for developing new criminal law would suggest that there is every justification for considering adopting them to promote legal change in post-conflict environments. Yet academic commentators on legal transplants have been unable to reach any universal agreement on their value for legal development. While this might appear to be anything but helpful when examining transplant justification, in fact the various theoretical perspectives on transplant feasibility provide useful insights on the legitimacy and constraints of legal transplants and require review.<sup>59</sup> After all, if legal transplants can be adjudged to be valueless or even unfeasible tools for legal change, there is perhaps no justification for employing them at all.

#### **4 Theoretical Perspectives on Legal Transplants as Tools for Legal Change**

Much of the academic literature on legal transplants has been concerned with the association between a transplanted law and its importing and exporting environments. To a large extent, disagreements over the existence and feasibility of legal transplants have reflected conflicting perspectives over the relationship between law and the society in which it exists.<sup>60</sup>

Watson's controversial theory on legal transplants represents one extreme. His historical analysis of legal development and the prevalence of legal transplantation as a mechanism for promoting legislative change leads him to conclude that there is only a tenuous relationship between law and the society in which it operates, the significance of which is at best limited.<sup>61</sup> The recipient system simply 'does not require any real knowledge of the social, economic, geographical and

<sup>59</sup> See generally H Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *ICLQ* 659.

<sup>60</sup> Kanda and Milhaupt, above n 42, 889.

<sup>61</sup> W Ewald, 'Comparative Jurisprudence: The Logic of Legal Transplants' (1995) 43 *Am J Comp L* 489, 491.

political context of the origin and growth of the original rule'.<sup>62</sup> Law, for Watson, consists of propositional statements and rules which have an autonomous existence separate from environmental concerns, affording them a nomadic character that enables them to be easily transplanted from one jurisdiction to another. Indeed, the many examples of successful borrowing and transplantation of legal rules over the course of legal history, rules which have not experienced change in their new environment, demonstrate the autonomous nature of law and its independence from external influences.<sup>63</sup> Similarly, rules that might seem deeply entrenched in their political context are capable of being successfully transplanted to countries with quite different socio-political cultures, such as the adoption of French law into the Japanese Penal Code and Code of Criminal Procedure in 1882,<sup>64</sup> and the adoption of Italian law into post-conflict Afghanistan. The recurring advent of legal transplantation, Watson suggests, can be explained by the prestige that new laws and rules carry. Their architects, and thus the engineers of legal transplants, are generally elite lawyers, judges and legislators who insulate law from external influences, thus conspiring to further negate the value of wider national society to law.<sup>65</sup>

Pierre Legrand offers a perspective on transplant feasibility entirely at odds with that proposed by Watson. He asserts that legal rules are so dependent on the national environment in which they exist that they are incapable of travelling at all. For Legrand, law cannot be transplanted. Because legal transplants are 'impossible', post-conflict criminal law reformers must find other means of promoting legal change.<sup>66</sup>

Several other theories have been proposed on the existence, cause and relevance of legal transplantation as an explanation for legal development, which lie somewhere between the opposing views of Watson and Legrand, each offering different variations on the key factors that play a part in transplant feasibility. Most of these positions owe their heritage to Charles Montesquieu who, in the mid-18<sup>th</sup> century, declared that:

the political and civil laws of each nation should be so closely tailored to the people for whom they are made, that it would be pure

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<sup>62</sup> Watson, above n 30, 81.

<sup>63</sup> See generally Watson, above n 41.

<sup>64</sup> *Ibid.*, 82.

<sup>65</sup> See generally A Watson, *Failures of the Legal Imagination* (1988) chs 1 & 2.

<sup>66</sup> P Legrand, 'Legal Transplants', in D Nelken and J Feest (eds), *Adapting Legal Cultures* (2001) 57.

chance [*un grand hazard*] if the laws of one nation could meet the needs of another [...]<sup>67</sup>

Montesquieu's interpretation of the development of law has found resonance among a large number of theoreticians, who contend that law corresponds with societal features or is an expression of social interests or needs.<sup>68</sup> Its growth and development, therefore, are dependent on any number of physical, cultural and political ingredients unique to the particular society it serves.<sup>69</sup>

Socio-legal theoreticians of this persuasion have a shared perception of law, not as a Watsonian autonomous entity, but as something that is relative, moulded by the society that it serves and by various itinerant features of that society. Law is bound so closely to its habitat by a potent mixture of physical, sociological, cultural and economic forces that it can rarely have validity in any other environment.<sup>70</sup>

This interdependence between law and society can, it would seem, make the adoption of foreign law problematic. While law may travel, the processes that foster and enable the trip are complicated and multifarious and dependent on stimuli that are more relevant than legal transplants alone for motivating and shaping legal change, such as society, culture, economy,<sup>71</sup> politics and power.<sup>72</sup> Context is everything for legal development.<sup>73</sup>

What of Watson's stance on legal change? He advocates that the legal transplant is the one device that accounts for legal development. For Watson, there is every justification for developing post-conflict criminal law by resorting to legal transplants. That is how law develops. The baggage that might be known as 'societal influences' and 'local context' are largely inconsequential and can be discarded. This suggests that the post-conflict environment where the local economy may have collapsed, and where human, physical and institutional infrastructure are often devastated and where the legal system may be subject

<sup>67</sup> Charles de Secondat Montesquieu. *De L'Esprit des Loix* (1748), Book 1, Ch. 3, Des Lois Positives.

<sup>68</sup> See e.g. L Friedman, 'Some Comments on Cotterrell and Legal Transplants', in Nelken and Feest, above n 68, 93–7; O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *MLR* 1.

<sup>69</sup> Ewald, above n 62, 491.

<sup>70</sup> W Twining, Lecture IV: Generalizing About Law: The Case of Legal Transplants' (2000) *The Tilburg-Warwick Lectures*. Available at: <[http://www.ucl.ac.uk/laws/jurisprudence/docs/others/twi\\_til\\_4.pdf](http://www.ucl.ac.uk/laws/jurisprudence/docs/others/twi_til_4.pdf)> 46. [accessed 23 April 2014]

<sup>71</sup> Friedman, above n 68, 595.

<sup>72</sup> Kahn-Freund, above n 68, 13.

<sup>73</sup> G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 16.

to plural legal traditions is largely an irrelevance in the context of criminal law reform. Watsonian theory also appears to favour the Brahimi Report's support of 'foreign solutions' for legal development in post-conflict states and the use of readily-available draft laws from the Model Codes for Post Conflict Criminal Justice.

Although it is perhaps arguable that Watson's conclusions should only have application to the field of private law from which he draws most of his data, his contention that legal transplants are ubiquitous is difficult to rebut. Moreover, Watson's conviction that the antiquity of legal transplants demonstrates that they have been a major source of legal development is supported by the experience of many of the world's criminal justice systems. His work is undeniably useful for criminal law reformers in post-intervention states in that it at least encourages them to respect legal transplants as potentially viable promoters of legal change.

Where Watsonian theory is less useful is that it fails to properly consider what factors might be important for the successful transplanting of law. For the most part, Watson is non-committal on this issue.<sup>74</sup> He prefers to concentrate on output rather than outcomes and has generally been more concerned with demonstrating that legal transplants are the primary source of legal development,<sup>75</sup> than with the finer details of what may or may not make them successful sources.<sup>76</sup> Ultimately, Watson's message for criminal legal reformers in post-intervention states would appear to be this: if you are creating new law you are certainly justified in considering employing legal transplants. In fact, this is how law develops. If you are also concerned about whether or not the new law will actually succeed, there is a presumption that it will, based on the experiences of legal history. The result is a bias towards transplant success and, ultimately, a theoretical stance that promotes transplant justification but which is fettered by the obvious criticism of unrealistic prejudice towards the effect and use of the legal transplant mechanism.

If the theories of Watson, Legrand and Montesquieu do not have all the answers to legal development, where does this leave us on the issue of transplant justification and post-conflict criminal law? It is perhaps more advantageous to balance the more constructive features of the various theoretical outlooks on legal transplantation rather than being concerned with their differences. Evidence from criminal law reform in post-intervention states and the motivational

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<sup>74</sup> He is not entirely atheoretical on the issue of transplant feasibility: see L McDonough, 'The Transferability of Labor Law: Can an American Transplant Take Root in British Soil?' (1992) 13 *Comparative Labour LJ*, 504.

<sup>75</sup> A Watson, *Legal Transplants: An Approach to Comparative Law* (1974) 95.

<sup>76</sup> Twining, above n 70, 40.

rationale for employing transplants supports Damaska's observation that lawyers appear to be naturally inclined to transplant law to promote legal change. Indeed, as Richard Sannerholm maintains, '[c]harged with the task of supporting criminal law reform [...] [an] international expert would be hard pressed not to look at models and international benchmarks'.<sup>77</sup>

It would seem that international actors drafting new law in post-intervention states are justified in considering using legal transplants to develop law, a position that positivist approaches such as Watson's would endorse. However, whether it is realistic for them to go on to do so depends on their potential for successful reception, an argument that draws on sociological positions that insist that legal development is inextricably linked to local context. This premise acknowledges a relationship between law and the society in which it exists. But if transplant justification is related to transplant evaluation, there needs to be some clarity on the variables that should be employed in order to measure the successful reception of a transplanted law.

## 5 Transplant Evaluation

A number of useful theories have been developed identifying the determinants for the successful transplantation of law and suggesting ways in which success can be measured. Otto Kahn-Freund has maintained that successful transplants can occur but it is the quality of the political relationship between the donating and recipient countries that determines their success or failure. Some rules which might have a weak connection to the socio-political structure of the society where they exist may be easily transplanted, whereas other rules with close connections to their socio-political environment are less likely to be transplantable.<sup>78</sup> Thus, successful transplantation depends on new rules being put in and/or being taken from the right socio-political plot.<sup>79</sup>

Hideki Kanda and Curtis Milhaupt's views on transplant evaluation also emphasise the need to find 'the right plot'. For them, success is determined by the 'fit' between the adopted rule and the host environment. The nature of the fit depends on the complimentary relationship between the imported rule and the existing legal infrastructure in the host country (micro-fit), and between the

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<sup>77</sup> Sannerholm, above n 18, 2–3.

<sup>78</sup> Ewald, above n 62, 495.

<sup>79</sup> Kahn-Freund, n 70, 11–13.

imported rule and existing legal institutions of the political economy in the host country (macro-fit).

Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard's analysis of the reception of transplanted law in 49 different countries during the 19<sup>th</sup> and early 20<sup>th</sup> centuries, a particularly useful contribution to the issue of transplant evaluation, revealed that transplanted law may work successfully if it contains principles familiar to the local population and if it is capable of adaptation by local users.<sup>80</sup> Legal transplants that develop 'internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties [...] tend to be highly effective.'<sup>81</sup> Transplant success is a socio-legal concern and necessitates the adoption of rules not unfamiliar to the recipient countries that are capable of further local change.<sup>82</sup>

The findings of Berkowitz et al resonate with those of Jacque deLisle following his assessment of the effect of US legal assistance programmes in former Soviet Bloc countries and China in the 1990s. deLisle concluded that the successful importation of legal transplants, while tied to their approximation with the legal culture of the importing country, could be facilitated by close collaboration between domestic and foreign legal experts, reliance on local expertise to determine the content of transplanted law and commitment by the importing country to implement its provisions.<sup>83</sup>

The conclusions by both Berkowitz et al and deLisle are insightful but perhaps their use in the context of assessing criminal law legal transplants, which are the focus of this article, is questionable. The majority of the legal transplants observed in both studies involved civil and commercial rather than criminal legislation. This reflects a trend among theories on transplant success and evaluation. None of the aforementioned theories have derived from evaluations of criminal law legal transplants, or indeed those connected to the reform of post-intervention criminal law frameworks. This is potentially significant because there is an important distinction to be drawn between civil law and criminal law transplants which may impact on evaluations of their success or failure. In the former, different forms of procedure, for example, are generally optional, diverse and not subject to determining international precepts. In the latter case, however, all transplantation led by international interlocutors

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<sup>80</sup> D Berkowitz, K Pistor & J-F Richard, 'The Transplant Effect' (2003) 51 *Am J Comp L* 163.

<sup>81</sup> *Ibid*, 189.

<sup>82</sup> *Ibid*.

<sup>83</sup> J deLisle, above n 46.

is subject to the imperative to respect international human rights norms. The international human rights framework provides benchmarks for the normative content of procedural criminal law. The provisions which ensure conformity with this framework, and with instruments such as the ICCPR, are not negotiable on 'cultural' grounds but are regarded as an absolute necessity irrespective of the economic, political or sociological environment of the receiving country. To that extent, if provisions included in transplanted criminal law are consistent with international human rights and due process standards, it is generally because they have to be included. There is no legislative choice on this issue. Therefore, it would be difficult to maintain that they should be judged against measurements of 'efficiency' or 'competition' or criticised to the extent that they 'find the right plot', 'fit' or have become 'unstuck'.

If we are to find a suitable means of evaluating the reception of transplanted criminal law, including post-intervention criminal law, and understanding the variables that might contribute to successful and failed reception, it is constructive to reflect on the experience of criminal legal reform that has involved legal transplantation. This provides further valuable insight into the determinants of transplant feasibility, useful for developing a suitable evaluative test for transplanted law that is designed to reform the criminal law frameworks of conflict states.

## 6 Evaluations of Transplanted Criminal Law

Evaluations of the effect of some of the legislation introduced by legal transplants during various law and development and rule of law promotion movements have revealed mixed results. The movement that witnessed the exportation of US law in the 1970s has been condemned by some commentators as a failure.<sup>84</sup> Although driven by well-intentioned US academics and lawyers, it was undermined by adherence to arrogant assumptions of the effectiveness of laws and legal systems that were flawed, untested and found ultimately to be unsuitable.<sup>85</sup>

More recent legislative efforts to promote the rule of law in crisis and post-conflict societies involving transplanting model templates have been criticised

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<sup>84</sup> D M Trubek & M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin LR* 1062, 1071–2; J N Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (1990) 280.

<sup>85</sup> Trubek & Galanter, above n 87, 1075–7.

as being 'disappointing',<sup>86</sup> their potential for success reduced by a failure to understand important inter-relationships between law, norms and culture. Using Kosovo as a case study, Rosa Brooks argues that recent rule of law promotion efforts in crisis and post-conflict states have been typified by the transplantation of foreign formal law without proper prior consideration of the relationship in the recipient country between formal law and cultural norms. Brooks comments that:

[C]hanges in formal law matter where prevailing cultural norms say that formal law matters. But when formal law has little resonance for people, changes in formal law cannot by themselves create new normative commitments to the rule of law.<sup>87</sup>

This advice has been borne out with regard to the ICPC in Afghanistan. A state law based on Italian law and which failed to contain provisions drawing on procedural rules from Afghanistan's customary or Islamic legal traditions is largely ignored by legal actors who discretionally apply more historically relevant customary law and Shari'a to criminal cases.

A number of commentaries on criminal reform involving the transplantation of unfamiliar foreign models into established procedures have also revealed disappointing results. Many of these concern the adoption of adversarial procedures into the inquisitorial criminal justice systems of former Soviet Union republics. Jason Reichelt suggests that the introduction of plea-bargaining in the Republic of Georgia was a well-intentioned but ultimately ill-conceived transplant largely because it did not have a sufficiently equipped defence bar at the time of the adoption of the new system to render it fair and equitable.<sup>88</sup> According to Reichelt, rather than the transplanted procedure achieving the desired effect of reducing trials, it increased the potential for corruption and alienated the public against the state justice system.<sup>89</sup>

A weak defence bar also hampered the successful transplantation of western European and US adversarial procedures into the Russian Criminal Procedure Code in 2001. Drawing from lessons from the Russian experience, Richard

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<sup>86</sup> R Brooks, 'New Imperialism: Violence, Norms and the 'Rule of Law'' (2002–2003) 101 *Michigan LR* 2285.

<sup>87</sup> *Ibid*, 2322.

<sup>88</sup> J Reichelt, 'A Hobson's Experiment: Plea Bargaining in the Republic of Georgia' (2004) 11(2) *J East European L* 159.

<sup>89</sup> *Ibid*, 187–188.

Vogler maintains that the imposition of adversarial and due process norms by law on its own is unlikely to bring about significant procedural change.<sup>90</sup> Cynthia Alkon reaches similar conclusions with regard to the transplantation of US-style plea-bargaining into the Moldovan criminal justice system. According to Alkon, this has amounted to a 'transplant failure' because of lack of support for the procedure by legal professionals.<sup>91</sup>

Other studies on criminal justice reforms involving transplantation offer more optimistic appraisals of transplants. Krapac suggests that some of the criminal law reforms conducted by European countries, notably Croatia, involving the adoption of adversarial procedures, have been successful. They have resulted in better human and defence rights protections that meet international standards.<sup>92</sup> Davor Krapac also notes that new criminal law in these countries has often been subject to repeated amendment, indicating that legislators' initial choices of transplanted law may not always be realistic and may often be resisted.<sup>93</sup> This is supported by the experience of criminal justice reform in Italy. The 1989 Code of Criminal Procedure imported significant adversarial features into Italy's inquisitorial system, but the model intended by the original reformers has since been eroded by the Constitutional Court and legislature. The Italian experience underlines the difficulties of transplanting procedures from different legal traditions.<sup>94</sup> According to Luca Marafioti, 'different legal traditions and cultures foster different responsibilities within a system, thus encouraging different expectations',<sup>95</sup> which may impact on whether or not a transplant is successfully received. Cultural resistance to a transplant may adversely affect the prospects of achieving its intended outcome.<sup>96</sup> The same may be said of a lack of genuine commitment to reform amongst the legal authorities of the host country responsible for applying the provisions of any transplanted law introduced to promote legal change.<sup>97</sup>

Studies have also revealed that the existence (or not) of a culture of legality in the receiving country is also an important variable which can impact on transplant feasibility. No matter how potentially effective a transplanted criminal

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<sup>90</sup> Vogler, above n 27, 185.

<sup>91</sup> Alkon, above n 36, 408.

<sup>92</sup> Krapac, above n 36, 141.

<sup>93</sup> *Ibid.*, 124.

<sup>94</sup> Marafioti, above n 33, 91.

<sup>95</sup> *Ibid.*

<sup>96</sup> By way of example, the attempts to transplant the English criminal jury system on continental Europe after the French Revolution. See Damaska, above n 26.

<sup>97</sup> J Mertus, 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society' (1998–9) 14 *Am U ILR* 1335, 1383.

law may be, its prospects of succeeding is likely to be reduced in societies where the legitimacy of state law and adherence to state concepts of criminal justice are weak. The transplantation of laws to promote criminal justice and the rule of law are less likely to be successful in the absence of a commitment to establishing these ideals.

What conclusions can be drawn from these examples of transplanted law to help determine the manner in which legal transplants intended to effect criminal justice reform in post-intervention states should be evaluated? Some criminal law transplants have been successful, while others have encountered reception difficulties, attributable to variables such as the capacity and commitment of legal professionals and the progress of related infrastructural and capacity-building reform efforts. The concept of success generally emerges, however, as controversial and difficult to measure. It may depend on whose point of view is considered. An international reformer may regard a law that they have drafted, dependent on foreign texts, as a success merely because it has been enacted, while a judge applying it may regard it as a failure. Furthermore, some aspects of transplanted laws may be successful, while others are not. It is difficult to judge accurately the effect of any law, let alone transplanted criminal law or the variable that will determine its success or failure. In this regard it is hard not to sympathise with Grazi's experience of 'the ubiquity of uncertainty during transplantation',<sup>98</sup> or to agree with Beckstrom's observation that '[t]he identification of performance indicators for a transplanted legal system is a perplexing business as best'.<sup>99</sup>

While acknowledging this, it is perhaps useful to note that the experience of legal transplants in the field of criminal law largely confirms Watsonian optimism over the significance of the legal transplantation medium for developing law. They also verify sociological perspectives of the centrality of local environment to legal development. Ultimately, they confirm the premise that law can develop by legal transplantation, but that the fundamental issue of whether or not they will succeed is tied to local contextual concerns. Furthermore, the weight of academic evidence in this field suggests that the criteria that are adopted for evaluating the success of any proposed or actual legal transplant must ultimately be fundamentally related to the environment into which the new law is imported. The same rule of thumb must apply for assessing legal transplants adopted for criminal law reform in post-conflict situations. Having said this, it is vital to

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<sup>98</sup> P Grazi et al, 'The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law' (2008). Available at: <<http://ssrn.com/abstract=1130124>> 5. [accessed 23 April 2014].

<sup>99</sup> J Beckstrom, 'Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia' (1973) 21 *Am J Comp L* 557, 558.

acknowledge that problems surrounding the reception of transplanted law in post-conflict states are likely to be symptomatic of the huge challenges that the state criminal justice system may face at the time of the enactment of the law. The poor capacity of legal personnel, potentially limited reach of the state system in countries such as Somalia and Afghanistan with plural legal traditions, corruption and insecurity are likely to impact negatively on transplant reception.

Perhaps when international reform and reconstruction efforts have had more time to 'bed-in', these negative effects can be reduced, allowing for better prospects of successful transplantation. Turkey's transplantation of the Swiss Civil Code was assessed as being successful, after all, some 25 years after the legislation was enacted.<sup>100</sup> Moreover, at the time of its introduction, Turkey possessed a generation of well-trained jurists. Typical of post-intervention states, this was far from being the case in Afghanistan when either new criminal law was passed between 2004 and 2007. A UNAMA rule of law officer noted in 2007 that:

[W]e are starting at a low point. 40% of judges have no legal training at all. So it will take time for the new generation to come through. In many respects the foundations have been laid in terms of education and it will take time for the newly trained generation of lawyers to come through and make a difference. It will take at least a decade.<sup>101</sup>

It is likely that there will be a slower rate of progress in terms of legislative reform taking root in post-interventionist as opposed to non-conflict states, delaying the reception of any transplanted laws. According to Samuels:

It is increasingly clear that a realistic timeframe for re-creating a working criminal justice system following serious armed conflict with formal courts, trained judges and a retrained police force is close to twenty-years. This is all the more true where the criminal justice system was never particularly strong or effective before the conflict, and it is even worse where new legal norms are sought to be introduced, or if there is little political will or weak local constituency support for the reforms.<sup>102</sup>

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<sup>100</sup>Ibid, 582 (n 94).

<sup>101</sup>Interview, Senior United Nations Assistance Mission in Afghanistan Rule of Law Officer, 17 October 2007.

<sup>102</sup>Samuels, above n 25, 18.

What yardsticks should be adopted for evaluating post conflict criminal law legal transplants? What emerges from evaluative studies of legal transplants in general and from the experience of criminal law reform involving legal transplantation is that local environment matters. Success or failure is connected to local contextual concerns such as local ownership, participation and commitment to reform. Evaluations of legal transplants in post-intervention states must therefore be responsive to the idiosyncratic legal requirements of the country concerned at the time of its introduction and during the course of the evaluation, placed in the wider context of its legal traditions, cultural considerations and social, economic and political concerns. While these wider issues must be borne in mind, two key questions need to be addressed in order to evaluate the success of post-conflict criminal law legal transplants to assess transplant success. First, to what extent has the transplanted law been accepted by the local population of the recipient post-conflict country? And secondly, to what extent has it achieved the objectives for which it was enacted in the context of the post-conflict situation in which it was introduced? The greater its acceptance and the degree to which it has achieved its objectives the more successful it is as a transplanted law.

These two variables balance the socio-legal and positivist perspectives on law which have permeated academic discourse on legal transplants, the first reflecting the former and the second the latter. Answering them should help to determine whether there is any justification for adopting a legal transplant to promote legal change to a post-conflict criminal law framework. The greater the potential for the law being accepted and achieving its objectives, the greater the justification for developing it by adopting transplanted foreign provisions. In addition, the ongoing application of this test can help to ascertain whether or not there is any need for further amendment to the law.

A law's 'acceptance' can be determined with reference to its application. Objective performance indicators such as legal detention statistics, prison populations, and conviction and acquittal rates are informative in this respect if available and reliable. It is critical also to assess the application of a transplanted law by local law enforcement agents, judges, prosecutors and defence lawyers. This tallies with Beckstrom's observation during reform in Ethiopia that '[j]udges and lawyers practicing new laws are in the front line of the confrontation between new laws and the nation. The acceptance and effectiveness of the entire legal order depend in the first instance and for the most part on these men.'<sup>103</sup>

The acceptance, and application, of a law by local practitioners is likely

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<sup>103</sup>Beckstrom, above n 99, 561.

to be heavily influenced by the extent to which they regard it as meaningful and appropriate for use in their own jurisdiction. According to Berkowitz, if legislation is to be effective, 'it must be meaningful in the context in which it is applied so citizens have an incentive to use the law'.<sup>104</sup> The more meaningful and appropriate local practitioners consider new legislation to be, the easier they will find it to understand, engage in and enforce, improving the prospects of its success. This, therefore, also requires assessment and will be largely conditioned by the compatibility of the new law with the established legal order and traditions of the host country, underlining the necessity of being sensitive to these variables prior to the transplantation of any law.

Assessing the extent to which a transplanted law's objectives have been achieved is also vital to its evaluation. This requires some analysis of the reasons for the demand for the law and the motivations for relying on the transplant mechanism to prepare it, which can impact on the achievement of objectives and therefore transplant success. Transplantation in the arena of post-conflict criminal law reform can often be motivated by expediency. The criminal justice systems in these states typically require urgent procedural and substantive reform. Yet 'cost-saving' legal reform involving transplantation may fail to be sufficiently sensitive to local legal traditions and context. The motivation of expediency may not guarantee success.

This is also the case with regard to transplants motivated by modernisation. Legal transplants designed to modernise post-conflict criminal justice systems often in reality reflect western and more particularly US motivations of promoting stability and combating concerns such as terrorism and international drug trafficking. This can be translated into legislative reform which, on the one hand, appears to augment criminal justice reform in conflict states requiring rule of law assistance, while on the other hand serves western and US foreign policy stabilisation interests. The requirement for rule of law reform can motivate US legal intervention and indeed hegemony, which has been articulated through agencies such as USAID and CEELI that actively promote US interests by dominating criminal procedure reform. However, it can also lead to reform that involves the transplantation of foreign-based law without any local participation. This can cause local resentment leading to the legislation being regarded negatively by local populations and politicised as impositions bent on imperialism and expansion. This perception can be increased when it competes with other practices in a country with plural legal traditions and when law reform is backed by military

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<sup>104</sup>Berkowitz, above n 80, 167.

force, which is often the case during rule of law promotion programmes in post-conflict countries, such as that undertaken in Afghanistan. Visible foreign armies can provide coercive authority for lawmaking, but at the cost of local scepticism and contempt, which can undermine the ability of transplanted laws to achieve their objectives. This may well have been the case with the transplanted ICPC and the CNL in Afghanistan, the reception of which was problematic.

## 7 Conclusion

The post-conflict period can be an opportune time for promoting legal change, and criminal law frameworks are often a focus for reform to create functioning criminal justice systems, paramount for the establishment of the rule of law. While legal transplants have frequently been employed to develop new criminal law in post-conflict states, there is uncertainty over the justification for adopting them. Greater clarity on this issue of transplant justification may provide some guidance to post-conflict reformers on whether or not legal transplants represent practical solutions for promoting legal change.

The number and variety of motivational forces for legal transplantation certainly underline their practical significance and importance as a form of legal development.<sup>105</sup> Moreover, the overwhelming historical evidence that legal transplants have been responsible for the development of new criminal law for a considerable period of time in many of the world's criminal justice systems demonstrates that it is, as Damaska observed, 'natural' for legislators to rely on them, particularly when engaged in the reform of criminal law frameworks of post-conflict states. Indeed, the ubiquity of legal transplants in the field of criminal law implies that it would be bad practice not to consider them as vehicles for developing new law. As Sannerholm maintains, '[c]harged with the task of supporting criminal law reform [...] an international expert would be hard pressed not to look at models and international benchmarks.'<sup>106</sup>

While academic literature on legal transplantation reveals fundamental disagreement over transplant existence and feasibility, which reflect differences of opinion on the wider relationship between law and society, the more constructive aspects of these conflicting theories suggest that criminal law can certainly be developed by legal transplantation. This transplant justification is however dependent on the prior application of an evaluative test to determine the prospects of

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<sup>105</sup>Kanda & Milhaupt, above n 42, 889.

<sup>106</sup>Sannerholm, above n 18, 2–3.

successful reception. The weight of evidence from evaluative studies of criminal law and theoretical assessments of transplant feasibility suggests that the success or failure of legal transplants will be intimately related to the local contextual concerns of the receiving countries at the time of their introduction and, subsequently, during their application. Bearing this in mind, evaluations of post-conflict criminal law should assess the extent to which it is capable of being accepted and achieving their objectives. This entails examining the manner in which it will be applied by local practitioners, whether it has the potential to be regarded as meaningful and appropriate, the motivations behind its enactment and whether its objectives can be realised. The more positive the projected outcomes of the law relative to these criteria, the greater the justification for developing it by legal transplant.

## ARTICLE 4 OF THE ECHR AND THE OBLIGATION OF CRIMINALISING SLAVERY, SERVITUDE, FORCED LABOUR AND HUMAN TRAFFICKING

Vladislava Stoyanova\*

### Abstract

This article addresses the interaction between international human rights law and national criminal law as exemplified and revealed in relation to the abuses of slavery, servitude, forced labour and human trafficking (THB). First, I point out the mismatch between the interpretative techniques of international human rights law and national criminal law. The reportedly low numbers of prosecutions and convictions for abuses against migrants has gathered increasing attention. As a reaction it has been suggested that the definitions of THB and of slavery, servitude and forced labour (where the latter have been specifically criminalized) have to be expansively construed. These suggestions ignore basic criminal law precepts. Criminal law has to remain faithful to the principle of legal certainty and to the rights of the accused which ban expansive interpretations. It is human rights law which celebrates liberal interpretations of concepts for the purpose of holding states internationally responsible for their failures to protect. Despite the difference in their interpretative standpoints, there is a clear interaction between these two fields of law. A manifestation of the interaction is that the ECHR obliges states to criminalize the abuses falling within the material scope of Article 4 of the ECHR. I argue that many states have failed to fulfil this obligation since the focus has been predominantly placed on the criminalisation of THB. This leads to failures to address abuses where there are no elements of recruitment, transportation, transfer etc. by means of deception/coercion. I also demonstrate that Article 4 of the ECHR obliges states to incorporate in their domestic criminal laws clear definitions of crimes intended to address the abuses falling within the scope of Article 4. An obligation which many states have failed to fulfil since they have directly copied the international definition of THB and/or the human rights definitions of slavery, servitude and forced labour, without further establishing the elements of the crimes at domestic level. Finally, I suggest that there needs to be a better articulation of the distinctions between different crimes meant to address abuses falling within the ambit of Article 4 of the ECHR.

### Keywords

Slavery, Servitude, Forced labour, Human trafficking, ECHR Article 4, Positive

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human rights obligations, *Siliadin v France*, *Rantsev v Cyprus*, *CN and V v France*, *CN v United Kingdom*

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## 1 Introduction

Until recently, Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*ECHR* or *Convention*) was a provision rarely invoked. Article 4 has, however, sprung into life in light of the abuses to which migrants in host European countries are being subjected. As a result, the European Court of Human Rights (*ECtHR*) has delivered a couple of judgments on Article 4. In *Siliadin v France*, the Court held that ‘the member States’ positive obligation under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in [...] a situation [of slavery, servitude or forced labour].<sup>1</sup> The Court concluded that ‘slavery and servitude are not as such classified as offences under French criminal law’,<sup>2</sup> as a result of which *Siliadin* was not able to see those responsible for the wrongdoing convicted under criminal law. In *CN v France*, the ECtHR reiterated that ‘States are required to put in place a legislative and administrative framework that prohibits and punishes forced or compulsory labour, servitude and slavery’.<sup>3</sup> In *CN v The United Kingdom*, the ECtHR again emphasised that the Government was under a positive obligation to enact domestic law provisions specifically criminalising the conduct prohibited by Article 4.<sup>4</sup> In *Rantsev v Cyprus*, trafficking in human beings (*THB*) was found to fall within the scope of Article 4.<sup>5</sup> Accordingly, criminal law measures intended to punish traffickers also form part of states’ positive obligations under the ECHR.<sup>6</sup>

In light of the above cited judgments, it is clear that states have the positive human rights obligation to criminalise abuses falling within the material scope of Article 4.<sup>7</sup> There has been, however, little consideration of the implications

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<sup>1</sup> *Siliadin v France* [2005] VII Eur Court HR 333, para 112 (*Siliadin*).

<sup>2</sup> *Ibid*, para 141.

<sup>3</sup> *CN and V v France* (European Court of Human Rights, Chamber, Application No 67724/09, 11 October 2012), para 105.

<sup>4</sup> *CN v United Kingdom* (2013) 56 EHRR 24, para 66.

<sup>5</sup> *Rantsev v Cyprus* (2010) 51 EHRR I, para 282 (*Rantsev*).

<sup>6</sup> *Ibid*, paras 284, 290.

<sup>7</sup> Besides human rights law, the obligation of criminalising slavery, servitude, forced labour and THB has another source. There are a number of transnational criminal law treaties which oblige

flowing from this positive obligation for the national substantive criminal law. I draw attention to the following implications. First, in the ample literature on THB and in the existing literature on slavery, servitude and forced labour, arguments are advanced for expansive interpretation of the definitions of slavery, servitude, forced labour and THB. These arguments are a response to the reportedly low numbers of prosecutions and convictions. However, the difference in terms of means of interpretation applicable in human rights law and in national criminal law has remained ignored. There is little regard to the principle of legal certainty, which bans expansive interpretation of the definition of crimes. In contrast, human rights law celebrates progressive interpretations. In this article, I point out the mismatch between the interpretative techniques of international human rights law and national criminal law. I illustrate how this mismatch plays out in the context of the abuses of slavery, servitude, forced labour and THB.

Despite the difference in their interpretative standpoints, there is a clear interaction between these two fields of law. A manifestation of the interaction is that the ECHR obliges states to criminalise the abuses falling within the material scope of Article 4 of the ECHR. The second argument that I develop is that many states have failed to fulfil this obligation since the focus has been predominantly placed on the criminalisation of THB. This leads to failures to address abuses where there are no elements of, *inter alia*, recruitment, transportation, transfer by means of deception or coercion.

Finally, I submit that states' obligations under Article 4 are not limited to the simple introduction of criminal offences. Article 4 imposes certain standards as to the quality of the national substantive criminal law. I demonstrate that many states have failed in this respect, since they have directly copied the international definition of THB and/or the human rights definitions of slavery, servitude and forced labour, without further establishing the elements of the crimes at a domestic level. I also add that states might be found in violation of their obligations under Article 4 not only when national crimes are obscurely defined, but also when they are haphazardly distinguished.

I take the following steps in order to develop my arguments. I lay out how the ECtHR has developed criminalisation as an aspect of states' positive human rights obligations (Section 2). Then, I emphasise the different rationales and interpretation techniques applicable in international human rights law and in

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states to criminalise these practices. See generally N Boister, *An Introduction to Transnational Criminal Law* (2012).

national criminal law (Section 3), in order to finally address the major questions ensuing from the obligation to criminalise: are states under the obligation to have the specific criminal law labels of slavery, servitude and forced labour (Section 4)? Are states under the obligation to define slavery, servitude, forced labour and THB in any particular way in their national criminal law? In light of states' positive obligations under Article 4, what standards must substantive national criminal law live up to (Section 5)?

When addressing these questions, I concentrate on abuses against migrants. The reason for the latter choice is that it is precisely abuses against migrants in host states which have enlivened the questions of how slavery, servitude, forced labour and THB are to be defined in the context of criminal law and human rights law. I rely on judgments of the ECtHR and of national courts as well as national legislation to achieve this article's objectives. The relatively recently published reports of the GRETA play important facilitative role for gaining insights into the national criminal legislation of the Council of Europe's member states.<sup>8</sup>

Proper engagement with the above questions requires initial familiarity with the definitions of the concepts falling within the ambit of Article 4. Slavery is defined in the 1926 Slavery Convention as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.<sup>9</sup> The ECtHR has endorsed this definition for the purpose of interpreting slavery under Article 4 of the ECHR.<sup>10</sup> The ECtHR has taken the ILO definition of forced labour as a starting point for its own interpretation of the concept.<sup>11</sup> The 1930 ILO Forced Labour Convention defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said

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<sup>8</sup> GRETA monitors the implementation of the Council of Europe's Trafficking Convention by the state parties. See Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197, Art 36(1) (*Trafficking Convention*).

<sup>9</sup> Slavery Convention, 25 September 1926, 60 LNTS 254, Art 1.

<sup>10</sup> In *Siliadin*, the ECtHR referred to the definition of the 1926 Slavery Convention. It interpreted it as requiring exercise of a 'genuine right of legal ownership' and reduction of the person to the status of an 'object'. The Court's reference to 'legal ownership' as a required element of slavery gave rise to criticism. See J Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 *HRLR* 546. In *M and Others v Italy and Bulgaria*, the Court changed its language by discarding the requirement for 'legal ownership' and simply referring to slavery as an 'exercise of a genuine right of ownership and reduction of the status of the individual concerned to an "object"'. See *M and Others v Italy and Bulgaria* (2013) 57 *EHRR* 29, para 149.

<sup>11</sup> *Van der Musselle v Belgium* (1983) 70 *Eur Court HR*, Ser A, para 32; *Siliadin* [2005] VII *Eur Court HR* 333, para 116; *Stummer v Austria* (2011) 54 *EHRR* II, paras 117–18.

person has not offered himself voluntarily'.<sup>12</sup> The ECtHR defined servitude as a 'particularly serious form of denial of freedom'.<sup>13</sup> Servitude 'in addition to the obligation to perform certain services for others' also includes 'the obligation for the "serf" to live on another person's property and the impossibility of altering his condition'.<sup>14</sup> In *CN and V v France*, the Court further clarified that:

the fundamental element which distinguishes servitude from forced or compulsory labour, within the meaning of Article 4 of the Convention, consists in the feeling of the victims that their condition is unchangeable and that the situation is not likely to improve.<sup>15</sup>

As to the definition of THB, in *Rantsev v Cyprus and Russia* the ECtHR held that THB under Article 4 of the ECHR is to be defined in the same way as it is defined in the Council of Europe Convention on Action against Trafficking in Human Beings (*Trafficking Convention*).<sup>16</sup> The latter convention stipulates that:

[t]rafficking in human beings' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>17</sup>

The above outlined definitions delineate the scope of the rights protected under Article 4 of the ECHR. They guarantee some level of determinacy as to the range

<sup>12</sup> Convention Concerning Forced or Compulsory Labour, 28 June 1930, 39 UNTS 55, Art 2(1).

<sup>13</sup> *Siliadin* [2005] VII Eur Court HR 333, para 123.

<sup>14</sup> *Ibid.*

<sup>15</sup> *CN and V v France* (European Court of Human Rights, Chamber, Application No 67724/09, 11 October 2012) para 91.

<sup>16</sup> *Rantsev* (2010) 51 EHRR 1, para 282. Interestingly, in *Rantsev*, the ECtHR also defined human trafficking with reference to the definition of slavery. This approach is problematic and raises questions as to the relationship between the definitions of slavery and human trafficking. For an elaborate discussion of this question, see V Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30 *Netherlands Quarterly of Human Rights* 163.

<sup>17</sup> Trafficking Convention, Art 4.

of situations when states are required to act in order to ensure the rights protected under Article 4. They also indicate situations when states are required to use the coercive power of their criminal law by investigating and holding perpetrators of abuses criminally responsible.

## 2 Criminalisation as an Aspect of States' Positive Human Rights Obligations under Article 4 of the ECHR

Originally, the ECHR was conceived as a legal framework defending individuals against state interference.<sup>18</sup> However, states are not the only perpetrators of abuses. Individuals can be threatened by other individuals who act as private parties and whose actions are not attributable to the state. Migrants in host European countries, in particular, are vulnerable to private harm, including abuses by employers.<sup>19</sup> In order to address these situations, human rights law has developed additional tools, namely positive obligations.<sup>20</sup> Criminalising abuses at the domestic level is an aspect of these positive obligations.

Criminalisation is regarded as a means of ensuring the rights protected in the Convention. Pursuant to Article 1 of the ECHR, states are under the obligation not only to respect, but also to secure the rights in the Convention. Thus, Article 1 of the ECHR has been the basis for the development by the ECtHR of positive obligations.<sup>21</sup> In its case law, the Court has developed different types of positive obligations, including the obligation of adopting effective regulatory frameworks.<sup>22</sup> Regulatory frameworks are necessary since individuals need to be

<sup>18</sup> See K Starmer, 'Positive Obligations under the Convention', in J Jowell & J Cooper (eds), *Understanding Human Rights Principles* (2001) 139.

<sup>19</sup> See generally C Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' (2013) 62(3) *ICLQ* 599; E Albin, 'Introduction: Precarious Work and Human Rights' (2012) 34 *Comp Labour L & Policy J* 1; J Fudge 'Precarious Migrant Status and Precarious Employment: the Paradox of International Rights for Migrant Workers' (2012) 34 *Comp Labour L & Policy J* 95.

<sup>20</sup> Positive human rights obligations are not relevant only in the context of private harm; they are as much of relevance in the context of harm inflicted by agents whose actions are attributable to the state. The present article, however, focuses on private harm.

<sup>21</sup> See A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); C Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (2003); D Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (2011).

<sup>22</sup> The ECtHR has elaborated upon, for example, the positive obligation of investigating abuses and the positive obligation of taking protective operational measures.

provided with legal protection in their relations *vis-à-vis* the state, its agents and *vis-à-vis* private actors. The legal protection is effectuated through the adoption of relevant legal rules.<sup>23</sup> Legal rules are required since 'it is hard to imagine compliance with the undertaking in Article 1 to secure the Convention rights and freedoms to everyone without some legal basis for all of the latter being provided'.<sup>24</sup> The rights protected in the Convention require 'a positive regulatory environment', which means that states have to adopt legal rules to ensure that individuals can enjoy their rights.<sup>25</sup> The obligation of criminalising abuses is an aspect of the positive obligation of adopting an effective regulatory framework for ensuring the rights in the ECHR.<sup>26</sup>

The leading cases in which ECtHR elaborated on and affirmed the positive obligation of criminalising abuses are *X v The Netherlands*<sup>27</sup> and *MC v Bulgaria*.<sup>28</sup> *Siliadin v France* was the first case in which the obligation of criminalising abuses falling within the material scope of Article 4 of the ECHR was considered. There was a flaw in the French national legislation since there were, *inter alia*, no specific provisions criminalising slavery, servitude and forced labour. Similar gaps were the object of enquiry in *CN and V v France* and *CN v The United Kingdom*.<sup>29</sup>

<sup>23</sup> For a comprehensive discussion concerning states' positive obligation of adopting legal frameworks to protect the ECHR's rights, see L Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights', in E Brems & Y Haeck (eds), *Human Rights and Civil Rights in the 21<sup>st</sup> Century* (2014, in press).

<sup>24</sup> J McBride, 'Protecting Life: A Positive Obligation to Help' [1999] *European LR* 43, 43.

<sup>25</sup> The expression 'positive regulatory environment' was taken from the concurring opinion of Judge Sajó and Judge Tulkens in *Ternovszky v Hungary* (European Court of Human Rights, Chamber, Application No 67545/09, 14 December 2010).

<sup>26</sup> See generally A Ashworth, *Positive Obligations in Criminal Law* (2013) 196–211.

<sup>27</sup> *X v Netherlands* (1985) 91 Eur Court HR, Ser A, para 27. The case of *X v Netherlands* concerned a mentally handicapped child who was raped in a mental hospital. The case uncovered a gap in the Dutch criminal law. Since neither the child nor her father could file a criminal complaint, there was no possibility for holding the abuser criminally responsible. The ECtHR found a violation of Article 8 of the ECHR since:

the protection afforded by the civil law in the case of wrong-doing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.

<sup>28</sup> *MC v Bulgaria* (2005) 40 EHRR 20, para 153. In this case, a girl claimed that she was raped and that the national criminal law failed to provide her with effective legal protection. The ECtHR agreed and found that Bulgaria had violated Article 3 and Article 8 of the ECHR.

<sup>29</sup> *CN and V v France* (European Court of Human Rights, Chamber, Application No 67724/09, 11

Criminalisation is necessary for ensuring that individuals are protected from abuses inflicted by other individuals. In this sense, the ECtHR regards enactment of criminal law as an instrument for effective deterrence.<sup>30</sup> It is assumed that the rights under the ECHR cannot be ensured without deterring other individuals from inflicting harms.<sup>31</sup> To that effect, states have to send a clear message to the abusers that, if detected, they can expect prosecution, conviction and punishment in the normal course of events.<sup>32</sup>

Yet, the argument that criminal law is necessary for better deterrence is susceptible to challenges. More specifically, since the abuse against the individual has already been committed, arguments that the existence of criminal law can deter the specific abuse inflicted on the specific victim are unsustainable. Nothing can be done at this point in time to protect the individual. However, it would be wrong to assume that the positive human rights obligation to criminalise abuses is concerned with specific deterrence. As Jonathan Rogers has explained:

when he [the victim] criticizes the domestic criminal law, he is claiming to be a representative victim of the state's failure to achieve a satisfactory level of general deterrence against the offence in question. It follows, then, that the doctrine of positive obligations is concerned only with general deterrence when it considers whether the state has a duty to adapt its criminal law in response to a particular type of abuse of human rights.<sup>33</sup>

Rogers's explanation is persuasive. However, general deterrence apart, criminalisation also provides specific deterrence against repetition of the conduct by the individual perpetrator and possibly against the individual victim. The latter is particularly relevant in settings involving abuses against migrants. It can be ex-

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October 2012) para 105; See also *CN v United Kingdom* (2013) 56 EHRR 24, para 66.

<sup>30</sup> *Branko Tomasic and Others v Croatia* (European Court of Human Rights, Chamber, Application No 46598/06, 15 January 2009) para 49; *Opuz v Turkey* [2009] III Eur Court HR 107, para 128; See P Londono, 'Developing Human Rights Principles in Cases of Gender-based Violence: *Opuz v Turkey* in the European Court of Human Rights' (2009) 9 *Human Rights LR* 657.

<sup>31</sup> The question of the actual deterrent effect of the criminal law has never been profoundly discussed by the ECtHR. In the ECtHR's judgments, it is simply assumed that the establishment of criminal offences can act as deterrence.

<sup>32</sup> J Rogers, 'Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings' [2003] *Crim LR* 690, 695.

<sup>33</sup> *Ibid.*

pected that an abuser who has been subjected to criminal prosecution, convicted and/or punished will be deterred from engaging in abusive practices again.

It can also be discerned from the ECtHR's case law that criminalisation is viewed as having important value for the individual victim. Criminal law makes it possible for the victim to see the abusers convicted and sentenced. For example, in *Siliadin*, the Court observed that '[...] in the instant case, the applicant who was subjected to treatment contrary to Article 4 and held in servitude, was not able to see those responsible for the wrongdoing convicted under the criminal law'.<sup>34</sup>

### **3 The Relation between Positive Human Rights Obligations and National Criminal Law**

As the previous section demonstrated, human rights law can shape the national criminal law by requiring it to criminalise the abuses falling within the scope of Article 4. Herein, I undertake a more general enquiry of the relationship between national criminal law and international human rights law.<sup>35</sup> These two bodies of law are different in terms of their purposes, objects of regulation and interpretation techniques. These differences have an impact as to how slavery, servitude, forced labour and THB are to be defined and how their respective definitions are to be interpreted in the context of criminal law and in the context of human rights law. The differences have largely remained ignored in the existing literature on slavery, servitude, forced labour and THB.

Jean Allain has made a major contribution to the better understanding of the meaning of slavery, servitude and forced labour. He argued that slavery as defined in the 1926 Slavery Convention should be understood as 'control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or

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<sup>34</sup> Yet, the Court has emphasised that the ECHR does not guarantee a right of the victim of a crime to have someone prosecuted and punished. See *Öneryildiz v Turkey* [2009] XII Eur Court HR 79, para 96; See also A Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009) 119; J McBride, *Human Rights and Criminal Procedure: The Case Law of the European Court of Human Rights* (2009) 276.

<sup>35</sup> This relationship has been predominantly investigated from the perspective of the human rights of accused and/or convicted persons. See A Ashworth & B Emmerson, *Human Rights and Criminal Justice* (2001); A Ashworth, 'Criminal Law, Human Rights and Preventive Justice', in B McSherry, A Norrie & S Bronitt (eds), *Regulating Deviance: The Redirection of criminalisation and the Futures of Criminal Law* (2009).

disposal of that person.<sup>36</sup> His analysis seems to be situated within the context of criminal law since he seeks to identify concrete actions which a perpetrator undertakes to keep a person in slavery.<sup>37</sup> At the same time, Allain criticises scholars and UN bodies for construing the concept of slavery in an expansive way which is not in conformity with the 1926 slavery definition. While in principle his criticisms are well substantiated,<sup>38</sup> he is not sufficiently attentive to the tension which exists between, on the one hand, the criminal law approach requiring precise definitions and determinacy of the elements of crimes and, on the other hand, the human rights law approach, guided by the rationale of expanding the beneficiaries of protection and of more involvement by the state in protection.

As a result of the above mentioned insensitivity, the contexts of individual criminal responsibility and state responsibility under international human rights law seem to be blurred. For example, Allain has submitted that the 1926 slavery definition 'is wide enough to be accepted by advocates, but also opens a new vista, one which can be used to hold states and individuals responsible for enslavement, whether de jure or de facto'.<sup>39</sup> Holding individuals criminally responsible for slavery needs to be conceptually separated from holding states internationally responsible for enslavement. In addition, within the Council of Europe and even within broader geographical lines, it is not likely that states enslave individuals; rather, states might be found in breach of their positive human rights obligations for failing to protect persons who are subjected to abuses by private parties.

The literature on THB has been fundamentally oblivious of the basic principles underlying national criminal law. Anne Gallagher offers an analysis of the THB definition which disregards the purpose for which the definition is inter-

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<sup>36</sup> *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, <<http://www.law.qub.ac.uk/schools/SchoolofLaw/FileStore/Fileupload,398946,en.pdf>> [accessed 19 March 2014]. See also J Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (2013) 128; R Hickey, 'Seeking to Understand the Definition of Slavery', in J Allain (ed), *The Legal Understanding of Slavery. From the Historical to the Contemporary* (2012) 220.

<sup>37</sup> Allain and Hickey also state that 'the 1926 definition provides a powerful way forward for identifying and prosecuting cases of slavery'. J Allain & R Hickey, 'Property and the Definition of Slavery' (2012) 61 *ICLQ* 915, 924.

<sup>38</sup> As Suzanne Miers has remarked, slavery has been used as a referent to various social problems and injustices which can ultimately render the concept meaningless. See S Miers, *Slavery in the Twentieth Century* (2003) 453. An example to this effect is the UN High Commissioner for Human Rights' Report entitled *Abolishing Slavery and its Contemporary Forms*, authored by D Weissbrodt and Anti-Slavery International, UN Doc HR/PUB/02/4. The report includes under the rubric of 'forms of slavery' various practices, including prostitution, without offering meaningful legal analysis of the legal parameters of the concept of slavery.

<sup>39</sup> J Allain, 'The Definition of Slavery in International Law' (2009) 52 *Howard LJ* 239, 242.

preted: for the purpose of its incorporation in the national criminal law or for the purpose of delineating a group of individuals, victims of human trafficking, who are eligible for certain protection measures.<sup>40</sup> She has submitted that the THB definition is 'inclusive', covering 'a wide range of contemporary exploitative practices', and that 'it is difficult to identify a "contemporary form of slavery" that would not fall within its generous parameters'.<sup>41</sup> Therefore, Gallagher is a proponent of interpreting THB broadly. However, she does not ask herself the question whether this is acceptable from the perspective of the application of national criminal law and the rights of the accused. A similar approach has been adopted by Venla Roth. Roth's analysis appears to be contextualised in the field of criminal law. Yet, without acknowledging the constraints of the criminal law context, she has submitted that 'it is necessary to understand the definition [of THB] in a way which allows broader interpretations'.<sup>42</sup>

Ryszard Piotrowicz and Alice Edwards have drawn attention to the two separate fields of law, namely international human rights law and national criminal law, which are of relevance in the context of abuses against migrants.<sup>43</sup> Piotrowicz, has rightly pointed out that THB is usually a private criminal act and that further explanations solidly grounded in the rules for finding states' internationally responsible under human rights law are necessary for conceptualising THB as a human rights issue.<sup>44</sup> However, Piotrowicz and Edwards have not investigated the definitional implications: how abuses are defined and interpreted in the context of national criminal law and in the context of international human rights law.

In light of the above outlined deficiencies, it is necessary to shed some light on the interactions between human rights law and criminal law and on the differences between these fields of law in terms of purposes, objects of regulation and interpretation techniques. Human rights law is meant to bind states, while criminal law is enforced with regard to individuals at a national

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<sup>40</sup> A Gallagher, *The International Law of Human Trafficking* (2010) 12–53.

<sup>41</sup> A Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49(4) *Va J Int L* 789, 811–14.

<sup>42</sup> V Roth, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-related Trafficking in Human Beings* (2012) 75.

<sup>43</sup> R Piotrowicz, 'The Legal nature of Trafficking in Human Beings' (2009) 4 *Intercultural Human Rights LR* 175; A Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour' (2007) 36 *Denver JILP* 9.

<sup>44</sup> R Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24(2) *Int J Refugee L* 181.

level. Since these two bodies of law have different purposes, the transplantation of concepts and case law from human rights law to criminal law and *vice versa* should not be endorsed uncritically. Since human rights law applies to the state, it seeks to improve practices by states in order to advance the protection of beneficiaries. Criminal law focuses on the culpability of individuals. The purpose of criminal law is to hold individuals criminally responsible. The purpose of human rights law is to maximise protection for individuals, including those who might suffer abuses by private parties. Certainly, national criminal law also aims at protecting society. In addition, many of its prohibitions are rooted in human rights law and are intended to reinforce those rules. However, as Darryl Robinson noted, the ‘general justifying aim’ of the criminal law system as a whole—which may be a utilitarian aim of protecting society—cannot be conflated with the question of whether it is justified to punish a particular individual for a particular crime.<sup>45</sup> Liora Lazarus also warned that the duty of general protection against the population at large cannot be deployed to justify the coercion of a particular individual in a particular way.<sup>46</sup>

Human rights law and criminal law have different objects of regulation. Human rights law focuses on systems. It seeks to improve practices of states in order to advance protection of individuals. Criminal law can reinforce this objective. However, it focuses on individual criminal responsibility and is restrained by certain principles such as the principles of personal culpability and fair warning.<sup>47</sup> The principle of personal culpability means that persons are held responsible only for their own conduct. This principle also requires knowledge and intent in relation to the conduct so that the person can be found responsible. The principle of fair warning relates to the principle of legality, which requires that definitions of crimes be construed strictly in order to provide fair notice to individual actors and to constrain arbitrary exercise of states’ coercive power.<sup>48</sup>

In the field of criminal law the behaviour which is to be considered a criminal offence must be precisely defined. In case it is not, this might come into clash with the defendant’s human rights.<sup>49</sup> The requirement for a clear definition

<sup>45</sup> D Robinson, ‘The Identity Crises of International Criminal Law’ (2008) 21 *Leiden JIL* 925, 938.

<sup>46</sup> L Lazarus, ‘Positive Obligations and Criminal Justice: Duties to Protect or Coerce’, in L Zadner & J Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 136, 150.

<sup>47</sup> Robinson, above n 45, 946–7.

<sup>48</sup> See P Robinson, ‘Fair Notice and Fair Adjudication: Two Kinds of Legality’ (2005) 154 *Un Pa LR* 335. See generally K Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2009).

<sup>49</sup> See Article 7 of the ECHR; see also *Sunday Times v United Kingdom* (1979) 30 Eur Court HR, Ser

of the offence is satisfied 'where the individual can know from the wording of the relevant provision—and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice—what acts and omissions will make him criminally liable'.<sup>50</sup> In addition, crimes cannot be extensively interpreted or interpreted by analogy.<sup>51</sup>

It should be, however, also kept in mind that progressive development of criminal law is not precluded:

[h]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.<sup>52</sup>

Therefore, there is no absolute adherence to the principle of legality.<sup>53</sup> Some crimes are vague and this is inevitable for avoiding 'excessive rigidity and to keep pace with changing circumstances'.<sup>54</sup> Yet, the principle of legality has a central role.

In the realm of human rights, the requirement of a definition means that the material scope of Article 4 must be delimited so that there is clarity as to the conduct from which the state has to restrain itself. From the perspective of states' positive human rights obligations, the purpose of the definitions of slavery, servitude and forced labour is to demarcate the range

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<sup>50</sup> *Korbely v Hungary* [2008] IV Eur Court HR 299, para 70 (*Korbely*).

<sup>51</sup> *ES v Sweden* (European Court of Human Rights, Chamber, Application No 5786/08, 21 June 2012) para 69. For elucidation of the general principles which the ECtHR applies in relation to *nullum crime, nulla poena sine lege*, see *Kasymakhunov v Russia* (European Court of Human Rights, Chamber, Application Nos 26261/05 & 26377/06, 14 March 2013) paras 76–8.

<sup>52</sup> *Korbely* [2008] IV Eur Court HR 299, para 71.

<sup>53</sup> M Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 *JICJ*1007.

<sup>54</sup> *Kokkinakisi v Greece* (1993) 260-A Eur Court HR, Ser A, para 40.

of circumstances in which the state has an obligation to act. Importantly, human rights norms, including Article 4 of the ECHR, are in principle framed vaguely and in broad terms.<sup>55</sup> Human rights norms have to be subjected to interpretation. The interpretation techniques endorsed by the ECtHR favour progressive and expansive interpretation.<sup>56</sup> These techniques of interpretation are not appropriate in the context of criminal law.

Therefore, human rights law and criminal law rest on two contradictory interpretative approaches. Criminal law principles forbid an expansive interpretation of norms, while human rights law celebrates such expansions. Since criminal law must remain faithful to the principle of legality, interpretative approaches to human rights law which favour a liberal construction for the purpose of maximising protection for beneficiaries are contrary to the principles underpinning the criminal justice system.<sup>57</sup>

The concrete abuses of human trafficking and of subjecting someone to forced labour can be used to demonstrate the above points. The person who commits recruitment by means of deception has to have the specific *mens rea* in order to be found guilty of human trafficking. He/she should be aware that he/she is recruiting and that he/she recruits for the purpose of exploitation. The application of criminal law requires that the *mens rea* of the alleged trafficker be proven beyond reasonable doubt. An employer who threatens his/her employee with a penalty could be found guilty of subjecting that employee to forced labour. The application of criminal law requires an examination of the specific actions of the specific employer who allegedly subjected his/her employee to forced labour.

From the perspective of human rights law, when asking the question whether the state has failed to ensure that migrants not be subjected to Article 4's abuses, the *mens rea* of the alleged trafficker and abusive employer is irrelevant.<sup>58</sup> Instead, we are interested in the overall situation of the victim and the abuses which he/she has suffered irrespective of who inflicted those abuses and what intention each specific perpetrator had.<sup>59</sup> In human rights law, the specific

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<sup>55</sup> S Trechsel, 'Comparative Observations on Human Rights Law and Criminal Law' (2000) *St Louis-Warsaw Transnational LJ* 1, 17.

<sup>56</sup> ECtHR has determined that the ECHR is intended to guarantee rights that are 'practical and effective' and that the Convention is 'a living instrument'. See *Tyrer v United Kingdom* (1978) 26 Eur Court HR, Ser A.

<sup>57</sup> Robinson, above n 45, 929.

<sup>58</sup> A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *ICLQ* 615, 617.

<sup>59</sup> Human rights law can only be interested in the question of who inflicted the abuses if the perpetrator is a state's agent and/or when his/her actions are attributed to the state. However,

actions by the employer who allegedly subjected the victim to forced labour could be of relevance. However, in the context of human rights law the broader circumstances of the victim's situation have to be inspected. The focus is on the overall conditions surrounding the victim and whether these conditions amount to abuses falling within the scope of Article 4.

In addition, for the purposes of applying some of the positive human rights obligations as developed by the ECtHR, it is not even necessary to demonstrate that the migrant's circumstances necessarily qualify as slavery, servitude, forced labour or THB. States may be found responsible for their failure to conduct effective investigation into alleged abuses when migrants' complaints give rise to a reasonable suspicion that they have been held in conditions of, for example, servitude. In *CN v United Kingdom*, a judgment in which the ECtHR found that the respondent government failed to investigate a potential situation of servitude, the question whether the applicant was indeed held in servitude was not considered.<sup>60</sup> The Court noted that her complaints concerning the abuses could not be assessed as 'inherently implausible' and concluded that these complaints 'did give rise to a credible suspicion that she had been held in conditions of domestic servitude, which in turn placed the domestic authorities under an obligation to investigate those complaints'.<sup>61</sup>

Similarly, it should be underscored that when the Court applies the positive obligation of taking protective operational measures, the criteria triggering this obligation do not necessarily include demonstrating that the migrant was held in slavery, servitude or forced labour. As these criteria have been originally expanded in *Osman v United Kingdom* and applied since then,<sup>62</sup> it must be established that 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk' that a person could be subjected to the criminal acts by another individual.<sup>63</sup> Accordingly, at the time when the events were unfolding, state authorities need not necessarily be convinced that the migrant was kept in slavery, servitude or forced labour. Notably, the criminal

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this scenario is excluded from the present analysis.

<sup>60</sup> *CN v United Kingdom* (2013) 56 EHRR 24, paras 69, 71, 72.

<sup>61</sup> *Ibid*, paras 72–3. The Court did not refer to the established phraseology of 'reasonable suspicion'. Instead, it used the expression 'credible suspicion'. I find this change very problematic. However, it goes beyond the purposes of the present article to elaborate upon this issue.

<sup>62</sup> *Osman v United Kingdom* [1998] VIII Eur Court HR 3124, para 116; see also *Opuz v Turkey* [2009] III Eur Court HR 107.

<sup>63</sup> See also *Rantsev* (2010) 51 EHRR 1, para 286. In *Rantsev*, the ECtHR modifies the wording of the *Osman* test without offering any explanations. Discussing the implications of this modification, however, goes beyond the scope of this article.

culpability of any alleged perpetrators and their *mens rea* are immaterial.

In human rights law, the focus is on the state and its system of protection. In the context of positive human rights obligations, the focus is on identifying failures by the state. This reflects its origins as a subset of the general international law of state responsibility.<sup>64</sup> Broader meaning of norms means more protection for individuals by the state. Since the addressee of human rights norms is the state, the underlying assumption is that progressive and broader interpretation of norms is the better articulation. This is not the case in the context of criminal law. Human rights interpretative techniques can conflict with the principles underlying the contemporary criminal justice systems.

Therefore, the transition from criminal law to human rights law, which is about responsibility of a collective (the state), requires a conceptual move. In light of this, it could be submitted that different questions are asked in the context of criminal law for the purpose of finding a suspect guilty and in the context of human rights law for the purpose of finding the state responsible for its failures. It can also be submitted that under human rights law, more flexibility as to the meaning of slavery, servitude, forced labour and THB can be expected. It could be advanced that this flexibility is desirable since this might expand the range of circumstances in which states' obligations are triggered and widen the scope of protected persons.

At this junction, however, the interests of the states should not be ignored. There is a clear need for determinacy in the context of human rights law also. Otherwise, the human rights law concepts of slavery, servitude, forced labour and THB will be rendered ineffective and there will be no clarity as to the human rights obligations held by states. Therefore, the interpretative techniques applicable to human rights law also have limitations. Furthermore, despite the tolerated definitional flexibility in the realm of human rights, the ECtHR has strived to delineate the material scope of the rights protected in the ECHR and to elaborate upon their meanings. Therefore, the expectation of definitional flexibility should not be interpreted to the effect that the terms covered by Article 4 are at risk of being subjected to conceptual disintegration.

An additional caveat must also be mentioned. The above text might seem to imply that the interpretation techniques applied in human rights law work only in favour of the alleged victims of crimes or the alleged victims of human rights violations. This is a deceptive impression. An expansive interpretation of

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<sup>64</sup> A M Danner & J Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 *Ca LR* 75, 87.

human rights norms works equally for the protection of the alleged perpetrators of crimes. Human rights law applies to criminals as well. For example, a person might complain that he has been convicted for a crime contrary to the principle of *nullum crimen sine lege*, which embodies the requirement for clarity of the definitions of crimes.

My efforts to draw the lines demarcating the distinctions between criminal law and human rights law should not be misunderstood to the effect that there is no interaction between the two levels. The mere positive obligation upon states to criminalise certain forms of abuses is an expression of the interaction. The interaction also extends further. When there is a deficit in terms of interpretative guidelines, criminal law can benefit from developments in the realm of human rights law and vice-versa. In addition, human rights law can set standards regarding how national crimes should be defined and interpreted so that they can be effectively applied for the purposes of investigation, prosecution and conviction. These issues and their relevance to Article 4 of the ECHR are an object of enquiry in the two forthcoming sections.

## **4 Criminalisation under the Specific Labels of Slavery, Servitude and Forced Labour**

The questions addressed in this section are whether state parties to the ECHR are under an obligation to adopt the specific criminal law labels of slavery, servitude and forced labour in their domestic law, and how the existence of these specific criminal law labels affects the interpretation of abuses against migrants. I argue that against the backdrop of the lack of criminalisation at the national level of slavery, servitude and forced labour, the abuses against migrants are conceptualised with reference to the crime of human trafficking. This could create gaps in the national criminal law as a result of which abuses against migrants might not be properly addressed.

*Siliadin*, *CN and V v France* and *CN v United Kingdom* will be used as a basis for responding to the above questions. As already mentioned, the primary importance of *Siliadin* lies in the recognition that states have to criminalise at the domestic level abuses falling within the material scope of Article 4.<sup>65</sup> Critically, however, the French criminal law contained criminal offences which

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<sup>65</sup> H Cullen, '*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) 6 *HRLR* 585; A Nicholson, 'Reflection on *Siliadin v France*: Slavery and Legal Definition' (2010) 14 *IJHR* 705.

could have been operationalised for holding the family which used Siliadin's services criminally responsible. In particular, it was a criminal offence:

to obtain from an individual the performance of services without payment or in exchange for payment that is manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence.<sup>66</sup>

Pursuant to French criminal law, it was also a criminal offence 'to subject an individual to working or living conditions which are incompatible with human dignity by taking advantage of that individual's vulnerability or state of dependence'.<sup>67</sup> In relation to these criminal law provisions, the ECtHR observed that 'these provisions do not deal specifically with the rights guaranteed under Article 4 of the Convention, but concern, in a much more restrictive way, exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'.<sup>68</sup>

The abuses of subjecting someone to forced labour, to servitude or to slavery were not as such defined as crimes at the national level. Instead, there were other criminal offences, i.e., the ones quoted above. The existing criminal law offences were more restrictive regarding the scope of abuses covered because they required the findings of taking advantage of a person's vulnerability or state of dependence and incompatibility with human dignity.<sup>69</sup> Not only was there a tendency by the national courts to interpret them restrictively, but due to their ambiguity there was also a lack of consistency regarding how to interpret them at all. The same deficiencies were found to be at the core of the violation in *CN and V v France*.

Yet, the Court's reasoning in *Siliadin* and *CN and V v France* is not that straightforward. These judgments could be also interpreted to the effect that the failure of the respondent state lay not so much in the lack of criminalisation of specifically slavery, servitude and forced labour, but rather in the ambiguity of the existing crimes at the national level and their restrictive interpretation by

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<sup>66</sup> Criminal Code (France), Art 225-13.

<sup>67</sup> *Ibid*, Art 225-14.

<sup>68</sup> *Siliadin* [2005] VII Eur Court HR 333, para 142.

<sup>69</sup> *Ibid*, para 141. Other authors have argued that the lack of a specific offence of servitude did not in itself violate Article 4 of the ECHR. See B Rudolf & A Eriksson, 'Women's Rights under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence' (2007) 5(3) *Int J Const L* 507, 516.

the national courts.<sup>70</sup> In this sense, if the existing national crimes—although not labelled as slavery, servitude or forced labour—were interpreted more broadly and in a consistent manner by the national courts, the respondent state would not be in violation of Article 4.

A reference to *CN v United Kingdom* can further enrich the discussion. The applicant submitted that since the UK had not enacted domestic law specifically criminalising the conduct prohibited by Article 4, ‘any investigation into her complaints was ineffective as it was not directed at determining whether or not she had been a victim of treatment contrary to Article 4 and could not therefore result in a prosecution.’<sup>71</sup> In response, the UK submitted that:

Article 4 did not require that the effective protection against the prohibited conduct should be achieved by means of the adoption of a single, specific criminal offence. At the time of the conduct alleged by the applicant there were a number of offences in English law which criminalised the essential aspects of slavery, servitude and forced or compulsory labour.<sup>72</sup>

The UK referred to the following offences: human trafficking, kidnapping, grievous bodily harm, assault, blackmail, harassment and employment-related offences. The ECtHR responded that:

In view of the Court’s finding in *Siliadin*, it cannot but find that the legislative provisions in force in the United Kingdom at the relevant time were *inadequate to afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention*. Instead of enabling the authorities to investigate and penalize such treatment, the authorities were limited to investigating and penalizing criminal offences which often—but do not necessarily—accompany the offences of slavery, servitude and forced labour. Victims of such treatment who were not also victim of one of these related offences were left without any remedy.<sup>73</sup>

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<sup>70</sup> The elements of ‘taking advantage of a person’s vulnerability’ and ‘incompatibility with human dignity’ were subjected to various interpretations by the French courts.

<sup>71</sup> *CN v United Kingdom* (2013) 56 EHRR 24, para 47.

<sup>72</sup> *Ibid*, para 56.

<sup>73</sup> *Ibid*, para 76 (emphasis added).

The ECtHR emphasised that domestic servitude is a specific offence. It found that due to the absence of the specific offence of domestic servitude, the domestic authorities were unable to give due weight to various factors regarding the applicant's situation, such as overt and subtle forms of coercion.<sup>74</sup>

In sum, the ECtHR has not categorically said that states must adopt the specific labels of slavery, servitude and forced labour in their domestic law. Yet, for the following reasons I submit that implicitly there is such a requirement.<sup>75</sup> What emerges from *CN v United Kingdom* is that the issue of interpretation is consecutive. In this sense the labels of slavery, servitude and forced labour are needed before one can discuss how they should be interpreted. Article 4 is not neutral regarding the assessment made at the national level of the different possible legal bases for prosecution. The specific criminal labels of slavery, servitude and forced labour are necessary because they have an impact on the way in which abuses against migrants are interpreted. Only once having specific criminalisation of slavery, servitude and forced labour can issues of interpretation be addressed and proper regard be taken of the interpretative developments in human rights law. If the labels are not present at the national level, the international law developments in terms of acceptance of subtle forms of coercion against migrants might be disregarded. In this respect, the ECtHR observed that domestic servitude is an offence which:

involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another. [...] no apparent weight was attributed to the applicant's allegations that her passport had been taken from her, that P.S. had not kept her wages for her as agreed, and that she was explicitly and implicitly threatened with denunciation to the immigration authorities [...].<sup>76</sup>

Therefore, states' obligations under Article 4 of the ECHR shape the national criminal law. If interpretative developments in the field of human rights law are

<sup>74</sup> Ibid, para 80.

<sup>75</sup> For a different perspective on this very issue, see M Eriksson, 'The Prevention of Human Trafficking: Regulating Domestic Criminal Legislation through the European Convention on Human Rights' (2013) 82 *Nordic JIL* 339, 352.

<sup>76</sup> *CN v United Kingdom* (2013) 56 EHRR 24, para 80.

disregarded, the national criminal law could be found incomplete, leading to the lack of criminal investigations. This way the discretion left for the States as to how to label abuses and how to interpret the elements of crimes can in effect be restrained.

In addition to the ECtHR's judgments, further arguments can be advanced in support of the proposition that states need to incorporate the specific criminal law labels of slavery, servitude and forced labour.<sup>77</sup> First, applying other labels might diminish the gravity of the abuses.<sup>78</sup> Second, the essence of the wrongdoing might not be captured by other criminal law labels. The essence and the gravity of the abuses could not be represented if they were labelled as ordinary coercion by instance, when in fact the abuses amount to servitude. Third, specific criminalisation ensures strengthening of the deterrent effect and enables the tracking and monitoring of the specific crime. At this juncture, the reader should be reminded that deterrence is the main justification proposed by the ECtHR for criminalising the abuses falling within the scope of Article 4. Therefore, if indeed deterrence is what is sought to be achieved, then having the specific labels is necessary.

Finally, the principle of 'fair labelling' also plays a role. The principle relates to the questions of how the content of the national criminal law should be structured, how one should distinguish wrongs from each other and how the content of the wrongs should be articulated.<sup>79</sup> The principle of 'fair labelling' requires that 'the label of the offence should fairly express and signal the

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<sup>77</sup> These arguments have been explored in the context of international criminal law. International criminal law faces the issue whether international crimes need to be incriminated in domestic law in specific terms. The question under discussion is whether states need to have specific provisions in their domestic legislation for crimes against humanity or whether they are allowed to use 'common' crimes such as murder to effectively prosecute the offenders. See C Kress & F Lattanzi (eds), *The Rome Statute and Domestic Legal Orders*, vol 1 (2000), vol 2 (2006); O Bekou, 'Crimes at Crossroads: Incorporating International Crimes at the National Level' (2012) 10 *JICJ* 677, 691.

<sup>78</sup> A similar argument has been submitted in relation to the question whether states need to have a specific crime of torture under their domestic law in light of their obligations under the Convention Against Torture. The Committee Against Torture recommended the introduction of a separate offence to torture. The Committee underscored the close relationship between Arts 4(1) and 4(2) of the Convention Against Torture, suggesting that the absence of a separate offence of torture in the national legal order is likely to result in penalties which do not take the grave nature of torture adequately into account. See A Marchesi, 'Implementing the UN Convention Definition of Torture in National Criminal Law' (2008) 6 *JICJ* 195, 214.

<sup>79</sup> V Tadros, 'Fair Labeling and Social Solidarity', in L Zedner & J Roberst (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 68, 69.

wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act.<sup>80</sup> Labelling reflects the moral judgments that the public makes about the relevant conduct.<sup>81</sup> Therefore if migrants are subjected to abuses which in terms of content and level of gravity amount to slavery, servitude and forced labour, these abuses should be labelled as such in compliance with the principle of 'fair labelling'.

Against the backdrop of the above, the issue of whether the Council of Europe member states have actually lived up to their obligation to criminalise the abuses of slavery, servitude and forced labour needs to be reviewed. As a result of their obligations under the Council of Europe Trafficking Convention, states have incorporated the crime of THB in their domestic criminal legislation.<sup>82</sup> However, states have largely ignored the need for criminalising slavery, servitude and forced labour. The ILO has reported that the vast majority of the ILO member States have not provided for the specific offence of forced labour in their criminal law.<sup>83</sup> My review of the national criminal legislation, which was greatly facilitated by the GRETA reports from the first evaluation round, demonstrates that, besides the United Kingdom, no other country has a specific criminal offence of forced labour and servitude.<sup>84</sup> For example, it has been reported that pursuant to Dutch criminal law, it is impossible to prosecute forced labour in cases where trafficking is not present.<sup>85</sup> Similarly, in Ireland, forced labour is dealt with under the anti-trafficking law and is not a separate offence.<sup>86</sup> In Bulgaria, the abuses of

<sup>80</sup> Robinson, above n 45, 927.

<sup>81</sup> A Ashworth, *Principles of Criminal Law* (2009), 78–80.

<sup>82</sup> See GRETA's reports, <[http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Evaluation\\_Reports/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Evaluation_Reports/default_en.asp)> [accessed 19 March 2014].

<sup>83</sup> *A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, UN Doc ILC.93/I(B), 16 June 2005, 7.

<sup>84</sup> In some jurisdictions, forced labour is criminalised as a war crime and/or as a crime against humanity. See e.g. Criminal Code (Bosnia and Herzegovina), Art 173; Criminal Code (Latvia), Art 74; Criminal Code (Malta), Arts 54(C)(1), 54(D)(b). In France, reduction to slavery could be a crime against humanity if other conditions are also present. See J Verner, 'French Criminal and Administrative Law Concerning Smuggling of Migrants and Trafficking in Human Beings: Punishing Trafficked Persons for their Protection?', in E Guild & P Minderhoud (eds), *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (2006) 7, 22–3.

<sup>85</sup> M Houwerzijl & C Rijken, *Responses to Forced Labour in the EU: Country Report of The Netherlands*, 2, <<http://workinglives.org/fms/MRSite/Research/wlri/Netherlands%20Responses%20to%20Forced%20Labour%20in%20the%20EU.pdf>> [accessed 19 March 2014].

<sup>86</sup> Migrant Rights Centre Ireland, *Forced Labour: The Case for Criminalisation*, 2010, <[http://mrci.ie/wp-content/uploads/2012/11/Forced-Labour\\_The-Case-for-Criminalisation.pdf](http://mrci.ie/wp-content/uploads/2012/11/Forced-Labour_The-Case-for-Criminalisation.pdf)> [accessed 19 March 2014]. For an elaborate discussion on the Irish

slavery, servitude and forced labour are not criminalised outside the context of human trafficking.<sup>87</sup> A few states have specifically criminalised slavery.<sup>88</sup>

Pursuant to the national criminal laws, abuses against migrants are primarily conceptualised with reference to the migration process under the concept of human trafficking. As required by the crime of human trafficking, abuses are to be interpreted with reference to the deception/coercion in relation to, *inter alia*, the recruitment, transfer, receipt of the person. As demonstrated by the ECtHR's cases of *CN v United Kingdom* and *Kawogo v United Kingdom*, abusers do not necessarily participate in, *inter alia*, recruitment, transfer, receipt.<sup>89</sup> Neither do abusers necessarily recruit, transfer, receipt, *inter alia*, migrants by means of deception/coercion. In *CN v United Kingdom*, the ECtHR observed that the investigating authorities had heavily focused on the offence of THB, while ignoring the abuse of domestic servitude.<sup>90</sup> Similarly, in *Kawogo v United Kingdom*, the applicant's abusers did not arrange or facilitate her arrival in the United Kingdom for the purposes of exploitation.<sup>91</sup> As a result, they were not

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legislation, see D Keane, 'Abolitionist in Heart But Not in Action: Slavery, Servitude and the Status of Article 4 in Irish Law' (2013) 50 *Irish Jurist* 166.

<sup>87</sup> V Stoyanova, 'The Crisis of a Definition: Human Trafficking in Bulgarian Law' (2013) 5 *Amsterdam L Forum* 64.

<sup>88</sup> There has been a misperception that 'virtually all States have domestic norms which deal with slavery as a crime'. See F Lenzerini, 'Suppressing Slavery under Customary International Law' (2000) 10 *Italian YIL* 145, 155. Within the Council of Europe, examples of states which have specific criminal provisions on slavery are Norway (Criminal Code [Norway], Art 225), Italy (Criminal Code [Italy], Art 600), Austria (Criminal Code [Austria], Art 104), Bosnia and Herzegovina (Criminal Code [Bosnia and Herzegovina], Art 185), Croatia (Criminal Code [Croatia], Art 175), the United Kingdom (Coroners and Justice Act 2009 [UK] s 71) and Portugal (Criminal Code [Portugal], Art 159).

<sup>89</sup> In the United Kingdom, slavery, servitude and forced labour were criminalised only in 2009 with the Coroners and Justice Act. In contrast, human trafficking in prostitution was criminalised with section 145, The Nationality, Immigration and Asylum Act 2002 (The Sexual Offences Act 2003 repealed this provision and replaced it with the offence of trafficking or sexual exploitation). The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 created the offence of trafficking people for exploitation. See I MacDonald & R Toal, *MacDonald's Immigration Law and Practice* (2010) 1232–3. See also the Protection of Freedoms Act 2012, which introduced amendments to the Sexual Offences Act 2003 and the Asylum and Immigration Act (Treatment of Claimants, etc.) 2004.

<sup>90</sup> *CN v United Kingdom* (2013) 56 EHRR 24, para 80.

<sup>91</sup> *Kawogo v United Kingdom* (European Court of Human Rights, Chamber, Application No 56921/09, 3 September 2013). In light of the declaration submitted by the respondent government the ECtHR decided to strike the application out. The reasons for not continuing with the examination of the application were, *inter alia*, that with the adoption of Section 71 of the Coroners and Justice Act 2009 the specific offences of slavery, servitude and forced labour

subjected to prosecution since the elements of the crime of human trafficking were not constituted. The mere fact that the family which used Elisabeth Kawogo's services subjected her to abuses, which could qualify as slavery, servitude or forced labour, was not sufficient to meet the element of the offence of human trafficking as defined in national legislation. The investigating authorities ignored that Elisabeth Kawogo might have been subjected to slavery, servitude, or forced labour.

## 5 Defining the Crimes of Slavery, Servitude, Forced Labour and THB at National Level

Even if states have incorporated the crimes of slavery, servitude and forced labour at a domestic level, it must be also considered that Article 4 of the ECHR raises certain requirements as to the quality of their definitions. In this subsection, I respond to three questions. First, I ask whether states parties to the ECHR are required to define the national crimes intended to cover the abuses prohibited by Article 4 in a particular way. Second, since I give a negative response to the prior question, I ask whether there are any requirements identifiable in the ECtHR's case law as to the quality of the national substantive criminal law. I argue that there are. Finally, I scrutinise the national legislation of some states and test it against the ECHR's standards.

### 5.1 Are States Required to Define National Crimes in a Particular Way?

The ECtHR's judgment of *MC v Bulgaria* is an appropriate starting point for addressing this question. For the purposes of this article, *MC v Bulgaria* is of relevance because in this case the Court was faced with the question whether states might be required to adopt certain definitions of certain crimes at the national level.<sup>92</sup> In *MC v Bulgaria*, the issue of the definition of the crime

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were incorporated in the national legislation. Thus, the complaints raised by Elisabeth Kawogo concerned a 'historical' problem.

<sup>92</sup> *MC v Bulgaria* (2005) 40 EHRR 20, para 153. The case was about a fourteen-year-old girl who claimed that she had been raped by two men. The national investigation came to the finding that there was insufficient proof that she had been compelled to have sex. At the national level it was concluded that there was no sufficient evidence that force had been used and that the girl had manifested some physical resistance. The ECtHR found that Bulgaria was in violation of its positive obligations under Article 3 and Article 8 of the ECHR due to the restrictive

of rape was under scrutiny. The applicable Bulgarian legislation criminalised rape. Moreover, the wording of the Bulgarian legal provisions did not differ significantly from the wording found in other states.<sup>93</sup> The problem, however, laid not in the wording but in the interpretation of the national law by the national authorities: 'What is decisive, however, is the meaning given to words such as "force" or "threats" or other terms used in legal definitions'.<sup>94</sup> The ECtHR found that the Bulgarian investigating authorities assumed that in the absence of violence and resistance, lack of consent could not be inferred and therefore the crime of rape was not constituted. Thus, in practice, the requirement for resistance was elevated to the status of a necessary element in the definition of rape under the national law. Ultimately, the Court found that Bulgaria had failed to fulfil its positive obligation to 'establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse'.<sup>95</sup> It determined that 'member States' positive obligations under Article 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim'.<sup>96</sup>

Therefore, *MC v Bulgaria* can be read to the effect that physical resistance should not be made a necessary element for the purpose of prosecuting rape. Rather, the lack of consent should be the core element. However, in *MC v Bulgaria*, the ECtHR did not instruct how the criminal offence should be defined and formulated in the national legislation.<sup>97</sup> The Court was very careful about how it framed the implications for the national criminal law flowing from the positive obligations under the ECHR. It did not say that the crime of rape had to be formulated and worded in a certain manner at national level. The cases of *Siliadin*, *CN and V v France* and *CN v United Kingdom* confirm the above conclusion. The ECtHR was interested in how the national crimes were interpreted and the effects of the adopted interpretations in the particular circumstances.<sup>98</sup> It did not

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interpretation of the crime of rape.

<sup>93</sup> Ibid, para 74. The concrete formulation of the crime of rape at the national level was as follows: 'sexual intercourse with a woman (1) incapable of defending herself, where she did not consent; (2) who was compelled by the use of force or threats; (3) who was brought to a state of helplessness by the perpetrator'.

<sup>94</sup> Ibid, para 171.

<sup>95</sup> Ibid, para 185.

<sup>96</sup> Ibid, para 166.

<sup>97</sup> P Asp, 'MC v Bulgaria: A Swedish Perspective' (2009) 54 *Scand Stud in L* 191, 202.

<sup>98</sup> I do envision circumstances when the ECtHR could say that the particular national definition of a crime gives rise to a violation. For example, in relation to *CN v The United Kingdom* if the

prescribe how they should be defined.

## 5.2 Ambiguous Framing of Crimes

Yet, states could be in breach of Article 4 when definitions of crimes are ambiguous. In *Siliadin* and *CN and V v France* the ECtHR took notice of the framing of the national criminal law in relation to its ambiguity. The national criminal law provisions were open to very different interpretations from one court to the next. Different courts could interpret differently the meaning of 'vulnerability', 'dependency' and incompatibility with human dignity. This was one of the reasons for the ECtHR to conclude that national criminal law could not permit effective prosecution of servitude and forced labour.

In conclusion, the national criminal law has to be armed with sufficiently clear definitions which ensure effective investigation and prosecution of abuses falling within the material scope of Article 4. Precise provisions have to be available for the investigatory authorities and for the courts so that they can determine the facts easily, and where necessary investigate, prosecute and convict.

## 5.3 The Framing of the Crimes of THB, Slavery, Servitude and Forced Labour at National Level

Have states lived up to the above standard? A review of the national crimes which are intended to address abuses falling within the material scope of Article 4 follows. The review is conducted in two stages. The first stage covers the crime of THB. The second covers the crimes of slavery, servitude and forced labour.

### 5.3.1 Human Trafficking

The definition of human trafficking in the Council of Europe Trafficking Convention has been directly reproduced in the criminal legislation of many states.<sup>99</sup> In this subsection, I argue that directly copying the international law

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UK criminal law explicitly said that subtle forms of coercion were irrelevant for the purposes of finding a person guilty of the crime of forced labour, then the wording would be problematic.

<sup>99</sup> Many states have simply incorporated the international law definition of THB without defining exploitation, slavery, servitude and forced labour in their criminal legislation. See GRETA reports, above n 82, Croatia Report (2011) paras 34–5; Denmark Report (2011) paras 44–5; Slovak Republic Report (2011) para 36. It has been reported that the direct incorporation of the international law definition of THB in Poland has led to uncertainty and complications since

definition of human trafficking in the domestic criminal law is highly problematic from the perspective of guaranteeing clear definitions of crimes for the purposes of effective investigation and prosecution. The international law definition of human trafficking contains elements ('exploitation', 'deception', 'abuse of position of vulnerability') which are ambiguous and, therefore, it might be difficult for a criminal court to convict an alleged perpetrator for human trafficking without entering into serious interpretation problems. This was precisely the situation faced by the UK Court of Appeal in *R v SK*.<sup>100</sup> The judge could not give proper instructions to the jury as to the meaning of 'exploitation' so that the jury could decide whether K, who arranged the arrival of MM in the United Kingdom from an African country in order to work for her as a housekeeper, should be convicted for human trafficking. For that reason, the Court of Appeal found the conviction to be unsafe and held that:

[w]e do not think that, when read fairly as a whole, the judge's summing-up provided the jury with a proper definition of exploitation for the purposes of Section 4 of the 2004 Act. In describing the ingredients of the offence the judge did not identify and explain the relevant core elements of Article 4 [of the ECHR]. In our judgment, he focused too much on the economics of the relationship between the appellant and the complainant, thus diluting the test the jury had to apply to one appropriate to an employment law context but not strong enough to establish guilt of the criminal offence with which the appellant was charged. [...] What the jury had to concentrate on in this case was not the fact that the complainant was paid 'a mere pittance' or an 'exploitative' wage, but whether, when the appellant arranged for the complainant to come to the United Kingdom, she had intended to exploit her in such a way as would violate her rights under Article 4 [of the ECHR].<sup>101</sup>

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the national authorities have to use terms and notions with unclear meaning and foreign to the domestic legal system. See C Nowak, 'The Europeanisation of Polish Substantive Criminal Law: How the European Instruments Influenced Criminalisation in Polish Law' (2012) 3 *New J Eur Crim L* 363, 378–9.

<sup>100</sup>*R v SK* [2011] EWCA Crim 1691. See also A Ashworth, 'Trafficking People for Exploitation: Arranging Individual's Entry into United Kingdom with Intention to Exploit' (2012) 1 *Crim LR* 63.

<sup>101</sup>*R v SK* [2011] EWCA Crim 1691, para 44 (Justice Lindblom).

Therefore, national legislation which has incorporated the concept of ‘exploitation’ as an element of the crime of human trafficking without further defining it, might not be compatible with the standards established in the ECtHR case law.<sup>102</sup> As suggested by the UK Court of Appeal, ‘exploitation’ could be defined with reference to the concepts of slavery, servitude and forced labour.<sup>103</sup> Importantly, the latter cannot be simply left undefined in the national substantive criminal law either.

In conclusion, a simplistic incorporation of the international law definition of THB leads to inadequacies. This definition was crafted in a particular legal context, namely transnational organised crime, which pursues its own particular objectives.<sup>104</sup> It might be appropriate for human rights law to endorse the same international definition. However, as explained in Section 3, national criminal law has to live up to different standards.

### 5.3.2 Slavery, Servitude and Forced Labour

Since many Council of Europe member states do not have the specific criminal law labels of slavery, servitude and forced labour, in order to prosecute abuses falling within the scope of Article 4, they need to resort to other labels. These other labels could be human trafficking,<sup>105</sup> deprivation of liberty, coercion or,

<sup>102</sup>Many national jurisdictions have incorporated the term ‘exploitation’. See, e.g., GRETA reports, above n 82, Austria Report (2011) paras 30–1. Pursuant to Article 104(a)(3) of the Australian Criminal Code, ‘exploitation’ is defined as ‘sexual exploitation, exploitation through organ transplantation or labour exploitation’.

<sup>103</sup>This approach has been followed by the UK courts when applying the crime of human trafficking. See *R v Siwak* (Portsmouth Crown Court, Case No T20120208, 22 February 2013).

<sup>104</sup>The main objective of transnational organised crime is efficient international cooperation:

the main reason for defining the term ‘trafficking in persons’ in international law was to provide some degree of consensus-based standardisation of concepts. That, in turn, was intended to form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases.

*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto*, UN Office on Drugs and Crime Division for Treaty Affairs (2004) 269. See also *The Explanatory Report to the Council of Europe Trafficking Convention*, para 216.

<sup>105</sup>In the criminal legislation of some states the labels of slavery, servitude and forced labour are mentioned as elements of the definition of the crime of human trafficking. As argued above (see Section 4), this is inadequate for meeting the standards under Article 4 of the ECHR. Within this cluster, Norway and Germany can be distinguished since they have criminalised subjecting a person to slavery, servitude or forced labour. However, instead of naming the

as is the case in France, 'taking advantage of persons' vulnerability or state of dependence'. Undertaking an enquiry of what crimes different states use to address abuses falling within the scope of Article 4 of the ECHR is a very arduous task. This is a task which I cannot attend to within the scope of the present article. Rather, my focus in this subsection is directed to those states which have the labels of slavery, servitude or forced labour.<sup>106</sup> In the forthcoming analysis, I first refer to states with criminal legislation which arguably does not live up to the standards required by Article 4 of having clear definitions. Then, I refer to the national criminal legislation of states which perform better in terms of definitional requirements. The latter can be used as illustrations of better practices.

The legislation in the United Kingdom is an appropriate starting point since the specific prohibitions of slavery, servitude and forced labour were recently incorporated in the national criminal law of that country. In 2009, the UK criminalised slavery, servitude and forced labour. Section 71 of the Coroners and Justice Act states:

(1) A person (D) commits an offence if—(a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or (b) requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.

(2) In subsection (1) the reference to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention [the ECHR, which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour].

The Coroners and Justice Act does not define the elements of slavery, servitude and forced labour. Instead, it refers to Article 4 of the ECHR, a human rights treaty meant to be applied against states. The definition of slavery under human

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offences accordingly, they have relabelled them as human trafficking.

<sup>106</sup>Some states prohibit slavery, servitude and forced labour only in their constitutions. Since there are no corresponding provisions and definitions in the national criminal legislation, I do not examine these states. See e.g. Constitution of the Republic of Cyprus, Art 10; Constitution of the Republic of Latvia, Art 106.

rights law refers to 'condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. Similarly, the definition of servitude, namely 'particularly serious form of denial of freedom involving an obligation to perform certain services and a feeling of the victim that the situation will not change and improve', refers to a condition. The definition of forced labour also delineates a condition of a person who is exacted to do work or service 'under the menace of any penalty and for which the said person has not offered himself voluntary'. For all the reasons stated in Section 3 of this article, these definitions might not be appropriate and sufficient for the purposes of criminal law.

The UK approach has been followed by Ireland. At the time of writing, Ireland is preparing amendments to its criminal legislation. One of the proposed amendments includes criminalisation of forced labour. According to the proposed legislation, forced labour is to be defined 'in line with the definition of that term in International Labour Organisation (ILO) Convention No 29 of 1930 concerning Forced or Compulsory Labour'.<sup>107</sup> It is dubious whether reproducing the ILO forced labour definition in a criminal law statute establishes an effective basis for prosecuting abuses. An argument could be anticipated that the choice of the legislators in the UK and in Ireland could have positive repercussions since any advanced interpretations endorsed by the ECtHR could be taken into account when the national criminal law is applied. Yet, this in no way diminishes the need for specifying the action elements of the crimes so that they can be effectively applied. The rights of the accused are also an important consideration in this context.

Within the Council of Europe there are states which have the criminal law labels of slavery, servitude and forced labour and have adopted more advanced definitions. In Italy, the crime of slavery is constituted when someone exerts on any other person powers and rights corresponding to ownership and when someone places or holds any other person in conditions of continuing enslavement. The Italian criminal law further specifies that:

[p]lacement or maintenance in a position of slavery occurs when use is made of violence, threat, deceit, or abuse of power; or when anyone takes advantage of a situation of physical or mental inferiority and poverty; or when money is promised, payments are

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<sup>107</sup> See Criminal Law (Human Trafficking) (Amendment) Bill 2013 (Ireland).

made or other kinds of benefits are promised to those who are responsible for the person in question.<sup>108</sup>

The Georgian Criminal Code also refers to the action of placing a person in conditions of slavery. More specifically, Article 143 of the Georgian Criminal Code stipulates:

[p]lacing a person in conditions of contemporary slavery shall mean the deprivation of identification documents, restriction of freedom of movement, restriction of communication with his/her family, including correspondence and telephone conversation, cultural isolation as well as forced labour in a situation where human honour and dignity are violated and/or without remuneration or with inadequate remuneration.

The criminal legislation of Azerbaijan first defines the condition of slavery: 'the partial or full possession of rights of other person treated like property'. It indicates the specific actions criminalised in relation to slavery:

[s]lave trade, i.e. forcing into slavery or treatment like a slave, slave keeping with a view to sale or exchange, disposal of a slave, any deed related to the slave trading or trafficking, as well as sexual slavery or divestment of sexual freedom through slavery, shall be punished by imprisonment of from 5 to 10 years.<sup>109</sup>

The latter is a successful drafting technique which ensures specificity of the crimes. It also ensures specificity as to the action element of the crimes.

#### **5.4 Lessons from the Australian Criminal Code**

In the course of this paper, an additional possibility needs to be canvassed: a scenario in which states have criminalised all the four abuses, to wit, slavery, servitude, forced labour and THB. An issue which emerges then is how to draw distinctions among them. The lack of understanding as to how the crime of human trafficking is to be related to and distinguished from other criminal

<sup>108</sup>See Penal Code (Italy), Art 600, translated in UNODC *Model Law against Trafficking in Persons*, UN Doc V.09-81990(E), 2009, 20.

<sup>109</sup>Criminal Code (Azerbaijan), Art 106, translated in UNODC *Model Law against Trafficking in Persons*, UN Doc V.09-81990(E), 2009, 20.

offences has already been reported.<sup>110</sup> Additional aggravation emerges from Anna Gallagher's suggestion that human trafficking has to be expansively interpreted so that it can encompass not only the process which could potentially lead to exploitation, but also the actual abuses.<sup>111</sup> Thus, there could be at least two sources of insecurity: (i) what are the action elements of, for example, the crime of slavery, and how are they different from the action elements of the crime of human trafficking; and (ii) how could the distinctions between the above mentioned crimes be formulated.

In light of the above outlined obscurity, I find it useful to refer to the Australian Criminal Code, which can be assessed as containing very advanced criminal law legislation on slavery, servitude, forced labour and THB. It is praiseworthy not only for its definitions, but for its well-articulated distinctions between the different crimes. The latter is of significance because if abuses against migrants are articulated based on offences which are 'obscurely defined and chaotically distinguished', this situation is prone to create gaps and confusion.<sup>112</sup>

The Australian Criminal Code defines the conditions of slavery, servitude and forced labour.<sup>113</sup> These definitions are very much in line with the definitions endorsed by the ECtHR under Article 4. In addition to defining the conditions of slavery, servitude and forced labour, the Australian Criminal Code Act indicates the *actus reus* of the crimes: reducing a person to slavery, exercising any of the powers attaching to the right of ownership, engaging in slave trading, entering into a transaction involving a slave,<sup>114</sup> causing another person to enter into or remain in servitude, causing another person to enter into or remain in forced labour, conducting a business involving servitude, or conducting a business

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<sup>110</sup> See GRETA reports, above n 82, Norway Report (2013) paras 39–40 (the distinction between THB and slavery/forced labour); V Roth, *Defining Human Trafficking and Identifying its Victims: a Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-related Trafficking in Human Beings* (2012) 167–80 (the distinction between THB and pandering); D B Jansson, *Harmonizing National Laws on Human Trafficking by Implementing Article 3 of the Palermo Protocol: Problems and Reform* (PhD Thesis, Uppsala University, 2013).

<sup>111</sup> '[M]aintaining an individual in a situation of exploitation through any of the stipulated means would [...] also amount to trafficking': A Gallagher, *The International Law of Human Trafficking* (2010) 30.

<sup>112</sup> See Tadros, above n 79, 81.

<sup>113</sup> See Criminal Code Act 1995 (Cth) s 270.1. The slavery offence was introduced in the Australian criminal law in 1991. See Criminal Code Amendment (Slavery and Sexual Servitude Act) 1999 (Cth). For application of the slavery definition, see *R v Tang* [2008] HCA 39; *Ho v R* [2011] VSCA 344; *Ho v R* [2012] HCATrans 199.

<sup>114</sup> Criminal Code Act 1995 (Cth) s 270.3.

involving forced labour.<sup>115</sup> For a person to be convicted for these crimes, the prosecution is required to prove that the victim was in a condition of slavery, servitude or forced labour, and that the defendant intentionally engaged one of the above enumerated actions.<sup>116</sup>

The criminalisation of slavery, servitude and forced labour as set out in the Australian Criminal Code Act was an object of gradual development.<sup>117</sup> For example, the action of reducing a person to slavery was not initially included. Subsequently, it was realised that the offences of exercising any of the powers attaching to the right of ownership, engaging in slave trading, entering into a transaction involving a slave 'may have the unintended result of requiring the prosecution to prove the victim was already in a state or condition of slavery at the time the offender possessed, exercised the power of ownership over, or entered into a transaction involving the victim'.<sup>118</sup>

The action of reducing a person to slavery was included so that the above concern can be addressed. In this way, a person who renders another person a slave can be held criminally responsible for slavery.<sup>119</sup>

How does the Australian legislation compare with the legislation in the United Kingdom, which was relatively recently adopted and which is likely to serve as an example for other Council of Europe states? Pursuant to Section 71 of the Coroners and Justice Act, the action criminalised is holding another person in slavery. This formulation is directly copied from Article 4 of the ECHR. In relation to the action of 'holding', the Ministry of Justice Circular has clarified that: '[i]f labour is subcontracted to another company and the employees of that other company who do the work are held in slavery or servitude or are required to perform forced or compulsory labour, then the subcontractor is the principle

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<sup>115</sup> *Ibid*, ss 270.5, 270.6A.

<sup>116</sup> Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth), Addendum to the Explanatory Memorandum (2012), 3.

<sup>117</sup> See Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth).

<sup>118</sup> *Ibid*, Explanatory Memorandum (2012), 13. For other relevant documents related to the bill see <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r4840](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4840)> [accessed 19 March 2014].

<sup>119</sup> For an overview of other amendments introduced in the Australian criminal legislation in relation to the crimes of slavery, servitude and forced labour see Bills Digest No 14, 2012–13, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (Cth), <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/1869207/upload\\_binary/1869207.pdf;fileType=application%2Fpdf#search=%22legislation/billsdgs/1869207%22](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/1869207/upload_binary/1869207.pdf;fileType=application%2Fpdf#search=%22legislation/billsdgs/1869207%22)> [accessed 19 March 2014].

offender.<sup>120</sup> In contrast, if the action specifically referred to in the UK legislation were not only holding, but also rendering/reducing another in slavery, then not only the subcontractor's conduct, but the abusive practices of the agencies that make workers available to companies could be an object of investigation. Thus, besides the action of holding another person is slavery, the action of reducing a person to slavery should be also considered for inclusion. Clearer formulation of the required action elements is desirable. Simplistic reproduction of the text of Article 4 of the ECHR in national criminal legislation is insufficient.

In addition to criminalising slavery, servitude and forced labour and clearly setting out the elements of the respective crimes, the Australian Criminal Code Act contains a separate offence of trafficking in persons.<sup>121</sup> The action elements of the latter offence are organisation or facilitation of the entry or proposed entry or receipt of another person in Australia.<sup>122</sup> In this way, the crime of human trafficking is clearly distinguished from the crimes of slavery, servitude and forced labour. Thus, human trafficking is about the organisation of a person's movement. This formulation is in line with the international law origins of the concept of human trafficking.<sup>123</sup> Accordingly, the above mentioned suggestion by Gallagher which favours the recasting of abuses as human trafficking even when the perpetrator is not involved in the facilitation of the person's movement is dubious and leads to unnecessary confusion.

## 5.5 Conclusion

*Siliadin* and *CN and V v France* point out that states can be in breach of their positive obligations under Article 4 of the ECHR if the national crimes meant to address abuses are vaguely framed and, thus, difficult to apply for the purposes of effective investigation and prosecution. I demonstrated that states which have directly incorporated the international law definition of human trafficking, without further defining the elements of the crime, risk breaching their obligations under Article 4 of the ECHR. As the judgment of *R v SK* suggests,

<sup>120</sup>Ministry of Justice Circular 2010/07 'Slavery, Servitude and Forced or Compulsory labour: Implementation of Section 71 of the Coroners and Justice Act 2009, Ministry of Justice Circular 2010/07', in P Chandran (ed), *Human Trafficking Handbook: Recognizing Trafficking and Modern-Day Slavery in the UK* (2011) App 11.

<sup>121</sup>Criminal Code Act 1995 (Cth) Div 271.

<sup>122</sup>*Ibid*, s 271.1.

<sup>123</sup>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 8 January 2001, 2237 UNTS 319.

the international definition of human trafficking is highly insecure as to the required elements and the required thresholds. I also demonstrated that states cannot simply reproduce the definitions of slavery, servitude and forced labour as utilised by the ECtHR for the purpose of establishing state responsibility when applying Article 4 of the ECHR. Finally, I submitted that states might be found in violation of their obligations under Article 4 not only when national crimes are obscurely defined, but also when they are chaotically distinguished. At this juncture, I found it useful to refer to the Australian criminal legislation. The latter is exemplary not only for its definitions of slavery, servitude, forced labour and human trafficking, but also for its well-articulated distinctions between the different crimes.

## **6 Conclusion**

It has been widely reported that the number of prosecutions and convictions for THB and for slavery, servitude and forced labour, where the latter have been specifically criminalised, is low. As a reaction, it has been suggested that the definitions of these crimes have to be expansively construed. These proposals ignore the basic criminal law precepts. Criminal law has to remain faithful to the principle of legal certainty and to the rights of the accused which ban expansive interpretations. It is human rights law which celebrates liberal interpretations of concepts for the purpose of holding states internationally responsible for their failures to protect individuals.

In this article, I demonstrated how the different interpretative standpoints of human rights law and criminal law apply in relation to the abuses of slavery, servitude, forced labour and THB. From the perspective of human rights law, when asking the question whether the state has failed to ensure the human rights of migrants not to be subjected to abuses, expansive interpretation of the concepts of slavery, servitude, forced labour and THB can be celebrated. This is intimately linked to the reasons for which we undertake the enquiry. We are interested in the overall situation of the victim and the abuses which he/she has suffered irrespective of who inflicted those abuses and what intention each specific perpetrator had in mind. In the context of human rights law, we are to inspect the broader circumstances of the victim's situation. The focus is on the overall conditions surrounding the victim, and whether these conditions amount to abuses falling within the scope of Article 4. In contrast, from the perspective of criminal law, the actions of the individual defendants need to be scrutinised.

It needs to be determined whether they correspond to the action elements of the respective crimes. When this latter enquiry is undertaken, the objective is establishment of individual criminal responsibility, and the restraints of the criminal law interpretative tools need to be taken seriously.

I also underscored that for the purposes of applying some of the positive human rights obligations as developed by the ECtHR, it is not even necessary to demonstrate that the migrant's circumstances qualify as slavery, servitude, forced labour or THB. For example, the triggering of the procedural limb of Article 4 (the positive obligation of investigating) requires reasonable suspicion that a migrant has been subjected to abuses.

Instead of proposing interpretations which sit at odds with the interpretative methodology applied in the realm of criminal law, I suggested that more efforts should be invested in understanding the implications from the positive human rights obligation of criminalising abuses falling within the material scope of Article 4. I focused on the following implications. First, Article 4 of the ECHR obliges states to specifically criminalise slavery, servitude and forced labour, an obligation which many states have failed to fulfil since the focus has been predominantly placed on the criminalisation of THB.<sup>124</sup> This leads to failures to address abuses where there are no elements of, *inter alia*, recruitment, transportation, transfer by means of deception/coercion.

Second, Article 4 of the ECHR obliges states to incorporate in their domestic criminal laws sufficiently clear definitions of crimes intended to address the abuses falling within the scope of Article 4. As demonstrated by *Siliadin* and *CN and V v France*, when crimes are vaguely framed, it is difficult to apply them for the purposes of effective investigation and prosecution. I argued that states cannot live up to the above mentioned obligation when they directly copy the international law definition of human trafficking. This definition was crafted in a legal context, namely transnational organised crime, with certain goals distinct from the precepts of national substantive criminal law and it is rife with ambiguities. Similarly, states cannot simply reproduce in their domestic criminal laws the definitions of slavery, servitude and forced labour as used by human rights law. Human rights law and the ECHR are applied for the purpose of establishing state responsibility. In contrast, national criminal law is applied for the purpose of establishing individual criminal responsibility. For the purpose

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<sup>124</sup>My arguments should not be interpreted to the effect that I am a proponent of the extension of criminalisation. Article 4 of the ECHR imposes additional positive obligations which extend to other areas of the national regulatory framework. These positive obligations are an object of my current work.

of convicting perpetrators, the requisite action elements of the crimes need to be specifically indicated in the national criminal legislation.

Finally, I submitted that states might be found in violation of their obligations under Article 4 of the ECHR not only when national crimes are obscurely defined, but also when they are haphazardly distinguished. The distinctions between the different crimes need to be well articulated to address the abuses falling within the ambit of Article 4. The Australian Criminal Code Act serves as a helpful model for this purpose.

## AN INTERPRETIVE TURN TO PRACTICE?

*Daniel Peat*<sup>\*</sup>*Matthew Windsor*<sup>†</sup>

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In August 2013, the Lauterpacht Centre for International Law and the Faculty of Law at the University of Cambridge hosted a conference on the theme *Interpretation in International Law*. As conveners of the conference, we were delighted with the response to our call for papers, and the creative insights brought to bear on a perennially popular subject in the theory and practice of public international law. The keynote speakers included Professor Philip Allott,<sup>1</sup> Judge Sir David Baragwanath,<sup>2</sup> Professor Andrea Bianchi,<sup>3</sup> and Associate Professor Ingo Venzke,<sup>4</sup> and sessions were ably chaired by the likes of Professor James Crawford AC SC<sup>5</sup> and Sir Michael Wood.<sup>6</sup> In their presentations and discussions, we urged the many distinguished academics and practitioners in attendance to consider who has or claims to have the authority to interpret in international law, and how actors within the international legal system advance these claims. Rather than concentrating on textual interpretation or doctrinal exposition, we considered that the identity of the interpreters and the epistemic communities involved in interpretation should be foregrounded.

The exceptional quality of the papers presented at the conference has given rise to two major scholarly outputs: an edited collection titled *Interpretation in International Law*, to be published by Oxford University Press in 2015;<sup>7</sup> and this symposium, focusing on interpretation in the context of international adjudication.

The proliferation of international courts and tribunals in recent times has given rise to a juridification of international relations, and has significantly al-

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<sup>7</sup> A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (2015, in press).

tered the landscape of global governance.<sup>8</sup> Although the process of judicialisation has been described as ‘uneven’,<sup>9</sup> international adjudication has had an increasing part to play in facilitating the peaceful settlement of disputes.<sup>10</sup> However, the international adjudication ‘progress narrative’ has resulted in a range of interpretive dilemmas, frequently discussed in terms of regime interaction and fragmentation.<sup>11</sup> The growth of international adjudication has given rise to a greater range of actors engaged in the battle for ‘semantic authority’ that characterises the practice of interpretation in international law.<sup>12</sup> Accordingly, it has become increasingly imperative to closely analyse the interpretive approaches adopted by different international courts and tribunals.<sup>13</sup> Given that international courts and tribunals inevitably ‘develop their own hermeneutics’,<sup>14</sup> a myopic focus on the rules of the Vienna Convention on the Law of Treaties is no longer sufficient to tackle the complexities of interpretation in international adjudication.

In the first two Articles of this symposium, interpretation in international adjudication is considered in the context of the Special Tribunal for Lebanon (STL), the Court of Justice of the European Union (CJEU) and the WTO Appellate Body by authors working within those institutions. If ‘international law is what international lawyers do and how they think’, as Martti Koskeniemi contends,<sup>15</sup> we are fortunate to be privy to such candid analyses of the interpretive inner-workings in the aforementioned adjudicatory bodies.

<sup>8</sup> See e.g., C Romano, K Alter & Y Shany (eds), *The Oxford Handbook of International Adjudication* (2013); K Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014); C Brown, *A Common Law of International Adjudication* (2007); A von Bogdandy & I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014, in press); and A Paulus, ‘International Adjudication’ in S Besson & J Tasioulas (eds), *The Philosophy of International Law* (2010) 207.

<sup>9</sup> B Kingsbury, ‘International courts: uneven judicialisation in global order’ in J Crawford & M Koskeniemi (eds), *The Cambridge Companion to International Law* (2012) 203, 211–15.

<sup>10</sup> J Klabbers, *International Law* (2013) 163.

<sup>11</sup> For differing perspectives, see UN International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006; P Webb, *International Judicial Integration and Fragmentation* (2013); A Nollkaemper & O Fauchald (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012); and M Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (2012).

<sup>12</sup> I Venzke, *How Interpretation Makes International Law* (2012) 62–4.

<sup>13</sup> See e.g., J Pauwelyn & M Elsig, ‘The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals’, in J Dunoff & M Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 445.

<sup>14</sup> Kingsbury, above n 9, 204.

<sup>15</sup> M Koskeniemi, ‘Between Commitment and Cynicism: Outline of a Theory of Law as Practice’, in *The Politics of International Law* (2011) 271, 293.

In an article based on his keynote address, Judge Sir David Baragwanath, the President of the STL, reflects on the challenges of interpretation in international adjudication across the common law/civil law divide. The ability to bridge these legal traditions assumes particular relevance in the STL, the controversial UN-sponsored international criminal tribunal tasked with applying the substantive criminal law of Lebanon.<sup>16</sup> Baragwanath, whose professional background is as a common law judge,<sup>17</sup> provides an illuminating discussion of the relationship between interpretation and international law-making, the tensions between interpretive certainty and flexibility, and the need for an interpretive test predicated on the 'highest standard of practical necessity'. He contends that the interpreter must examine legal issues 'through a periscope that lifts one's vision beyond the confines of our own particular experience', enabling one to select the path that most readily responds to the exigencies of the case at hand. Baragwanath argues that common law and civilian legal traditions share origins and aims that often help unite their approach across the interpretive divide; it is the adherence to these values that form the bedrock of the interpretive approach of the STL.

The following article deals with treaty interpretation in the CJEU and the WTO Appellate Body. Authored by Andreas Sennekamp and Isabelle Van Damme,<sup>18</sup> a Counsellor at the WTO Appellate Body Secretariat and *Référendaire* at the CJEU respectively, this contribution provides the reader with a valuable insider's perspective into the interpretive practices of the two institutions. The article begins by providing a general background to the adjudicatory practices of the CJEU and the Appellate Body, highlighting elements of the institutional context that shape the judicial function of each tribunal. The interpretive approaches of the CJEU and the Appellate Body are often juxtaposed in academic analysis; the former noted for its teleological approach and attachment to effectiveness, and the latter for adopting a strict textualist approach.<sup>19</sup> Moving away from a simplistic analysis that attributes this divergence to fundamentally

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<sup>16</sup> See generally A Alamuddin, N N Jurdi and D Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (2014).

<sup>17</sup> Prior to joining the STL, Judge Sir David Baragwanath was a Judge of the Court of Appeal of New Zealand.

<sup>18</sup> See also I van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009). See M Waibel, 'Demystifying the Art of Interpretation' (2011) 22 *EJIL* 571, 588: 'With this book at hand, there is no risk that the novice, much less the cognoscenti, will miss the forest for the trees'.

<sup>19</sup> See e.g., N Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20(3) *Fordham ILJ* 656, 664. Cf W Magnuson, 'WTO Jurisprudence and its Critiques: The Appellate Body's Anti-Constitutional Resistance' (2010) 51 *Harvard ILJ Online* 121, 124-29: '[The interpretive approach of the Appellate Body] is textualism run amok'.

different views regarding the rules of treaty interpretation, Sennekamp and Van Damme attempt to frame the interpretive practice of each adjudicatory body within their respective institutional contexts, arguing that legal and extra-legal constraints must be borne in mind when analysing the approaches that the CJEU and Appellate Body adopt. The linguistic and procedural practices of the adjudicatory body, as well as the character of the legal text, frame the approach to treaty interpretation that each body takes. The methodology of this article is a timely reminder that interpretation cannot, and should not, be divorced from the context in which it occurs.

The final three articles in the symposium all deal with interpretation in the context of international human rights adjudication.

Shai Dothan's article explores the phenomenon, and permissibility, of expansive interpretation by the European Court of Human Rights. Expansive interpretation refers to the interpretive techniques employed by the Court to expand states' human rights obligations beyond the obligations states undertook when ratifying the Convention. Although expansive interpretation has been challenged on the basis that it undermines the democratic decisions of signatory states, Dothan examines two contexts in which expansive interpretation is consistent with democratic theory: first, when the refusal by a small group of states to amend the Convention means that the democratic will of representative states is not fully reflected in the treaty text; and second, in situations where states misrepresent the interests of individuals affected by their human rights policies, including individuals who cannot vote and 'discrete and insular minorities'.<sup>20</sup> In such situations, Dothan argues that expansive interpretation is a necessary corrective to democratic failure and enhances the Court's normative legitimacy.<sup>21</sup> For Dothan, an expansive interpretive posture may have purchase in other international adjudication contexts, where states' treaty obligations do not represent the views of states and their citizens.

Jure Vidmar's article is a searching analysis of the interpretation of democracy in judicial practice as opposed to political theory.<sup>22</sup> It focuses on judicial interpretation of the so-called 'democratic rights' in a range of human rights treaties including the International Covenant on Civil and Political Rights, the European

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<sup>20</sup> *United States v Carolene Products Co*, 304 US 144 (1938).

<sup>21</sup> For further discussion of judicial tactics employed by international courts to maximize their reputational gains, see S Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (2015, in press).

<sup>22</sup> See also J Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (2013).

Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. Although the wording of the rights in each instrument is almost identical, international courts have developed different understandings of democracy through interpretation, in the absence of an authoritative definition. Vidmar demonstrates that judicial interpretation of the right to political participation has resulted in multi-party elections being prescribed as the preferred institutional setting in international human rights law. Indeed, some courts have limited the possibility of independent candidates participating outside the party politics framework. Vidmar also canvasses a more substantive conception of democracy that is emerging through judicial interpretation of the 'necessary in a democratic society' limitation clause, whereby exercise of the democratic rights is limited in order to protect democracy. Thus, the article cogently highlights the role of international adjudication in interpreting legal obligations generated by the principle of democracy.

In the final article of the symposium, Diane Desierto and Colin Gillespie address the interpretation of the International Covenant on Economic, Social and Cultural Rights (*ICESCR*) by a pluralist community of institutional interpreters including the Committee on Economic, Social and Cultural Rights, and a range of international and national courts and tribunals. Desierto and Gillespie articulate an interpretive paradigm for the authoritative determination of international responsibility for violations of *ICESCR*. They focus on normative justiciability (the precision of *ICESCR* rights and amenability of application by judicial or quasi-judicial bodies) and institutional justiciability (the competence of a tribunal to adjudicate or assess violations of Covenant rights). In terms of normative justiciability, the authors foreground the 'minimum core content' of *ICESCR* obligations that are jointly determined by each State Party with the Committee upon accession, in conjunction with the principles of non-discrimination, non-retrogression and progressive realisation. Regarding institutional justiciability, the authors argue that the proliferation of authoritative interpreters explains the diversity of forms of relief granted for *ICESCR* violations. Desierto and Gillespie's comprehensive analysis of interpretive practice under *ICESCR* is both timely and instructive, in the context of a symposium on international adjudication: timely, given the recent quasi-adjudicative competences conferred on the Committee under the *ICESCR*'s Optional Protocol;<sup>23</sup> and instructive, in its

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<sup>23</sup> The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force on 5 May 2013. See also D Desierto & C Gillespie, 'Evolutive Interpretation

salutary reminder that the interpretation of international law norms is not the exclusive domain of international adjudication.<sup>24</sup>

The majority of the articles in the Symposium demonstrate the analytic value of a ‘turn to practice’ when considering interpretation in international adjudication.<sup>25</sup> The extensive practical experience of Baragwanath, Sennekamp and Van Damme is brought to bear in their rich discussion of interpretation in the STL, the WTO Appellate Body and the CJEU. Meanwhile, Vidmar, Desierto and Gillespie orient their discussion around a detailed consideration of interpretive practice. However, the value of theory in the context of interpretation in international law has not diminished, as evidenced by our forthcoming co-edited book on the subject.<sup>26</sup> As Anne Peters has argued, international legal scholarship can ‘support practice by pursuing a *via media* between infertile alienation from and fetishism with practice.’<sup>27</sup> Dothan’s chapter exemplifies the enduring virtue of doctrinal analysis complemented by theoretical research, in his transposition of democratic theory from the domestic constitutional context to a consideration of the appropriate interpretive posture of the European Court of Human Rights.

The *Interpretation in International Law* conference and this symposium would not have been possible without the help of many. We thank the symposium authors for their articles; the other speakers and session chairs at the conference; our sponsors including Oxford University Press, Cambridge University Press, Hart Publishing, Ashgate and Gonville & Caius College; and the CJICL editorial team for their assistance.

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and Subsequent Practice: Interpretive Communities and Processes in the Optional Protocol to the ICESCR’ (2013) 73 *ZaöRV* 549.

<sup>24</sup> J Dunoff & M Pollack, ‘Reviewing Two Decades of IL/IR Scholarship: What We’ve Learned, What’s Next’ in J Dunoff & M Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 626, 635–6.

<sup>25</sup> Johns discusses the ‘turn to practice’ as follows: ‘an orientation towards knowledge practices is associated less with analysis of inputs and outputs or causes and effects, than with immanent, critical investigation of the patterned activities and often mundane modes of work in which social knowledge-makers engage’: F Johns, *Non-Legality in International Law* (2013) 23.

<sup>26</sup> Bianchi, Peat & Windsor, above n 7.

<sup>27</sup> A Peters, ‘Realizing Utopia as a Scholarly Endeavour’ (2013) 24 *EJIL* 533, 533.

# THE INTERPRETATIVE CHALLENGES OF INTERNATIONAL ADJUDICATION ACROSS THE COMMON LAW/CIVIL LAW DIVIDE

Sir David Baragwanath\*

## Abstract

Interpretation is viewed, and the relationship between the interpretation and creation of international law is examined, from the standpoint of international adjudication across the common law/civil law divide. In cases where there is no settled principle, 'the highest standard of practical necessity' is proposed as the requirement for innovation. The jurisprudence of the Special Tribunal for Lebanon is considered in that light.

## Keywords

Interpretation, adjudication, the Special Tribunal for Lebanon, common law, civil law

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We exist in order to win some measure of justice for the victims of massive crimes.<sup>1</sup>

## 1 Introduction

Like disputes among states, criminality having serious consequences for humanity is the kind of problem that requires and has increasingly given rise to international law. Interpretation in international law requires a clear understanding of the issues at stake, the roles of decision-makers, the options available to them, and their consequences. This article examines the contributions to that topic of the common law and the civil law traditions, drawing upon a common lawyer's experience of the work of the Special Tribunal for Lebanon (STL), where both legal traditions have to work side by side to find common ground. It requires me to recall John Austin's remark that, for most of us, '[...] it is only a few systems with which it is possible to become acquainted, even imperfectly.'<sup>2</sup>

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<sup>1</sup> J Stewart, Deputy Prosecutor of the International Criminal Court, 'Ceremony for the Solemn Undertaking of the Deputy Prosecutor' (The Hague, 8 March 2013) <[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/pr879/Solemn\\_Undertaking\\_DP\\_08032013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/pr879/Solemn_Undertaking_DP_08032013.pdf)> [accessed 10 February 2014].

<sup>2</sup> J Austin, 'The Uses of the Study of Jurisprudence', in H L A Hart (ed), *The Province of Jurisprudence Determined; and, the Uses of the Study of Jurisprudence* (1954) 363, 373.

For reasons of unfamiliarity I will mention only in passing other great legal systems, such as those of Islam. But I underline Austin's point by contrasting the blinkered approach of a famous common law judge, displayed both in the International Law Reports<sup>3</sup> and in a standard Arab arbitration text,<sup>4</sup> and the wisdom of Guy Canivet, a distinguished French judge, who opened the legal year with the modest aphorism, '*Il est vrai que nous ne rendons justice que les mains tremblantes.*'<sup>5</sup>

The advice of President Canivet is of special import in interpreting international law, because it is not simply a *Ding an sich*—Kant's 'thing-in-itself', a fixed object frozen in time. While there is much settled international law, it is in a state of continuous development. This means that an interpreter can contribute to that process, for better or worse.

The first part of this article discusses legal principles of interpretation in international law. It begins with the relationship between interpretation and creation of international law. It claims that interpretation is likely to be a form of law-making and that judges must accept both that in interpreting they may have to make law; and that to do so they must identify and apply sound principles,

<sup>3</sup> *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144, 149 (Lord Asquith of Bishopstone, Umpire):

If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments [...].

Cf *Musawi v R E International (UK) Ltd* [2007] EWHC Ch 2981 (Mr Justice Richards) para 82:

It is [...] common ground that the arbitrator was required by agreement to apply to the subject matter of the dispute and its resolution the principles of Shia Sharia law. This was an agreement which the parties were entitled to make under section 46(1)(b) of the Arbitration Act 1996: see *Halpern v Halpern* at para 36, per Waller LJ and *Dicey, Morris & Collins: Conflict of Law* (14<sup>th</sup> ed.) at 16-050 to 16-053).

<sup>4</sup> The Arab concepts of arbitration, stretching back to the Pre-Islamic period and recognised by the Koran, are discussed in A H El Ahdab and J El Ahdab, *Arbitration with the Arab Countries* (2011) 5–44.

<sup>5</sup> G Canivet, *Audience solennelle du 6 janvier 2006 – Discours de Guy Canivet, Premier président de la Cour de cassation* (Paris, 8 January 2006) <[http://www.courdecassation.fr/IMG/File/pdf\\_2006/audience\\_solennelle\\_2006\\_discours\\_pp.pdf](http://www.courdecassation.fr/IMG/File/pdf_2006/audience_solennelle_2006_discours_pp.pdf)> [accessed 10 February 2014].

which are then discussed. It moves to identify two tensions, one between certainty and flexibility, the other between the common law and the civil law. It argues that international judges, coming from various domestic jurisdictions, should employ a metaphorical periscope that rises above the idiosyncrasies of our past experience and allows us to adopt an interpretation complying either with settled principle or, where that is lacking, ‘the highest standard of practical necessity’, a test which I contend is supported by the greatest jurists.

The second part turns to discuss the characteristics of the STL and several of its decisions, focusing on the civil law/common law contributions to the result.<sup>6</sup> The role of interpretation is especially important in the STL—a unique tribunal which must create its own rules and applies national and international law. Because the experience of our Chambers and bar includes the common law tradition as well as that of Lebanon and other civil law jurisdictions, we have had to work together to resolve tensions between the two which our cases have thrown up and take full advantage of their respective contributions.

## **2 Interpretation in International Law**

To address the principles underlying interpretation in international law candidly and practically, four issues are in my mind essential. Where did international law come from, and what is the role of judges in this process? What are the particular contributions of civil law? What about the common law? What now are the interpretive challenges for international tribunals sitting at the interface of the challenges? I will then discuss two sets of tensions affecting, in my view, the work of international judiciaries in their quest for interpretation of the law.

### **2.1 Principles of interpretation in international law**

#### **2.1.1 *Where does international law come from?***

Interpretation is so closely linked with law-making that it may be seen as a form of the latter. So I begin with that topic which, *a fortiori*, must govern interpretation.

International law notoriously lacks any general legislature, except to the extent that multipartite treaties, including the UN Charter, and resolutions of

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<sup>6</sup> That discussion is limited by my role as Judge of the Special Tribunal for Lebanon’s Appeals Chamber, and the convention that judges do not elaborate reasons for their decisions.

the Security Council, have that effect.<sup>7</sup> It is largely that lack which imposes added responsibility on the judges and requires interpretation to be closely linked with the creation of international law.<sup>8</sup>

The notion that judges can act as makers of international law has been viewed with reticence, perhaps even more than has been the case with domestic law. After all, where could judges derive authority to pronounce on the law of nations, when nations guard jealously their prerogative to accept new rules and new responsibilities? Yet if no settled custom or other source of existing law is ascertainable, to decide the case the judges must somehow secure a law to apply. And if no law is to be found—in legal vernacular, if *non liquet* is not an option—law simply must be created. So in my view, it must be recognised that a measure of law creation is simply inherent in the judicial function: those who create judicial decision-makers perforce create law-makers, and must be aware of this.

What such judges create for the purpose of resolving a particular case may of course be rejected by later courts. But if accepted it will be legitimated as new law on the uncontroversial basis of becoming a new custom.<sup>9</sup>

Heretical as some may view that conclusion, the alternative is even less attractive. When Topsy was asked by Ophelia about heaven, and who made her, she answered:

Nobody as I knows on [...] I spect I grow'd. Don't think nobody never made me.<sup>10</sup>

Judges have always been reluctant to acknowledge that they actually make law. I suggest that this is because it would be seen as usurpation of authority never conferred upon them. So more soothing language than 'law-making' is normally used. Sir Hersch Lauterpacht spoke not of making but of 'clarifying and

<sup>7</sup> The debate on this issue has been one of the hallmarks of the past decade. See among others S Talmon, 'The Security Council as World Legislature' (2005) 98 *AJIL* 175.

<sup>8</sup> As recognised by I Venzke, *How Interpretation Makes International Law* (2012). See also S Darcy and J Powderly, *Judicial Creativity at the International Criminal Tribunals* (2010).

<sup>9</sup> This 'dynamic' view of custom is discussed in V Lowe, *International Law* (2007) 37; see also T Treves, 'Customary International Law', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2006) 937. For an application of this theory to the realm of international criminal tribunals and their interactions with States, see G Acquaviva, 'Non-State Actors from the Perspective of International Criminal Tribunals', in J d'Aspremont (ed), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011) 185, especially at 186–7.

<sup>10</sup> Harriet Beecher Stowe, *Uncle Tom's Cabin*, vol II, chapter XX, reproduced in E Ammons (ed), *Uncle Tom's Cabin* (2<sup>nd</sup> ed, 2010) 221.

developing' international law; hence the title of *The Development of International Law by the International Court*.<sup>11</sup>

In modern democracies, judges are the servants of the community, not their masters, and must account publicly for their decisions.<sup>12</sup> Nowadays candour is recognised as essential to public confidence in the judicial process and judges no longer pretend that every legal decision is dictated by some pre-existing rule. That indeed is my topic, which may be put as follows: what compass should direct a judge to steer left or right when none currently exists? Expelling the metaphor, why, and by what criteria, does a judge create new law?<sup>13</sup>

Vaughan Lowe argues that the system of international law is now substantially complete.<sup>14</sup> That depends on the criteria. Certainly there is an immense and sophisticated set of norms by which a myriad of international transactions are regulated every day. The *non liquet* principle is generally, if over-simply, treated as requiring a court to provide an answer to any question posed,<sup>15</sup> even though the reach of international criminal law, for example, is still at an early stage. So international criminal tribunals are constantly forced to engage in this creative aspect of interpretation. But the interpretation of international law turns not only on existing principles but on how its future development should be directed. What is it that is to be developed and how should that be done? Hall considered that:

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree

<sup>11</sup> H Lauterpacht, *The Development of International Law by the International Court* (1982) 156, concluding that 'judicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable'. See also A Boyle and C Chinkin, *The Making of International Law* (2007) 268.

<sup>12</sup> A Bianchi & A Peters (eds), *Transparency in International Law* (2013). See further *Kennedy v Charity Commissioner* [2014] UKSC 20, paras 8, 112 and 132.

<sup>13</sup> In 'The Existential Function of Interpretation in International Law' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (2015, in press), D Hollis cites H L A Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) 204: 'the open texture of law leaves a vast field for creative activity, which some call legislative. Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind arbitrary choice, or 'mechanical' deduction from rules with predetermined meaning'. Hollis also cites J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009) 224, noting how interpretation straddles the divide between the identification of existing laws and the creation of new ones.

<sup>14</sup> V Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M Byers (ed), *The Role of Law in International Politics* (2001) 207, 207ff.

<sup>15</sup> J Stone, 'Non liquet and the Function of Law in the International Community' (1959) 35 *BYIL* 124. See also Hollis, above n 13.

to that binding a conscientious person to obey the laws of his country[...]<sup>16</sup>

While that provides a useful element of a general test of existing international law—the *lex lata*—more needs to be said about the evolution of both the test and the creation of law—the *lex ferenda*.<sup>17</sup> Brierly's contribution, classically summarised in Sir Hersch Lauterpacht's 'Appreciation' that introduces *The Basis of Obligation in International Law* (1958),<sup>18</sup> is needed to complete it. He emphasised that:

[...] as the law exists for the sake of the individual living in society, its final appeal must be directed to the individual and not to a non-existing collective conscience.<sup>19</sup>

What sorts of development will meet the policy of that composite standard? One bedrock of international law, endorsed by Article 38(1)(b) of the Statute of the International Court of Justice, is of course custom accepted by states. Yet to seek what States customarily regard as binding as a litmus test for whether international law exists can be unhelpful when the point has never been raised with them (and when to do so is unfeasible). The same may be said of the other Art 38 criteria,<sup>20</sup> which all presuppose some existing answer. Where that is lacking the adjudicator must find a further practical and principled test. An answer must be given even if the decision, while determining the instant case, can only be a provisional statement of international law until and unless it has indeed been authoritatively accepted. Such acceptance may indeed be by customary practice or by another Article 38 source, such as a decision of the International Court of Justice. I return shortly to propose '*the highest standard of practical necessity*' as the appropriate test.

In employing such a test, different contexts may require different treatment. For example, in international law, as in private law, particular clarity and

<sup>16</sup> W Hall, *A Treatise of International Law* (1924) 1.

<sup>17</sup> Cf H Thirlway, 'Reflections on *lex ferenda*' (2001) 32 *NYIL* 3.

<sup>18</sup> J Brierly, *The Basis of Obligation in International Law* (1958).

<sup>19</sup> *Ibid.*, xix. Likewise the concept is picked up in the Preamble to the UN Charter: 'to reaffirm faith in human rights, in the dignity and worth of the human person, in the equal rights of men and women [...]':

<sup>20</sup> International conventions establishing rules expressly recognised by the contesting States, general principles of law recognised by civilized nations and, as subordinate means, judicial decisions and the teachings of highly qualified publicists.

precision is required in relation to status and property. Then come the requirements of commerce, both domestic and international, which must blend maximum certainty with some flexibility, as is seen in the evolving jurisprudence on bilateral investment treaties.<sup>21</sup> By contrast, human rights norms, which are rapidly developing in domestic law, require the regular updating of international standards—and, to a certain extent, vice-versa, in that international standards are often implemented at the domestic level. More generally, the field of international law is dynamic, as is required by the dynamism of the issues for which it is needed. These considerations should receive effect in the jurisprudence, as they do to a degree.

### 2.1.2 Contributions of the Civil Law

While in domestic law the common law tradition may arguably have somewhat greater flexibility than the Romano-Germanic tradition, civil lawyers have created both international law's foundations and much of its modern structure. Without offering more than examples, one might mention Bartolus da Sassoferrato (1313-1357), the 14<sup>th</sup> century Italian who mastered Roman law and wrote both of conflict of laws and, for the first time, of entities '*superiorem non recognoscentes*'—independent of both Emperor and Pope;<sup>22</sup> Alberico Gentili, also Italian, who made a transition to Oxford and whose *De Jure Belli* made skilful use of civil law concepts and the actual practice of international law;<sup>23</sup> and of course Hugo de Groot—Grotius—the civil lawyer and great innovator whose works on the law of war and of freedom of the sea are no doubt among the reasons why the Statute of the International Court of Justice includes among the sources of international law 'the teachings of the most highly qualified publicists of the various nations'.<sup>24</sup> Another significant figure is the Spanish theologian Francisco de Vitoria. His *De Indis* is a mixture of brilliant innovation and disastrous conservatism: creating the modern colonial law—that usages of colonized people (indigenous peoples of South America) are to be given legal force in the new society—yet with

<sup>21</sup> See B Kingsbury and S Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' in A J van den Berg (ed), *Fifty Years of the New York Convention* (2009) 5, 10. Consider also the evolution of private law contractual principles in international developments, as proposed in *Yam Seng Pte Limited v International Trade Corporation* [2013] 1 All ER (Comm) 1321 (Leggatt J).

<sup>22</sup> See, among others, L Gross, *Essays on International Law and Organization* (1984) 12–13.

<sup>23</sup> A Gentili, *De jure belli libri tres* (first published in 1589 as *De Jure Belli Commentationes Tres*).

<sup>24</sup> Statute of the International Court of Justice, Art 38(1)(d) (*ICJ Statute*).

the literally fatal reservation of their accepting the colonists' religion.<sup>25</sup>

Antonio Cassese, whose charming *Five Masters of International Law* contains interviews with two common lawyers, Jennings and Henkin, and three civilians, Dupuy, Jiménez de Aréchaga, and Schachter,<sup>26</sup> may himself prove to have been a Grotius of our time, an innovator who wrenched old law into a modern form. *Tadić* in the ICTY,<sup>27</sup> with its extension of Grotius' law of war to civil war, is among Cassese's many notable contributions. Whether the same may be said of his role in seeking to systematise the international law of terrorism remains to be seen.<sup>28</sup>

### 2.1.3 Contributions of the Common Law

At this stage, I touch briefly on the common law, repeating my contention that interpretation is closely linked with, and may be seen as, a form of law-making. Here, a fundamental point is that the whole of the common law, like a great deal of international law, is made by judges. In both the first generation of international criminal courts at Nuremburg and Tokyo and the second generation, beginning with the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>29</sup> common law judges and counsel have played a prominent part. The STL by contrast deals not with the international crimes of genocide, war crimes and crimes against humanity but the domestic criminal law of a civil law State. So it is appropriate that there is greater emphasis on aspects of the practice of civil law jurisdictions, a topic to which I will return. Such a development is a novel expression of the evolving responsibility to protect<sup>30</sup> which may be seen as initiating a third generation of international criminal courts.<sup>31</sup>

<sup>25</sup> F de Vitoria, *Relectio de Indis* (1539: tr J P Bate in E Nys (ed), *Classics of International Law*, 1917).

<sup>26</sup> A Cassese, *Five Masters of International Law* (2011).

<sup>27</sup> *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) (*Prosecutor v Tadić*).

<sup>28</sup> See *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011). Cf *R v Gul* [2013] 3 WLR 1207.

<sup>29</sup> See also the International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, Extraordinary Chambers of the Courts of Cambodia and the International Criminal Court.

<sup>30</sup> See e.g., A Orford, 'Humanitarian Intervention to the Responsibility to Protect' (Speech delivered as the James Crawford Lecture, University of Adelaide, 11 September 2013).

<sup>31</sup> Other options include complementing the individual efforts of UN Member States and the work of the Security Council Counter-Terrorism Committee and its Executive Directorate with an international terrorism tribunal.

The common law judges assumed the power to make law in order to defeat infringement of their notion of injustice. Their influence is seen in the structure and practice of much of modern international criminal law. An example in tribunals such as the ICTY, where there is no civil law *dossier*, is the conferral of the function of questioning witnesses on counsel.<sup>32</sup> The internationalists Brierly and Lauterpacht (who is claimed by civilian and common lawyers alike) have been identified as of special influence in judicial law-making.<sup>33</sup>

#### 2.1.4 *Current Challenges*

The challenges currently facing international adjudication, and thus interpretation, is the core issue in the present article. The credibility of each tribunal requires a wise blend of two elements—applying the law and doing justice.

A common lawyer must steer between the rock of outmoded precedent and the whirlpool of uncertainty. Equally, a civil law judge of an international tribunal, aided by a lesser concern with *stare decisis*, may perhaps bear in mind that the absence of any legislature might warrant a somewhat more expansive approach to judicial law-making than is familiar in domestic law. I will come back to the different tendencies. But it is as well to begin with fundamental principle.

Recognising the wisdom of the past, Newton acknowledged that he stood on the shoulders of others.<sup>34</sup> In law, there is a special importance in maintaining stability, which is imperiled by any interpreter who claims to know best, thus wreaking havoc upon legal certainty. Yet in interpretation, there is also a need to be alert to other considerations. The historian Marci Shore has recently written:

[...] all meanings are fragile, temporary, open to change—but for all that no less deep and binding and real [...] meaning is possible, but not above and outside ourselves. Everything around us is not found by us, but rather is, in a certain measure, our creation.<sup>35</sup>

<sup>32</sup> Other criminal tribunals of international character have a more flexible approach. The Statute and procedures of the Extraordinary Chambers of the Courts of Cambodia and of the STL seek to instil a civil law judge-led process as being appropriate for a tribunal responsible for doing justice in a local context suffused with French (and therefore civil) legal culture.

<sup>33</sup> A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) 2–3.

<sup>34</sup> Thomas McSweeney attributes the concept to Bernard of Chartres: T McSweeney, 'English Judges and Roman Jurists: the civilian learning behind England's first case law' (2012) 84 *Temple LR* 827, 846. See John of Salisbury, *The Metalogicon of John of Salisbury: a Twelfth Century Defense of the Verbal and Logical Arts of the Trivium* (c. 1159: tr D McGarry, 1955) Book II Chapter 9 93–95.

<sup>35</sup> M Shore, 'Out of the desert – A Heidegger for Poland', London, *The Times Literary Supplement*, 2 August 2013, 15, referring to the Polish philosopher Krzysztof Michalski.

In legal interpretation, when should stability surrender to the change involved in creation? As a practical starting point in today's world, of many religions or none, I am attracted by the standard of *practical necessity* which, stripped of the religious flavour of Grotius' term 'moral', underlies the formulation he adopts:

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or *moral necessity*; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God [...] The law of nature, again, is unchangeable—even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; for things of which this is said are spoken only, having no sense corresponding with reality and being mutually contradictory. Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil.<sup>36</sup>

Ostensibly referring to law as derived from God, inherent in Grotius' argument was that, whatever else God may seek to do, the law is what conforms with a rational evaluation of practical necessity:

[i]f a creditor gives a receipt for that which I owe him, I am no longer bound to pay him, not because the law of nature has ceased to enjoin upon me that I must pay what I owe, but because that which I was owing has ceased to be owed.<sup>37</sup>

This test of practical necessity, reminiscent of and conceivably related to Cicero's 'right reason',<sup>38</sup> also evokes techniques of the modern common law and, so far as my experience extends, the civil law as to both the creation and interpretation of law.

<sup>36</sup> H Grotius, *On the Law of War and Peace* (1625: tr F Kelsey, 1964) Book I, Chapter 1 (emphasis added).

<sup>37</sup> Ibid.

<sup>38</sup> Cicero, *De Legibus* (tr C Yonge, 1856) Book I, Chapter XV: 'For there is but one essential justice which cements society, and one law which establishes this justice. *This law is right reason*, which is the true rule of all commandments and prohibitions. Whoever neglects this law, whether written or unwritten, is necessarily unjust and wicked' (emphasis added).

The issue is, of course, whose opinion is to govern. There is the problem common to adjudication, cogently identified by Lord Hailsham LC,<sup>39</sup> that two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts. It is therefore not enough for a judge who ventures to turn law-maker simply to act ‘reasonably’. He or she must do better, abandoning subjective self-confidence in favour of President Canivet’s trembling hands, and adding the adjective ‘highest’ to the standard of ‘practical necessity’.

Judges are endlessly creative. Take, by way of example, the judicial device of *non liquet* already mentioned and to which I return: lifting the Latin of the Roman term for ‘not proven’<sup>40</sup> across to the proposition that judges must find a rule to determine every issue argued, employed by judges from both common law and civil law backgrounds. But instant creation of new law for the purposes of the case is permissible only if meeting ‘the highest test of practical necessity’, a proposal to which I will return. If generally accepted, new international law will have resulted.

## 2.2 Two sets of tensions: certainty and flexibility and the common law/civil law divide

### 2.2.1 Certainty and flexibility

I have mentioned that international law is constantly developing. Fundamental to the process of its creation and interpretation are two overlapping tensions. The first is between certainty and flexibility in international law. It parallels the competing elements of the English judicial oath, adopted widely in other jurisdictions: ‘to do right to all manner of people after the laws and usages’ of a particular state.<sup>41</sup> A *law* may be certain but unjust; to do *right* may require flexibility and so detract from certainty. The essayist Michel de Montaigne, a profound and balanced legal thinker, offered a conservative expression of the point:

[i]t [seems to me] most iniquitous to wish to submit immovable public regulations and observances to the instability of private ideas (private reasoning having jurisdiction only in private matters) [...] (even though human reason is far more involved in civil law [than

<sup>39</sup> *In re W (an infant)* [1971] AC 682, 700.

<sup>40</sup> Cicero, *The Orations of Marcus Tullius Cicero* (tr C Yonge, 1856) 28.76 (*pro cluentio*).

<sup>41</sup> Promissory Oaths Act 1868, 31 & 32 Vict, ch 72, s 4.

in the case of divine ordinances], the Law is the sovereign judge of its judges; judicial discretion is limited to explaining and extending accepted usage: it cannot deflect it or make innovations).<sup>42</sup>

Yet he acknowledged that:

[...] Fortune [...] sometimes presents us with a need so pressing that the laws simply must find room for it.<sup>43</sup>

Montaigne went on to ask:

[...] are there any [opinions] so strange that habit has not planted them and established them by laws [...]? And that ancient exclamation is totally right: Is it not a disgrace that the natural philosopher, that observer and tracker of Nature, should seek evidence of the truth from minds stupefied by habit?<sup>44</sup>

Reconciling tensions between inconsistent values within the context of any case is a familiar and constant challenge to the judge. It is often impossible to simply say that one predominates, certainly not when the two components of the judicial oath are in conflict. For example, in *Douglas v Hello! Limited*, the Court of Appeal of England and Wales was unable to assert *a priori* that the right to privacy was greater than the right to freedom of expression. As Sedley LJ observed:

Neither element is a trump card. [...] the principles of legality and proportionality [...] constitute the mechanism, by which the court reaches its conclusion on countervailing or qualified rights.<sup>45</sup>

In short, the judge must evaluate which decision in the particular circumstances does better justice, bearing all relevant considerations in mind. That requires an examination of the factual and legal context, including high principle and any particular facet or analogy, in order to find the best answer. Regular differences among judges of final appellate courts evidence the difficulty of the task. But evaluation is part of the judge's function. Indeed the challenge of reconciling change and certainty in international criminal law is a *leitmotif* of the discussion of STL decisions in Part III.

<sup>42</sup> M de Montaigne, 'On habit: and on never easily changing a traditional law', in *The Complete Essays* (1580: tr M Screech, 1993) 137.

<sup>43</sup> *Ibid*, 138.

<sup>44</sup> *Ibid*, 125. Citing Cicero, *De Natura Deorum*, 1, xxx, 83.

<sup>45</sup> [2001] QB 967, para 36.

### 2.2.2 *The Common Law/Civil Law Divide*

The other tension is between the respective traditions of the civil law and the common law. In domestic law, their 'divide' has long been debated. I refer to the civil law as the legal systems generally known as 'Romano-Germanic', which are based on a framework of written laws of which Justinian's Code, Digest and Institutes, contributed to by the great University of Beirut, provided the classic example. This framework of written laws was adopted in many European, African, Asian, South American and Middle Eastern States, including Lebanon. I refer to common law as those legal systems derived from the decisions of judges in England and extended more recently to its former colonies in North America, Africa, Asia and Oceania.<sup>46</sup>

Montesquieu saw civil law judges as mere robots mouthing the words of the lawmaker:

[...] *les juges de la nation ne sont [...] que la bouche, qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent pas modérer ni la force, ni la rigueur.*<sup>47</sup>

A similar opinion is expressed in Article 5 of the 1804 Code Napoléon, perpetuated in the modern Code Civil:

Il est défendu aux juges de prononcer, par voie de disposition général et réglementaire, sur les causes qui leur sont soumises.

This approach had been seen in the process of *référé législatif* prescribed by the Constitution of 1791, requiring judges to refer questions of interpretation to the legislature. Although the process was terminated in 1837, its influence was seen in the French exegetic school of legal interpretation which became prominent in the nineteenth century. The entire law was deemed to be contained in the statutory codes and a careful study of the text was regarded as sufficient to reveal the solution in any case.<sup>48</sup>

Moving to the present, Professor Roger Perrot suggests:

<sup>46</sup> See for instance, in international criminal law, the recent L Carter & F Pocar (eds), *International Criminal Procedure—the Interface of Civil Law and Common Law Legal Systems* (2013).

<sup>47</sup> *De l'Esprit des Lois*, Livre XI/VI (1748) 301.

<sup>48</sup> For references see C Germain 'Approaches to statutory interpretation and legislative history in France' (2003) 13 *Duke Journal of Comparative International Law* 195, 197–8.

*Même s'il a l'intime conviction que la Loi est injuste, le Juge peut suggérer des réformes, le Juge peut les proposer, il peut oeuvrer pour qu'elles aboutissent; mais aussi longtemps que la Loi existe il ne peut que l'appliquer, à moins de se placer dans un schisme qui ruinerait sa propre autorité.<sup>49</sup>*

But he continues:

*Mais, l'ardeur combative du magistrat peut légitimement s'exercer dans le domaine qui lui est propre et qui est celui de l'interprétation [...] Les exemples sont légion de textes qui sont sortis de l'épreuve judiciaire, totalement métamorphosés.<sup>50</sup>*

Perrot cites Président Bellet, the President of the *Cour de cassation*:

*[...] complétant le travail du législateur, le juge participe à l'élaboration des règles qui sont destinées à régir la cité et fait 'lato sensu' une certaine politique.<sup>51</sup>*

Perrot also cites Professeur Weill:

*Si le législateur s'abstient de modifier le droit quand la société a besoin qu'il soit modifié, il s'en remet implicitement aux Tribunaux, du soin de faire les changements nécessaires.<sup>52</sup>*

The nuances of these analyses go far beyond Montesquieu's caricature and update Montaigne.

The teleological approach adopted by the STL, based on 'the search for the purpose and object of a rule with a view to bringing to fruition as much as possible the potential of the rule',<sup>53</sup> is said to be used mostly by the highest courts—the *Cour de cassation* and the *Conseil d'État*—rather than by lower courts.<sup>54</sup>

<sup>49</sup> M Perrot, 'Le rôle du juge dans la société moderne', *Gazette du Palais*, 12 February 1997, Présenté aux entretiens de Nanterre, septembre 1976, organisés par l'A.N.A., 94.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> A Weill, *Droit Civil: Introduction Générale* (1973) 167.

<sup>53</sup> *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 29.

<sup>54</sup> Germain, above n 48, 202.

Common law judges are less reluctant to create law through adjudication. In *Fairchild v Glenhaven Funeral Services Ltd*,<sup>55</sup> sufferers from the pernicious industrial disease asbestosis, which can take about 30 years to display symptoms, had been unable to show which of several periods of employment by different firms, each exposing them to asbestos, had caused their condition. In the lower courts, which applied a strict settled rule that a plaintiff must prove causation, they lost their case. But the final English court allowed the workers' appeal. Lord Bingham applied two principles employed by common law judges in making law. The first is a test of fairness of result, and the second is the precedent of earlier authority—here a general principle stated over two centuries earlier and applied more recently in another common law jurisdiction:

I do not consider that the House [of Lords] is acting contrary to principle in reviewing the applicability of the conventional test of causation to cases such as the present. Indeed, [1] *it would seem to me contrary to principle to insist on application of a rule which appeared, if it did, to yield unfair results.* And I think it salutary to bear in mind [2] Lord Mansfield's aphorism in *Blatch v Archer* (1774) 1 Cowp 63, 65, quoted with approval by the Supreme Court of Canada in *Snell v Farrell* [1990] 2 SCR 311, 328: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."<sup>56</sup>

It took some common law judges until 1972 to admit categorically that they have always made law,<sup>57</sup> and indeed have created the whole of the common law. But others had acknowledged their role much earlier with both candour and pride. In 1885, declining to make a book seller liable for a defamation contained in a book offered for sale in his shop, Lord Esher MR confidently stated:

The question does not depend on a statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England.<sup>58</sup>

<sup>55</sup> [2003] 1 AC 32. In a few states, United States judges have gone further. See M Geistfeld, 'The Doctrinal Unity of Alternative Liability and Market-Share Liability' (2006) 155 *U Pa LR* 447.

<sup>56</sup> *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, para 13 (emphasis added).

<sup>57</sup> Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22.

<sup>58</sup> *Emmens v Pottle* (1885) 16 QBD 354, 357–8.

In explaining why the media should have access to documents referred to in open court, Lord Toulson extended candour to enthusiasm:

I base my decision on the common law principle of open justice. In reaching it I am fortified by the common theme of the judgments in other common law countries [...] Collectively they are strong persuasive authority. [...] The development of the common law did not come to an end on the passing of the Human Rights Act. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the development of the common law elsewhere.<sup>59</sup>

The common law/civil law divide does appear to have some substance. For instance, in the private international law sphere of domestic decision-making, a distinct difference concerning judicial co-operation in cross-border insolvency may be noted. Common law judges have readily adopted protocols for cross-border judicial cooperation, pioneered by Hoffman J in England and Brozman J in New York in *In re Maxwell Communications Corp.*<sup>60</sup> At least some civil law judges have felt more reluctant to authorise such transactions unless their State has adopted the UNCITRAL Model Law on Cross-Border Insolvency.<sup>61</sup>

<sup>59</sup> *R (Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2013] QB 618, para 88. See also *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23; *Saunders v Houghton* [2010] 3 NZLR 331; *Kennedy v Charity Commission* [1914] UKSC 20, paras 46 and 133.

<sup>60</sup> *Barclays Bank v Homan* [1993] BCLC 680; *In re Maxwell Communications Corp.*, 93 F.3d 1036 (2d Cir, 1996); J Westbrook, 'The Lessons of Maxwell Communication' (1996) 64 *Fordham Law Report* 2531.

<sup>61</sup> Personal comment from a distinguished South American appellate judge. See also P Zumbro, 'Cross-Border Insolvencies and International Protocols – An Imperfect But Effective Tool' (2010) 11 *Business Law International* 157, 157–8: 'First introduced nearly two decades ago, international insolvency protocols ('protocols') have become an important tool for providing a framework for communication and cooperation among courts and parties in cross-border insolvencies. Protocols can provide an important jointly agreed-on and court-authorised framework for cooperation and coordination among participants in concurrent insolvency proceedings occurring in different jurisdictions [...] Generally, protocols do not predetermine substantive legal disputes that may arise during the proceedings. Instead, they aim to harmonise management of the cases before conflicts arise. While once novel, they are now commonly employed by courts, particularly in common law jurisdictions, such as the United States, Canada and the United Kingdom, to resolve choice of law issues in advance and coordinate case administration. Courts have approved protocols in cases where there are concurrent plenary proceedings in multiple jurisdictions and where there is a plenary main proceeding in one or more jurisdictions

The leading comparative law text in English—Merryman's *The Civil Law Tradition*<sup>62</sup>—contrasts the lack of structure of the common law with the system and rigour of the civil law, which is regarded as a formidable strength. But it also emphasises how the distinctions are shrinking. Merryman recounts the increasing borrowing by civil and common law systems of features of the other as mutual familiarity increases. For example, the advantages of codification, so admired by Jeremy Bentham (who invented the term 'international law'), have been adopted in respect of many areas of the law of England, Hong Kong and other common law states. And in France, *Le Monde* reported the account of the then *Garde des sceaux* (Minister of Justice) of legislative reform that counsel may in future be present throughout a client's interview (by a state official) in ordinary crimes, thus bringing French practice more closely in line with that of common law states.<sup>63</sup> And while the civil law lacks the strict common law rule of *stare decisis*, the current accessibility of appellate judgments of course bears materially on its decision-making.

Significant differences no doubt remain. That is perhaps to be expected given differences in legal tradition, such as the difference between the civil law practice of appointing judges in their early 20s, and the common law practice of appointing judges from the practising profession in middle age. The advantage of early appointment in civil law systems includes the wisdom and confidence borne of vast judicial experience seen in civil law judges of forty years service. Other differences relate to the principles guiding the law of procedure and evidence. The French-devised institutions existing in several other jurisdictions, such as the Lebanese courts—including (i) *juge d'instruction* in criminal matters (a judge tasked with investigating the crime); (ii) the use of a *dossier* for the trial chamber, to facilitate trial; and (iii) the authority of trial judges to lead questioning of witnesses—are all quite contrary to the practice of the common law criminal courts which act as referees and for the most part leave questioning to counsel. Professor Damaška has described:

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accompanied by ancillary proceedings in one or more additional jurisdictions.<sup>3'</sup> (emphasis added). [FN 3]: Judges in civil law jurisdictions may be unable or unwilling to approve protocols if not explicitly authorised by the civil code of their jurisdiction. However, in certain cases, civil law courts have given tacit approval to operating under a protocol not formally approved by the court.'

<sup>62</sup> J Merryman and R Pérez-Perdom, *The Civil Law Tradition* (3rd edn, 2007).

<sup>63</sup> *Le Monde* (Paris), 9 September 2010, 11. '*l'avocat pourra désormais être présent pendant toute la garde à vue, en matière de droit commun.*' (Ordinary crimes are here contrasted with crimes such as terrorism).

the pervasive continental distaste for rules that call for advance assessment of the probative effect of evidence [resulting from] the judicially-controlled mode of interrogation [which] accords witnesses considerable freedom to relate what they know, [so that] the free flow of their narratives [...] almost invariably includes at least passing remarks on the accused's character traits [whereas] by contrast, where evidence is adduced in the common law's *staccato* fashion, namely by questions of partisan counsel, the content of witnesses' testimony can be more closely monitored and forbidden information more easily prevented from reaching triers of fact.<sup>64</sup>

I take Lebanese law as a paradigm example of the civil law. One begins with its Constitution, statutes, judge-made law, values and traditions. Lebanese traditions include the provision of the alphabet to ancient Greece, the contribution to and codification of the Roman law, and vital contributions to the three pillars of our civilisation: democracy, the rule of law,<sup>65</sup> and international order.<sup>66</sup> When introducing his codification of the Roman law that underlies today's civil law and much of the common law, Justinian wrote of 'the fair city of Berytus, which may well be called the nurse of laws', from whose famous law school professors had been called to contribute to the reform.<sup>67</sup> The continuing value of the principles of Roman law is that they form part of the heritage of both civil lawyers and common lawyers, and are readily adopted by each when there might be hesitation on either side in adopting a concept peculiar to the other. Lebanon is also a founding member of the United Nations and party to the proliferation of international law that resulted. The Universal Declaration of Human Rights is recited in the Constitution of Lebanon. The Lebanese Constitutional Council has held that the International Covenant on Civil and Political Rights also forms an integral part of the Constitution and enjoys constitutional authority. Of course many common law States share a number of these characteristics. Moreover the

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<sup>64</sup> M Damaska, 'Propensity Evidence in Continental Legal Systems' (1994–1995) 70 *Chicago-Kent LR* 55, 56–7.

<sup>65</sup> This was first expressed in writings by Aristotle: A Ryan, *On Politics* (2013) 91.

<sup>66</sup> The pillars concept is that of A Maalouf, *Disordered World: Setting a New Course for the 21<sup>st</sup> Century* (2012) 184.

<sup>67</sup> The Latin phrase '*in Beyrytiensium pulcherrima civitate quam et legum nutricem bene quis appelet*' is cited by the late Samir Kassir, a bombing victim, in S Kassir, *Beirut* (2010) 53 (n 103). It appears in Justinian's preface to the Digest 'Constitutio Omnem', para 7. A translation by CH Monro is available at: <[http://archive.org/stream/digestofjustinia01monruoft/digestofjustinia01monruoft\\_djvu.txt](http://archive.org/stream/digestofjustinia01monruoft/digestofjustinia01monruoft_djvu.txt)> [accessed 10 February 2014].

ascendancy of parliaments has increasingly seen legislation overtake the common law as a source of jurisprudence. Still, there remains a deep divide of orientation; the importance of codified legislation remains a distinctive feature of the civil law system.<sup>68</sup>

Yet the width of the divide must not be over-stated. At the outset of the common law, Bracton permitted English judges only to improve (*in melius converti*) and not to change (*mutari*) the law.<sup>69</sup> Lord Justice Laws recently echoed Bracton as follows:

Politicians may re-invent the wheel; judges may not. Law is evolutive. Politics is revolutionary. Law and government both make new lamps; but law, certainly the common law, makes new lamps from old.<sup>70</sup>

That said, it is only recently that common law judges have been prepared to recognise the interests of other states in enforcing even the civil law. As late as 1995, the Privy Council declined to permit the freezing of funds in Hong Kong of a German national who was alleged to have obtained money from Mercedes Benz in Monaco by deception. It reasoned that because the Hong Kong courts had no jurisdiction to determine the substantive claim of fraud, it lacked the power to freeze the alleged fraudster's assets.<sup>71</sup> The decision had to be reversed by legislation. In 2010, the Final Court in Hong Kong adopted a very different approach, rejecting a submission that Hong Kong's anti-corruption legislation

<sup>68</sup> For citations, see *In the matter of El Sayed (Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2011/01, 19 July 2011) n 102.

<sup>69</sup> Bracton, *Tractatus de Legibus* (ed 1569) f. 1b, as cited in F Pollock and F Maitland, *The History of English Law* (1968) vol 1, 176 (n 4).

<sup>70</sup> Lord Justice Laws, 'The Good Constitution' (Speech delivered as the 12th Sir David Williams Lecture, Cambridge, 4 May 2012) 11. Available at <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-laws-speech-the-good-constitution.pdf>> [accessed 10 February 2014]. Another formulation is that of R Jennings in A Cassese, *Five Masters of International Law* (2011) 176: 'the judge [...] may change the law but he does so without moving out of the legal framework within which the law requires him to work.'

<sup>71</sup> *Mercedes Benz v Leiduck* [1996] AC 284. Lord Nicholls distilled the reasons for his dissent (at 305): 'The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.'

should be construed to apply only to bribery in Hong Kong committed by local officials and not that by foreign officials. Bokhary P stated:

Such a course makes a positive and important contribution to the worldwide struggle against corruption, an endeavour inherently and highly dependent on cross-border co-operation. Acting cooperatively, each jurisdiction properly protects itself from the scourge of corruption and other serious criminal activity.<sup>72</sup>

There exists in the common law some tendency towards:

[b]alancing what Murphy J called ‘the culture of their own community’ against the culture of others to see ourselves as part of *both* communities: local and international.<sup>73</sup>

Yet, for several reasons, it is too simplistic to suggest that common law judges feel free to modify the law to avoid injustice unless there is clear legislation in the way, and that civil law judges tend to prefer to have explicit legislative authority.

To speak simply of ‘common law’ and ‘civil law’ judges lumps together the many different jurisdictions, and many more judges, whose discipline originated more or less in either the common law or the Romano-Germanic tradition, ignoring the differences among the legal systems within either tradition and among their judges. It ignores the common law’s distinct debt to Rome.<sup>74</sup> It overlooks the rapidly increasing tendency in a globalizing world of all legal systems and judges to learn from one another, not least via computer resources, travel, the emergence of English as a *lingua franca*, and the evolution of a truly

<sup>72</sup> *B v Commissioner of the Independent Commission Against Corruption* (2010) 13 HKCFAR 1, para 21.

<sup>73</sup> D Baragwanath, ‘The Community of the Common Law’ in J Young & R Lee (eds), *The Common Law Lecture Series* (2010) 83, 118, citing *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1, para 57.

<sup>74</sup> Seen in the civil law experience of some outstanding English judges, as in: G Burnett, *The Life and death of Sir Matthew Hale* (1682) 4: ‘He set himself much to the study of the Roman law, and though he liked the way of Judicature in England by Juries, much better than that of the Civil Law, where so much was trusted to the Judge; yet he often said, that the true Grounds and Reasons of Law were so well delivered in the Digests, that a man could never understand Law as a Science so well as by seeking it there, and therefore lamented that it was so little Studied in England’. Other jurists, including the English Julius Caesar and Francis Bacon, lived for a period in France in the household of a practising civil lawyer: L Jardine & A Stewart, *Hostage to Fortune, The Troubled Life of Francis Bacon* (1998) 59–61. As to the common law’s reception of French law, see D Baragwanath, ‘The Law of France and the Law of New Zealand’ (1999) *NZLJ* 13.

international jurisprudence in many spheres. Most importantly, the suggestion disregards the historical fact that to a great extent international law emerges from decisions of civil law judges and ‘the teachings of the most qualified publicists of the various nations’, such as Grotius, referred to in Article 38(1)(d) of the Statute of the International Court of Justice. Comparing legal systems is an exacting task. Having noted the limits on comparative law familiarity already mentioned, Austin added less happily:

From [the ‘few systems with which it is possible to become acquainted’], however, the rest may be presumed. And it is only the systems of two or three nations which deserve attention: the writings of the Roman Jurists; the decisions of English Judges in modern times; the provisions of French and Prussian Codes as to arrangement.<sup>75</sup>

Despite the emphasis in the UN Charter of the sovereign equality of *all* its members,<sup>76</sup> Austin’s *de haut en bas* attitude to other legal systems, as being less than ‘civilized’, is sadly retained in the Statute of the International Court of Justice. Among the sources of law to be applied by that Court are ‘general principles of law recognised by *civilized* nations’.<sup>77</sup> We are however coming to appreciate that civilization is more complex than appeared to colonial powers in an age of empire.<sup>78</sup>

While substantial equality is still at a distance,<sup>79</sup> it is among the values that together make up the ideal of a system of law that delivers on the ambitions of the Charter. So too is the best use of the range of legal techniques that can be drawn on to achieve optimum justice. The decisions discussed in Part III seek to draw on and to meld both the civil law and the common law. For an outsider, increasing exposure increases respect for the civil law for a range of reasons: the clarity and precision of the various Codes; the relative accessibility of law to the layman; the independence of the *juge d’instruction* and the efficiency that can be provided by that judge’s *dossier* which allows the trial judges to understand the case from the

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<sup>75</sup> Ibid.

<sup>76</sup> UN Charter, Art 2(1).

<sup>77</sup> ICJ Statute, Art 38(1)(c) (emphasis added).

<sup>78</sup> See K Kwarteng, *Ghosts of Empire: Britain’s Legacies in the Modern World* (2011).

<sup>79</sup> Compare the majority opinion in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453 with *AXA General Insurance Limited v The Lord Advocate* [2012] 1 AC 868, 97 (Lord Mance): ‘fundamental rights or the rule of law, at the very core of which are principles of equality of treatment’.

outset; and such efficiencies as the practice of the French *Conseil constitutionnel* to deliver its decisions within about two months.<sup>80</sup> These are among the reasons why the civil law is so widely adopted in various forms. Common lawyers also see virtues in their system. Kept within bounds by experienced appellate judges, the ability to update the law through processes of interpretation and, in limited cases, overt law-making can both avoid injustice in the instant case and contribute to a fairer and more principled jurisprudence.<sup>81</sup> The primary topic however is not of the respective virtues of civil and common law but the relevance of these and other differences to interpretation in international law, to which I turn within the specific context of the STL.

### 3 A case study: the Special Tribunal for Lebanon

#### 3.1 Characteristics of the STL

While the present article concerns interpretation in international law, that is not the primary focus of the STL. Our Statute requires us to apply the substantive law of Lebanon (Article 2), and we are also directed to apply adjectival law (procedure and evidence) which reflects the highest standards of international criminal law (Article 28). Particular reference is made to the law of Lebanon. So the Constitution, legislation and judge-made law of Lebanon comprise our substantive law and are important to the making and interpretation of our adjectival law.

In stating the law of Lebanon and in formulating the highest standards of international criminal law, like the Lebanese courts, we bear in mind the great traditions of Lebanon already mentioned. The values of Lebanon, expressed in its Constitution, statutes and judge-made law, are of the highest importance to our decisions.

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<sup>80</sup> *Le Monde* (Paris), 2 March 2013, 9.

<sup>81</sup> A notable example is the judge-made development of the law of restitution, illustrated by the recent statement of principle by Lord Walker in *Test Claimants in the Franked Investment Income Group Litigation (Appellants) v Commissioners of Inland Revenue* [2012] 2 AC 337, para 79: 'where tax is purportedly charged without lawful parliamentary authority, a claim for repayment arises regardless of any official demand (unless the payment was, on the facts, made in order to close the transaction). The same effect would be produced by saying that the statutory text is itself a sufficient demand, but the simpler and more direct course is to put the matter in terms of a perceived obligation to pay, rather than an implicit demand.' As with earlier stages in systematising restitution, the law was changed in an important respect without reference to Parliament.

But given the topic of this article, it is the contribution of international law, and those of the civil and common law rather than the law of Lebanon, on which the following discussion is focused.

While drawing heavily on the lessons of other international criminal tribunals, as in the listing of specific rights of the accused (Article 16), the STL Statute and Rules make more use than some tribunals of civil law practices. These include the rebuttable presumption that examination of a witness shall commence with questions posed by the presiding judge, then other judges, followed by the Prosecutor and the Defence (Article 20(2) and Rule 145); specific recognition of status for victims (Article 17 and Rules 50–51 and 87); and provision for trial *in absentia* (Article 22 and Rules 105–109).

The Pre-Trial Judge, independent from the Trial Chamber, is a valuable innovation drawing in part on the *juge d'instruction* and used for many purposes, including confirming an indictment, overseeing and facilitating preparation of the case for trial, and generally promoting the policy of the STL Statute to ensure both fairness to the accused and expedition (Articles 16 and 21).

Common law elements include the contempt provisions (Rule 60 *bis*) and the ability of the Trial Chamber to give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial (Rule 130).

An important innovation is the addition to the conventional three organs—Prosecutor, Registrar and Chambers—of the Head of the Defence Office, who is responsible for protecting the rights of the Defence and helps equality of arms with the Prosecutor (Article 13). The creation of the Head of Defence role and appointment to it of François Roux, an able and experienced international defence counsel, is of the greatest importance to the performance and credibility of the Tribunal, just as is the appointment of the no less able Prosecutor, Norman Farrell. The Prosecutor of an international tribunal has the formidable task among many others of defining what investigation is undertaken, overseeing its performance by the investigators, deciding what charges are warranted by the evidence, and overseeing the prosecution. The legitimacy of the Tribunal as a truly independent body which places fair trial and the presumption of innocence above all other interests depends to a large degree on the Head of Defence. He is responsible for the appointment of defence counsel, for the policies of his office, and, as a member of the Senior Management Board together with the Prosecutor, Registrar and President, for contribution to major policy decisions of the organization as a whole.

Lacking the inherent standing of judges appointed to a respected domestic

court, an *ad hoc* international tribunal must secure its credibility by the quality of its processes and decisions. Only real equality of arms, which includes the status of the Defence,<sup>82</sup> will allow such a result.

## 3.2 The tests applied by the Lebanon Tribunal

In the STL, we have encountered a variety of means by which international law has been found, interpreted or created.

### 3.2.1 Jurisdiction

In an early proceeding, counsel appointed to represent four accused contended that the Security Council lacked jurisdiction to create a criminal tribunal. The principal argument was that Chapter VII confers jurisdiction on the Security Council only where there is a threat to *international* peace and security. Since most attacks listed in Article 1 of the Statute took place in Beirut, a condition precedent to jurisdiction was not met. The Trial Chamber and the majority of the Appeals Chamber held, with the support of high authority, that the STL had no power to investigate its own legitimacy. Expressing another view, I began with Article 24(2) of the UN Charter which requires the Security Council to act in accordance with the Principles of the United Nations, among them the principle in Article 2(7) that nothing in the Charter authorises the United Nations to intervene in matters essentially within the domestic jurisdiction of a State apart from enforcement measures under Chapter VII (Article 2(7)). It seemed to me that, as a court of law, albeit one created by Security Council Resolution, we must examine whether the conditions for applying those measures were satisfied. I did, and concluded they were. I considered that there was no reason in principle why the *ultra vires* principle of domestic law should not apply in international law. Why else did the Charter not give *carte blanche* to the Council?<sup>83</sup> Like the similar ICTY appellate decision in *Tadić*,<sup>84</sup> where President Cassese's more

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<sup>82</sup> *Prosecutor v Ayyash (President's decision on Head of Defence Office request for review of Registrar's decision relating to the assignment of a local resource person)* (Special Tribunal for Lebanon, The President, Case No STL-11-01/PT/PRES, 21 December 2012) paras 22–4.

<sup>83</sup> For academic discussion, see J Alvarez, '*Tadić* Revisited: The *Ayyash* Decisions of the Special Tribunal for Lebanon' (2013) 11 *JICJ* 291; M Nikolova & M Ventura, 'The Special Tribunal for Lebanon Declines to Review UN Security Council Action: Retreating from *Tadić's* Legacy in the *Ayyash* Jurisdiction and Legality Decisions' (2013) 11 *JICJ* 615.

<sup>84</sup> *Prosecutor v Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995).

succinct opinion had commanded a majority, my minority view turned ultimately on a characterization of the judicial role as requiring me to implement the legal limitation on the authority of the Security Council. Notwithstanding their commitment to the rule of law, my colleagues, predominantly civil lawyers but also including experienced common lawyers, regarded the judicial role as requiring abstinence here.

I do not venture to elaborate on any considerations beyond those in our judgments, which may have contributed to our respective decisions. The time and place for judges to give reasons for their decision is in the judgment, not afterwards. But I venture a general comment on a particular example of moving from the familiar common law world into a mixed Lebanese and international sphere.

Following the major attack of 14 February 2005 which killed 22 victims and injured many more, the UN established an Independent International Investigation Commission (IIIC). Mr El Sayed was one of four generals detained during the period of the IIIC's enquiry. When the STL commenced operation on 1 March 2009, the Prosecutor took over a great volume of materials from the IIIC. Mr El Sayed, who had then been in custody for some three and a half years, was immediately released. On the application of the Prosecutor, he applied to the Prosecutor to see the documents on which his detention was based. On the Prosecutor's refusal, Mr El Sayed applied to the Pre-Trial Judge for an order to that effect. His decision that the STL possessed jurisdiction to make such an order was upheld by the Appeals Chamber. So too was a later decision of the Pre-Trial Judge ordering specific disclosure.

Two issues of principle arose. The first was whether the STL had jurisdiction to deal with the claim for access to documents, even though the Statute and Rules did not contemplate civil litigation over documents held by the STL. We analysed the difference between the scope of jurisdiction of domestic courts and that of international tribunals.

We held that whereas the former is normally defined by law, things were different at the international level:

In this field, there is no judicial *system*. Courts and tribunals are set up individually by States, or by intergovernmental organizations such as the United Nations, or through agreements between States and these organizations, but they do not constitute a closely intertwined set of judicial institutions. [...] As was aptly noted in 1995 by the ICTY Appeals Chamber in *Tadić (Interlocutory Appeal)*, interna-

tional law 'lacks a centralized structure, [and] does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others'.

[...] It follows that international courts and tribunals may not rely on other international courts for the determination of jurisdiction and the host of other procedural matters not addressed by their own statutes. They have perforce to settle such issues for themselves. In other words, international judicial bodies must each exercise powers which in other legal systems are spread across a hierarchy of courts.

[...] Whenever a question relating to the jurisdiction of an international tribunal is raised, therefore, it falls to the court itself to adjudicate it, for lack of any other judicial body empowered to settle the matter. In instances where that court's constituting documents do not expressly grant the court the power to decide on its own jurisdiction, the resulting condition may appear to be paradoxical. Indeed, in such instances, a court exercises a power not provided for in its statutory provisions, with a view to determining whether, under those provisions, it has the power to pass on the merits of the question at issue. The paradox, however, disappears if one recognises that a customary international rule has evolved on the inherent jurisdiction of international courts, a rule which among other things confers on each one of them the power to determine its own jurisdiction (so-called *compétence de la compétence* or *Kompetenz-Kompetenz*). This rule is attested to, inter alia, by the numerous international decisions holding that international courts are endowed with the power to identify and determine the limits of their own jurisdiction.<sup>85</sup>

I suspect we adopted the approach which I have attributed to Cicero and Grotius.

We went on to consider whether the Appeals Chamber could and should exercise jurisdiction to consider the Prosecution's appeal against the decision of the Pre-Trial Judge in favour of Mr El Sayed. We further held:

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<sup>85</sup> *In the matter of El Sayed (Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing)* (Special Tribunal for Lebanon, Appeals Chamber, Case No. CH/AC/2010/02, 10 November 2010) paras 41–3.

The Appeals Chamber also exercises its inherent jurisdiction to consider this interlocutory appeal. The Appeals Chamber will not normally consider interlocutory appeals outside the scope of the Rules but finds it necessary to do so here, where a situation has arisen that was not foreseen by the Rules, and it is alleged that a jurisdictional error has been committed and injustice may result if such an error as is alleged were left uncorrected.

[...] The Appeals Chamber is empowered to decide at this stage not only on jurisdiction but also on standing. This power does not derive from the Rules, which only deal with cases where an accused has been brought before the Tribunal, a situation that has not yet come to pass. It rather derives from general principles of international criminal law, and from the fundamental principle of judicial economy.<sup>86</sup>

It may be added that to impute an unexpressed right of appeal ran flatly counter to principles of domestic law in a common law system. That may have been a factor in the opinion of Judge Nsereko, a distinguished common lawyer, joining Vice-President Riachi, an equally distinguished civilian, in dissent in the *Ayyash* case (discussed below under rights of victims).<sup>87</sup> The majority decision—that we should grant leave to appeal against an order as to suppression of victims' names where no explicit right of appeal had been conferred—depended on the principle stated in *El Sayed* and what was seen as the fundamental importance of the issue.

The second issue of principle, which we addressed in *El Sayed*, was whether Mr El Sayed was entitled to see the documents he sought. We considered both international law and Lebanese law and determined that, taking into account his legitimate interest in accessing the claimed documents—their use in a court of law to bring claims against those allegedly responsible for an unlawful detention—he should have such access but subject to any overriding contrary public interests. We relied on two streams of international jurisprudence: the right of access to justice and what has been called the 'right' to information held by a public authority.

As to the first stream, we noted the principle of a right of access to justice, emphasised by President Cassese and supported by major human rights

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<sup>86</sup> Ibid, paras 54–5.

<sup>87</sup> Below n 106.

instruments as well as jurisprudence from regional human rights courts.<sup>88</sup> We cited the old equitable bill of discovery reviewed in *Norwich Pharmacal v Customs and Excise Commissioners*<sup>89</sup> and recently applied in the *Binyam Mohamed* litigation.<sup>90</sup>

As to the second stream, we found that up to 115 countries had legislative provisions recognizing freedom of information, while another 22 had draft laws in progress. We held that the adoption of such an approach is required by the Preamble of the Constitution of Lebanon, which refers explicitly to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, each guaranteeing, as a component of freedom of expression, the right to 'seek, receive and impart information'. We further concluded that the international sea-change is of such dimensions as to demand acceptance that freedom of information has become a general principle of law. In terms of international custom, as evidence of a general practice accepted as law, it met the standard of Article 38(1)(b) of the ICJ Statute. We adopted the following test:

The presumption henceforth should be that information is to be made available unless there is good reason to withhold it.<sup>91</sup>

In short, we drew heavily on both civil law and common law in adopting what in retrospect looks very much like the robust approach of both Professeur Weill and Lord Bingham.

We upheld Mr El Sayed's claim as follows:

[to the extent] necessary to avoid a real risk that, if it is declined, the applicant will suffer an injustice that clearly outweighs the opposing interests. Nor should it be granted beyond the extent required for that purpose.<sup>92</sup>

<sup>88</sup> *In the matter of El Sayed (Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2011/01, 19 July 2011) paras 40–1.

<sup>89</sup> *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

<sup>90</sup> *R (on the application of Binyan Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC Admin 2048; [2009] 1 WLR 2579 and 2653; on appeal [2010] EWCA Civ 65 and 158, [2010] 3 WLR 554.

<sup>91</sup> *In the matter of El Sayed (Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge's Decision of 12 May 2011)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2011/01, 19 July 2011) para 49.

<sup>92</sup> *Ibid.*, para 67.

Domestic judges, like the fellow citizens of their State, carry the experience and consequent mind-set of the familiar, which unsurprisingly will differ from that of judges of the other 192 States. Within limits, that contains an advantage when dealing with domestic disputes at home. It is only when sitting in the court of another society that one realises what an effort is required to ensure an appreciation of its differences sufficient to avoid causing unease, offence or injustice. Sitting as an international judge, because of unfamiliarity one tends to be apprehensive about adopting others' notions. But having collected fundamental precepts from a range of very different societies,<sup>93</sup> Hans Corell, after a decade as Legal Counsel of the United Nations, concluded:

[...] learned theologians and philosophers would probably have views about this kind of comparison. But to me it was important that the quotations were contributed by my own staff. I maintained that this comparison proves again the point that the Secretary-General often makes, namely that there are very similar thoughts in the religious and philosophical sources that guide people all over the world.<sup>94</sup>

So one must try hard to put aside one's personal parochialism and be open to other, better concepts (and especially, in the case of the STL, those of Lebanon). The Hippocratic oath 'abstain from doing harm', often rendered as 'first do no harm', transfers readily to the task of the judge. Given that judges can and must contribute to the creation of international law, the obligation to do right requires

<sup>93</sup> H Corell, 'Commentary to 'Shari'a and the Modern State' and 'Narrating Law', in A Emon, M Ellis & B Glahn (eds), *Islamic Law and International Human Rights Law* (2012) 82, 87–8: 'And why beholdest thou the mote that is in thy brother's eye, but considerst not the beam that is in thine own eye?' Holy Bible, Matthew 7:3; 'Not the faults of others, nor what others have done or left undone, but one's own deeds, done and left undone, should one consider.' 50th Stanza from the Dhammapada (The Path of Wisdom); 'Believers, let not a group of you mock another. Perhaps they are better than you. ...Let not one of you find faults in another nor let anyone of you defame another.' Holy Qur'an, Chapter 49:11 (Al-Hujarat); 'You see in others what you actually see in yourself.' The Guru Dronacharya in Mahabharata; 'I went in search of a bad person; I found none as I, seeing myself, found me the worst.' Kabir, Saint Poet of North India; 'I wonder whether there is any one in this generation who accepts reproof, for if one says to him: Remove the mote from between your eyes, he would answer: Remove the beam from between your eyes!' Talmud: Baraitha: Rashi (1050–1115 ce) quoting Rabbi Tarfon; 'It is easy to see the faults of others, but not so easy to see one's own faults.' Gautama Buddha (563–483 BCE); 'The first half of the night, think of your own faults, the second half, the faults of others when you are asleep.' Chinese proverb.

<sup>94</sup> *Ibid.*, 88.

an international judge to try to do better and look for the best result that can be achieved.

I have tried in interpretation to employ the notion of a periscope that lifts one's vision beyond the confines of our own particular experience in an effort to determine what is right, for an adjudication that will:

- protect the rights of the accused and otherwise comply with the 'highest standards of international criminal law' which we are charged to maintain (Articles 16 and 28);
- maintain and promote confidence in our work and the rule of law by adhering to settled principle. The ever accelerating process of globalization, dissolving former impediments to cross-border dealing, requires international judges as far as possible to accept and contribute to the existing common fabric of law, in our case that of Lebanon, rather than causing the chaos of unnecessary change;
- recognise we are dealing with Lebanese issues. I have emphasised the role of the Constitution, statutes, judge-made law, values and traditions of Lebanon;
- meet the criteria of transparency and expedition required of an international tribunal created by the Security Council, with its leading members appointed by the UN Secretary-General;
- conform with our statutory obligation of expedition, and satisfy fair-minded critics that we are spending to best and principled advantage the contributions to our budget borne as to 49% by Lebanon and 51% by nearly 30 volunteer States' taxpayers; and
- avoid injustice in the practical way employed by Cicero, Grotius and modern adjudicators in the civil law and the common law alike.<sup>95</sup>

Looking back at the decisions, while forming no explicit part of any judgment, it may also be that as well as the law of Lebanon, Article 28 of the Statute of the Tribunal, which requires us in matters of evidence and procedure to make

<sup>95</sup> See Hans-Georg Gadamer's notion of 'fusion of horizons' in *Wahrheit und Methode (Truth and Method)* (1960). This hermeneutical idea stressed that real understanding required a certain openness to transcend the interpreters' standpoints and achieve a fusion of horizons with the other.

rules conforming with ‘the highest standards of international criminal law’, could unconsciously by analogy have flavoured our approach to issues of substantive law and its interpretation. It seems to me a valuable expression by the Security Council of what the judicial task entails, and it supports the ‘highest standard of practical necessity’ test proposed earlier for substantive as well as adjectival law-making.

### 3.2.2 *Non liquet*

In the case of *Ayyash*, the Appeals Chamber was asked by the Pre-Trial Judge under Rule 68(G) to construe the concept of ‘terrorism’ employed in the Lebanese criminal legislation which Article 2 of the Statute of the Tribunal requires us to apply. To assist interpretation of the domestic law on which our decision turned, we examined the hotly debated issue of whether there exists any concept of ‘terrorism’ in international law.<sup>96</sup> William Schultz has recently argued that:

The world has not even been able to agree on a common definition of terrorism, much less an international treaty against it.<sup>97</sup>

At an early stage of the case, while assisted by argument from the Head of Defence but before the appointment of counsel to represent the four accused who are being tried *in absentia*, we were satisfied, in interpreting our obligations, that the *non liquet* principle derived from the civil law prevented us from simply saying the question was too difficult.<sup>98</sup> We concluded that a customary rule of international law has evolved on terrorism in time of peace, requiring the following elements: (i) the intent (*dolus*) of the underlying crime; (ii) the special intent (*dolus specialis*) to spread fear or coerce authority; (iii) the commission of a criminal act; and (iv) that the terrorist act be transnational.<sup>99</sup>

As a common lawyer aware of the role played by *non liquet* in international law discourse, I was content to employ the civil term which avoided the injustice

<sup>96</sup> B Saul, *Defining Terrorism in International Law* (2008) 270.

<sup>97</sup> A Mazrui & W Schulz, ‘Who is Afraid of Human Rights?’, in A Williams (ed), *The Brilliant Art of Peace: Lectures from the Kofi Annan Series* (2012) 50.

<sup>98</sup> *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 23; see also *R v Gul* [2012] 1 WLR 3432, para 33ff.

<sup>99</sup> *Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 85.

of declining to deal with the issue. Nor do I doubt that my civil law colleagues were of a similar opinion.

### 3.2.3 *Jus cogens*

In the Appeals Chamber's decision in *Ayyash*, we held that the principle of legality (*nullum crimen sine lege*) inherent in the law of Lebanon, whereby individuals may not be punished if their conduct had not been previously criminalised by law, has been so extensively proclaimed in international human rights treaties with regard to domestic legal systems and so frequently upheld by international criminal courts with regard to international prosecution of crimes, that it is warranted to hold that it has the status of a peremptory norm (*jus cogens*), imposing its observance both within domestic legal orders and at the international level.<sup>100</sup> We drew on the statutes of international criminal tribunals and some eight decisions, one dissenting, which emphasised the importance of that norm.<sup>101</sup> More generally, it is derived from a fundamental principle of fairness. If generally accepted, it will prove a valuable addition to the jurisprudence.

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<sup>100</sup>Ibid, para 76.

<sup>101</sup>The *nullum crimen* principle has been laid down in the international criminal tribunals' statutes (see: *Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Res 808*, UN Doc S/25704, 3 May 1993, para 34; Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Art 22; *Report of the UN Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc SI2000/915, 4 October 2000, para 12) and in the relevant case law (see: *Prosecutor v Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) paras 139, 141, 143; *Prosecutor v Jelisić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-10-T, 14 December 1999) para 61; *Prosecutor v Delalić (Appeals Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) para 170; *Prosecutor v Erdemović (Appeals Judgment, Separate and Dissenting Opinion of Judge Cassese)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997) para 11; *Prosecutor v Krstić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) para 580; *Prosecutor v Vasiljević (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-32, 29 November 2002) paras 193, 196, 201; *Prosecutor v Hadzihasanović (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-83-AR72, 16 July 2003) paras 32–6; *Prosecutor v Galić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003) paras 90, 93, 98, 132; *Prosecutor v Akayesu (Trial Judgment)* (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4-T, 2 September 1998) para 605.

*Jus cogens* has the appearance of a civil law principle. Judge Rafael Nieto-Navia notes in this context that Wolff, Vattel and Grotius spoke of *jus naturale necessarium* and moral necessity to which I have earlier alluded.<sup>102</sup> But *jus cogens* has been developed more recently into a tenet of modern international law. For myself, the recognition of the principle of legality as *jus cogens* is well familiar to the common law—and indeed integral to the rule of law as stated by John Finnis:

A legal system exemplifies the Rule of Law to the extent [...] that [...] its rules [...] are promulgated, [...] clear, and [...] are sufficiently stable to allow people to be guided by their knowledge of the content of the rules.<sup>103</sup>

The recognition of the principle of legality as *jus cogens* appeared to be appropriate, both to myself and my civil law colleagues who are trained to emphasise the principle of legality.

### 3.2.4 *Teleological interpretation*

Historically, courts have applied the principles *in dubio mitius* and *favor rei* as required by the presumption of innocence. In proper contexts they retain their force. The latter precept resolved a dilemma posed by the difference between Article 2 of the Statute which requires us to apply the criminal law of Lebanon and Article 3 which in the case of issues over parties permits us to use principles of international criminal law. How should we direct the Pre-Trial Judge to approach the question? We found the answer in the maxim *favor rei* which authorised us to give to the accused an election as to which better favoured him, holding that if the principle of teleological interpretation did not prove helpful:

[...] one should use the interpretation which is more favourable to the rights of the suspect or the accused, in keeping with the general principle of criminal law of *favor rei* (to be understood as “in favour of the accused”). This principle [is] a corollary of the overarching

<sup>102</sup>R Nieto-Navia, ‘International Peremptory Norms (Jus Cogens) and International Humanitarian Law’, in Lal Chand Voh (ed), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 595, 599–602.

<sup>103</sup>J Finnis, *Natural Law and Natural Rights* (1980) 270.

principle of fair trial and in particular of the presumption of innocence.<sup>104</sup>

Another facet is that:

[...] the principle of teleological interpretation, based on the search for the purpose and the object of a rule with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle *in dubio mitius* (in case of doubt, the more favourable construction should be chosen), a principle that—when applied to the interpretation of treaties and other international rules addressing themselves to States—calls for deference to state sovereignty. The principle *in dubio mitius* is emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role and there did not yet exist intergovernmental organisations such as the United Nations tasked to safeguard such universal values as peace, human rights, self-determination of peoples and justice [...] Today the interests of the world community tend to prevail over those of individual sovereign states; universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout the world community.<sup>105</sup>

As a Chamber then composed of four civil law judges and one common lawyer,<sup>106</sup> when settling the Rules of Procedure and Evidence, we had benefited from debating with our other colleagues in plenary a variety of issues of principle.<sup>107</sup> The Appeals Chamber decision contained over a dozen citations of Latin precepts, derived either from the Roman Law or from subsequent practice, which

<sup>104</sup>*Prosecutor v Ayyash (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01, 16 February 2011) para 32.

<sup>105</sup>*Ibid*, para 29.

<sup>106</sup> Antonio Cassese, President, from Italy; Judges Riachi, Vice-President, and Judge Chamseddine from Lebanon, and Judge Björnberg from Sweden.

<sup>107</sup>All except two being civil lawyers: the Pre-Trial Judge, Judge Fransen from Belgium, and the members of the Trial Chamber: Judge Swart from The Netherlands, and Judge Braidy and Judge Akoum from Lebanon. The common lawyers were Judge Morrison QC from England and Judge Nosworthy from Jamaica. Subsequent appointments have been Judge Roth of Switzerland, Judge Nseroko from Uganda, Judge Hrdličková from the Czech Republic and Judge Lettieri from Italy.

express principles to which both civil and common lawyers have fallen heir.<sup>108</sup> Whether it would have been so easy for me to find the answer in their expression by a particular civil law domestic system I do not know. Unfamiliarity with other systems could risk doubt and delay, perhaps for my colleagues as well as me. But having available the Latin maxims with which all of us were familiar, and which underlay the law of Lebanon, provided a *lingua franca* that allowed a confident common answer. As one of the ‘periscope’ factors, this adoption of settled civil law principle was wholly acceptable to a common lawyer.

In my own case the shift from domestic to international judging has brought out both the desirability of synthesis of legal principle to meet the problems of rapidly increasing global activity and, in that process, the benefit of Roman Law principles as contributing a sort of common ground for civil law and common law which helps to transcend difference.

### 3.2.5 Estoppel

In *El Sayed*, the Prosecutor had stated in writing that three documents were among those which should be made available to Mr El Sayed.<sup>109</sup> Over a year later, before Mr El Sayed had been shown the documents, the Prosecutor changed his mind and sought to withhold them, despite an order of the Pre-Trial Judge that he should receive them. On appeal from that decision, counsel for Mr El Sayed held that principles of estoppel barred the Prosecutor from changing his mind.

We examined the international jurisprudence on estoppel, both common law and civil law.<sup>110</sup> Although the term ‘*estoupail*’ had derived from old French and been brought to England by the Normans,<sup>111</sup> it was not until 2005 that estoppels became a concept of French law.<sup>112</sup> After considering comparative jurisprudence we noted:

<sup>108</sup>H Broom, *A Selection of Legal Maxims, Classified and Illustrated* (1939); *Adages du Droit Français* (1999).

<sup>109</sup>*In the Matter of El Sayed (Decision on Appeal By the Prosecutor Against Pre-Trial Judge’s Decision of 11 January 2013)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2013/01, 28 March 2013).

<sup>110</sup>The decision is not, I think, inconsistent with the later decision of the UK Supreme Court in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] 3 WLR 299.

<sup>111</sup>*McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, para 10–11 (Lord Denning MR).

<sup>112</sup>*Golshani v Gouvernement de la République islamique d’Iran*, Cour de Cassation [French Court of Cassation], 01-15.912, 6 July 2005 (2005) Bull civ n° 302, 252; G Cuniberti, ‘Enhancing Judicial Reputation through Legal Transplants – Estoppel Travels to France’ (2012) 60 *AJCL* 383, 385.

[t]he doctrine of estoppel is legally complex, viewed differently by different legal systems, and its precise application depends on a number of factors [...] [T]here is no evidence that Mr El Sayed acted in some manner on the basis of the Prosecutor's initial position. [...] No principle was cited to us and [...] we are not aware of one, which in the absence of such evidence would prevent the Prosecutor from reviewing his initial decision [...] Estoppel by deed aside, the authorities we have examined require either subsequent conduct or other acts of reliance by the party invoking the estoppels or unconscionability.<sup>113</sup>

Essentially because of settled international custom, we dismissed the appeal. So the analysis began with old French, followed it to England, then checked comparative authority including French law before reaching the conclusion.

### 3.2.6 *Trial in absentia*

While trial *in absentia* was employed at Nuremberg, it had not been used since by any international criminal tribunal. It is barely known to the common law, save in exceptional cases where an indicted accused absconds, and is not employed in many civil law jurisdictions. But following the law of both Lebanon and France and the guidance of the European Court of Human Rights, the authors of the STL Statute provided for it in the general terms of Article 22 with its guarantee of retrial for anyone tried *in absentia*. Further provision was made in Rule 106. A decision of the Trial Chamber authorizing trial *in absentia* of each of the four accused in the Prosecutor's first indictment was challenged on appeal to the Appeals Chamber. We dismissed the appeal, holding:

[...] Article 22 of the Statute and Rule 106 of the Rules, interpreted in light of the international human rights standards, require that *in absentia* trials are possible only where (i) reasonable efforts have been taken to notify the accused personally; (ii) the evidence as to notification satisfies the Trial Chamber that the accused actually knew of the proceedings against them; and that (iii) it does so with such degree of specificity that the accused's absence means they

<sup>113</sup> *In the Matter of El Sayed (Decision on Appeal By the Prosecutor Against Pre-Trial Judge's Decision of 11 January 2013)* (Special Tribunal for Lebanon, Appeals Chamber, Case No CH/AC/2013/01, 28 March 2013) paras 19–21.

must have elected not to attend the hearing and therefore have waived their right to be present.<sup>114</sup>

Our decision, which pays much respect to the crucial fact findings of the Trial Chamber, sought to meld the experience and wisdom of the Lebanese judges experienced in conducting trials *in absentia*, the experience of other jurisdictions including the European Court of Human Rights, and our common concern to meet the double criteria of utter fairness to the accused and protection of the other interests engaged, of both victims and the community. As a result of this exercise, I have become a convert, in the most serious cases, to trial *in absentia* with the accused protected by an absolute right of retrial. Victims and the community are spared the frustration of the file gathering dust in some archive where there is reason to believe the accused is deliberately avoiding trial. It presents, in my view, a clear example of how the common law may learn from civil law procedures.

### 3.2.7 *Rights of victims*

I mention finally *Ayyash*,<sup>115</sup> in which the Legal Representative of Victims appealed against a decision of the Pre-Trial Judge holding that ‘victims participating in the proceedings (VPPs)’, a term of art for victims given such status, could not receive the protection of an order for permanent suppression of their identity. The case raised important issues of first impression as to the status of victims and VPPs; the role they play in proceedings; and the effect of an anonymity order on the absolute right of fair trial guaranteed to the accused.

We held that despite the immense importance of victims, whose protection is the very reason both for the establishment of the STL and indeed of international criminal law (and as earlier noted was a major factor in the majority’s decision to give leave to appeal), the accused’s right to fair trial precluded permanent anonymity for a victim who wished to play an active part by becoming a VPP. The judgments reveal a common concern of both civil law and common law judges to identify each of the values in play and to find a result that, while ensuring the accused’s absolute entitlement to fair trial, acknowledged also the dignity and importance of the victims.

<sup>114</sup> *Prosecutor v Ayyash (Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial In Absentia Decision)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/PT/AC/AR126.1, 1 November 2012) para 31.

<sup>115</sup> *Prosecutor v Ayyash (Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge’s Decision on Protective Measures)* (Special Tribunal for Lebanon, Case No STL-11-01/PT/AC/AR126.3, 10 April 2013).

## 4 Conclusion

The foregoing themes may be summarised:

1. Interpretation can embrace law making.
2. Such law-making should meet the test of the 'highest standard of practical necessity'.
3. Interpretation in international law operates across the civil law/common law divide, with each contributing to a just and effective result.
4. The periscope metaphor describes the obligation of international judges to reach above the domestic predilections of their domestic law experience to find an optimum result.
5. In the STL, there is a process of personal development of civil lawyers and common lawyers learning from one another, as they pursue a common obligation to deliver justice according to the substantive criminal law of Lebanon and the highest standards of international law of procedure and evidence.

We have seen a wide variety of issues raised for determination and have experienced a confluence of invaluable responses made to them. In each instance we have been greatly helped by the wide range of experience of the judges in each Chamber, including a background in the law of Lebanon, other civil law, common law and international law.

It would be presumptuous to suggest that our decisions have of themselves effected any change or even clarification of international law. That will depend on future events, and whether and to what extent the mainstream of international custom will find them sustainable. The proliferation of tribunals called on to adjudicate on issues of international law is ever-increasing, presenting many problems including that of choice of forum.<sup>116</sup> There is a compelling need to facilitate access to the International Court of Justice, as recently proposed by both Antonio Cassese and James Crawford SC,<sup>117</sup> which would have provided a

<sup>116</sup> C McLachlan, *Lis Pendens in International Litigation* (2009).

<sup>117</sup> A Cassese, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady', in A Cassese (ed), *Realising Utopia: The Future of International Law* (2012) 239; J Crawford, 'International Legal Outlook for Governments Today' (Lecture delivered at the Hague Institute for Global Justice, 22 May 2013).

convenient forum for our case about the jurisdiction of its sibling the Security Council, and to make other reforms which would help systematise the constant burgeoning of international law. However, its development will be accelerated by the continual process of mutual education of litigants, scholars, lawyers, and judges which modern communications increasingly permit. The pattern is evidenced by the experience of the Special Tribunal for Lebanon, whose judges, legal officers and counsel draw on whichever of the accessible legal options will work the best justice consistently with settled principle.

# A PRACTICAL PERSPECTIVE ON TREATY INTERPRETATION: THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE WTO DISPUTE SETTLEMENT SYSTEM

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## **Abstract**

This article offers a pragmatic account of the practice of treaty interpretation by the Court of Justice of the European Union and the dispute settlement system of the World Trade Organization. The first part of the article addresses several institutional and structural aspects of the context in which treaty interpretation is undertaken and which may have a bearing on the practice of treaty interpretation. The second part of the article identifies several constraints on that practice, such as the characteristics of the treaty texts being interpreted, limitations resulting from multilingualism, as well as particular features of the decision-making processes in the Court of Justice of the European Union and the dispute settlement system of the World Trade Organization. By contributing these institutional and practical considerations to the debate on the operation of the principles set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, the article demonstrates that, as part of the renewed interest in the law of treaties, the study of the internal functioning and design of international courts is critical for a proper assessment of the development of the law of treaties.

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## **1 Introduction**

The revival of the academic discourse on treaty interpretation in international law has produced an abundance of analysis and commentary regarding treaty interpretation by international courts and tribunals. In that discourse, however, factors stemming from the institutional context within which the practice of treaty interpretation is conducted have not always been taken into account. This paper focuses on these factors examining them from the perspective of

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the interpreter, be it in the capacity of judge, Advocate General or legal officer. The paper offers a pragmatic account of the professional practice of treaty interpretation and its constraints in the context of two different fora, namely the Court of Justice of the European Union (the *Court of Justice* or *Court*) and the World Trade Organization (*WTO*), in particular the *WTO Appellate Body*.

While there are important differences in the mandate and in the institutional structure of the Court of Justice and the *WTO* dispute settlement system,<sup>1</sup> both institutions have used treaty interpretation as an instrument for establishing authority in their respective contexts. Each has developed its own particular method of interpretation and ways of explaining its interpretive choices. The Court of Justice's approach is characterised by, among other features, a strong attachment to teleology and considerations of effectiveness, and relatively little formalism in explaining the interpretive choices it makes. In addition, its approach to treaty interpretation is marked by the fact that there is a wide variety of sources constituting *EU* law for which the Court of Justice is the ultimate interpretive authority.<sup>2</sup> Its case-law is not marked by a rigid adherence to the *Vienna Convention on the Law of Treaties (VCLT)* though in many cases the process or result of its interpretation can be explained by reference to the *VCLT*.<sup>3</sup>

*WTO* panels and the *Appellate Body*, on the other hand, interpret a more limited variety of legal instruments. The 'covered agreements' in the sense of Article 1.1 of the *Dispute Settlement Understanding of the WTO (DSU)* predominantly consist of a multilateral treaty.<sup>4</sup> Unlike the Court of Justice, *WTO* panels and the *Appellate Body* usually refer expressly to the *VCLT* and apply the framework set out in Articles 31 and 32 of the *VCLT* rather formalistically. They typically explain the different steps of their interpretive analysis in relation to the *VCLT*, considering the meaning of the words of the text of the relevant provision in its context and in the light of the object and purpose of the treaty.

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<sup>1</sup> See e.g. C-D Ehlermann, 'Six Years on the Bench of the World Trade Court—Some Personal Experiences as a Member of the Appellate Body of the *WTO*' (2002) 36 *JWT* 605.

<sup>2</sup> See e.g. G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (2012); K Lenaerts & JA Gutiérrez-Fons, 'To Say What the Law of the *EU* Is: Methods of Interpretation and the European Court of Justice' (EUI Working Papers AEL, 2013), <[http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL\\_2013\\_09\\_DL.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1)> [accessed 1 February 2014].

<sup>3</sup> For a comparison between the Court's hermeneutics and treaty interpretation in accordance with public international law, see the rewritten version of *Van Gend en Loos* in JHH Weiler, 'Rewriting *Van Gend & Loos*: Towards a Normative Theory of ECJ Hermeneutics', in O Wiklund (ed), *Judicial Discretion in European Perspective* (2003) 150.

<sup>4</sup> *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 3, Annex 2, Art 1.1 (Understanding on Rules and Procedures Governing the Settlement of Disputes).

The WTO panels and the Appellate Body are often criticised for how, and the degree to which, they rely on text and dictionary definitions. However, one of us has previously shown that their interpretive methods are indeed more varied.<sup>5</sup>

In this paper, we focus on certain practical aspects of interpretation, and in particular on several constraints arising in the practice of interpretation in both judicial systems. We start by setting out some features of the general context in which each system operates. Thereafter we consider different types of constraint. In doing so, we seek to contribute a number of practical and institutional considerations to the debate on the principles set out in Articles 31 to 33 of the VCLT.

## **2 General background**

Both the Court of Justice and WTO panels and Appellate Body are engaged in the exercise of a judicial function. Yet, both institutions exercise that function in distinct contexts and their interpretive mandate is described differently. Article 19(1) of the Treaty on European Union (*TEU*) defines the jurisdiction of the Court of Justice in very general terms and states that: 'It shall ensure that in the interpretation and application of the Treaties the law is observed'. In contrast to many other international agreements, including the *TEU*, which are silent with regard to the question of how the provisions of the treaty should be interpreted, the *DSU* contains a specific rule setting out how the covered agreements are to be interpreted. Article 3.2 of the *DSU* stipulates that the dispute settlement system of the WTO serves to 'clarify the existing provisions of [the] agreements in accordance with customary rules of interpretation of public international law'.

With these considerations in mind we address several institutional aspects of the two fora, which can have a bearing on the practice of treaty interpretation.

### **2.1 Size of the institution, individual cases and case-load**

The size of each institution, its case-load and individual cases handled by them shapes the way in which the judicial function is carried out, as these factors have

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<sup>5</sup> See generally C-F Lo, 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding' (2010) 1 *JIDS* 431; I Van Damme, 'Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding—A Reply to Professor Chang-Fa Lo' (2011) 2 *JIDS* 231; C-F Lo, 'A Clearer Rule for Dictionary Use Will Not Affect Holistic Approach and Flexibility of Treaty Interpretation—A Rejoinder to Dr Isabelle Van Damme' (2012) 3 *JIDS* 89.

a bearing on the style and form of judicial decision-making. Each institution has developed a particular style of judicial decision-making. Decisions by the Court are typically much shorter than decisions by WTO panels and the Appellate Body, and there are important differences between an average case at the Court and at the WTO in terms of content, number and length of submissions and exhibits, as well as the number of parties involved, although no perfect comparison is possible.

In addition, the case-load of the Court significantly exceeds that of the WTO dispute settlement system. In 2011, the Court of Justice completed 550 cases, whereas only 10 panel reports and 6 Appellate Body reports in original proceedings (as opposed to compliance and other types of proceedings) were issued. In 2012, in Luxembourg, 527 cases were completed while, in Geneva, 6 panel reports and 6 Appellate Body reports in original proceedings were issued.<sup>6</sup>

In order to complete these cases, the Court then had available 27 judges<sup>7</sup> and eight Advocates General<sup>8</sup> each working with three to four *référéndaires*, though typically only one *référéndaire* will work on a given case. By contrast, three ad hoc panelists hear a case at the panel stage at the WTO, and at the Appellate Body a division composed of three out of seven permanent Appellate Body Members hears an appeal. A team of typically three to four lawyers assists a division of the Appellate Body in a case. Overall, there are currently 12 lawyers working at the Appellate Body Secretariat and 41 lawyers in the Legal Affairs Division and in the Rules Division, assisting first instance panels.

There are important variations in the size of cases adjudicated within both systems. Where possible, the Court of Justice attempts to control the length of written observations and pleadings through guidelines or by imposing strict time limits for pleadings.<sup>9</sup> Limitations on the length of written submissions have

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<sup>6</sup> Regarding the WTO, see *Total Reports and Awards Circulated Each Year*, <<http://www.world-tradelaw.net/dsc/database/reportcount.asp>> [accessed 4 February 2014]; regarding the Court of Justice, see *Annual Report 2012*, 1 January 2013, 10 <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685\\_2012\\_6020\\_cdj\\_ra\\_2012\\_en\\_proof\\_01.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf)> [accessed 1 February 2014].

<sup>7</sup> As a result of Croatia's accession to the European Union, there are (as of 1 July 2013) 28 judges at both the Court of Justice and the General Court.

<sup>8</sup> There are now nine Advocates General.

<sup>9</sup> Court of Justice of the European Communities, *Notes for the guidance of counsel in written and oral proceedings before the Court of Justice of the European Communities*, February 2009, 25 <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9\\_2008-09-25\\_17-37-52\\_275.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf)> [accessed 1 February 2014]; in addition, Art 58 of the Rules of Procedure of the Court of Justice, [2012] OJ L 265/1 states that

also been considered at the WTO,<sup>10</sup> although to date no such limitations have been adopted. However, as a matter of standard practice the Appellate Body imposes limitations on the length of oral statements in hearings. There is a trend, perceptible at both the Court of Justice and at the Appellate Body, towards an increase in the number of grounds of appeal in appellate proceedings. At the Appellate Body, the average number of issues raised in each appeal has increased from approximately eight issues per case in the first ten appeals during the period spanning from 1996 to early 1998 to more than 13 issues per case in the ten appeals adjudicated by the Appellate Body between the beginning of 2011 and the end of 2012.<sup>11</sup>

Finally, it is important to note that at the Court, with few exceptions, written observations filed by the parties are translated by the institution itself into at least the working language of the Court, which is French. In addition, both in Luxembourg and in Geneva the institutions provide simultaneous interpretation at the oral hearings. Both translation of documents and interpretation at the oral hearings contribute to the complexity of proceedings, particularly so at the Court, as the European Union (EU) has many more official languages than the WTO.

## 2.2 Jurisdiction

Jurisdiction of the Court of Justice and the WTO dispute settlement system is both compulsory and exclusive. A condition set for acceding to the EU and the WTO is acceptance of their jurisdiction and of the requirement to submit disputes about the interpretation and application of EU law and WTO law, respectively, to those fora. The WTO dispute settlement system serves to resolve disputes between WTO Members about the interpretation and application of the covered agreements. Individuals have no standing and national courts cannot refer questions to either a panel or the Appellate Body.

The jurisdiction of the Court of Justice is much more varied, in terms of the type of proceeding, the actors involved and the subject matter of jurisdiction. Leaving aside the jurisdiction of the General Court and that of the Civil Service Tribunal (where individuals have standing subject to different conditions), in

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[w]ithout prejudice to any special provisions laid down in [the Rules of Procedure], the Court may, by decision, set the maximum length of written pleadings or observations lodged before it.

<sup>10</sup> See: A Jara, *Progress Report on Informal Consultations to Enhance Efficiency of the Panel Process*, 13 March 2012, <[http://www.wto.org/english/news\\_e/news12\\_e/ddg\\_13mar12\\_e.htm](http://www.wto.org/english/news_e/news12_e/ddg_13mar12_e.htm)> [accessed 1 February 2014].

<sup>11</sup> Appellate Body, 'Annex 1: The Workload of the Appellate Body' in *Annual Report for 2013*, WTO Doc WT/AB/20, 14 March 2014, 32, 35.

general the Court can consider issues of law and fact in infringement proceedings (the comparison here being with panel proceedings though the Court acts as a court of first and last instance), or issues of law in either appellate proceedings or preliminary ruling proceedings. In terms of framing the interpretive questions to be addressed, the Court is flexible in reformulating questions in preliminary ruling proceedings in a manner that it is evidently precluded from doing in, for example, appellate or infringement proceedings.

### 2.3 Institutional context

Both the Court of Justice and the WTO dispute settlement system operate in the context of a particular legal regime, the features of which have implications for the institution's approach to treaty interpretation. One key difference between the organisations they belong to relates to the number of members—28 versus 159, respectively—as well as their respective membership's political, economic and cultural diversity.

The Court of Justice is part of a comprehensive institutional model. The balance of powers between the EU institutions as they stand today has evolved over time, resulting in a wider scope of the jurisdiction of the Court and more ample powers of the European Parliament in the legislative process. The Court's interpretations of the Treaties (primary law) and secondary legislation (secondary law) are part of an evolving institutional environment. Decisions of the Court sometimes prompted legislative developments and initiatives for treaty amendment. At the outset, it appeared doubtful whether initial steps of European integration were aimed at establishing solely a treaty-based system, fully part of public international law, or whether the drafters of the founding Treaties intended to create a closer union and a *sui generis* type of legal system. In *Van Gend en Loos* and later in *Costa v Enel*, the Court actively asserted that (what is now called) the EU is a separate autonomous legal order and that, provided certain conditions are met, EU law (whether or not treaty law) could create directly effective rights for individuals which they could invoke before national courts.<sup>12</sup> Unlike WTO law (with respect to which, in the absence of a provision to that effect in the agreements themselves, it is for national law of each WTO Member to determine its effect within the domestic legal order), EU law—as ultimately interpreted by the Court of Justice—sets the terms on which it permeates into the national laws of Member States. By virtue of the doctrines of supremacy, direct

<sup>12</sup> See Case C-26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I, 12; Case C-6/64, *Costa v Enel* [1964] ECR 585.

effect and the principle of consistent interpretation, judgments of the Court of Justice penetrate deeper and more directly into the national legal systems of the EU Member States. WTO law does not itself set the terms for its effect in the municipal law of WTO Members. While, as a matter of international law, failure to implement dispute settlement reports might entail state responsibility, it is for each WTO Member to determine the effects of these reports in its legal order.

By contrast, the WTO's institutional model does not include a parliamentary assembly, the extent of its political bodies' powers remain uncertain and it largely misses effective governance structures enabling the organisation to adapt to changing circumstances and to adopt new legal instruments. The creation of the WTO dispute settlement system was undertaken in order to judicialise dispute resolution, making it rules-based rather than controlled by politics.<sup>13</sup> Panel and Appellate Body reports become binding on the parties after adoption by the Dispute Settlement Body (DSB) which has become quasi-automatic because of the reverse-consensus rule. In addition, drawing on the text of Article 3.2 of the DSU, which stipulates that the dispute settlement system shall provide security and predictability to the multilateral trading system, the Appellate Body held in *US – Stainless Steel (Mexico)* that the mandate of 'clarify[ing] the existing provisions of [the] agreements' goes beyond interpretation and application of a provision in one particular case. In this decision, the Appellate Body referred to the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements.<sup>14</sup>

While the number of cases adjudicated by the WTO dispute settlement system seems low in comparison to the number of cases adjudicated by the Court, the WTO dispute settlement system has produced a rich practice of interpretation in the almost twenty years of its existence. This contrasts with the paralysis of the legislative branch of the WTO, which arguably lacks decision-making processes allowing for a gradual evolution of the legal rules. Contrary to the EU system, where the legislator can react to a decision of the Court by adopting new legislation, by changing legislation (and ultimately the Treaties) or by codifying existing case-law, WTO Members lack similar means to react quickly to a decision by a panel or by the Appellate Body. In practice, amendments to the WTO covered agreements require consensus among WTO Members. These

<sup>13</sup> See J H Jackson, 'The Evolution of the World Trading System – The Legal and Institutional Context' in D Bethlehem, D McRae, R Neufeld & I Van Damme (eds), *The Oxford Handbook of International Trade Law* (2009) 30, 45-53.

<sup>14</sup> Appellate Body, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc WT/DS344/AB/R (30 April 2008) para 161 (*US – Stainless Steel (Mexico)*).

rigidities have resulted in an imbalance between the political branch and the judicial branch within the WTO.

Furthermore, the institutional architecture of the organisations to which the Court of Justice and the Appellate Body belong are different in that the Commission is involved in every case before the Court, defending the Union's interests. No similar defender of the objectives of the WTO exists in WTO dispute settlement. While the DSB establishes panels and adopts panel reports and Appellate Body reports, it is not actively involved in the disputes.

Finally, if jurisprudence is seen as a form of dialogue between the actors appearing before the court and the judges hearing a case, then the nature of this interaction and the style of this discourse might also be shaped by features of the professional communities appearing before the Court of Justice and the Appellate Body. The Court sees a variety of actors appearing before it, ranging from repeat players (such as the Commission and to a lesser extent Member States and other institutions, depending on the type of dispute) to first time players (such as counsel for parties to the main proceedings before a national court that has requested a preliminary ruling). In WTO dispute settlement, however, Members are typically represented by a delegation of their government, often assisted by legal counsel. There is typically no role for representatives of the other bodies of the WTO, of other international organisations, or of individuals in WTO dispute settlement, nor is there representation of the interest of the WTO.

### **3 Constraints on the practice of interpretation**

Against the background of some of the factors shaping the exercise of the judicial function in the Court and in WTO dispute settlement, we now consider several constraints existing in the practice of interpretation in the two fora.

#### **3.1 Texts**

Treaty text usually provides a certain degree of specificity but is, almost inevitably, also incomplete. With regard to the legal instruments interpreted by the Court and in WTO dispute settlement, there appear to be similarities in the terms, the style and the function of certain provisions, such as exception clauses or provisions setting out the fundamental principles of non-discrimination, the basic rights of free movement, or the prohibition on quantitative restrictions. At the same time there are also significant differences. The WTO treaty text, such as the Agreement on the Application of Sanitary and Phytosanitary Measures

or the Customs Valuation Agreement, is in many instances much more detailed than the text found in the EU Treaties, making the former more akin to different forms of secondary EU law with respect to which the Court is also the final interpretive authority. On the contrary, primary EU law tends to express broad principles using language of greater indeterminacy than many provisions in the WTO covered agreements.<sup>15</sup> This might be one of the reasons why the Court of Justice has exercised greater discretion in interpreting the EU Treaties. Even where the language in the EU Treaties—or secondary forms of EU law—is more precise or more technical, general principles of EU law form part of the inherent context in which other, more formal, sources of EU law must be interpreted.<sup>16</sup>

While the Court routinely interprets secondary law adopted by EU institutions, these institutions may themselves adopt legislation (or amend the Treaties) so as to either codify or override an interpretation articulated in a decision of the Court. In the context of the WTO, the legislative arm of the institution is much more constrained, on the one hand, because instruments akin to secondary law are not properly developed, and, on the other hand, because the process for amending instruments of primary law is almost on the verge of paralysis. This further enhances the rigidity of the WTO Agreements and weighs in favour of a text-based interpretation by panels and the Appellate Body.

Yet, whatever the particular features of the law being interpreted, and despite different reasons explaining the interpretive choices used in the two fora, there cannot be any doubt that those who interpret start by considering the text of the treaty, directive, regulation or other documented form of law. The text expresses the intent of the drafters—or at least a degree of consensus—by all Members or a group thereof whose majority is considered to be sufficient for accepting that text as law. The allocation of interpretive authority to a third party generates a mandate for that party to produce an interpretation that replaces the individual, and therefore possibly more subjective, positions taken by those facing an interpretive problem in a dispute.

The Appellate Body's approach to treaty interpretation is sometimes classed as belonging to the 'strict constructionist school that interprets texts literally and narrowly'.<sup>17</sup> Moreover, the Appellate Body's reasoning has been described

<sup>15</sup> See also Lenaerts & Gutiérrez-Fons, above n 2, 15.

<sup>16</sup> See, generally, K Lenaerts & J A Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *CMLR* 1629.

<sup>17</sup> G Abi-Saab, 'The Appellate Body and Treaty Interpretation' in G Sacerdoti, A Yanovich & J Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (2006) 453, 461; see also J Pauwelyn & M Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations

as privileging close contact with the words of the treaty over reasoning based on general considerations of object and purpose of the treaty.<sup>18</sup> It is widely known and visible that the Appellate Body often uses dictionary definitions as a starting point for its interpretation of treaty text. In addition, the Appellate Body typically articulates the interpretive methods it applies clearly, even to the point of a 'laborious and mechanistic handling'<sup>19</sup> of the principles codified in Articles 31 and 32 of the VCLT.

However, this emphasis on the text of the treaty does not necessarily suggest that the Appellate Body does not attribute sufficient weight to the other criteria of interpretation, such as context or object and purpose. As one of us has described elsewhere,<sup>20</sup> even the Appellate Body's use of dictionaries is not an entirely neutral exercise because, in choosing between different dictionaries and dictionary definitions, the interpreter inevitably makes a choice and starts to contextualise. The Appellate Body typically considers the ordinary meaning of the words of the treaty along with the context and the object and purpose of the treaty. On occasion, the Appellate Body has also considered subsequent agreements,<sup>21</sup> subsequent practice,<sup>22</sup> as well as other relevant rules of international law pursuant to Article 31(3)(c) of the VCLT,<sup>23</sup> and it has taken recourse to supplementary means of interpretation in the sense of Article 32 of the VCLT. In using context, the object and purpose, and possibly other considerations such as the principle of effectiveness, the Appellate Body often explains its interpretive choices by reference to the different provisions and individual sub-paragraphs of the VCLT. When applying the principle of effectiveness, the Appellate Body focuses especially on the effectiveness of an individual agreement as a whole as well as the inter-effectiveness of different agreements and it maintains a strong focus on the text of the treaty. The Appellate Body thus

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Across International Tribunals', in J L Dunoff & MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* (2012) 445, 452.

<sup>18</sup> Abi-Saab, above n 17, 461; Ehlermann, above n 1, 615–16.

<sup>19</sup> Abi-Saab, above n 17, 458.

<sup>20</sup> See generally I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009).

<sup>21</sup> See e.g. Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012) paras 371–7 (*US – Tuna II (Mexico)*).

<sup>22</sup> See e.g. Appellate Body, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WTO Doc WT/DS269/AB/R, WT/DS286/AB/R (12 September 2005) paras 251–76 (*EC – Chicken Cuts*).

<sup>23</sup> See e.g. Appellate Body, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc WT/DS379/AB/R (11 March 2011) paras 307–16 (*US – Anti-Dumping and Countervailing Duties (China)*).

employs the principle of effectiveness in order to give meaning and effect to all components of the agreements it applies and interprets.

In the Court of Justice, it is less common to see references to dictionary definitions as a starting point for the interpretive exercise. Indeed, given the number of official languages at the Court, it would be quite impracticable for the Court to consult dictionary definitions for different words used in different language versions of the treaty and explain the reasons for adopting one and not another. Ultimately, the main reason why the Court gives less prominence to dictionary definitions may simply be a matter of judicial style. However, the fact that decisions of the Court contain fewer references to dictionaries does not necessarily mean that dictionaries are not used by the Court or that positions on the ordinary meaning of a word or provision are reached in isolation of considerations that panels and the Appellate Body expressly include in the formal explanation of their interpretive process. With regard to the principle of effectiveness, it is worth noting that the focus of the Court is on the effectiveness of the EU as an organisation and the separate autonomous legal order that it forms. Indeed, the Court's creation of general principles of EU law must be seen as part of that concern.<sup>24</sup>

In both contexts, a focus on one out of several means of interpretation might also be a function of the nature of the obligation or right described in the text being interpreted. In this vein, considerations of object and purpose might be particularly relevant with respect to the interpretation of broadly circumscribed principles, such as those in the area of fundamental rights. Many of the obligations contained in the WTO Agreements, however, are not of that type. Rather, they contain a number of more or less narrowly circumscribed rights and obligations; broader considerations of object and purpose may not always be very helpful for interpreting such provisions. On the other hand, these obligations are complemented with exceptions, such as the general exception of Article XX of the GATT 1994.<sup>25</sup> Some of the exceptions make reference to broader concepts, which might be structurally similar to those in the area of fundamental rights and, consequently, considerations of object and purpose may feature more prominently in the interpretation of these provisions.

Thus, it would appear that if, in practice, interpretation is best characterised as the exercise of moving from one concentric circle to another,<sup>26</sup> the circles as

<sup>24</sup> See Lenaerts & Gutiérrez-Fons, above n 16, 1632.

<sup>25</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, Annex 1A, Art 20 (General Agreement on Tariffs and Trade 1994) (GATT 1994).

<sup>26</sup> M Huber, 'Commentaire de l'interprétation des traités' (1952) 44 *Annuaire de l'Institut de droit*

such are not fundamentally different in the interpretive practice of the Court of Justice and the WTO. Yet, the considerations made when moving, for example, from the ordinary meaning, to the immediate and broader context, and then to the object and purpose and other elements of interpretation might be different. The same would appear to apply to the proximity of the different circles.

### 3.2 *Multilingualism*

While the constraints resulting from multilingualism are undoubtedly more visible in Luxembourg, both judicial systems interpret texts which are authentic in different languages. The WTO agreements are authentic in English, French and Spanish.<sup>27</sup> The different formal sources of EU law are authentic in the 24 official EU languages.<sup>28</sup>

It is not unlikely that a single person (whether it be a judge, an Advocate General or a legal officer) masters the three official languages of the WTO, but it is quite impossible that he or she is proficient in all EU languages. This results undoubtedly in matters getting lost in translation and renders the application of the rule in Article 33 of the VCLT often somewhat impracticable at the Court. The constraints of performing the judicial function in a multilingual environment are most visible in the Court of Justice.<sup>29</sup> Taking the example of the preliminary ruling procedure, a reference might arrive in any of the 24 official languages depending on which national court refers the matter to the Court. That reference, and at least the question(s) referred, typically will be translated into all other official languages and the various parties authorised to intervene (including the different Member States) might file written observations in different languages. All of these documents are then translated into French which is the internal working language of the Court. Hearings will then be organised with simultaneous interpretation. An Advocate General might write an opinion in English and the reporting judge may prepare a draft judgment in French which is then the basis, in principle, for the *délibéré* in French with other judges in a chamber of three, five or fifteen judges, none of whom might be native French speakers. A given provision will be read in French and possibly

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*int'l* 198, 200; M Koskeniemi, 'Fragmentation of International law: difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission', UN Doc A/CN.4/L.682, 13 April 2006, paras 463–4 .

<sup>27</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, Art 16 (*Marrakesh Agreement*).

<sup>28</sup> Consolidated Version of the Treaty on European Union, [2012] OJ C 326/13, Art 55(1) (*TEU*).

<sup>29</sup> See also Lenaerts and Gutiérrez-Fons, above n 2, 8–13.

in the other languages in which the judge(s), Advocate General and legal officer(s) working on the case are proficient. At the same time, the text of a regulation or directive might itself not be perfectly uniform in the different language versions in which it is available. Indeed, there might be some differences in language versions of the Treaties.<sup>30</sup> The resulting judgment or opinion will be translated by a separate team of lawyer-linguists into different languages and it is simply impossible, taking into account the limited resources available, for the drafters of the original document to verify each translation. If treaty interpretation is in essence the process of finding meaning of an authoritative text agreed as having the status of law in different language versions, it thus appears evident that by definition that process will be imperfect in a context such as that of the Court of Justice.

By comparison, multilingualism in the WTO presents fewer challenges. In the overwhelming majority of disputes, the parties have chosen to make their submissions in English. On occasion, parties have filed submissions in Spanish or French. At the Appellate Body, however, this has so far not led to a change in the language of the proceeding in those disputes. Up to today, all Appellate Body reports have been drafted in English and have subsequently been translated into Spanish and French. Nonetheless, the Spanish and the French texts of the covered agreements are sometimes referred to in arguments by the parties in a dispute as well as by the Appellate Body in its reasoning.<sup>31</sup>

### 3.3 Preparing a judgment or report

The internal processes for preparing the final judgment or report in a case differ greatly in the Court of Justice and the WTO dispute settlement system. This has an impact on styles of explaining interpretive reasoning. This is partly due to the type of jurisdiction being exercised, the multilingual regime, the case-load, the internal organisational structure in the respective systems and the time available to deliver a judgment or report.

In the Court of Justice, internal preparations of a case, in terms of substantive treatment, typically start only after the written procedure is completed and, depending on the language of proceedings, when translations of all written

<sup>30</sup> See e.g. Case C-219/95 P, *Ferriere Nord SpA v Commission* [1997] ECR I-4411, paras 12–14.

<sup>31</sup> See e.g. the relevance of the French and the Spanish versions of the GATT 1994 Art III:8(a) for the Appellate Body's interpretation of the term 'governmental purposes' in Appellate Body, *Canada – Renewable Energy & Canada – Feed-in Tariff Program*, WTO Doc WT/DS412/AB/R & WT/DS426/AB/R (6 May 2013) para 5.67.

observations are available. In that context, it must be emphasised that the written procedure is strictly separated from the oral procedure. Typically, it is not possible to begin preparatory work at an earlier stage because: (i) a full comprehension of the file is not possible until all translations are available; (ii) there are competing demands in other pending cases, taking into account that each member of the Court has a chamber of three or four lawyers, with typically only one lawyer working on a given case; (iii) depending on the type of jurisdiction, there is a possibility of anticipating new issues. After translations become available, the burden is on the so-called reporting judge to prepare a preliminary report on the case, describing the applicable law, the issues at stake and the arguments made as well as assessing the complexity of the case and setting out suggestions on how the Court should treat the case procedurally (for example, whether a hearing is required, an opinion of an Advocate General is needed, or whether the case should be allocated to a chamber of three, five or fifteen judges). That report is then first considered by the Advocate General, who is expected to accept but not approve the report—a subtle but nonetheless important distinction because the ownership over the report remains with the reporting judge. Ultimately, the report is considered by all members of the Court at their weekly meeting. Following that meeting, the jurisdiction of the Court is exercised by the specific chamber to which the case is allocated. This means that, unlike the WTO Appellate Body, there is in principle no exchange of views with the full court, even on matters of fundamental importance referred to the Grand Chamber. In exceptional cases, the full Court will consider a case.<sup>32</sup> Following that stage, a hearing might be organised and an opinion of the Advocate General might be delivered before the reporting judge returns to a full study of the case and prepares a draft judgment ready to be deliberated. In the Court there are fewer possibilities of—at a preliminary stage, possibly even before the Court's jurisdiction is seized—studying the case in a horizontal level and having available a general reflection document against the background of which to consider a particular case. At best, the Court might ask the department 'Research and Documentation' to collect the relevant case law in a particular area or Member States' practice in a certain area.

At the Appellate Body, work on an appeal typically begins once a panel report has been circulated, regardless of whether that panel report will ultimately be

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<sup>32</sup> See e.g. Case C-370/12, *Thomas Pringle v Government of Ireland* [2012] 2 CMLR 2; Opinion O-2/13, *Request for an opinion submitted by the European Commission pursuant to Article 218 (11) TFEU* [2013] OJ C 260.

appealed or not. This is so because the 90-day deadline for the completion of an appeal proceeding and translation of the Appellate Body report into the three official languages of the WTO could not be met if preparation started only once a notice of appeal had been filed. The case is assigned to a team of lawyers of the Appellate Body Secretariat. That team will study the case, compile relevant case law and academic writing and assist the Appellate Body division hearing the appeal throughout the proceeding. The appeal proceeding is officially initiated with the filing of a notice of appeal with the WTO Dispute Settlement Body and the Appellate Body and the filing of a written appellant's submission on the same day. At that point, a division of three Appellate Body Members will be constituted to hear the case. According to Rule 6(2) of the Working Procedures for Appellate Review, the Members constituting a division are selected on the basis of rotation while taking into account the principles of random selection, unpredictability and the opportunity for all Members to serve regardless of their origin. Each division has a presiding Member, elected by the Members of that division. While it is for the division to decide all issues under appeal in a particular case, the division will hold an exchange of views with all Appellate Body Members not on the division in the case, in order to ensure consistency and coherence in the case law and to draw on the expertise of all Appellate Body Members in deciding the case. A division will make every effort to take a decision by consensus. However, if consensus cannot be reached, the matter may be decided by majority vote.<sup>33</sup>

### **3.4 Internal actors**

To some extent, differences in the approach to interpretation in the Court and in the Appellate Body might be a function of the background of the individual adjudicators or legal officers serving on the respective adjudicative bodies. At the Court of Justice, the internal actors are all lawyers and nationals of the Member States. Their backgrounds vary widely but most of them have studied law and then practised in some form or another in a context wherein EU law is internalised in national law. The Court does not employ economists; an earlier experiment of employing an economist at the General Court was short-lived. Expertise in a particular area of EU law might be valuable but ultimately, taking into account the breath of EU law and width of the Court's jurisdiction, the

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<sup>33</sup> Working Procedures for Appellate Review, WTO Doc WT/AB/WP/6, 16 August 2010, Rule 3(2); see also, P Van den Bossche & W Zdouc, *The Law and Policy of the World Trade Organization* (3<sup>rd</sup> edn, 2013) 234.

chances of working on cases involving matters not studied or otherwise known before are high.

With regard to WTO dispute settlement, Articles 8 and 17.3 of the DSU, respectively, set out the criteria of eligibility for panelists and Members of the Appellate Body. These provisions do not require individuals serving on panels or on the Appellate Body to be lawyers. In practice, however, the great majority of individuals having served and currently serving as Appellate Body Members have been or are lawyers. At the panel stage, appointment of individuals who are not lawyers is a more frequent phenomenon. However, all members of the professional staff at the Appellate Body Secretariat are lawyers and so is the vast majority of staff assisting first instance panels. However, in recent years, the involvement of economists, usually from the Economic Research and Statistics Division of the WTO, has become more frequent particularly in trade remedy cases.

### **3.5 Internal decision-making: or exchange of views**

Both judicial systems involve, in most cases, a consensus among at least three Members or judges. At the Appellate Body, decision-making involves a consensus of the three Members of a division hearing an appeal. At the Court, the required majority will depend on the size of the chamber hearing the case.

In the WTO dispute settlement system, dissenting opinions—often on individual issues—are not prohibited. Article 14.3 of the DSU stipulates that opinions expressed in a panel report by individual panelists shall be anonymous. Similarly, pursuant to Article 17.11 of the DSU, opinions expressed in an Appellate Body Report by individual Appellate Body Members shall be anonymous. Thus, separate opinions are permitted at both the panel and appellate stage. The Working Procedures for Appellate Review, however, also stipulate that an Appellate Body division shall make ‘every effort’ to decide by consensus. In practice, there have been very few Appellate Body Reports containing separate, dissenting, or concurring opinions, and they typically concern rather specific and narrowly circumscribed questions. Conversely, separate opinions are prohibited in the Court of Justice.<sup>34</sup>

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<sup>34</sup> Members of the Court of Justice do, however, appear to have a wider freedom to comment in an extrajudicial context on the case law of the Court and sometimes even on matters not yet resolved by the Court. Illustrations are discussed in A Vauchez, ‘The transnational politics of judicialization. *Van Gend en Loos* and the making of EU polity’ (2010) 16 *Eur LJ* 1.

In both systems, in principle, it is impossible to discern from the decision the majority in the relevant chamber or division, discussions of which are strictly confidential.<sup>35</sup> The need to make the interpretive reasoning acceptable to the majority without necessarily isolating the minority might render that reasoning more nuanced and balanced, or perhaps, to the contrary, it might lead to reasoning becoming less stringent or less clearly articulated in an attempt to accommodate the concerns of the minority. At the same time, in a chamber or in a division of three, where two judges or Members hold different views, the third judge or Member will be the decisive voice, and might thereby have a considerable impact on the decision and its form.

Interpreting texts and deciding cases in a setting involving fewer than the total members of the Court or the Appellate Body unavoidably increases risks of incoherence in the case law. Tensions between interpretive arguments can arise in different ways: from the co-existence of a final judgment or report with dissenting opinions, or from the case law itself.

In order to achieve greater coherence, the Working Procedures for Appellate Review provide that the Appellate Body division deciding a particular dispute shall exchange views with the four Appellate Body Members who are not on the division in the dispute. This takes place soon after the oral hearing and before the drafting of the Appellate Body report in the case begins. This step in the proceedings allows identifying potential disagreements at an early stage. While the decision is ultimately taken and reasoned by the division and consensus with Appellate Body Members not on that division is not necessary, the exchange of views allows the division to take potential disagreements into account. A division might choose to reason a decision in a less controversial way, if possible, in order to accommodate concerns or views of non-division Members.<sup>36</sup>

A similar exchange of views does not exist in the Court. Thus, for example, one chamber of five judges might sequentially or concurrently consider an interpretive question that is similar to that before another chamber in which five other judges sit. Allocations of cases to reporting judges and Advocates General as well as the possibilities under the Rules of Procedure for joining cases or offering them parallel treatment do not entirely prevent such parallel track situations from occurring in practice. At the same time, the number of cases before the Court of Justice and its organisational structure of chambers and different sizes of chambers permit identifying inconsistencies and uncertainties in its case law

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<sup>35</sup> For the Appellate Body, see DSU Art 17.10.

<sup>36</sup> On the practice of the exchange of views see Ehlermann, above n 1, 612.

relatively quickly because similar questions of interpretation are often recurring, even if presented in a slightly different factual context. Ultimately, the Grand Chamber should and will intervene if a similar question is at issue in subsequent proceedings.

In the WTO, no mechanism similar to that of the Grand Chamber exists. In addition, there are fewer cases and therefore there are less frequent opportunities to revisit, refine or review interpretive decisions. Nor do the WTO dispute settlement procedures foresee that reports might be preceded by a publicly available opinion of the Advocate General. While the style and form of such opinions in the Court of Justice might vary widely, they nonetheless often set out a wider interpretive analysis than that found in the judgments. Advocates General might be less pre-occupied by the consideration of deciding a case on the narrowest grounds available and, due to their very function, have more freedom in considering an interpretive question at a more abstract level. It is not uncommon that, in cases where the Advocate General's opinion is followed, the Court's explanation of its interpretation is but a shorter version of that found in the opinion or that a full comprehension of the Court's reasoning involves reading the opinion together with the Court's judgment.<sup>37</sup> Or, the Court might disagree or not yet be willing to agree with the Advocate General's interpretation (a subtle but nonetheless visible distinction); in such cases, it is not uncommon that the interpretive analysis might be quite short.

## 4 Conclusion

The Court of Justice and the WTO dispute settlement system have developed different ways of articulating their methods of interpretation. This is not necessarily a reflection of different positions on the content of the principles of treaty interpretation as codified in the VCLT. Interpreters in both institutions operate in different environments and face several practical constraints in interpreting treaties. These must be taken into consideration in assessing the methods of interpretation that have evolved in the two systems. In this paper we have addressed some of these constraints. This review demonstrates that, as part of the renewed interest in the state of the law of treaties, the study of the internal functioning and design of international courts is critical in properly assessing

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<sup>37</sup> See e.g. Case C-440/12, *Metropol Spielstätten Unternehmungsgesellschaft v Finanzamt Hamburg-Bergedorf* [2013] ECR I-0000, para 40.

what jurisprudential developments serve as evidence of the development of the law of treaties.

## IN DEFENCE OF EXPANSIVE INTERPRETATION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Shai Dothan\*

### Abstract

The European Court of Human Rights applies a series of interpretive techniques that systematically expand states' human rights obligations far beyond the obligations states took upon themselves by ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms. Some commentators argue that this practice is illegitimate because states represent their citizens and their decision not to undertake certain human rights obligations should be respected. This paper argues that expansive interpretation is nonetheless legitimate in two important situations which often occur in the international arena. First, in situations where most states would have subscribed to the additional obligation but for a minority of states that use their veto power to prevent an amendment of the Convention, expansive interpretation will bring the states' actions into better alignment with their own desires and the desires of their citizens. Second, in situations where democratic failures lead states to misrepresent the interests of individuals affected by their human rights policies, expansive interpretation can help align the policies of states with the true interests of the citizens they represent. Although the paper does not provide a general justification for expansive interpretation, it does suggest that in certain limited contexts where the conditions identified above hold, it might well serve the goals of international law and international courts.

### Keywords

Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, treaty interpretation, human rights

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## 1 Introduction

In the course of interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms (the *Convention*),<sup>1</sup> the European Court of Human

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

Rights (ECtHR) commonly invokes a wide variety of jurisprudential approaches and policy based arguments that have had the effect of expanding the obligations the Convention imposes on its signatories, often requiring them to assume obligations that go far beyond those they contemplated when they signed the Convention. Commentators have widely criticised these aspects of the Court's operation. They argue that even though the Court has special expertise in protecting human rights (as compared to that of state parties), it should not be allowed to expand the obligations of state parties.<sup>2</sup> These commentators explain that because the ECtHR is not democratically accountable, its expansion of treaty obligations undertaken in the guise of interpretation might well have the effect of thwarting the democratic decisions of signatory states.

This article suggests that while there are many situations in which the Court's tendency towards expansive interpretation might indeed be inconsistent with democratic decisions of signatory states, there are two important contexts in which its approach might in fact be more consistent with democratic theory (and hence the Court's normative legitimacy) than a more narrow approach to interpretation: first, when a democratic state voted or would have voted for a treaty amendment whose inclusion was thwarted by the opposition of other states; second, in situations where the state itself fails to represent its citizens, that is in situations where there has been some type of democratic failure. In both cases, the ECtHR will sometimes be able to engage in expansive interpretation, while either retaining, or perhaps enhancing, its normative legitimacy.

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<sup>2</sup> For the argument that the ECtHR should not digress from the will of the state parties see Judge Borrego Borrego's concurring opinion in the case of *Stec and Others v United Kingdom* [2006] VI Eur Court HR 1162 (*Stec*). For an analysis of arguments favouring restrictive interpretation by the ECtHR raised by the British delegation before the ECtHR in the case of *Golder v United Kingdom* (1975) I Eur Court HR, Ser A (*Golder*), and by the dissenting judges in this judgment, especially Judge Fitzmaurice; see E Bates, *The Evolution of the European Convention on Human Rights—From its Inception to the Creation of a Permanent Court of Human Rights* (2010) 293–301. For a strongly worded attack on the ECtHR by the media, arguing that it is not representative and not accountable to the European public, see J Slack, 'Social Ties Keep Rapists in Britain', *Mail Online*, 21 September 2011, <<http://www.dailymail.co.uk/debate/article-2039657/Akindoyin-Akinshipe-Social-ties-rapists-Britain.html>> [accessed 19 December 2013]:

The court's 'one country, one judge' rule means that Liechtenstein, San Marino, Monaco and Andorra each have a seat on the court's bench despite their combined populations being smaller than the London borough of Islington's. However, it is able to over-ride the wishes of the British people, its Parliament and its court. This has to end.

Part 2 describes the general doctrinal methods of treaty interpretation and the expansive interpretation methods used by the ECtHR. Part 3 explores the legitimacy of the ECtHR's adjudicative approach in contexts where the refusal of a small group of states to sign a treaty or particular protocols means that the democratic will of representative states is not fully reflected in the treaty text. Part 4 explores the approaches to legitimacy in contexts where a state does not represent the will of its citizens. Part 5 studies the possible responses of states to expansive interpretation, arguing that states can respond to expansive interpretation by refusing to sign protocols to the Convention whose content, strictly construed, they view as beneficial to their interests. Part 6 presents a case study of the attempts by the ECtHR to expansively interpret the right to equality that appears in the Convention. By this expansive interpretation the ECtHR obligated states that did not sign Protocol 12 to grant their citizens the same level of protection as the one protected by the Protocol. Part 7 concludes and offers more general implications of the argument.

## 2 Expansive Treaty Interpretation

### 2.1 Treaty Interpretation in General

There are three main approaches to the interpretation of treaties: the textual approach, the subjective approach, and the teleological approach. The textual approach emphasizes the text of the treaty itself as the primary tool of interpretation. The subjective approach uses the intent of the parties to interpret the treaty. The teleological approach calls for interpreting the treaty according to its object and purpose.<sup>3</sup> These three approaches are not mutually exclusive and courts often use all of them to clarify treaties.<sup>4</sup>

The Vienna Convention on the Law of Treaties (*Vienna Convention*) codified the basic rules of treaty interpretation.<sup>5</sup> Its provisions are commonly accepted as reflecting customary international law and were used by international courts even before the treaty came into effect in 1980.<sup>6</sup> The most important provision

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<sup>3</sup> F Jacobs, 'Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 *ICLQ* 318, 318–19.

<sup>4</sup> I Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn, 1984) 124.

<sup>5</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Arts 31–3.

<sup>6</sup> H Briggs, 'United States Ratification of the Vienna Treaty Convention' (1979) 73 *AJIL* 470, 471–2. See, for example, *Golder* (1975) 18 Eur Court HR, Ser A, para 29: stating that that the ECtHR will

is: 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>7</sup> Authors and commentators noted that this provision favoured the textual approach to interpretation and placed the text of the treaty as the most important source of interpretation.<sup>8</sup> However, other provisions that call attention to subsequent practice and agreements of the parties<sup>9</sup> and to the preparatory work for the treaty<sup>10</sup> attest that the teleological and subjective approaches are not completely neglected.<sup>11</sup> Indeed, the interpreter usually has to consider the purpose of the treaty, even if only to verify that the clear meaning of the text is the correct one.<sup>12</sup>

The Vienna Convention and all three approaches to treaty interpretation are consistent with either expansive or restrictive interpretation.<sup>13</sup> The International Law Commission that drafted the Vienna Convention took the position that if the treaty can be interpreted in two different ways, only one of which gives the treaty an appropriate effect, then this is the interpretation that should be adopted, since that is the only one that interprets the treaty in good faith and in accordance with its object and purpose.<sup>14</sup> But what if two interpretations of the treaty are possible, the first gives it some effect, causing a few obligations on the states, and the other gives it a greater effect, causing greater obligations on the states? In this case an expansive interpreter will adopt the latter interpretation. Often it will champion the need to give effect to the treaty in the name of the principle of effectiveness, but in fact it will give the treaty a greater effect rather than a lesser effect.<sup>15</sup> A

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apply Articles 31–3 of the Vienna Convention before it entered into force because they reflect accepted principles of international law.

<sup>7</sup> Vienna Convention, Article 31(1).

<sup>8</sup> A Watts, *The International Law Commission 1949–1998*, vol 2 (1999) 687; Jacobs, above n 3, 326; Sinclair, above n 4, 115.

<sup>9</sup> Vienna Convention, Articles 31(3)(a–b).

<sup>10</sup> Vienna Convention, Article 32, which states that these supplementary means might be used to confirm the meaning reached by the application of Article 31 or to determine the meaning when Article 31 leaves the meaning or obscure or leads to an absurd or unreasonable result.

<sup>11</sup> Jacobs, above n 3, 326–7.

<sup>12</sup> Sinclair, above n 4, 116.

<sup>13</sup> M A Rogoff, 'Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court' (1996) 11 *Am UJ Int L & Policy* 559, 568–9.

<sup>14</sup> Watts, above n 8, 684.

<sup>15</sup> H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *BYIL* 48, 70; Y Dinstein, *International Treaties* (1974) (Hebrew) 133–5. The International Law Commission made a deliberate decision not to refer to the principle of

restrictive interpreter will adopt the former interpretation. This interpreter will protect states' sovereignty by preventing any limitations on states' actions that they did not agree to expressly in the treaty.<sup>16</sup>

Authors argued that international tribunals have limited the use of restrictive interpretation only to the almost impossible situations in which all other considerations fail to lead to a result. By this account, international tribunals have preferred expansive interpretation over restrictive interpretation.<sup>17</sup> The next subpart will investigate the methods of interpretation used by the ECtHR and will argue that this Court also adopted an expansive interpretation of treaties.

## 2.2 Treaty Interpretation by the ECtHR

The ECtHR is an international court that has jurisdiction over forty seven states within the Council of Europe that ratified the Convention. It has the largest caseload of any international court,<sup>18</sup> which is constantly expanding.<sup>19</sup> This makes it a court whose methods of treaty interpretation are worth investigating. Almost all the cases decided by the ECtHR were initiated by individual applicants complaining that their human rights protected by the Convention had been breached.<sup>20</sup> This makes the choice of the Court between expansive interpretation and restrictive interpretation easier to analyse than in courts that deal with the mutual obligations of two opposing states.

The Convention might be different from many other treaties because it creates a community and institutions that function within it, rather than regulating the cooperation between separate states. Furthermore, it is a law-making treaty

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effectiveness fearing that it would lead to an overly expansive interpretation of treaties, which would illegitimately contradict the 'letter and spirit' of the treaty, see Watts, above n 8, 684.

<sup>16</sup> Lauterpacht, above n 15, 58; I Shearer, *Starke's International Law* (11<sup>th</sup> edn, 1994) 436–7.

<sup>17</sup> Lauterpacht, above n 15, 67; A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 529, 534 (arguing that restrictive interpretation is almost never used in international law).

<sup>18</sup> E Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 *Int Org* 669, 671.

<sup>19</sup> In 2011 the number of pending applications exceeded 150,000 and 64,500 new applications were allocated to the judges.

<sup>20</sup> A state party to the Convention might also refer violations committed by other state parties to the ECtHR, even when the referring state was not harmed by the violation, according to Article 33 of the Convention. However, this method of referral is almost never used. See D Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2009) 42 *Creighton LR* 361, 372 (suggesting that more than 95% of the cases result from individual applications).

that sets norms to protect human rights, rather than a treaty that serves as a contract between two states.<sup>21</sup> The ECtHR explicitly decided that because of the law-making nature of the Convention it should be interpreted in a way that realises the object of the treaty and makes its safeguards effective, and not in a way that restricts states' obligations.<sup>22</sup> Due to the special nature of the Convention, the interpretive choices of the ECtHR might not be shared by international courts that interpret other types of treaties.<sup>23</sup>

The ECtHR relied on the principle of effectiveness to make many interpretive choices that constitute expansive interpretation:<sup>24</sup> it rejected formalistic interpretation in favour of interpretation that fulfils the purpose of protecting rights;<sup>25</sup> it read into the Convention certain rights that do not appear clearly within the text;<sup>26</sup> it required the states to provide practical safeguards that ensure the actual

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<sup>21</sup> F Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M Delmas-Marty (ed), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (1992) 283, 288.

<sup>22</sup> *Wemhoff v Germany* (1968) 2 Eur Court HR, Ser A, para 8; *Soering v United Kingdom* (1989) 14 Eur Court HR, Ser A, para 87 (*Soering*). See also *Ireland v United Kingdom* (1978) 1 Eur Court HR, Ser A, para 239; *Golder* (1975) 1 Eur Court HR, Ser A, para 57; D Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights* (1995) 7; F Matscher, 'Methods of Interpretation of the Convention', in R Macdonald F Matscher & H Petzold (eds), *The European System For The Protection Of Human Rights* (1993) 63, 66.

<sup>23</sup> See P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *HRLJ* 57, 64–5: calling for special rules of interpretation for the Convention that would allow it to continue and protect human rights over a long time despite changing conditions. Nevertheless, the International Law Commission deliberately did not make the distinction between different types of treaties in the Vienna Convention, despite the views of scholars that the nature of the treaty might affect its interpretation, see Watts, above n 8, 684.

<sup>24</sup> See generally P Van Dijk & G Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3<sup>rd</sup> edn, 1998) 74–6; G Merrills, *The Development Of International Law by the European Court of Human Rights* (2<sup>nd</sup> edn, 1993) 98–124.

<sup>25</sup> *Golder* (1975) 1 Eur Court HR, Ser A, para 5 of the separate opinion of Justice Fitzmaurice, deciding that preventing the applicant, a prisoner, from writing to a solicitor interferes with his correspondence, even though the applicant did not write any letters since he was informed his letters will be stopped. *Minelli v Switzerland* (1983) 4 Eur Court HR, Ser A: in this case a journalist was prosecuted for defamation, and the prosecution was repealed because a limitation period passed. But the national court ordered him to bear two thirds of the court's costs based on the presumption that he would be convicted if it was not for the limitation period. The ECtHR decided this violates his presumption of innocence protected by Art 6(2) of the Convention, even if there is no formal decision that the accused is guilty.

<sup>26</sup> *Soering* (1989) 14 Eur Court HR, Ser A: case deciding that extraditing the applicant to the United States, where he might be detained for a long time awaiting a death penalty, would violate Art 3 of the Convention. This was the decision even though the text of Art 3 prevents only subjecting

enjoyment of the rights protected in the Convention;<sup>27</sup> it read articles that provide protection from actions of the states as creating positive obligations on the states,<sup>28</sup> and even as creating an obligation on the states to protect individuals from infringements of their rights by private parties;<sup>29</sup> it interpreted narrowly the exceptions and the derogations from the rights within the Convention,<sup>30</sup> as well as the reservations of states from the Convention,<sup>31</sup> it prevented states from evading responsibility for violations by not recognising attempts to delegate responsibility to other actors;<sup>32</sup> it relaxed the condition that applicants have to be victims,<sup>33</sup> and even allowed non-victims to serve as applicants in unique circumstances;<sup>34</sup> it decided that states are responsible for actions taken outside their territory;<sup>35</sup> and finally, it recently shifted from issuing only declaratory judgments,

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a person 'to torture or to inhuman or degrading treatment or punishment' and not extraditing him to a state where he might be subject to these conditions.

<sup>27</sup> See *Artico v Italy* (1980) 4 Eur Court HR, Ser A, deciding that the right to free legal representation guaranteed in Art 6(3)(c) of the Convention is not fulfilled by merely supplying a defendant with a lawyer, but by ensuring effective legal representation by either causing the lawyer to represent properly or replacing him; *Airey v Ireland* (1979) 3 Eur Court HR, Ser A, deciding that the right to access the court, protected by Article 6(1) to the convention was violated since the applicant could not afford to pay for a lawyer to represent her before the national court, and, even though she could legally argue in person, she would not be able to represent her case properly.

<sup>28</sup> See *Marckx v Belgium* (1979) 2 Eur Court HR, Ser A: deciding that Art 8 of the Convention protecting the right to private and family life does not only protect individuals from actions of the state, it includes positive obligations to shape the legal regime to allow illegitimate children to lead a normal family life. See also *Mehemi v France (No 2)* [2003] IV Eur Court HR 311, para 325; Van Dijk & Van Hoof, above n 24, 74.

<sup>29</sup> See *X and Y v Netherlands* (1985) 4 Eur Court HR, Ser A: Miss Y was a mentally handicapped adult person who was raped. Her father, Mr X, was legally prevented from filing a complaint in her name. The ECtHR decided that the state's legal system did not adopt the necessary measures to protect the applicant's right to private life from infringements by other individuals.

<sup>30</sup> *Klass and Others v Germany* (1978) 45 Eur Court HR, Ser A, para 42; Merrills, above n 24, 116.

<sup>31</sup> Merrills, above n 24, 116–9.

<sup>32</sup> See *Van der Musselle v Belgium* (1983) 13 Eur Court HR (ser A), para 15. In this case, the applicant was a lawyer who complained he was forced to represent defendants without receiving any compensation. Although the applicant was ordered to represent the defendant by the local bar and not directly by the state, the state compelled the bar to compel its members to represent without compensation and was therefore equally responsible as if it acted directly in this manner.

<sup>33</sup> Van Dijk & Van Hoof, above n 24, 76.

<sup>34</sup> See *Fairfield and Others v United Kingdom* [2005] VI Eur Court HR 4: stating that relatives of a deceased victim can bring cases concerning the violations of her right to life under Article 2 of the Convention.

<sup>35</sup> See *Al-Skeini and Others v United Kingdom* [2011] 53 Eur Court HR 18: deciding that state's jurisdiction expands to territories under their effective control even if they are not members of the Convention. This judgment resolved an ambiguity in past judgments of the ECtHR in

which let the states choose the means to remedy their violations, to issuing in some cases judgments that required specific actions from states.<sup>36</sup>

As these interpretive choices demonstrate, the ECtHR has clearly favoured expansive interpretation over restrictive interpretation. Nevertheless, there are limits to the willingness of the ECtHR to expand the obligations of the states. The ECtHR is limited by the text of the Convention. The ECtHR can interpret the text, but it cannot revise the text or bend it to reach any result it wishes. Furthermore, the object of the Convention is not to protect every right, and protecting rights is not its only purpose. The ECtHR also considers the interests of states and defers to some of their decisions by granting them a so-called margin of appreciation.<sup>37</sup> Moreover, the ECtHR often invokes the principle of proportionality. According to this principle, states are allowed to infringe rights enshrined in the Convention if other legitimate interests of proportionate weight necessitate this infringement, and if this infringement does not impair the essence of the protected right.<sup>38</sup>

The interpretation of the Convention did not remain static. In fact, the ECtHR interpreted the Convention in an evolutionary manner, and took into account changing conditions in European states.<sup>39</sup> When a European consensus emerged that certain rights must be protected, the ECtHR interpreted the

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favour of an expansion of states' extraterritorial jurisdiction. For a strategic analysis of this case as reflecting the ECtHR's increasing reputation see S Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (2015, in press). For an analysis based on the decreasing salience and the increasingly negative attitude towards foreign military intervention in European public opinion see S Dothan, 'How International Courts Enhance their Legitimacy' (2013) 14 *Theo Inq L* 455, 475–6.

<sup>36</sup> The ECtHR issues so-called 'pilot judgments' that require states to take specific actions to repair structural problems that could affect many other applicants. See, for example, *Broniowski v Poland* [2005] V Eur Court HR1. See J Jackson, 'Broniowski v Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court' (2006) 39 *Conn LR* 759, 783–4, describing the incremental shift in the ECtHR judgments towards demanding specific actions from the states.

<sup>37</sup> Merrills, above n 24, 119–22.

<sup>38</sup> *Mathieu-Mohin and Clerfayt v Belgium* (1987) 1 Eur Court HR, Ser A, para 52; *Lithgow and Others v United Kingdom* (1986) 8 Eur Court HR, Ser A, para 194; *Ashingdane v United Kingdom* (1985) 8 Eur Court HR, Ser A, para 57; *James and Others v United Kingdom* (1986) 2 Eur Court HR, Ser A, para 50. For an analysis of ECtHR's use of the principle of proportionality, see K Starmer, *European Human Rights Law—The Human Rights Act 1998 and the European Convention on Human Rights* (1999) 169–76; M Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights', in S Macdonald, F Matscher & H Petzold (eds), *The European System for the Protection of Human Rights* (1993) 125.

<sup>39</sup> *Tyrer v United Kingdom* (1978) 2 Eur Court HR, Ser A.

Convention as granting protection to these rights.<sup>40</sup> Over time, the ECtHR incrementally increased its demands on states and the protection of human rights.<sup>41</sup> The ECtHR often used teleological interpretation to expand states' obligations.<sup>42</sup> While expansive interpretation might be achieved by other interpretive approaches, the teleological method allowed the ECtHR the necessary flexibility to widely interpret the states' obligations and narrowly interpret the limitations to these obligations, as well as to change the interpretation of the treaty over time.<sup>43</sup>

### 3 Why and When States' Treaty Obligations Do Not Represent Their Interests

If states represent their citizens, there is good reason for the ECtHR to respect the choices states made when they signed the European Convention, and to adopt a restrictive interpretation.<sup>44</sup> Even if the ECtHR can lead to better results than what the states agreed to because of its human rights expertise, for instance even if the Court can lead to better utility for all individuals involved,<sup>45</sup> deciding against the will of the public under the Court's jurisdiction would damage its normative legitimacy.<sup>46</sup> Because the Court is not an elected or a representative body, it

<sup>40</sup> *Christine Goodwin v United Kingdom* [2002] VI Eur Court HR 588, para 74; L Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell ILJ* 133.

<sup>41</sup> S Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12 *Chi JIL* 115; Mahoney, above n 23, 66–8.

<sup>42</sup> Ost, above n 21, 292.

<sup>43</sup> Dothan, above n 41, 131; Dinstein, above n 15, 133, tying together the teleological approach to treaty interpretation and the principle of effectiveness.

<sup>44</sup> J L Dunoff & J P Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict' (1999) 93 *AJIL* 394, 399. V M Padmanabhan, 'The Human Rights Justification for Consent' (2013) 35 *U Pa JIL* 1, 39: arguing that courts should respect the states' right to assume or not to assume international obligations, because of the need to protect the rights of individuals to self-determination and to determine the obligations of their communities.

<sup>45</sup> The ECtHR uses certain doctrines that allow it to reach good decisions. For example, the Court uses the emerging consensus doctrine that directs it to follow the policies of the majority of the states in Europe. Assuming that states make their policies independently and in an informed manner, the majority of states is likely to opt for good policies. See S Dothan, 'Three Interpretive Constraints on the European Court of Human Rights', in M Kanetake & A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (2014, in press).

<sup>46</sup> The problem of a court that does not defer to elected and democratically accountable institutions, and thus digresses from the will of the public, is often termed the 'counter-majoritarian difficulty'. National courts that do not adhere to the legislator can suffer from this difficulty that damages

should normally defer to the decisions of bodies that are democratically elected and therefore better represent the views of the majority of individuals affected by the Court's decisions.

This argument might be used against any expansive interpretation by international courts, but it applies with special force to issues of human rights, since they primarily affect the states' own citizens, and therefore do not usually create a risk of harmful externalities to individuals to whom the state is not accountable. This argument also rings especially true for the ECtHR, which deals with the behaviour of democratic states, where some measure of deliberative democracy exists.<sup>47</sup> However, this argument only applies if the Convention accurately represents the preferences of the states at the time the ECtHR interprets it.

The Convention would not represent the preferences of the states at the time the ECtHR interprets it if the states could not foresee the relevant changing circumstances when they ratified the Convention. Over the years, conditions might have changed, and the states would have preferred to agree to different terms than the original Convention. However, they are prevented from doing so by the cost of renegotiating the Convention.

Furthermore, the Convention reflects the agreement of many different states and its provisions reflect the power struggles within this group of states, including efforts of coercion, persuasion and logrolling.<sup>48</sup> In order to secure the agreement of all states that negotiated the initial version of the Convention, the drafters narrowed the protection of human rights granted in the Convention, omitted the protection of political liberty rights, and weakened the enforcement regime by making the rights of individuals to petition the Court conditional on a separate agreement by the state. The attempt to reach unanimity across the negotiating states gave a minority of states that were concerned about their sovereignty, primarily the United Kingdom, the power to impose on the majority of states a weak and partial convention, and caused much resentment among the representative of other states.<sup>49</sup>

Therefore, even at the inception of the Convention, the political constraints

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their normative legitimacy, even if their expertise ensures they will make good legal decisions. See O Bassok & Y Dotan, 'Solving the Counter-majoritarian Difficulty' (2013) 11 *Int J Const L* 13, 14–5.

<sup>47</sup> Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *EJIL* 907, 919–21, using similar arguments to justify the margin of appreciation doctrine, which checks the ECtHR's ability to engage in expansive interpretation.

<sup>48</sup> E Posner & C Sunstein, 'The Law of Other States' (2006) 59 *Stan LR* 131, 165–6.

<sup>49</sup> Bates, above n 2, 92–3, 95, 100.

on the negotiating process rendered it unrepresentative of the views of the majority of the states. A minority of states should certainly be allowed to use logrolling to promote their views and may deserve a disproportionate power if their preferences are especially strong. Nevertheless, the need to reach unanimity gave the recalcitrant states a disproportional power that rendered the Convention much closer to their preferences than to the preferences of the majority. After the Convention's initial acceptance in 1950, it was ratified by many other states that had to accept the Convention as is, if they wanted to join it, and did not have a real ability to renegotiate its provisions. In addition, the inevitable brevity of the Convention results in ambiguity of its provisions that, consequently, do not offer certain protections that the states might have agreed to if they had limitless space.<sup>50</sup>

While the Convention is certainly legitimate despite these considerations, and the Court should not be allowed to contradict it, as this would exceed its mandate given to it by the consent of sovereign states, all these considerations point to the fact that the Convention does not represent the wishes of the majority of the states and, consequently, of the people of Europe. Therefore, if the Court engages in expansive interpretation, within the discretion allowed to it by the text, it does not contradict the established will of the citizens of Europe and therefore does not raise a normative legitimacy problem.

These arguments solve the legitimacy problem with the use of expansive interpretation in cases in which states' treaty obligations do not reflect their real interests. However, there is another method for states to increase their human rights obligations where these arguments sometimes do not apply: states can ratify additional protocols to the Convention.<sup>51</sup>

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<sup>50</sup> Even in commercial contracts, some argue that allowing courts to digress from the plain meaning of the words of the contract and incorporate commercial practices can save on the so-called 'specification costs' of addressing any possible contingency within the contract. See J Kraus & S Walt, 'In Defense of the Incorporation Strategy' (Working Paper No 99-4, Legal Studies Working Papers, University of Virginia Law School, June 1999) 11 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=170011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=170011)> [accessed 1 July 2014]. L Bernstein, 'The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 *U Chi LR* 710, 716: arguing, based on empirical evidence, against the incorporation of commercial customs as a tool for contract interpretation.

<sup>51</sup> New additional protocols are prepared by the Committee of Ministers of the Council of Europe. The decision of the Committee to finalise an additional protocol for signature requires a two-thirds majority of the representatives casting a vote on the committee and a majority of the representative entitled to seat on the committee: Statute of the Council of Europe, 5 May 1949, 8 UNTS 103, Arts 15(a), 20(d). The paper focuses on protocols that were already approved by the committee for signature by the states.

There are two types of additional protocols: the first type of protocol changes the procedures of the Convention system regarding all states and constitutes, in essence, an amendment of the Convention system. This type of protocol must thus be ratified by all the states that are members to the Convention. Because the acceptance of such protocols must be unanimous, they are subject to strategic behaviour and holdout problems by states as is the Convention itself. For example, Russia strategically withheld its ratification of Protocol 14 for many years and, by remaining the only state not to ratify this Protocol, prevented all other states from making a change they commonly agreed to.<sup>52</sup>

The second type of protocol allows specific states to agree among themselves to protect certain human rights to a greater extent than they are protected by the Convention. These additional protocols constitute separate treaties from the Convention. They will only obligate the states that ratified them.<sup>53</sup> The additional protocols will enter into force and apply to the states that ratified them according to the conditions that these states set. States usually agree that the protocols will enter into force when a certain number of states, for example five states, submitted their ratification.

If states decide not to take on another obligation by ratifying an additional protocol, this choice probably reflects their current preferences. Even if the protocol is not yet in force, the state that wishes to assume the obligations within it only needs to coordinate a small number of states to ratify the protocol for it to enter into force. Moreover, if an additional protocol has already entered into force, any state can decide to ratify it without being susceptible to strategic behaviour by the other states. Therefore, if a state decides not to ratify an additional protocol that already entered into force, it makes a clear choice not to take on the obligations to protect the human rights mentioned in the protocol. To the extent that states accurately represent their citizens, this choice should be respected. If the ECtHR fails to respect this choice, it damages its normative legitimacy by digressing from the will of the citizens in that state.

In conclusion, while certain types of expansive interpretation might be justified by coordination problems between the states, certain types of expansive interpretation cannot be similarly justified. Part 6 will demonstrate that the ECtHR expanded states' obligations even when they could easily agree to take on these obligations by ratifying Protocol 12 that is already in force for the states that

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<sup>52</sup> Dothan, above n 41, 136.

<sup>53</sup> D Gomien, D Harris & L Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996) 18.

ratified it. This use of expansive interpretation cannot be justified by problems of inter-state coordination. Nevertheless, it does not necessarily pose a threat to the Court's normative legitimacy if states sometimes fail to adequately represent their citizens, an argument that the next part will advance.

#### **4 Why and When States Do Not Represent All Individuals' Interests**

In democratic states, the democratic process is meant to ensure that the state represents its citizens and is accountable to them. However, the democratic process does not always function properly. The preferences of some groups might be systematically ignored by the state, while other groups might exert a disproportional and unjustified influence on the state. Certain mechanisms to amend these democratic failures, such as granting the national judiciary the power of judicial review,<sup>54</sup> exist in many democratic countries. Nevertheless, these mechanisms might also fail sometimes. For example, even a relatively independent judiciary might yield to substantial political pressures.<sup>55</sup> Furthermore, the state's decision to ratify or not to ratify treaties is often not subject to substantial public deliberation, and the process of treaty negotiation is usually not accessible to wide social groups, which increases the risk that certain interest groups will capture this process and shape the treaty obligations of their state to suit their own interests.<sup>56</sup>

If states do not represent their citizens or other individuals affected by their decision to ratify or to not ratify protocols to the Convention, expanding states' obligations beyond what they agreed to explicitly should not endanger the Court's normative legitimacy. In any case, the ECtHR should not be allowed to contradict the text of the Convention because that would exceed its mandate. Nonetheless, there should be no constraints for the ECtHR not to apply expansive interpretation, because deference to the wishes of the states by restrictive interpretation is justified only to the extent that states properly

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<sup>54</sup> See J H Ely, *Democracy And Distrust—A Theory Of Judicial Review* (1980) 181–3: arguing that judicial review is justified by the need to correct democratic failures.

<sup>55</sup> See F B Cross & B J Nelson, 'Strategic Institutional Effects on Supreme Court Decision making' (2001) 95 *Northwestern U LR* 1437, 1450, discussing the institutional ways to manipulate the behaviour of the US Supreme Court; J Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *S Ca LR* 353: arguing that while individual U.S. judges are independent the judiciary is dependent on the executive.

<sup>56</sup> E Benvenisti, 'Exit and Voice in the Age of Globalization' (1999) 98 *Mich LR* 167, 184–6.

represent their citizens.<sup>57</sup> To the extent that states do not represent their citizens, the Court should be able to use expansive interpretation. The next sub-chapters present several situations in which states do not represent the people influenced by their ratification decisions.

#### 4.1 Individuals Who Cannot Vote

Some individuals are completely excluded from taking part in the democratic process. The main groups in this condition in European states are foreigners and prisoners. Foreigners are not citizens in their state of residence and usually cannot vote, although their interests are very much affected by the decision of the national government. In several European states, prisoners are disenfranchised, either for the duration of their sentence or for longer periods. While, in some circumstances, there might be sound arguments against allowing the members of these groups to vote,<sup>58</sup> their rights might not be adequately protected by the democratic process.<sup>59</sup> It is therefore commendable that the ECtHR was willing to fight for the political and other rights of foreigners and prisoners, even against substantial political resistance. As an example, the ECtHR was willing to face the ire of the British public when it demanded the abolition of the blanket ban on prisoner voting<sup>60</sup> and when it prevented the deportation of aliens, even those suspected or convicted of serious crimes.<sup>61</sup> However, as will be argued

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<sup>57</sup> See above n 44–7.

<sup>58</sup> R Ziegler, 'Legal Outlier, Again? US Felon Suffrage, Comparative and International Human Rights Perspectives' (2011) 29 *Boston U ILJ* 197, 203–10: presenting and rebutting the arguments against allowing prisoners to vote.

<sup>59</sup> Ely, above n 54, 161: describing the special need to protect the rights of aliens as they cannot vote.

<sup>60</sup> In *Hirst v United Kingdom (No 2)* [2005] IX Eur Court HR 681, the ECtHR decided that a blanket ban on prisoners' right to vote violated Article 3 of Protocol 1 of the Convention. Five years later, the ECtHR issued *Greens and MT v United Kingdom* [2010] IV Eur Court HR 1826, a so-called 'pilot judgment' that allowed the United Kingdom six months to amend its laws to conform with the *Hirst* judgment. This period was later extended in *Scoppola v Italy (No 3)* [2012] IV Eur Court HR 868, in which the United Kingdom participated as a third party. This series of cases drew intensive criticism from British public officials and damaged the support for the ECtHR in the United Kingdom. See E Voeten, 'Public Opinion and the Legitimacy of International Courts' 14 *Theo Inq L* (2013) 411, 418–9. The ECtHR recently decided to adjourn the consideration of 2,354 applications regarding the right to vote in the United Kingdom until 30 September 2013. See Press Release, 26 March 2013, issued by the Registrar of the Court (2013) ECtHR 91.

<sup>61</sup> An example of an alien suspected of serious crimes whose deportation was delayed is the extremist Muslim cleric Othman Abu Qatada. The ECtHR prevented one of the attempts to deport him to Jordan, where he was due to stand trial for terrorist attacks, because the trial might be illegitimate, since it would rely on confessions of third parties who were tortured. Abu

below, even citizens whose preferences should definitely not be excluded from the democratic process might be misrepresented sometimes.

## 4.2 Discrete and Insular Minorities

Democracy is based on the idea that every person within the state has an equal share of political power, reflected in the rule of ‘one person, one vote’. Nevertheless, even if free elections are held periodically and no citizen is disenfranchised, individuals who belong to certain minority groups might possess much less political power than other individuals. The famous ‘Footnote Four’ in the US Supreme Court’s *Carolene Products* case<sup>62</sup> defines such groups as ‘discrete and insular minorities’. These are minorities who are subject to special prejudice, for example because of their religion, race or ethnicity, which prevents them from taking a fair part in the political process. If members of this minority cannot form coalitions with other groups and take over government, their interests will not be fully represented.

The protection of discrete and insular minorities must ensure that, even if they have no real influence on the actions of government, the majority might not infringe on their interests. This is accomplished by preventing the majority from discriminating between its own members and members of the minority. If the same rights are guaranteed to all citizens, even discrete and insular minorities enjoy ‘virtual representation’—their interests are inextricably tied to those of the majority, and the majority is thereby forced to represent their interests.<sup>63</sup> Some authors argue that national courts who use the power of judicial review can guarantee this form of indirect political influence to discrete and insular minorities.<sup>64</sup> But to the extent that national courts do not fulfil this task, states do not adequately represent their minorities.<sup>65</sup>

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Qatada was deported only in July 2013 after an eight-year legal struggle. See *Othman (Abu Qatada) v United Kingdom* [2012] I Eur Court HR 917. See also Voeten, above n 60, 418: arguing that this was one of the main causes for the debate on the ECtHR in the United Kingdom. An example of an alien convicted of a serious crime whose deportation was prevented is *A A*, a Nigerian who was convicted of rape when he was 15. His deportation was prevented, because it would damage his right to private life, due to the connections he had to the United Kingdom. See *A A v United Kingdom* [2011] IV Eur Court HR 1345. For criticism of this judgment, see Slack, above n 2.

<sup>62</sup> *United States v Carolene Products Co*, 304 US 144 (1938).

<sup>63</sup> Ely, above n 54, 76–84.

<sup>64</sup> *Ibid*, 151.

<sup>65</sup> E Benvenisti, ‘Margin of Appreciation, Consensus and Universal Standards’ (1999) 31 *NYUJILP* 843, 849: arguing, based on this analysis, that the ECtHR should not grant a margin of

### 4.3 Small Interests Groups

Not every small group is a discrete and insular minority, and even if the group is discrete and insular, it is not necessarily politically powerless and prevented from taking part in the political process by the prejudice of other groups.<sup>66</sup> In fact, sometimes small groups yield vast political power and can use it to their advantage and to the disadvantage of the majority.<sup>67</sup> The main traits that can make some small groups disproportionately powerful and endowed with a great ability to shape the treaty obligations of their states are:<sup>68</sup> small groups can more easily avoid free-riding by their members, because each member of the group can expect greater gains from their cooperation,<sup>69</sup> and because the members can more easily monitor each other, giving them greater ability to coordinate their voting practices and to form potent political movements; small groups can more easily collect and disseminate information among their members, allowing them to track the behaviour of their public representatives;<sup>70</sup> and small groups can more easily exit their states or shift their business to other countries, providing them with a powerful threat against their representatives.<sup>71</sup> If states are captured by such interest groups, their decisions to take on treaty obligations might not accurately represent the interests of all their citizens.

## 5 Harmful State Responses to Expansive Interpretation

The ECtHR might enjoy special expertise in protecting human rights and adopt good legal solutions to questions of the rights of individuals. This paper argues

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appreciation to European states in issues that impinge on the rights of minorities if national judicial mechanisms do not guarantee their rights.

<sup>66</sup> B A Ackerman, 'Beyond *Carolee Products*' (1985) 98 *Harvard LR* 713, 724, arguing that sometimes groups that are anonymous (not easily distinguishable) and diffuse (spread within the society) are more politically disadvantaged than discrete and insular groups, which can more easily prevent free riding among their members.

<sup>67</sup> E Benvenisti, 'Judicial Review and Democratic Failures: Minimizing Asymmetric Information Through Adjudication' (2010) 32 *Tel Aviv U LR* 277, 280 (Hebrew).

<sup>68</sup> Benvenisti, above n 56, 170–5.

<sup>69</sup> M Olson, *The Logic of Collective Action* (1965) 33–4.

<sup>70</sup> S Lohmann, 'An Information Rationale for the Power of Special Interests' (1998) 92 *Am Pol Sci R* 809, 812.

<sup>71</sup> On the power of exit see A Hirschman, *Exit, Voice, And Loyalty—Responses To Decline In Firms, Organizations, And States* (1970) 55.

that the ECtHR's decisions to interpret states' obligations expansively might often be legitimate, because the state's treaty obligations do not always represent the true will either of the states or of their citizens. Nonetheless, even if expansive interpretation is both just and legitimate, it might still lead to harmful consequences.

States might be deterred from joining additional protocols if the ECtHR interprets the protocols that states ratified expansively.<sup>72</sup> States might calculate that when they ratify a protocol they cannot foresee how the ECtHR would interpret it and how far their obligations would expand. In response, they might choose to limit their obligations by not joining protocols whose content, interpreted restrictively, they actually view as serving their interests. While the ECtHR might still be able to interpret the current obligations of these states expansively, the constraints of the text would limit it and might prevent it from granting individuals the same rights that states would be willing to grant them by ratifying new protocols, if states were certain that the obligations they assumed would not be further expanded.

If expansive interpretation gives states an incentive not to join protocols they actually view as beneficial, the ECtHR might have to react strategically to the states' potential unwillingness to sign protocols, in order to reach the goal of protecting human rights. The ECtHR might consider that even if granting certain rights lies within its discretion and is substantively justified and normatively legitimate, it might be more prudent not to grant these rights, in order not to render states unwilling to ratify future protocols. This strategic calculation might seem problematic, since the Court that undertakes it does not make a clear moral or legal decision that uses its expertise in protecting rights. Instead, it complements its legal decision by engaging in political calculations. Nevertheless, international courts have to consider political considerations and make compromises to suit them all the time. Scholars argued that international courts change the content of their decisions by compromising on what they view as the perfect legal result to prevent backlash or harmful responses against the court.<sup>73</sup> If the ECtHR were to digress from what it views as the correct legal

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<sup>72</sup> Dunoff & Trachtman, above n 44, 399.

<sup>73</sup> For the argument that the ECtHR acts strategically and considers the possible responses of states to its judgments see Dothan, above n 41; Dothan, above n 35. The more general argument that courts, or individual judges, consider the responses of other political actors and change their judgments accordingly is known as the strategic model of judicial behaviour: see L Epstein, J Knight & A Martin 'The Political (Science) Context of Judging' (2003) 47 *St Louis U LJ* 783, 798. This model was applied to other international courts. See e.g. H Schulz, 'The Political

answer in order not to give states counter-productive incentives its decision would not be less legitimate than that of an international court that avoids making certain decisions in order not to provoke states to harm the court itself.

## 6 Case Study: The Prohibition on Discrimination

This Part demonstrates the ECtHR's use of expansive interpretation to interpret the right to non-discrimination, highlighting the potential normative considerations described in this paper.

Article 14 of the Convention protects the rights of individuals to enjoy their Convention rights without discrimination.<sup>74</sup> The text of Article 14 clearly grants a right to equality only in the enjoyment of other Convention rights, and does not form a general right to non-discrimination in the use of rights or interests not protected by the Convention.<sup>75</sup> In the 1968 *Belgian Linguistic* case, the ECtHR confirmed the idea that Article 14 does not have an independent existence from other articles, but it stressed that even if another article was not violated independently, it might be violated when taken in conjunction with Article 14. Therefore, if the state protects a certain right granted in the Convention in a way that does not violate another Convention article in itself, since this policy lies within the state's legitimate discretion, the state might still protect that right unequally, and thus violate the relevant substantive article in conjunction with Article 14.<sup>76</sup> The condition that the right violated by discrimination must

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Foundations of Decision Making by the European Court of Justice' (2005) 99 *ASIL Proc* 132, 133: arguing that the Court of Justice of the European Union seeks not to issue judgments that states would fail to comply with to avoid damaging its legitimacy. States can damage international courts' interests in many ways besides noncompliance, such as lowering their budget, criticising them and exiting or changing treaties that shape the court's jurisdiction. See T Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 *Va JIL* 631, 656–68; J Cogan, 'Competition and Control in International Adjudication' (2008) 48 *Va JIL* 411, 420–6. International courts might change their judgments to preempt such responses: see Dothan, above n 35.

<sup>74</sup> Article 14 reads:

enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status.

<sup>75</sup> *Haas v Netherlands* [2004] I Eur Court HR 13, para 41; C Ovey & R White, *Jacobs & White The European Convention On Human Rights* (4<sup>th</sup> edn, 2006) 413.

<sup>76</sup> *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium*

fall within the ambit of another Convention right was reiterated in many later judgments of the ECtHR.<sup>77</sup>

Several European states decided to expand their obligations to treat individuals equally by drafting Protocol 12, which protects a general right to equality. The Protocol was open to signature in 2000, and after the first ten states ratified it, in April 2005, it entered into force. As of June 2013, only 18 states ratified the Protocol.<sup>78</sup> Any other state that wants to expand its obligations to include the obligations protected by the Protocol needs only to ratify it.

The commentary on Protocol 12 defines the additional obligations of states that ratified it, and in the process circumscribes the obligations of states that did not ratify it. The two main additions to the obligations of states that ratified the Protocol are: preventing discrimination in the enjoyment of any right granted by national law (even if it is not protected by the Convention), and preventing discrimination even in the use of discretionary power by a public authority.<sup>79</sup> The commentary also explains the limits of the obligations under Protocol 12, stating that it does not require affirmative action to correct discrimination,<sup>80</sup> and that it does not imply that the ECtHR has jurisdiction to rule on the discriminatory provision of rights granted by other international instruments (such as other human rights treaties).<sup>81</sup>

During the past decade the ECtHR interpreted Article 14 to the Convention expansively and, as a result, subjected even the states that did not ratify Protocol 12 to obligations that appear in this Protocol.

The requirement that any violation of Article 14 would fall within the ambit of another convention right was effectively undermined in the *Stec* case by a substantial expansion of the ambit of Article 1 of Protocol 1, which protects the right to property.<sup>82</sup> The case concerned a pension regime that allegedly

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(1968) 3 Eur Court HR, Ser A, 33–5. The court also determines there, however, that not every distinction between individuals constitutes discrimination, only a distinction that has ‘no objective and reasonable justification’ would violate the Article. See *Ovey & White*, above n 75, 415.

<sup>77</sup> *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 Eur Court HR, Ser A, para 71.

<sup>78</sup> <

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG>> [accessed 1 July 2014].

<sup>79</sup> See the Explanatory Report on Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, ETS No 177, paras 21–2.

<sup>80</sup> *Ibid*, para 16.

<sup>81</sup> *Ibid*, para 29.

<sup>82</sup> *Stec* [2006] VI Eur Court HR 1162.

discriminated between men and women. In an admissibility decision, the Court considered that social security payments, whether funded by general taxation or directly by the beneficiaries, fell within the ambit of Article 1 of Protocol 1, in contrast to some of its past judgments.<sup>83</sup> This expansion of the ambit of Protocol 1 allowed the Court to examine whether discrimination in the protection of pension rights violated Article 14. The final judgment in the case did not find a violation of Article 14,<sup>84</sup> but the expansive interpretation used by the Court rendered the ambit requirement meaningless with regard to certain social rights. Judge Borrego Borrego wrote a concurring opinion to the judgment in which he decried this interpretation as contrary to the intentions of the parties, because it implies that the general obligation not to discriminate in Protocol 12 is applied to states who did not sign it.<sup>85</sup>

Scholars noted that the move towards extending the ambit of Article 14 to substantive provisions in the field of social rights has been persistent and occurred over several other cases. It had improved the protection against discrimination in a field which is not protected enough in the Convention and its protocols, which grant only limited social rights.<sup>86</sup> Judge Borrego Borrego's argument that this expansive interpretation contradicts the states' will is accurate, since any state can join Protocol 12 and assume these obligations without being subject to strategic behaviour. However, states might often fail to represent their citizens, especially in the field of social rights. Some individuals in society rely primarily on welfare provisions by the state and constitute a typical discrete and insular minority, whose rights might be abused by the democratic process. Other social benefits are enjoyed by the majority of the population. These benefits might be manipulated by small interest groups with superior organization and political influence. The Court's willingness to impose in some cases a general right to equality with regard to social rights on states that did not willingly assume this obligation might not therefore contradict the interests of these states' citizens. Consequently, this expansive interpretation might be normatively legitimate, because the state's decision not to ratify Protocol 12 does not represent its citizens' interests and wishes.

Besides the ambit requirement, the main limitation on the obligations of

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<sup>83</sup> Grand Chamber Decision as to the admissibility of the Applications nos 65731/01 and 65900/01 by *Stec and Others v United Kingdom*, para 53–6.

<sup>84</sup> *Stec*, above n 82.

<sup>85</sup> *Ibid.*

<sup>86</sup> R O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 *Leg Stud* 211, 216.

states not to discriminate against individuals is the margin of appreciation granted to the states. The margin of appreciation doctrine allows the states to exercise their discretion when making policy decisions, as long as their decision does not unreasonably violate the rights of individuals. One of the policies that the margin of appreciation seems to immunise in many cases was termed 'indirect discrimination'—a situation in which apparently neutral criteria are applied to all individuals, but these criteria disfavour some individuals. In such cases, no intention to discriminate is discovered, but if the Court wishes to find discrimination, it would have to rely on factual evidence and pass judgment on the state's policy. This would encroach on the state's discretion. The ECtHR was therefore traditionally reluctant to find cases of indirect discrimination as a violation.<sup>87</sup>

In the Chamber judgment in the case of *D H and Others v the Czech Republic*, the ECtHR continues its policy of rejecting claims of indirect discrimination.<sup>88</sup> Although the case discloses evidence that children of the Roma (Gypsy) minority are disproportionately more likely than other children to be sent to special schools, which teach an inferior curriculum, the Court decided that it cannot prove discrimination exists.<sup>89</sup> The Court therefore left the educational policies of the states within the states' permitted discretion.

The applicants requested that this case be referred to the Grand Chamber. The Grand Chamber overruled the Chamber's judgment and decided that the policies of the Czech Republic were discriminatory. Accordingly, the Court found that the Czech Republic violated Article 14 when taken in conjunction with Article 2 of Protocol 2, protecting the right to education. Notably, the Court recognised that indirect discrimination can violate the provisions of the Convention. This allowed the Court to rely on statistical evidence to find that Roma are being discriminated against, even if no intent to do so was proven.<sup>90</sup> The ECtHR's recognition of indirect discrimination as a violation was repeated and affirmed in other cases.<sup>91</sup>

Most importantly for the purpose of this paper, the Grand Chamber decided in its judgment that the state did not create the necessary safeguards that appropriately take into account the special needs of the Roma as a disadvantaged class. The failure of the state to respect the special needs of the Roma minority

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<sup>87</sup> Ibid, 220.

<sup>88</sup> *D H and Others v Czech Republic* [2007] IV Eur Court HR 922.

<sup>89</sup> Ibid, paras 52–3.

<sup>90</sup> *D H and Others v Czech Republic* [2011] IV Eur Court HR 922, para 184 (*D H*).

<sup>91</sup> O'Connell, above n 86, 221.

is what made its practices digress from the state's margin of appreciation.<sup>92</sup> The Court specifically identifies the Roma as a 'disadvantaged and vulnerable minority', a fact that justifies special protection of their rights.<sup>93</sup> The Grand Chamber judgment therefore seems to derive the normative legitimacy necessary to override the permitted discretion of the state exactly from the political weakness of the Roma, their being a discrete and insular minority.

The right to equality might be especially amenable for expansive interpretation that is normatively legitimate. By preventing discrimination, disadvantaged groups gain the 'virtual representation' discussed above. Because the rights of the powerless are set as equal to the rights of the powerful, powerful groups cannot ignore the interests of powerless groups, and are forced to protect the rights of the powerless to the same extent they protect their own rights. The ECtHR devotes special attention to the protection from discrimination of groups that lack political influence and sometimes, as in the *DH* case, even admits that it does so. This ensures that the ECtHR goes against the intention of states that deliberately did not assume the obligation of recognising a general right to equality only when the state does not represent the interests of its citizens.

Yet even if the ECtHR's expansive interpretation is both correct and normatively legitimate, it might still lead to bad results by giving states an incentive not to assume further obligations from fear they would be interpreted expansively. In other words, it is possible that more states would be willing to ratify Protocol 12, if they knew that it would be interpreted restrictively. Some evidence that this concern is real comes from the response of the United Kingdom government to the British Parliament Joint Committee on Human Rights.<sup>94</sup> The government specifically mentioned as a reason for the United Kingdom's decision not to ratify Protocol 12 the fear that its obligation not to discriminate would extend to the protection of rights under other international human rights instruments. If Protocol 12 were to be interpreted restrictively, this fear would be unfounded, since the commentary on the Protocol specifically states it would not apply to obligations under other international instruments. However, the ECtHR's past actions of expansive interpretation might have given rise to the suspicion that, should the United Kingdom ratify Protocol 12, its obligations would also be expansively interpreted and digress from the limitations mentioned in the commentary to

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<sup>92</sup> *DH* [2011] IV Eur Court HR 922, para 207.

<sup>93</sup> *Ibid*, paras 181–2.

<sup>94</sup> See the Seventeenth Report of the UK Parliament Joint Committee on Human Rights, paras 31–2 <<http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9906.htm>> [accessed 11 November 2013].

the Protocol. The United Kingdom government therefore favoured a cautious approach that would make it more difficult for the ECtHR to extend its obligations than if it would have ratified the Protocol. The government's representative specifically stated to the parliamentary committee that the government intends to wait and see the way the case law on the matter develops before it gives further power to the ECtHR.<sup>95</sup>

## 7 Conclusion

The lessons learnt from this paper about the normative legitimacy of the ECtHR's decisions might be limited in scope to only a part of its judgments. This paper argues that sometimes states are subject to strategic behaviour by other states, and consequently states' treaty commitments do not represent their interests. Furthermore, sometimes states might not properly represent their citizens, and consequently the states' treaty commitments do not represent the wishes of their citizens. However, at other times states are not subject to strategic behaviour and democratic mechanisms within the states function well and ensure proper representation of their citizens. In these cases, the decisions of the states should be protected from at least some forms of expansive interpretation; otherwise the Court's normative legitimacy would be damaged. A possible solution is to grant states a greater margin of appreciation in cases where democratic processes seem to function well, thus protecting these cases from expansive interpretation.<sup>96</sup> In fact, some authors argue that the ECtHR does grant greater deference to the states when their democratic processes seem to operate properly.<sup>97</sup>

But the lessons learnt from this article might also have wider implications, even beyond the ECtHR. By suggesting that expansive interpretation is often legitimate, the arguments raised here might legitimise decisions of other international courts as well. For example, some authors argued that the International Court of Justice and its predecessor, the Permanent Court of International Justice,

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<sup>95</sup> Ibid.

<sup>96</sup> Benvenisti, above n 65, 849–50.

<sup>97</sup> A von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 *ICON* 1023, 1042. See also *Stec* [2006] VI Eur Court HR 1162, para 52: pointing to the great deference to the states in cases regarding sexual inequality relative to cases regarding social and economic policy. A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012) 27–31: arguing that the ECtHR considers so-called 'second order reasons' about the quality of states' decision-making when it ratchets the margin of appreciation allotted to the state.

have clearly forsaken the method of restrictive treaty interpretation and favoured expansive interpretation.<sup>98</sup> This article argues that this practice might often be legitimate, because states' strictly construed treaty obligations sometimes misrepresent the views of the states or of their citizens.

The paper also cautions, however, that states might respond to this expansive interpretation by not joining treaties that actually concur with their interests. International courts should be aware of this danger, and might sometimes try to address it strategically when they make their decisions.

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<sup>98</sup> Lauterpacht, above n 15, 51, 67.

# JUDICIAL INTERPRETATIONS OF DEMOCRACY IN HUMAN RIGHTS TREATIES

*Jure Vidmar*\*

## **Abstract**

Human rights treaties contain provisions for the so-called democratic rights. These provisions are textually almost identical in various regional and universal human rights treaties, yet courts and other judicial bodies have constructed diverse understandings of democracy through interpretation. The main questions that arise are whether human rights treaties require a multiparty political setting and how they accommodate limitations on the will of the people. This article analyses developments in the context of the ICCPR and the three regional systems. It demonstrates that human rights courts have clearly established a requirement for multiparty elections and have even attempted a more robust, substantive definition of democracy. However, a new problem has arisen in recent case law. The electoral process has become dominated by political parties and electoral systems have often proven to be unable to accommodate independent candidates. The result is that candidates wishing to run at elections may be forced to associate with others. The contemporary interpretation of human rights treaties does not necessarily provide for suitable avenues to take part in elections outside of the framework of party politics. If it was once questionable whether human rights treaties guarantee the right to associate in political parties, it now seems that parties have become too central in the exercise of the so-called democratic rights.

## **Keywords**

human rights, democracy, political participation, elections, interpretation

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## **1 Introduction**

Human rights treaties, both universal and regional, contain provisions for the so-called ‘democratic rights’: the right to political participation, the freedom of association, and the freedom of expression. They also contain the phrase

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'necessary in a democratic society' as a limitation clause to certain human rights.<sup>1</sup> Although worded slightly differently, the text of these provisions is virtually identical in all human rights treaties. However, different interpretations have developed through judicial practice. A particularly difficult question is whether, and if so which, human rights treaties require a democratic political order with elections in a multiparty setting.

The interpretation that international human rights treaties have the political system of multiparty democracy in mind is not universally accepted. This is reaffirmed by the fact that the International Covenant on Civil and Political Rights (ICCPR) was drafted in the Cold War era. Since the ICCPR did not mention multiparty competition, it was arguable that the Communist notion of a single-party 'people's democracy' could also be compatible with the Convention rights.<sup>2</sup> Subsequently, some legal scholars have argued that, with the end of the Cold War, the interpretation of the ICCPR had changed and that democracy itself had become an international human right.<sup>3</sup> Others challenged this position, *inter alia*, by pointing out that democracy remains a rather vague term. Indeed, political theorists disagree as to whether democracy can be defined in a narrow procedural manner, in terms of an institutional arrangement for free and fair elections, or whether democracy requires a more substantive definition.<sup>4</sup>

This article is not concerned with the various definitions of democracy offered in political theory; it rather looks for the understanding of democracy

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<sup>1</sup> The clause appears in the Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 UNTS 3; American Convention on Human Rights, 21 November 1969, 1144 UNTS 123; and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

<sup>2</sup> B Roth, *Governmental Illegitimacy in International Law* (1999) 332.

<sup>3</sup> *Ibid.* See also T Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46; T Franck, 'Democracy as a Human Right', in L Henkin and J Hargrove (eds), *Human Rights: An Agenda for the Next Century* (1994); T Franck, 'Legitimacy and the Democratic Entitlement' in G Fox and B Roth (eds), *Democratic Governance and International Law* (2001); F Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia LR* 53; A Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503; and A Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183.

<sup>4</sup> See S Marks, *The Riddle of All Constitutions* (2000); Roth, above n 2; J Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *EJIL* 183; J d'Aspremont, 'The Rise and Fall of Democratic Governance in International Law: A Reply to Susan Marks' (2011) 22 *EJIL* 549.

in judicial practice. Its first task is to analyse how judicial bodies interpret the relationship between the so-called 'democratic rights' and political parties in human rights treaties. There are two aspects to this relationship. First, it is questionable whether judicial bodies interpret these treaty obligations as requiring multiparty electoral procedures. Second, there may be some indication in case law that the right to political participation has, in fact, become dominated by the requirement for a multiparty political system. Does the contemporary interpretation of human rights treaties provide for suitable avenues to take part in elections outside of the party politics framework, or has party politics become a presupposed institutional arrangement in international human rights law?

Furthermore, the article looks for judicial interpretations of democracy that reach beyond electoral procedures and refer to its substantive tenets. In the context of the 'necessary in a democratic society' limitation clause, a judicial practice has developed of limiting 'democratic rights' in order to protect democracy. This practice proves that democracy in judicial practice is not understood as majority rule crystallised through the electoral process. How do courts identify and interpret the non-democratic nature of a certain political force? How do they interpret legal obligations generated by the principle of democracy? Can such interpretations be universalised, or are they context and society specific, perhaps limited to a particular regional human rights arrangement?

The article analyses developments in the context of the ICCPR and the three regional systems: the European Convention for the Protection of Human Rights and Fundamental Freedoms (*ECHR*), the American Convention on Human Rights (*ACHR*), and the African Charter on Human and Peoples' Rights (*ACHPR*). It first determines the relationship between 'democratic rights' and political parties and then considers how a more substantive understanding of democracy has been developed through the interpretation of 'necessary in a democratic society'. It demonstrates that regional human rights courts have clearly established a requirement for multiparty elections on the basis of human rights treaties. Indeed, political parties are so important for the exercise of certain 'democratic rights' that courts have even limited the possibility for individuals to participate outside of the established framework of party politics. At the same time, courts have taken a more robust approach and decided that democracy does not simply comprise majority rule.

## 2 Interpreting the relationship between ‘democratic rights’ and political parties

The right most commonly associated with democracy is the right to political participation as it relates to elections, the most tangible element of a democratic process.<sup>5</sup> However, no international human rights treaty, universal or regional, textually specifies that elections need to take place in a multiparty setting. A definition of democracy then falls on judicial bodies when interpreting the obligations stemming from human rights treaties. In this section, it will be demonstrated that no authoritative (judicial) interpretation exists for holding that the right to political participation requires a particular multiparty setting in the ICCPR context. This is different in regional human rights arrangements, where political parties are deemed so central for the exercise of ‘democratic rights’ that individuals have been precluded from participation in the political process without their support. However, such practice may lead to the infringement of certain rights.

### 2.1 The requirement of multiparty elections in human rights treaties

At the level of universal human rights instruments, the right to political participation is contained in Article 21 of the Universal Declaration of Human Rights (*UDHR*) and Article 25 of the ICCPR. Neither instrument specifically requires elections to take place in a multiparty setting.<sup>6</sup> A ‘multiparty interpretation’ was also omitted in the United Nations Human Rights Committee (*HRC*) Comment on Article 25.<sup>7</sup> In the *Nicaragua* case, the International Court of Justice (*ICJ*) interpreted the ‘democratic rights’ textually and concluded: ‘[T]he Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections.’<sup>8</sup> Notably, Nicaragua was a party to the ICCPR and bound by the pro-

<sup>5</sup> See T Carothers, ‘Empirical Perspectives on the Emerging Norm of Democracy in International Law’ (1992) *ASIL Proc* 261, 264.

<sup>6</sup> The amendment to Article 21 of the UDHR, which would call for multiparty elections, was withdrawn upon a protest by the Soviet government. See Roth, above n 2, 326–7.

<sup>7</sup> HRC, *General Comment* 25, para 1.

<sup>8</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, ICJ Reports 1986 p 14, 132 (*Nicaragua*).

visions of the right to political participation, the freedom of assembly, and the freedom of speech.

After the end of the Cold War, a number of references to holding elections in a multiparty setting were made in the documents adopted in the UN framework.<sup>9</sup> However, these are all 'soft law' documents, supported by too few states to indicate general practice and/or *opinio juris*. Conversely, the General Assembly adopted a set of resolutions on supporting, promoting, consolidating and enhancing democracy.<sup>10</sup> These resolutions not only fail to specify that elections need to take place in a multiparty setting, but also affirm that the choice of political system is a domestic matter for each state.<sup>11</sup> The language of these resolutions remains within the textual parameters of the ICCPR. They specifically state that 'while democracies share common features, there is no single model of democracy [...] it does not belong to any country or region.'<sup>12</sup> Democracy is also mentioned in some other documents adopted in the UN framework, such as the Vienna Declaration and Programme of Action<sup>13</sup>, and the Millennium Declaration.<sup>14</sup> These references remain rather general and do not mention that the right to political participation could only be consummated in a multiparty setting. These widely supported resolutions may be seen as indicators of the universal understanding of democracy under the ICCPR and customary international law.

In essence, subsequent practice of states and UN organs affirms the ICJ's 1986 *Nicaragua* pronouncement: international (human rights) law does not require a specific political system in general or multiparty elections in particular. This is different in the framework of regional human rights treaties where the 'democratic rights' are textually reminiscent of those found in the ICCPR, but

<sup>9</sup> See Commission on Human Rights Resolution 1999/57, 27 April 1999; Commission on Human Rights Resolution 2000/47, 25 April 2000; Commission on Human Rights Resolution 2002/46, 23 April 2002.

<sup>10</sup> GA Res 45/150, 18 December 1990. The Resolution was adopted with a vote of 129 in favour and eight against, with nine abstentions: GA Res 45/151, 18 December 1990. The Resolution was adopted with a vote of 111 in favour and 29 against, with 11 abstentions: GA Res 50/133, 20 December 1995; GA Res 51/31, 13 December 1996; GA Res 52/18, 21 November 1997; GA Res 53/31, 23 November 1998; GA Res 54/36, 29 November 1999; GA Res 55/43, 27 November 2000; GA Res 58/13, 17 November 2003; GA Res 58/281, 9 February 2004; GA Res 60/253, 2 May 2006; and GA Res 61/226, 22 December 2006.

<sup>11</sup> GA Res 60/253, preamble, para 11; GA Res 61/226, preamble, para 8; and GA Res 62/7, preamble, para 8.

<sup>12</sup> GA Res 60/1, 24 October 2005, para 135.

<sup>13</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 12 July 1993.

<sup>14</sup> GA Res 55/2, 8 September 2000, paras 24 and 25.

regional bodies interpret them with a specific idea of democracy in mind.

In the framework of the ECHR, the right to vote did not originally appear in the Convention itself but was subsequently included in Article 3 of Protocol 1.<sup>15</sup> The question of whether elections need to be held in a multiparty setting was most prominently addressed in the context of other 'democratic rights' contained in the ECHR. In a number of cases concerning the freedom of assembly, the European Court did not initially venture into the question of whether the right covers political parties and thus guarantees multiparty elections. But in *Young, James and Webster v United Kingdom*, the Court established a close link between Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association), arguing that the realisation of one right is not possible without the realisation of another.<sup>16</sup>

While Article 11 of the ECHR specifically mentions trade unions but not political parties, in a series of Turkish cases, the Court departed from strict textual interpretation when it had to decide whether prohibiting and dissolving a certain political party could fall within the 'necessary in a democratic society' limitation clause. In *United Communist Party of Turkey v Turkey*, the Court reasoned:

It is [...] not possible to conclude, as the Government [of Turkey] did, that by referring to trade unions [...] those who drafted the Convention intended to exclude political parties from the scope of Article 11.<sup>17</sup>

The Court went on to invoke elections in a multiparty setting:

[P]olitical parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention [...] there can be no doubt that political parties come within the scope of Article 11 [...] [P]olitical parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.<sup>18</sup>

Although the provision guaranteeing the freedom of assembly in the ECHR is textually very similar to that in the ICCPR, the European Court's interpretation

<sup>15</sup> Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9, Art 3.

<sup>16</sup> *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38, para 57.

<sup>17</sup> *United Communist Party of Turkey and Others v Turkey* (1998) 26 EHRR 121, para 24.

<sup>18</sup> *Ibid*, paras 25 and 44.

has established a close-knit relationship between human rights and multiparty democracy in the European context. While the ICCPR and customary international law do not bind states to hold elections in a multiparty setting, this cannot be said for the ECHR. In the African and Inter-American regional systems, no case has directly addressed the issue of whether the underlying human rights treaties require multiparty elections. The ACHPR and ACHR guarantee the right to political participation in Article 13 and Article 23 respectively. Similarly to comparable provisions in the ICCPR and ECHR, they omit a reference to multiparty elections and leave specific modalities of the right to interpretation by the African Court and the Inter-American Court. However, these courts had to address another aspect of the relationship between political parties and the 'democratic rights': whether candidates can be forced to associate with political parties if they wish to run at elections.

## 2.2 Political parties as an institutional requirement for political participation

In *Tanganyika Law Society v Tanzania*, the African Court had to consider the Tanzanian constitutional requirement that anyone wishing to stand for an election be a member of a political party.<sup>19</sup> The Court decided that this requirement infringed Article 13 of the ACHPR,<sup>20</sup> which provides that '[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.'<sup>21</sup> The constitutional provision at issue only discriminated against independent candidates and not against any political party. The applicant in that case was not intending to run with his own party or list but as an independent individual.<sup>22</sup> The decision, therefore, does not directly confirm that elections in the framework of the ACHPR would need to be multiparty.

A broader interpretation of the ACHPR could follow from the interdependence of Article 13 with other 'democratic rights', in particular the freedom of association (Article 11).<sup>23</sup> When considering this right, the African Court remained

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<sup>19</sup> *Tanganyika Law Society and Legal and Human Rights Centre v The United Republic of Tanzania*, Application No 009/2011, Judgment of 14 June 2013 (The African Court of Human and Peoples' Rights).

<sup>20</sup> *Ibid*, para 111.

<sup>21</sup> ACHPR, Art 13(1).

<sup>22</sup> *Tanganyika Law Society*, above n 19, para 93.

<sup>23</sup> ACHPR, Article 11.

confined to the facts of the case and did not interpret Article 11 as analogous to the European Court's interpretation of the freedom of assembly.<sup>24</sup> Rather, the African Court found a violation of the freedom of association based on their interpretation of the Tanzanian constitutional provision, 'an individual is forced to associate with others.'<sup>25</sup>

In contrast with the Strasbourg jurisprudence discussed above, the African Court had to define the relationship between political parties and 'democratic rights' from the other direction: whether individuals can be forced to join a political party in order to run at an election. The answer was negative, as one cannot be forced to associate with others. In effect, through its interpretation of the freedom of association, the African Court has now established that the democratic electoral process is not only reserved for political parties but that individuals may also run. While acknowledging the importance of political parties in a democracy, the Court upheld the view that democratic elections can also accommodate individuals who choose to participate outside of the institutionalised party framework.

A somewhat similar problem to *Tanganyika Law Society* was brought to the HRC in *AP v Russia*.<sup>26</sup> In 2007, the Russian Electoral Commission was unable to register a citizen wishing to run in the parliamentary elections who was not a member of any political party. The Electoral Commission told the citizen that he could still 'apply to any regional branch of any political party for his inclusion in the federal list of candidates to be nominated by that political party.'<sup>27</sup> In other words, the Electoral Commission referred him to political parties in order to participate in the electoral process. Importantly, he would not need to become a member of any party, but would 'only' need to join a party list as an independent candidate. Conversely, in Tanzania, the option to run as a non-party member with party support was not available.<sup>28</sup>

On this basis, judicial bodies are trying to draw a fine line between being forced to join a political party and being forced 'only' to be included on a party list.<sup>29</sup> The former would be unacceptable, while the latter is seen as a reasonable alternative which enables individuals to run without having to join a party. The

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<sup>24</sup> Cf above n 17.

<sup>25</sup> *Tanganyika Law Society*, above n 19, para 113.

<sup>26</sup> HRC, *Communication No 1857/2008*, UN Doc CCPR/C/107/D/1857/2008, 10 May 2013 (*AP v Russia*).

<sup>27</sup> *Ibid*, para 2.2.

<sup>28</sup> *Tanganyika Law Society*, above n 19, para 107.3.

<sup>29</sup> *Ibid*.

line is artificial because joining a party list, even as a non-member, implies acceptance of that party's programme and ideology. *AP v Russia* illustrates this problem, as the complainant was not interested in running as a non-member on any party list and simply did not want to be connected to any political party in any way. On this basis he alleged several violations of the ICCPR, including Article 25.<sup>30</sup>

The HRC concluded that the application was inadmissible. With regard to Article 25, it noted that the complainant had a domestic remedy available if a political party refused to put him on its list as an independent candidate (i.e. non-member of that particular party).<sup>31</sup> However, the complainant was not in the position to use this remedy, as he did not even try to be included on a party list. In the end, the HRC added that the complaint contained 'no information as to why the author could not create his own political party together with individuals sharing similar political opinions and stand for elections through it.'<sup>32</sup> The HRC was clearly eager to declare the complaint inadmissible but, in so doing, it re-categorised the original problem. A domestic remedy may well have existed had the complainant tried to register for a party list and was refused the right to do so. But this is precisely what the complainant did not want to do—he wanted to run without having anything to do with political parties. In such circumstances, he had no domestic remedy to challenge the Russian law which could not accommodate candidates without a party backing.

In *Tanganyika Law Society*, the approach was quite different and the African Court did not tell the applicant either to pick an existing party or create his own. Rather, it found the requirement to participate in the electoral process exclusively through political parties incompatible with the ACHPR. Nevertheless, it must be noted that the 'middle option' of running on a party list as a non-member was unavailable in Tanzania, where the electoral system is based on single-member constituencies, with a number of seats reserved for female candidates.<sup>33</sup> The latter quota is distributed according to proportionate voting, while the basic 'first-past-the-post' system *can* accommodate independent candidates and does not require party lists. In contrast, the 2007 elections in Russia used a pure proportionate system, the central feature of which is party lists that cannot

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<sup>30</sup> *AP v Russia*, above n 26, para 3.1.

<sup>31</sup> *Ibid*, para 10.6.

<sup>32</sup> *Ibid*.

<sup>33</sup> See 'Tanzania: Electoral System', *Electoral Institute for Sustainable Democracy in Africa*, <<http://eisa.org.za/WEP/tan4.htm>> [accessed 1 March 2014].

accommodate individual candidates who are not on a list.<sup>34</sup> Had the complaint in *AP v Russia* proceeded to be considered on the merits, the HRC would have been asked to address the problem of political participation being monopolised by political parties. In particular, it would have considered why Article 25, which does not mention political parties at all, allows for complete exclusion of the ability to run at elections without being associated with a party, at least as a non-member supported by one of the parties.

The question omitted by the HRC has been addressed by the Inter-American Court of Human Rights in *Castañeda Gutman v Mexico*.<sup>35</sup> In that case, the complainant intended to run as an independent candidate at presidential, not parliamentary, elections, but would nevertheless only be entitled to do so if he were backed by a political party, albeit as a non-member. The Inter-American Court ruled that the requirement to seek party support was not an infringement of Article 23 of the ACHR. In reaching this conclusion, the Court noted that:

In the sphere of political rights the guarantee obligation is especially relevant and is implemented, among other mechanisms, by the establishment of the organizational and institutional aspects of the electoral processes, and by the enactment of norms and the adoption of different types of measures to implement the rights and opportunities recognized in Article 23 of the Convention.<sup>36</sup>

The Court further recalled that the ACHR, 'like other international human rights treaties, does not establish the obligation to implement a specific electoral system. Nor does it establish a specific mandate on the mechanism that the States must establish to regulate the exercise of the right to be elected in general elections.'<sup>37</sup>

Similarly, in *Mathieu-Mohin and Clerfayt v Belgium*, the European Court held:

[T]he Contracting States have a wide margin of appreciation, given that their legislation on the matter (the electoral system) varies from place to place and from time to time [...] It does not follow [...] that all votes must necessarily have equal weight as regards the outcome

<sup>34</sup> 'How the Duma Electoral System Works', *Centre for the Study of Public Policy, University of Strathclyde*, <[http://www.russiavotes.org/duma/duma\\_electoral\\_system.php](http://www.russiavotes.org/duma/duma_electoral_system.php)> [accessed 1 March 2014].

<sup>35</sup> *Castañeda-Gutman v Mexico*, Judgment of 6 August 2008 (Inter-American Court of Human Rights).

<sup>36</sup> *Ibid*, para 159.

<sup>37</sup> *Ibid*, para 197.

of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes' [...] any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'.<sup>38</sup>

The Court's interpretation of the ECHR does not specify the exact modalities or precise technical arrangements to be implemented at national elections. Rather, there is a margin of appreciation, as there exists no ideal electoral system which would be suitable for all states, regardless of historical, political, geographical, social and other differences.

The pronouncement that human rights treaties do not require a particular electoral system is certainly doctrinally sound and its basic premise is not contestable. However, it is debatable whether, in the context of presidential elections such as in *Castañeda Gutman*, the requirement to seek party support is really an institutional aspect of the electoral process. The problem is that such elections do not require party lists. It is arguable that the Inter-American Court's reasoning would be plausible in a case such as *AP v Russia*, that is, in the circumstances of parliamentary elections in a proportionate electoral system. Party lists are a central feature of such an electoral system and *can* be seen as an 'institutional aspect of the electoral process'.<sup>39</sup> But they play no institutional role in presidential and 'first-past-the-post' parliamentary elections, where votes are given to specific individuals. The Inter-American Court did not acknowledge this difference and made passive exercise of the right to vote conditional on involvement in party politics, albeit without a requirement to formally join a political party.

The relationship between political parties and 'democratic rights' has long been dominated by the question of whether human rights treaties require multiparty elections. Recent case law has presented the problem from the other direction: can national legislation require that the right to stand for an election only be consummated through party politics, not necessarily by membership but at least by inclusion on party lists? Relevant cases before different judicial bodies are not entirely comparable because different factual circumstances determine

<sup>38</sup> *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1, para 54.

<sup>39</sup> See above n 36.

each case. Nevertheless, it seems to be increasingly accepted that the right to political participation needs to take place in a multiparty setting and states need to make institutional arrangements necessary for such a political system. Sometimes these institutional arrangements will discriminate against candidates who want to run without being associated with any political party. In this context, courts have established an artificial line between the requirement to join a political party and the requirement 'only' to be supported by a political party in order to run at an election. In both circumstances, an individual is, however, forced to associate with a political party, even if not always formally as a member.

While the Inter-American Court was right in claiming that implementation of specific electoral systems falls to be determined by states, there is little reason to make candidates seek party support in those electoral systems which do not operate on the proportionate system of party lists. In other words, the requirement to seek party support may be justifiable in some electoral systems but not others. In *AP v Russia*, the HRC missed an opportunity to set such a precedent at the ICCPR level. It remains to be seen whether regional human rights courts will further develop the distinction between 'being a party member' and 'being merely supported by a party', or whether they will start scrutinising electoral systems and establish that some of them can institutionally accommodate candidates even if they run without party support.

### **3 Interpreting limitations on democratic rights**

Thus far, it has been established that universal and regional human rights treaties contain virtually identical textual provisions guaranteeing 'democratic rights', but that their scope crucially depends on judicial interpretation. Regional human rights case law has given much prominence to political parties, but the HRC remains evasive and has yet to clarify the precise relationship between political parties and 'democratic rights'. This section will analyse the judicial interpretations of the limitation clauses in human rights treaties, which allow human rights to be limited in the interest of 'a democratic society'.

#### **3.1 The interpretation of the limitation clauses**

A number of international human rights instruments contain the phrase 'democratic society' as a limitation clause. This reference initially appeared in Article

29(2) of the UDHR;<sup>40</sup> the human rights provisions contained in it may be limited if the interests of a 'democratic society' so requires. As a limitation clause attached to specific human rights provisions, the phrase also found its place in a number of international human rights treaties. The International Covenant on Economic, Social and Cultural Rights (*ICESCR*) comprehends a general limitation clause in Article 4:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.<sup>41</sup>

The *ICESCR* also refers to a 'democratic society' as part of the limitation clause in the context of the right to form trade unions.<sup>42</sup> The *ICCPR* attaches the interests of a 'democratic society' as one of the limitation clauses to the right to a fair trial,<sup>43</sup> freedom of assembly,<sup>44</sup> and freedom of association.<sup>45</sup> The Convention on the Rights of the Child (*CRC*) invokes the interests of a 'democratic society' as a limitation clause to the rights of a child to freedom of association and assembly.<sup>46</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (*ICPRMW*) attaches the interests of a 'democratic society' within the limitation clause to the right of migrant workers to take part in the trade unions,<sup>47</sup> and the freedom of assembly of migrant workers.<sup>48</sup>

However, these treaties were drafted at the time of the Cold War and should not be read too broadly. At the time, ideological differences between Western and Communist states prevented a reading of universal human rights treaties

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<sup>40</sup> Art 29(2) of the UDHR provides: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

<sup>41</sup> *ICESCR* Art 4.

<sup>42</sup> *Ibid*, Art 8(a) and (c).

<sup>43</sup> *ICCPR* Art 14.

<sup>44</sup> *Ibid*, Art 21.

<sup>45</sup> *Ibid*, Art 22.

<sup>46</sup> *CRC* Art 15.

<sup>47</sup> *ICPRMRW* Art 26.

<sup>48</sup> *Ibid*, Art 40.

with a particular political system in mind.<sup>49</sup> In this vein, when the ICJ decided the *Nicaragua* case in 1986, several treaties containing the phrase ‘democratic society’ were already in force. While the phrase cannot be read as a commitment to a particular political system or electoral method, in the absence of judicial interpretations of its scope, even the meaning of the phrase remains undefined.

This is different in some regional human rights treaties. The ECHR also attaches limitation clauses on certain rights if ‘necessary in a democratic society’. Such clauses are found in the context of the right to a fair trial,<sup>50</sup> the right to respect for private life and family,<sup>51</sup> the right to freedom of thought, conscience and religion,<sup>52</sup> the right to freedom of expression,<sup>53</sup> and the right to freedom of assembly and association.<sup>54</sup> In this respect, the ECHR does not textually differ from the ICCPR. However, through interpretation of a ‘democratic society’, the European Court progressively established a much closer and more specific link between human rights and democracy. In *Handyside v United Kingdom*, the European Court interpreted the phrase ‘democratic society’ in the context of the freedom of expression:

Freedom of expression constitutes one of the essential foundations of [...] a [democratic] society, one of the basic conditions for its progress and for the development of every man [...] This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.<sup>55</sup>

The relationship between the right to freedom of expression and democracy was reaffirmed in subsequent case law.<sup>56</sup> In essence, the European Court

<sup>49</sup> R Rich, ‘Bringing Democracy into International Law’ (2001) 12 *J Democracy* 20, 20–1. See generally also S Marks, ‘The European Convention on Human Right and its “Democratic Society”’ (1995) 66 *BYIL* 209.

<sup>50</sup> ECHR Art 6(1).

<sup>51</sup> *Ibid*, Article 8(2).

<sup>52</sup> *Ibid*, Article 9(2).

<sup>53</sup> *Ibid*, Article 10(2).

<sup>54</sup> *Ibid*, Article 11(2).

<sup>55</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

<sup>56</sup> See *Lingens v Austria* (1986) 8 EHRR 407, para 41; *Oberschlick v Austria* (1991) 19 EHRR 389, para 57; *Castells v Spain* (1992) 14 EHRR 445, para 42; *Jersild v Denmark* (1995), 19 EHRR 1, para 31; *Goodwin v United Kingdom*, (1996) 22 EHRR 123, para 39; *Karhuvaara and Iltalehti v Finland* (2005) 41 EHRR 51, para 37; *Busuioc v Moldova* (2005) 42 EHRR 252, para 58; and *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, para 87.

has established that the limitation clause cannot be triggered arbitrarily, and a legitimate aim must be pursued.

Similarly, the ACHR makes a reference to ‘democratic institutions’ in the preamble,<sup>57</sup> while the right to assembly,<sup>58</sup> freedom of association,<sup>59</sup> and freedom of movement and residence<sup>60</sup> invoke the interest of a ‘democratic society’ as a limitation clause. Article 32 provides for a general limitation clause: ‘The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.’<sup>61</sup> Article 28 provides that the ACHR rights need to be interpreted with democracy in mind: ‘No provision of [the ACHR] shall be interpreted as [...] precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.’<sup>62</sup>

The term ‘representative democracy’ has been addressed in reports of the Inter-American Commission on Human Rights, where the Commission ‘underlined the direct relationship between representative democracy and the guarantee of the observance of human rights.’<sup>63</sup> But phrases such as ‘necessary in a democratic society’ and ‘representative democracy’ were not interpreted any further by the Commission. ‘Representative democracy’ was, however, considered by the Inter-American Court in *Yatama v Nicaragua*, and interpreted as follows:

States may establish minimum standards to regulate political participation, provided they are reasonable and in keeping with the principles of representative democracy. These standards should guarantee, among other matters, the holding of periodic free and fair elections based on universal, equal and secret suffrage, as an expression of the will of the voters, reflecting the sovereignty of the people, and bearing in mind, as established in Article 6 of the Inter-American

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<sup>57</sup> ACHR Preamble, para 1.

<sup>58</sup> Ibid, Art 15.

<sup>59</sup> Ibid, Art 16.

<sup>60</sup> Ibid, Art 22.

<sup>61</sup> Ibid, Art 32(2).

<sup>62</sup> Ibid, para 29(c).

<sup>63</sup> A A Cançado-Trindade, ‘The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvements of its Mechanisms of Protection’, in D Harris and S Livingstone (eds.), *The Inter-American System of Human Rights* (1998) 410.

Democratic Charter, that '[p]romoting and fostering diverse forms of participation strengthens democracy'.<sup>64</sup>

This position reaffirms that implementation of a particular modality of political system is within the domestic jurisdiction of states. However, when interpreting 'democratic society' and 'representative democracy', the Inter-American Court remained confined to electoral procedures. The European Court has arguably interpreted democracy beyond electoral procedures, as the next section demonstrates.

### 3.2 Establishing 'imminence' through interpretation

In *Refah Partisi v Turkey*, the European Court considered that:

[...] a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy.<sup>65</sup>

However, as articulated in the earlier *United Communist Party of Turkey* case, such a measure needs to be 'proportionate to the legitimate aim pursued'.<sup>66</sup> According to the Court, the anti-democratic nature of a political party can only be judged from its actions or its programme and not from its name, even where the name implies a particular ideology. For this reason, the Court concluded that the United Communist Party of Turkey posed no automatic threat to the democratic political order, by choosing to call itself 'Communist'.<sup>67</sup> The Court at this point acknowledged a clear distinction between the United Communist Party of Turkey and the German Communist Party. The latter was dissolved by the Federal Constitutional Court of Germany in 1956 on the basis of its express anti-democratic programme, rather than the word 'Communist' in its name.<sup>68</sup>

<sup>64</sup> *Yatama v Nicaragua*, Judgment of 23 June 2005, para 207 (Inter-American Court of Human Rights).

<sup>65</sup> *Refah Partisi and Others v Turkey* (2003) 37 EHRR 1, para 102 (*Refah Partisi*).

<sup>66</sup> *United Communist Party of Turkey*, above n 17, para 47.

<sup>67</sup> *Ibid*, para 54.

<sup>68</sup> See *Kommunistische Partei Deutschlands—Verbotsurteil*, BVerfGE 5, 85, 17 August 1956. The German Communist Party, *inter alia*, declared as its goals the 'dictatorship of the proletariat', the 'opposition to the democratic order' of the Federal Republic of Germany, and 'propaganda of the Marxist–Leninist teachings'. The Constitutional Court of Germany accepted the application

The European Court adopted the model developed by the German Constitutional Court, which established that dissolution of a democracy-hostile party is a legitimate act where it aims to preserve democratic order, but such an act needs to be subject to rigorous judicial review. As the German Constitutional Court put it: ‘The dissolving of a Party is not an independent executive measure but a law-prescribed regular, typical and adequate consequence of finding a violation of the constitutional order.’<sup>69</sup> While the German Court carefully considered the goals and the actions of the German Communist Party, this was not done by the Constitutional Court of Turkey when it dissolved the United Communist Party of Turkey. The latter had expressly democratic goals and was given no time to engage in any anti-democratic activities, given that it was dissolved on the tenth day of its existence. The European Court thus refused the Constitutional Court of Turkey’s broad interpretation of the phrase ‘necessary in a democratic society’ and declared its decision ‘disproportional’ and ‘unnecessary in a democratic society.’<sup>70</sup>

The *United Communist Party of Turkey* case established the interpretative standard requiring that the reasons for dissolving a political party—and thus restrictions on the freedom of assembly—need to be ‘convincing and compelling.’<sup>71</sup> The threshold established in this case was confirmed in subsequent case law.<sup>72</sup> While *United Communist Party of Turkey* determines when a political party *cannot* be justifiably banned, the interpretation of the freedom of assembly in *Refah Partisi* determines the other parameter of this right, namely when a political party *can* be dissolved. The European Court relied on examination of a ‘pressing social need’ for such a restriction.<sup>73</sup> A ‘pressing social need’ was determined after examining the following questions:

- (i) whether the risk to democracy was sufficiently imminent; (ii) whether the acts and speeches of the leaders of the party under consideration [...] could be imputed to the party itself; and (iii)

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of the German Government, arguing that (at section 3, para 1): ‘The goals of the German Communist Party and the behaviour of its adherents aim at hindering, even abolishing, the liberal democratic fundamental order, and endangering the very existence of the Federal Republic of Germany’ (author’s translation).

<sup>69</sup> Ibid, section 3, para 2 (author’s translation).

<sup>70</sup> *United Communist Party of Turkey*, above n 17, para 61.

<sup>71</sup> Ibid, para 46.

<sup>72</sup> See *Socialist Party and Others v Turkey* (1999) 27 EHRR 51, paras 41–50; *Freedom and Democracy Party (ÖZDEP) v Turkey* (1998) 26 EHRR 121, paras 37–48.

<sup>73</sup> *Refah Partisi*, above n 65, para 132.

whether the acts and speeches imputable to the party constituted a whole, which gave a clear picture of the model of society advocated by the party, and whether this model was compatible with the concept of 'democratic society'.<sup>74</sup>

In *Refah Partisi*, the Court observed that the political party in question (the 'Welfare Party' or 'Prosperity Party') was a threat to Turkish secularism, which is a central concept in the modern Turkish state and its liberal-democratic order.<sup>75</sup> In so doing, the European Court referred to the reasoning of the Turkish Constitutional Court:

Several members of Refah, including some in high office, had made speeches calling for the secular political system to be replaced by a theocratic regime. These persons had also advocated elimination of the opponents of this policy, if necessary by force. Refah, by refusing to open disciplinary proceedings against the members concerned and even, in certain cases, facilitating dissemination of their speeches, had tacitly approved the views expressed.<sup>76</sup>

The Court ultimately concluded:

In making an overall assessment of the points it has just listed above in connection with its examination of the question whether there was a pressing social need for the interference in issue in the present case, the Court finds that the acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not

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<sup>74</sup> A Heringa and F van Hoof, 'Freedom of Association and Assembly' in P van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (2006) 829. See also *Partidul Comunistilor and Ungureanu v Romania* (2007) 44 EHRR 17, para 48.

<sup>75</sup> The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy': *Refah Partisi*, above n 65, para 125.

<sup>76</sup> *Ibid*, para 12.

exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a 'democratic society' and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a 'pressing social need'.<sup>77</sup>

Refah was dissolved on the basis of a pressing social need and imminence, as it was a threat to democratic political order. It is of particular importance that imminence was established on the basis of Refah's popularity, influence and realistic prospects of becoming the strongest political party in Turkey. This is how the Court reasoned:

Refah was founded in 1983, took part in a number of general and local election campaigns and obtained approximately 22% of the votes in the 1995 general election, which gave it 158 seats in the Grand National Assembly (out of a total of 450 at the material time). After sharing power in a coalition government, Refah obtained about 35% of the votes in the local elections of November 1996. According to an opinion poll carried out in January 1997, if a general election had been held at that time Refah would have received 38% of the votes. According to the forecasts of the same opinion poll, Refah could have obtained 67% of the votes in the general election likely to be held about four years' later [...] Notwithstanding the uncertain nature of some opinion polls, those figures bear witness to a considerable rise in Refah's influence as a political party and its chances of coming to power alone.<sup>78</sup>

In the Court's interpretation, a pressing social need existed because Refah was likely to win the elections, and it decided to uphold the exclusion of the likely winner from the electoral process. Indeed, the party was dissolved precisely

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<sup>77</sup> Ibid, para 132.

<sup>78</sup> Ibid, para 107. The Court's reliance on opinion polls was criticised by Judge Kovler in his concurring opinion (para 49): 'I find the use of figures derived from opinion polls [...] which would be natural in a political analysis, rather strange in a legal text which constitutes *res judicata*'.

because of its influence and size.<sup>79</sup> The Court thereby extended its understanding of democracy beyond the electoral process and the will of the people. It upheld the idea that people should not even be given a chance to vote for an anti-democratic political party.

A broader understanding of democracy also follows from other cases where national legislation limited the ‘democratic rights’ of certain individuals. In *Rekvenyi v Hungary*, the Court addressed the question of whether the Hungarian prohibition on members of police, military, and security forces joining political parties was a violation of Article 11 of the ECHR. The Court considered the Hungarian experience with Communism where police, military and security forces were politicised and subordinated to the Party.<sup>80</sup> These circumstances spoke in favour of the ban, as specifically acknowledged by the Court:

Bearing in mind the role of the police in society, the Court has recognised that it is a legitimate aim in any democratic society to have a politically neutral police force [...] In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.<sup>81</sup>

In other words, a limitation of the right of members of police, military, and security forces to join political parties would have been permissible in certain circumstances and such a limitation could be beneficial for the ‘consolidation and maintenance of democracy’. This is a further step further from an electoral-centric definition of democracy. By references to democratic consolidation, the Court clearly adopted a more substantive definition of democracy than one based solely on electoral procedures. In *Rekvenyi*, the prohibition was declared to be a violation of Article 11, as the level of democratic consolidation in post-Communist Hungary was regarded as sufficient to accommodate the possibility that members of the police force might join political parties.

<sup>79</sup> Cf B Roth, ‘Democratic Intolerance: Observations on Fox and Notle’ in G Fox and B Roth, above n 3, 442, arguing that it is rather odd to send a message that democracy gives people an option to choose any kind of government, except the one that most of them currently think they want to have. The European Court arguably adopted such reasoning, but used it in a pre-emptive way to prevent Refah Partisi from winning the forthcoming election.

<sup>80</sup> *Rekvenyi v Hungary* (2000) 30 EHRR 519, para 47.

<sup>81</sup> *Ibid*, para 42.

Although the factual circumstances were different, a similar question was raised in *Ždanoka v Latvia*.<sup>82</sup> The Court decided that the national limitation on the right to stand for an election to a person who was actively involved in the activities of the Communist Party of Latvia (CPL) was disproportionate and not necessary in a democratic society.<sup>83</sup> By holding that ‘neither a parliament nor an individual member of parliament may, by definition, be “politically neutral”’,<sup>84</sup> the Court drew a distinction between *Ždanoka* and *Rekvenyi*. However, the underlying question was similar: under what circumstances can an individual’s ‘democratic rights’ be limited in the interests of a democratic society?

The Government of Latvia submitted that former members of the CPL were a threat to Latvian democracy, as the CPL had sponsored subversive actions against the elected Latvian government, following the first democratic elections in 1990.<sup>85</sup> The Government thus claimed that the limitation of the right to stand for an election to former members of the CPL was ‘necessary in a democratic society’, as democracy needs to be able to defend itself. The Court rejected this view on the basis that:

[...] the applicant’s disqualification from standing for election to Parliament and local councils on account of her active participation in the CPL, maintained more than a decade after the events held against that party, is disproportionate to the aim pursued and, consequently, not necessary in a democratic society.<sup>86</sup>

The Court thereby expressly upheld the view of the dissenting opinion of three out of seven judges of the Constitutional Court of Latvia, which held that ‘the Latvian democratic system had become sufficiently strong for it no longer to fear the presence within its legislative body of persons who had campaigned against the system ten years previously.’<sup>87</sup> The decision of the European Court was based on the premise that the state of Latvian democracy ten years after the subversive

<sup>82</sup> *Ždanoka v Latvia* (2007) 45 EHRR 17.

<sup>83</sup> *Ibid*, para 110. This decision is interesting in light of the lustration laws adopted in some post-Communist states. See V Pettai, ‘Estonia: Positive and Negative Institutional Engineering’, in A Pravda and J Zielonka (eds), *Democratic Consolidation in Eastern Europe Volume 1: Institutional Engineering* (2001) 126–7.

<sup>84</sup> *Ždanoka v. Latvia*, above n 82, para 85.

<sup>85</sup> *Ibid*, para 66.

<sup>86</sup> *Ibid*, para. 110.

<sup>87</sup> Constitutional Court of Latvia, Judgment of 30 August 2000, cited in *Ždanoka v Latvia*, above n 82, para 49.

events was at a level where such restrictions were no longer necessary and could no longer be justified.<sup>88</sup> The Court again looked beyond formal democratic procedures and based its decision upon the level of democratic consolidation in Latvia. It clearly follows from the decision that the outcome could have been different in the circumstances of a more vulnerable democracy.

The Court thus not only interprets the ECHR as an instrument that guarantees multiparty elections. It has gone further and made defending democracy one of its functions, developed by interpretation of the rights in the ECHR. In so doing, the Court even resorts to opinion polls and electoral predictions to assess the level of democratic consolidation.

## 4 Conclusion

Textually, no human rights treaty mentions multiparty elections and/or binds contracting parties to a particular political system or electoral method. However, international and regional judicial bodies can interpret human rights treaties with a particular political system in mind. In principle, the ICCPR remains politically neutral. The only clear judicial interpretation on the matter remains the 1986 *Nicaragua* case, where the ICJ could not ‘find an instrument with legal force [...] whereby Nicaragua ha[d] committed itself in respect of the principle or methods of holding elections.’<sup>89</sup> In the absence of a centralised judicial body with compulsory jurisdiction at the international level, there is a lack of further judicial practice providing for interpretations of the ICCPR other than that offered in *Nicaragua*. It is worth noting that, a decade later, the HRC avoided a reference to multiparty elections in its comment on the right to political participation under the ICCPR.

The relationship between human rights treaties and multiparty democracy is more elaborate in regional human rights systems in which treaty provisions are interpreted by specialised human rights courts. All three regional human rights courts reject the idea that elections can be free and fair in a single party setting. The European Court, in particular, has developed very robust case law to this effect. Besides providing unambiguous authority that multiparty democracy is a part of the European public order, the Court has also considered the requisite

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<sup>88</sup> For further discussion on Latvian democracy, see, A Sprudz, ‘Rebuilding Democracy in Latvia: Overcoming a Dual Legacy’, in A Pravda and J Zielonka (eds), *Democratic Consolidation in Eastern Europe Volume 1: Institutional Engineering* (2001) 139–64.

<sup>89</sup> *Nicaragua*, above n 8, para 261.

level of democratic consolidation and upheld limitations on human rights for the protection of a democratic political system. At the same time, all human rights courts have allowed for a wide margin of appreciation and do not impose on parties to the respective treaties a specific institutional arrangement. In other words, it is understood that human rights treaties require multiparty elections and also that democracy is not only understood narrowly as an electoral process. But many different national political systems can fall within these parameters.

Besides the question of whether human rights treaties require multiparty elections, it is also controversial whether a system which allows political participation only through party politics can be compatible with human rights treaties. In *AP v Russia*, the HRC missed an opportunity to address the question of whether individuals can be forced to associate in political parties in order to run at elections. Article 25 of the ICCPR does not even mention political parties, yet it seems to be increasingly accepted that parties are at the heart of an institutional arrangement for exercising this right. Individuals can indeed be forced to act through political parties if they wish to run at elections. Is this still a democracy, understood as the rule of the people, or is it rather the rule of political parties? The issue is also very pressing at the regional level.

In *Tanganyika Law Society*, the African Court established that political participation is not reserved exclusively for candidates backed by political parties. However, because the Tanzanian constitution specifically required membership in political parties, it is possible to see this case as limited by its factual circumstances. The Inter-American Court has accepted that people may be forced to seek party support in order to run at elections. As long as they are not forced to join a party, the ACHR is not breached. In the otherwise inadmissible case, *AP v Russia*, even the HRC hinted that the solution would be in taking this 'middle option'. However, making a distinction between being forced to join a party and being forced 'only' to seek support of a party does not really solve the problem. As *AP v Russia* demonstrates, seeking party support also comes with pressure to associate with others with a particular party programme or ideology. Judicial bodies have not adequately scrutinised the features of different multiparty electoral systems. Some systems indeed require party lists and in such circumstances it may be justifiable to 'force' candidates to associate with political parties in this way. But other electoral systems can accommodate independent candidates and the requirement to seek support by political parties does not seem to be necessary for the electoral process.

Judicial bodies, especially regional human rights courts, have interpreted human rights treaties as requiring multiparty elections. But political parties now

seem to have a chequered role which can also lead to violations of 'democratic rights'. As the African Court put it, individuals should not be forced to associate with others and the *Tanganyika Law Society* case should not be disregarded in future judicial interpretations of human rights treaties simply because the Tanzanian constitution *specifically* required membership of a political party.

## A MODERN INTEGRATED PARADIGM FOR INTERNATIONAL RESPONSIBILITY ARISING FROM VIOLATIONS OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

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### **Abstract**

From its entry into force in 1976 up to its present membership of 160 States Parties, the interpretation of the International Covenant on Economic, Social and Cultural Rights (hereafter, the Covenant) has always involved confronting normative and institutional complexities. Unlike the specific prohibitions contained in the International Covenant on Civil and Political Rights (ICCPR), Covenant norms purposely contemplate dynamic implementation over time, with the quality of treaty compliance expected to accommodate and adjust to States' governance capabilities, resource endowments, and fiscal contexts. Such interpretive variability, however, did not necessarily doom the Covenant to normative indeterminacy. Rather, as we show in Part I (A Normative Lattice: The Determinacy of Economic, Social, and Cultural Rights), the lattice-like normative system of the Covenant still enables a reasoned assessment of international responsibility and compliance by State and non-State actors with Covenant obligations. Covenant interpreters must first identify the legal social protection baseline applicable to the State (e.g. the 'minimum core content of Covenant obligations' that are jointly determined at the outset by each State Party with the Committee on Economic, Social, and Cultural Rights upon the State's accession to the Covenant), in conjunction with two overarching obligations flowing parallel with this baseline – the 'principle of non-discrimination', which requires a State Party to guarantee non-discrimination in their implementation of Covenant rights; and the 'principle of non-retrogression', which commits a State Party to social protection conduct that will, at the very least, not fall below its pre-committed legal baseline of the 'minimum core' of Covenant rights. These two principles and the 'minimum core' baseline comprise the starting point for the periodic assessment of compliance with the Covenant. Beyond this point, Covenant interpreters have to assess the State's continuing obligation to 'progressively realize' Covenant rights as the State's fiscal, economic, and governance contexts and capabilities accordingly adapt and develop over time. We further note that the programmatic, evolutive, and transactional nature of economic, social and cultural rights inimitably involves a spectrum of actors – States as well as

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non-State actors (such as international organizations). As we show in Part II (Expanding Universes: Covenant Interpreters and Violations by State and non-State Actors), international responsibility for Covenant violations could attach, not just for conduct of States and non-State actors that breach individual substantive obligations in Articles 6 to 15 of the Covenant, but also from breach of the overriding 'duty to cooperate' that was built into the telos and design of Covenant obligations. The duty to cooperate, as recognized throughout the General Comments issued by the Committee, is an obligation that has particular salience especially in times of economic emergencies or resource scarcities impairing States Parties' abilities to 'respect, protect, and fulfill' economic, social and cultural rights. As is axiomatic with the law of international responsibility, Covenant violations give rise to a corollary duty to make reparations. However, the ultimate form of relief granted would depend on the actual jurisdictional remit of the forum chosen to adjudicate the Covenant violation. In this respect, the proliferation of authoritative institutions that now interpret the Covenant (e.g. the Committee on Economic, Social and Cultural Rights; States Parties; international, regional, and national courts and tribunals; other specialized agencies of the United Nations) explains the diversity of forms of relief recognized as sufficient reparations for Covenant violations. In the Conclusion (Reframing International Responsibility for Covenant Violations), we point out the convergence of various dialectical achievements throughout nearly five decades since the entry into force of the Covenant: 1) the sustained quasi-legislative work of the Committee throughout its General Comments; 2) the continuing interpretive practices of national, regional, and international courts and tribunals in regard to economic, social, and cultural rights; 3) the broad participation and interpretive praxis of States, international organizations, and other non-State actors in the settled reportage procedures before the Committee; and 4) the recent adoption of empirical methodologies for assessing human rights compliance. These developments helped ripen a modern interpretive paradigm for the authoritative determination of international responsibility for Covenant violations.

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In the field of treaty interpretation, the choice of a particular interpretive theory may simultaneously involve a choice in the wider forum of international politics. At the simplest level, the choice of one method of interpretation over another...may determine the result in a particular case. At the broader level, interpretive strategies may signal more far-reaching, non-legal choices and goals.<sup>1</sup>

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<sup>1</sup> D S Berry, 'Hyper-Interpretation: Promise or Peril?' (2008) 102 *ASIL Proc* 416, 416–20.

[...] while there are always mechanisms for ruling out readings, their source is not the text but the presently recognized interpretive strategies for producing the text [...]²

The Committee on Economic, Social and Cultural Rights [...] is a subsidiary organ that has the task of 'assisting' the [UN Economic and Social] Council in carrying out responsibilities vested by the Covenant not in the former but in the latter [...] in the longer term, the Committee would benefit from being accorded a steadily increasing degree of autonomy.³

## 1 Introduction: Interpretive Gaps in the Assessment of State Responsibility for Covenant Violations

There has not been much practical elucidation, whether from international tribunals or bodies, of an authoritative interpretive process when assessing State responsibility arising from violations of the International Covenant on Economic, Social and Cultural Rights (the *Covenant* or *ICESCR*). Indeed, the International Court of Justice has not yet had the opportunity to adjudicate allegations of Covenant breaches in an actual contentious case. Its single finding to date of a Covenant breach was in the 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Wall Advisory Opinion*),⁴ when the Court declared that the construction of the wall 'impede[s] the exercise by the persons concerned of the right to work, to health, to education, and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights'.⁵ In support of this conclusion, the Court cited information received from the Secretary-General of the United Nations;⁶ the UN Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories

² S Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 347.

³ P Alston & B Simma, 'Current Development: First Session of the UN Committee on Economic, Social and Cultural Rights' (1987) 81 *AJIL* 747, 755–6.

⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 p 136.

⁵ *Ibid*, para 134.

⁶ *Ibid*, para 132.

occupied by Israel since 1967;<sup>7</sup> a Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories;<sup>8</sup> and the Special Rapporteur on the Right to Food of the UN Commission on Human Rights.<sup>9</sup> However, there is no indication in the *Wall Advisory Opinion* that the Court obtained and relied on information from Israel, nongovernmental organizations, or other institutions, experts, or persons to controvert and establish the factual bases behind its declaration of Israel's violation of the Covenant. The Court preferred to leave the matter of its interpretive methodology quite open for future development in actual contentious proceedings.

Even the Committee on Economic, Social and Cultural Rights (the *Committee*), the body composed of 18 independent experts specifically tasked with monitoring States Parties' implementation of the Covenant,<sup>10</sup> has been reticent in issuing any definitive declarations of State violations of the Covenant. While the Committee has declared States Parties to have acted inconsistently with Covenant obligations (such as those on the right to housing, in the cases of the Dominican Republic, Panama, and the Philippines<sup>11</sup>), it has usually refrained from categorically declaring other State violations of the Covenant in most cases, a policy attributable to the limited mandate delegated to the Committee by the Economic and Social Council under Part IV of the Covenant, as much as to the Committee's own preferences for less confrontational language urging States to comply with Covenant obligations.<sup>12</sup> Other than its explication of Covenant norms through the General Comments it has issued thus far,<sup>13</sup> the Committee has not yet de-

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> The Economic and Social Council delegated its treaty monitoring authority under Part IV of the Covenant to the Committee. See Economic and Social Council, *Review of the composition, organization, and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/RES/1985/17, 28 May 1985.

<sup>11</sup> UN Committee on Economic, Social and Cultural Rights (CESCR or the *Committee*), *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Dominican Republic*, UN Doc E/C.12/1994/15, 19 December 1994; CESCR *Concluding observations of the Committee on Economic, Social and Cultural Rights: Panama*, UN Doc E/C.12/1/Add.64, 24 September 2001; K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2011) 319.

<sup>12</sup> See S Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform', in P Alston & J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 129–44.

<sup>13</sup> For the full text of the Committee's *General Comments* issued from 1989 to 2009, see <

fined a predictable methodology for how it would conduct the legal and evidentiary assessment of international responsibility for breaches of the Covenant.<sup>14</sup> However, with the entry into force of the Optional Protocol to the Covenant<sup>15</sup> in May 2013 and the corresponding expansion of the Committee's competences to include procedures for individual and/or group communications, broad and extensive *motu proprio* fact-finding and inter-State communications,<sup>16</sup> it is inevitable that in the near future the Committee will be impelled to more frequently and directly treat the question of international responsibility for Covenant violations.

This Article aims to contribute to the ongoing scrutiny of the processes and methods of interpretation involved in ascertaining international responsibility for Covenant violations. This will be done by focusing on the methodological techniques and forensic evidentiary practices of the Covenant's pluralist community of institutional interpreters (e.g. the Committee; international and national courts and tribunals; other UN specialized agencies and international organizations), and subsequently extrapolating features therefrom to describe a modern interpretive paradigm for determining international responsibility for Covenant violations. We note that, while the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (the *Maastricht Guidelines*) developed by the International Commission of Jurists have been recommended by the United Nations Commission on Human Rights to national human rights institutions dealing with Covenant violations,<sup>17</sup> they remain non-binding due to their soft law

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tneret.ohchr.org/\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11> [accessed 30 July 2013].

<sup>14</sup> We note that several Committee members were present in the experts' meetings convened for the purpose of adopting the Limburg Principles on the Implementation of the ICESCR (*Limburg Principles*) (UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles')*, UN Doc E/CN.4/1987/17, 8 January 1987 in (1987) 9 HRQ 122). See: V Dankwa, C Flinterman & S Leckie, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 705, 705–30. For a summary of the early features of Covenant violations identified in the Limburg principles, see S Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 HRQ 81, 81–124.

<sup>15</sup> Full text of the Optional Protocol available at <[http://www2.ohchr.org/english/law/docs/A.RES.63.117\\_en.pdf](http://www2.ohchr.org/english/law/docs/A.RES.63.117_en.pdf)> [accessed 1 January 2014].

<sup>16</sup> For other work that focuses narrowly on the procedural and interpretive effects of new competences vested in the Committee as a result of the passage of the Optional Protocol, see D A Desierto & C E Gillespie, 'Evolutive Interpretation and Subsequent Practice – Interpretive Communities and Processes in the Optional Protocol to the ICESCR' (2013) 73 *ZaöRV* 549.

<sup>17</sup> Office of the UN High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, UN Doc HR/P/PT/12, 2005, 45ff, 117–24 (*Hand-*

status.<sup>18</sup> Certainly neither the International Court of Justice or the Committee on Economic, Social and Cultural Rights appear to have explicitly referenced the Maastricht Guidelines in the rare instances where the Court or the Committee declared that a State violated the Covenant and was internationally responsible as such.<sup>19</sup>

We nonetheless accept the Maastricht Guidelines' conceptual articulation of Covenant violations as those that 'can occur through the direct action of States or other entities insufficiently regulated by States',<sup>20</sup> as well as those that occur 'through the omission or failure of States to take necessary measures stemming from legal obligations.'<sup>21</sup> Our integrated paradigm diverges from the Maas-

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book for *National Human Rights Instruments*). ICJ, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, <[http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)> [accessed 30 July 2013].

<sup>18</sup> International Commission on Human Rights Policy and International Commission on Jurists, *Human Rights Standards: Learning from Experience*, 2006, 15, <[http://www.ichrp.org/files/reports/31/120b\\_report\\_en.pdf](http://www.ichrp.org/files/reports/31/120b_report_en.pdf)> [accessed 30 July 2013]. It has been proposed that both the 1987 Limburg Principles and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights could be regarded as 'subsidiary means' for the interpretation of the Covenant under Article 38(1)(d) of the Statute of the International Court of Justice (*ICJ Statute*). See M Ssenyonjo, 'Economic, Social and Cultural Rights: An Examination of State Obligations', in S Joseph & A McBeth (eds), *Research Handbook on International Human Rights Law* (2010) 36, 41. One scholar cautions against over-reliance on the United Nations' 'positivist' approach to economic, social and cultural rights: W F Felice, 'The Viability of the United Nations Approach to Economic and Social Human Rights in a Globalized Economy' (1999) 75 *International Affairs* 563, 596 ('to move beyond merely denouncing violations, to actual implementation of a strategy to improve the working and living conditions of the most vulnerable sectors, must involve popular participation. The people whose economic and social rights have been violated should be a part of the implementation process.').

<sup>19</sup> We note that the Maastricht Guidelines' broad definitions of Covenant violations do not appear to have been reflected in the practice of international tribunals. A survey of supranational tribunals' adjudication of economic, social and cultural rights held that there was a 'fairly consistent pattern: a willingness to adjudicate failures of the obligation to respect, but virtually no tolerance for allegations of failures to protect or fulfill rights.' See D Marcus, 'The Normative Development of Socioeconomic Rights through Supranational Adjudication' (2006) 42 *Stanford JIL* 53, 88.

<sup>20</sup> *Maastricht Guidelines*, above n 17, para 14, subparagraphs (a)–(g). (Examples include: the formal removal or suspension of necessary legislation; denial of Covenant rights to particular individuals or groups; active support for third-party measures that are inconsistent with the Covenant; adoption of deliberately retrogressive measures that reduce the extent to which any Covenant right is guaranteed; calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant; as well as reduction or diversion of specific public expenditure resulting in non-enjoyment of Covenant rights without adequate measures to ensure minimum subsistence rights).

<sup>21</sup> *Ibid*, para 15, subparagraphs (a)–(j). Examples include failures to: take appropriate steps as

tricht Guidelines only to the extent that we differentiate between evidentiary thresholds, modes of reparations and items of relief afforded by the kind of forum in which a claim of international responsibility for a Covenant violation is brought.<sup>22</sup> While complexities do attend the interpretation of economic, social and cultural rights under the Covenant, they are not, in our view, so insurmountable as to render it impossible for the States burdened to devise pragmatic fiscal programs in the ordinary course of their economic decision-making, as well as to implement urgent policy responses and distributive welfare measures during economic crises and financial emergencies.<sup>23</sup>

The methodological question for interpreters of economic, social and cultural rights in the Covenant has always been more a matter of how to frame this particular treaty's evolving norms and their deeply contextual application to dynamic circumstances faced by individual States Parties.<sup>24</sup> We submit that various critiques against the salience of the Covenant—such as the supposed indeterminacy

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required under the Covenant; reform or repeal legislation which is manifestly inconsistent with Covenant obligations; enforce legislation or put into effect policies designed to implement the Covenant; regulate activities of individuals or groups so as to prevent them from violating Covenant rights; utilize maximum available resources towards full realization of the Covenant; monitor the realization of Covenant rights; remove obstacles to the immediate fulfillment of Covenant rights; implement without delay Covenant rights that must be provided immediately; meet a generally accepted international minimum standard of achievement, which is within the state's powers to meet; and take into account Covenant rights when entering into bilateral or multilateral agreements with other states, international organizations or multinational corporations.

<sup>22</sup> In contrast, the Maastricht Guidelines broadly prescribe that any state found responsible for violating the Covenant is required to 'establish mechanisms to correct such violations, including monitoring, investigation, prosecution, and remedies for victims': *ibid*, para 16. Victims of Covenant violations are deemed 'entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition': *ibid*, para 23.

<sup>23</sup> In this, we concur with Christine Chinkin's characterization of the 'hardening process' for international economic, social and cultural rights, where the 'level of obligation' has been perceptibly raised as a result of institutional initiatives, as well as state-driven experiences: C Chinkin, 'Normative Development in the International Legal System', in D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2003) 21, 33. For a recent example of the applicability of the ICESCR to states' economic decisions during financial or economic crises, see D.A. Desierto, 'Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment during Economic Crises' (2013) 1 *Transnational Dispute Management* (Special Issue on Aligning Human Rights with Investment Protection).

<sup>24</sup> On clarifying the normative content of Covenant rights, see P Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 *HRQ* 332, 351–5; B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *ICLQ* 573, 573–7; P Alston & B Simma, 'Second Session of the UN Committee on

and aspirational quality of Covenant obligations;<sup>25</sup> the alleged ineffectiveness of the enforcement and oversight mechanisms in the Covenant;<sup>26</sup> or the purported jettisoning of free market ideologies through supposedly paternalistic Covenant obligations<sup>27</sup>—could be better addressed by examining the interpretive, evidentiary, and normative practices of the plurality of the Covenant’s actual interpretive communities over five decades since the entry into force of the Covenant. To this end, our integrated paradigm deals with two dimensions of justiciability for purposes of determining international responsibility for Covenant violations—first, the ‘normative justiciability’<sup>28</sup> of Covenant violations, which refers to precision of Covenant rights as to give rise to the ‘possibility of applying a right in a specific case by judicial or quasi-judicial bodies’;<sup>29</sup> and second, the institutional justiciability,<sup>30</sup> or the ability, competence, or function of a tribunal or body to

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Economic, Social and Cultural Rights’ (1988) 82 *AJIL* 603, 605–8.

<sup>25</sup> See e.g. H Lewis, ‘“New” Human Rights? US Ambivalence Toward the International Economic and Social Rights Framework’, in C Soohoo, C Albisa & M F Davis (eds), *Bringing Human Rights Home: A History of Human Rights in the United States* (2009) 100, 129; K Bourquain, *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law* (2008) 236; C Puta-Chekwe & N Flood, ‘From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights’, in I Merali & V Oosterveld (eds), *Giving Meaning to Economic, Social, and Cultural Rights* (2001) 39, 43; G Baruchello & R L Johnstone, ‘Rights and Value: Construing the International Covenant on Economic, Social and Cultural Rights as Civil Commons’ (2011) 5 *Studies in Social Justice* 91, 93; M Dowell–Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (2004) 34–37.

<sup>26</sup> See e.g. L Camp Keith, ‘Human Rights Instruments’, in P Cane & H M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (2010) 353, 359 (“The ICESCR, with its limited commitment to “take steps...to the maximum of its available resources” is arguably the weakest treaty in terms of commitment and monitoring’); W Osiatyński, *Human Rights and Their Limits* (2009) 127–8; W M Cole, ‘Strong Walk and Cheap Talk: The Effect of the International Covenant on Economic, Social and Cultural Rights on Policies and Practices’ (2013) 92 *Social Forces* 165.

<sup>27</sup> On the history behind the United States’ rejection of the ICESCR under the Reagan Administration, see D J. Whelan, ‘The United States and economic and social rights: past, present...and future?’ (University of Denver Graduate School of International Studies, Working Paper No 26, 28 February 2005), <<http://www.du.edu/korbel/hrhw/workingpapers/2005/26-whelan-2005.pdf>> [accessed 30 July 2013].

<sup>28</sup> Aharon Barak distinguishes between ‘normative justiciability’ (whether there are legal criteria for determining a given dispute), and ‘institutional justiciability’ (whether it is appropriate for the institution seized of a dispute to adjudicate the question brought before it): A Barak, *The Judge in a Democracy* (2009) 178–85.

<sup>29</sup> K Roepstorff, ‘Economic, Social and Cultural Rights and the Question of Justiciability: International Legal Protection of the Right to Food’, in K Hoffmann–Holland (ed), *Ethics and Human Rights in a Globalized World: An Interdisciplinary and International Approach* (2009) 301, 311.

<sup>30</sup> Barak, above n 28.

adjudicate or assess violations of Covenant rights.<sup>31</sup>

Part I (A Normative Lattice: The Determinacy of Economic, Social, and Cultural Rights), addresses the issue of normative justiciability using a lattice-like analytical starting point for treaty interpreters. States Parties are required to observe a ‘minimum core’ of Covenant obligations—a legal social protection baseline determined jointly with the Committee on Economic, Social, and Cultural Rights shortly after the State’s accession to the Covenant.<sup>32</sup> Two further overarching obligations flow in parallel with this legal baseline – the ‘principle of non-discrimination,’<sup>33</sup> which requires a State Party to guarantee non-discrimination in their implementation of Covenant rights; and the ‘principle of non-retrogression,’<sup>34</sup> which commits a State Party to social protection con-

<sup>31</sup> K D Beiter, *The Protection of the Right to Education by International Law* (2006) 79 (‘Justiciability involves two questions: firstly, should the adjudicator act and, secondly, can the adjudicator act? [...] Both dimensions of justiciability may be addressed by drafting precise, narrow standards’).

<sup>32</sup> CESCR, *General Comment No 3: The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant)*, UN Doc E/1991/23, 14 December 1990, para 10 (*General Comment No 3*) (‘On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party [...]. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps the maximum of its available resources. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’).

<sup>33</sup> CESCR, *General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/20, 2 July 2009, para 7 (*General Comment No 20*) (‘Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights.’)

<sup>34</sup> H Jenkins, *Background Paper Submitted to the Committee on Economic, Social and Cultural Rights: Global Economic Governance and National Policy Autonomy in the Pursuit of Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/6, 7 May 2001, para 8 (‘In particular, member States that have signed and ratified the International Covenant on Economic, Social and Cultural Rights have legal obligations to “achieve progressively” the full rights set out in the Covenant, and must also afford “international assistance and cooperation” for this purpose. In other words, Governments must demonstrate, individually and collectively, that they are taking concrete steps toward realization of these rights. A major duty deriving from these obligations is

duct that will, at the very least, not fall below its pre-committed legal baseline of the ‘minimum core’ of Covenant rights. These two principles and the ‘minimum core’ baseline together comprise the normative lattice from which the Committee undertakes its periodic assessment of a State’s compliance with the Covenant. Beyond this point, the Committee builds its further assessment of how a State discharges its separate and continuing obligation to ‘progressively realize’<sup>35</sup> Covenant rights as the State’s fiscal, economic, and governance contexts and capabilities accordingly adapt and develop over time.

We approach the ‘institutional justiciability’ of Covenant violations from a pluralist prism recognizing that the Committee does not have exclusive or primary interpretive competence over the Covenant.<sup>36</sup> The programmatic, evolutive, and transactional nature of economic, social and cultural rights compliance inimitably involves participation of actors across a broad spectrum—from States Parties to the Covenant to non-State actors such as international organizations.<sup>37</sup> Accordingly, Part II (Expanding Universes: Covenant Interpreters and Violations by State and non-State Actors) discusses how international responsibility for Covenant violations could attach not just to conduct of States and non-State actors in breach of individual substantive obligations in Articles 6 to 15 of the Covenant, but also to breach of the overarching ‘duty to cooperate’ as part of the telos and design of Covenant obligations.<sup>38</sup> The duty to cooperate, as

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the “principle of non-retrogression”—meaning that State parties must not take retrogressive measures (through law or policy) that would jeopardize existing achievements, except in the limited circumstances specifically provided for in the relevant human rights instrument). For a more detailed explication of the principle, see C Gillespie, *Non-retrogression & Civil and Political Rights* (under submission, manuscript on file with author).

<sup>35</sup> Covenant, Art 2(1). See CESCR, *General Comment No 3*, above n 32, para 9.

<sup>36</sup> We concede that the Committee’s interpretations of the Covenant (either through its practice of issuing General Comments, Concluding Observations in regard to the Article 16/17 periodic state reporting process, and other unilateral statements), while often persuasive, are not always determinative, binding, or completely authoritative upon other international or domestic agencies, organizations, tribunals or courts seeking to interpret and apply Covenant norms. The Committee has even been criticized for ‘not always [being] rigorous in its concluding observations’: M Langford & J A King, ‘Committee on Economic, Social and Cultural Rights’, in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477, 493. For other examples criticizing instances of the Committee’s ‘neglect’ of the unitary system of interpretation in Article 31 of the Vienna Convention on the Law of Treaties, see K Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) 42 *Vanderbilt JTL* 905, 930–44.

<sup>37</sup> See F Coomans, ‘Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations’ (2007) 11 *Max Planck YUNL* 359.

<sup>38</sup> See M den Heijer & R Lawson, ‘Extraterritorial Human Rights and the Concept of “Jurisdiction”’,

recognized throughout the General Comments issued by the Committee,<sup>39</sup> is an obligation that has particular salience in times of economic emergencies or resource shortages that may impair States Parties' abilities to 'respect, protect and fulfill' economic, social and cultural rights. We further show that while Covenant violations axiomatically give rise to a corollary duty to make reparations, the ultimate form of relief granted would depend on the actual jurisdictional remit of the

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in M Langford, W Vandenhoe, M Scheinin, & W Van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2012) 153, 183 (stressing that the Covenant 'does differ from civil and political human rights treaties in that it contains an inherent international outlook [and] imposes the general obligation upon States to engage in international assistance and cooperation to realize the rights recognized in the Covenant').

<sup>39</sup> CESCR, *General Comment No 3*, above n 32, paras 8, 12; CESCR, *General Comment No 2: International Technical Assistance Measures (Art 22 of the Covenant)*, UN Doc E/1990/23, 2 February 1990, para. 9 (*General Comment No 2*); CESCR, *General Comment No 4: The Right to Adequate Housing (Art 11(l) of the Covenant)*, UN Doc E/1992/23, 13 December 1991, paras 8–11, 13, 18; CESCR, *General Comment No 5: Persons with Disabilities*, UN Doc E/1995/22, 9 December 1994, para 12; CESCR, *General Comment No 7: The Right to Adequate Housing (Art 11(l): Forced Evictions)*, UN Doc E/1998/22, 20 May 1997, paras 4, 6; CESCR, *General Comment No 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, UN Doc E/C.12/1997/8, 12 December 1997, paras 7, 10; CESCR, *General Comment No 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24, 3 December 1998, para 10 (*General Comment No 9*); CESCR, *General Comment No 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, UN Doc E/C.12/1998/25, 10 December 1998, para 3; CESCR, *General Comment No 11: Plans of Action for Primary Education (Art 14 of the Covenant)*, UN Doc E/1992/23, 10 May 1999, para 9; CESCR, *General Comment No 12: The Right to Adequate Food (Art 11 of the Covenant)*, UN Doc E/C.12/1999/5, 12 May 1999, paras 6, 15, 17, 28; CESCR, *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, UN Doc E/C.12/1999/10, 8 December 1999, paras 6, 57; CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)*, UN Doc E/C.12/2000/4, 11 August 2000, paras 11, 12, 28, 43, 47 (*General Comment No 14*); CESCR, *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)*, UN Doc E/C.12/2002/11, 20 January 2003, paras 10, 37, 41 (*General Comment No 15*); CESCR, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)*, UN Doc E/C.12/2005/4, 11 August 2005, paras 20, 42 (*General Comment No 16*); CESCR, *General Comment No 17: The Right of Everyone to Benefit from the Protection of Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She is the Author (Art 15, para 1(c) of the Covenant)*, UN Doc E/C.12/GC/17, 12 January 2006, paras 39, 41 (*General Comment No 17*); CESCR, *General Comment No 18: The Right to Work (Art 6 of the Covenant)*, UN Doc E/C.12/GC/18, 6 February 2006, paras 30, 32 (*General Comment No 18*); CESCR, *General Comment No 19: The Right to Social Security (Art 9 of the Covenant)*, UN Doc E/C.12/GC/19, 4 February 2008, paras 3, 50, 55 (*General Comment No 19*); CESCR, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, para. 1(a) of the Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/21, 21 December 2009, paras 23, 59 (*General Comment No 21*).

forum chosen to adjudicate the Covenant violation. The diversity of forms of relief granted against Covenant violations may be explained from the proliferation of authoritative institutions that now interpret the Covenant—the Committee; States Parties; international, regional and national courts and tribunals; other specialized agencies of the UN, among others. However, as we have discussed elsewhere,<sup>40</sup> we also anticipate that three new Committee procedures now operative under the Optional Protocol to the Covenant would aid in streamlining and harmonizing Covenant interpretation by enabling the consolidation of information<sup>41</sup> on states' subsequent practices in relation to the Covenant within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).<sup>42</sup>

In the Conclusion (Reframing International Responsibility for Covenant Violations), we point out the convergence of various dialectical achievements throughout nearly five decades since the entry into force of the Covenant: 1) the sustained quasi-legislative work of the Committee throughout its General Comments; 2) the continuing interpretive practices of national, regional, and international courts and tribunals in regard to economic, social, and cultural rights; 3) the broad participation and interpretive praxis of States, international organizations, and other non-State actors in the settled reportage procedures before the Committee; and 4) the recent adoption of empirical methodologies for assessing human rights compliance. These developments, we submit, help

<sup>40</sup> Desierto & Gillespie, above n 16.

<sup>41</sup> For other works expressing our respective concerns about the legitimacy and accuracy of information-gathering techniques in human rights treaties in general, as well as in relation to the Covenant, see P Alston & C Gillespie, 'Global Human Rights Monitoring, New Technologies, and the Politics of Information' (2012) 23 *EJIL* 1089; B Simma & D A Desierto, 'Bridging the Public Interest Divide: Committee Assistance for Investor-Host State Compliance with the ICESCR', in D Hanschel, S Graf Kielmansegg, U Kischel, C Koenig, R A Lorz (eds), *Mensch und Recht: Festschrift für Eibe Riedel zum 70. Geburtstag (Essays in Honour of Eibe Riedel)* (2013) 1–15, reprinted in (2013) 10 *Transnational Dispute Management*, <<http://www.transnational-dispute-management.com/article.asp?key=1931>> [accessed 30 July 2013].

<sup>42</sup> See Covenant, Arts 16, 17 (on mandatory state reporting processes required in the Covenant); Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art 31(3)(b) ('There shall be taken into account, together with the context [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'). For a synthesized description of the Committee's work on normative interpretation of the Covenant and the Committee's relationship with other specialized agencies of the United Nations, see K Arambulo, 'The International Covenant on Economic, Social and Cultural Rights and the Committee on Economic, Social and Cultural Rights', in P Van der Auweraert, T De Pelsmaeker, J Sarkin & J Vande Lanotte (eds), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (2002) 57.

ripen today's modern integrated paradigm for the authoritative determination of international responsibility for Covenant violations.

## 2 A Normative Lattice: The Determinacy of Economic, Social, and Cultural Rights

Claims about the alleged indeterminacy of economic, social, and cultural rights under the Covenant are often, at their core, manifestations of 'semantic skepticism', or 'the claim that there are no facts that constitute or determine a sentence's meaning, so that language is indeterminate at the most basic level: there are no *objective* facts that make it the case that language means one thing rather than another.'<sup>43</sup> The indeterminacy supposedly arises from the fact that Covenant rights 'remained deliberately abstract',<sup>44</sup> such that it would only be through 'understanding the resources and pressures of interpretation [that one] helps to contain the indeterminacy of economic and social rights.'<sup>45</sup>

We do not share the assumption above that Covenant rights are troublingly or inherently indeterminate; rather, we adhere to the view that Covenant obligations, similar to other human rights norms (such as civil and political rights)<sup>46</sup> whose meaning and content achieved settled definition after repeated application, are (and have in fact shown themselves) amenable to rules of treaty interpretation.<sup>47</sup> While meaning must certainly be elicited from open-textured Covenant rights such as 'the right to the highest attainable standard of health';<sup>48</sup> 'the right of everyone to education';<sup>49</sup> or the 'right of everyone to an adequate

<sup>43</sup> J L Coleman & B Leiter, 'Determinacy, Objectivity, and Authority' (1993) 142 *U Pa LR* 549, 568.

<sup>44</sup> K G Young, *Constituting Economic and Social Rights* (2012) 28.

<sup>45</sup> *Ibid*, 31.

<sup>46</sup> See C Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 26 ('where the vagueness of civil and political rights has partly been cleared up through many years of adjudication; socio-economic rights have not had a similar advantage. This is one of the reasons why a complaints procedure to ICESCR has been adopted. To deny the justiciability of socio-economic rights is to limit the opportunities of elaboration of the obligations they engender').

<sup>47</sup> See P Alston & G Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *HRQ* 156; United Kingdom House of Lords and House of Commons Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights: Twenty-first Report of Session 2003–04* (2004) 24.

<sup>48</sup> Covenant, Art 12(1).

<sup>49</sup> Covenant, Art 13(1).

standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions,<sup>50</sup> we likewise note that these rights have not lain dormant in nearly five decades of the existence and application of the Covenant by its States Parties with the Committee in clarifying the normative content of the Covenant.<sup>51</sup> As the Committee pointed out in its General Comment No 9 in 1998, many Covenant provisions are capable of immediate implementation, such as ‘articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4), and 15(3) [...] there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.’<sup>52</sup>

Accordingly, the assessment of State responsibility for Covenant violations should begin with describing the normative starting point at which one evaluates the State’s compliance with its continuing typology<sup>53</sup> of obligations to ‘respect’,<sup>54</sup> ‘protect’,<sup>55</sup> and ‘fulfill’<sup>56</sup> economic, social and cultural rights. We use the metaphor of a ‘normative’ lattice to make this starting point readily identifiable for treaty interpreters. This normative lattice would be composed of three elements that are mutually reinforcing and cross-cutting in the treaty interpreter’s assessment of State responsibility: first, the ‘minimum core’ of Covenant obligations, the content of which is determined jointly by the State Party with the Committee shortly after the former’s accession to the Covenant, such core operating as the guaranteed baseline of social protection regardless of the State Party’s economic circumstances; second, the ‘principle of non-discrimination’, which prohibits *de facto* and *de jure* discriminatory treatment in the State Party’s application of measures to comply with its Covenant obligations; and third, the

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<sup>50</sup> Covenant, Art 11(1).

<sup>51</sup> See M M Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 132–3 (detailing the role of the repeated application of Covenant rights in the development of their normative content by the Committee with states parties).

<sup>52</sup> CESCR, *General Comment No 9*, above n 39, para 10.

<sup>53</sup> See A Eide, *The Right to Adequate Food as a Human Right*, UN Doc E/CN.4/Sub.2/1987/23, 7 July 1987 (where the tripartite typology was first proposed in the context of the Covenant).

<sup>54</sup> The obligation to respect the Covenant ‘requires States to abstain from performing, sponsoring or tolerating any practice, policy, or legal measure violating the integrity of individuals or infringing upon their freedom to use those material or other resources available to them in ways they find most appropriate to satisfy economic, social and cultural rights’: Office of the UN High Commissioner for Human Rights, above n 17, 15.

<sup>55</sup> The obligation to protect Covenant rights ‘requires the State and its agents to prevent the violation of any individual’s rights by any other individual or non-State actor’: *ibid*, 17.

<sup>56</sup> The obligation to fulfill Covenant rights ‘requires positive measures by the State when other measures have not succeeded in ensuring the full realization of these rights’: *ibid*, 18.

‘principle of non-retrogression’, which restrains the State Party from *unjustifiably* implementing lower levels of social protection under the Covenant than either the minimum core that the State Party has committed to, or the current standard of social protection treatment that the State Party has already observed. As a doctrinal and descriptive matter essential to assessing State responsibility for Covenant violations, we discuss each of these three elements *seriatim*:

## 2.1 Minimum Core Obligations

The minimum core content of Covenant rights is meant to ‘establish[] a minimum quantitative and qualitative threshold enjoyment of each [ESC] right that should be guaranteed to everyone in all circumstance as a matter of top priority [...] [it] is linked to vital interests of individuals that are often connected to their survival.’<sup>57</sup> States must observe, regardless of resource or material constraints—a ‘minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.’<sup>58</sup> A State Party can only justify its failure to meet this minimum core content due to a lack of available resources if it shows that ‘every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’<sup>59</sup> Observance of Covenant’s minimum core obligation is required even in times of ‘economic recession’, where ‘the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.’<sup>60</sup>

Together with the Committee, the State Party to the Covenant participates in the contextual determination of the ‘minimum core’ content of Covenant obligations applicable to it, through the submission of the State Party’s initial report required under Articles 16 and 17 of the Covenant. The Committee’s initial assessment of the particular ‘minimum core’ content or baseline applicable to a given State Party then takes into consideration the State’s resource capacities, population needs, scientific and technological advancement, among others.<sup>61</sup> The

<sup>57</sup> A Müller, *The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health-Related issues in Non-International Armed Conflicts* (2013) 75.

<sup>58</sup> CESCR, *General Comment No 3*, above n 32, para 10.

<sup>59</sup> *Ibid*, para 10.

<sup>60</sup> *Ibid*, para 12.

<sup>61</sup> See P Alston, above n 24, 332–81 (discussing at 351–353 how the Committee’s mandate includes identification of the minimum core content of Covenant obligations). This process of identification, as evidenced by the Committee’s varying practices across reporting processes, has not been immune from criticism: see M Langford & J A King, ‘Committee on Economic, Social and Cultural Rights’, in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in*

assessment is a broad-based information-gathering process, one that is intended to elicit the essential levels of a Covenant right, 'without which a right loses its substantive significance as a human right.'<sup>62</sup> The process of identifying a State Party's minimum core obligations under the Covenant emulates proportionality analysis.<sup>63</sup> Following this paradigm, the Committee has been able to define and identify the criteria for determining the minimum core content of the right to food,<sup>64</sup> the right to health,<sup>65</sup> the right to social security,<sup>66</sup> the right to water,<sup>67</sup> among others. This methodology has parallels, with some differences, with those postulated by domestic constitutional courts,<sup>68</sup> as well as with those enshrined in regional human rights systems.<sup>69</sup>

A final counterfactual militating against claims of indeterminacy of Covenant rights is the growing trend towards the empirical verification of States' compli-

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*International and Comparative Law* (2008) 477, 492–5.

<sup>62</sup> Sepúlveda, above n 51, 366.

<sup>63</sup> See A Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) 202–10 (on proportionality and international and national human rights law); 422–34 (on proportionality and positive constitutional rights).

<sup>64</sup> CESCR, *General Comment No 12*, above n 39, para 17. See also R Künnemann, 'The Right to Adequate Food: Violations Related to its Minimum Core Content', in A Chapman & S Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 161.

<sup>65</sup> CESCR, *General Comment No 14*, above n 39, para 43. See also A R Chapman, 'Core Obligations Related to the Right to Health', in A Chapman & S Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 185.

<sup>66</sup> CESCR, *General Comment No 19*, above n 39, para 59. See also L Lamarche, 'The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights', in A Chapman & S Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 87.

<sup>67</sup> CESCR, *General Comment No 15*, above n 39, para 37.

<sup>68</sup> J Chowdhury, 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective' (Cornell Law School Graduate Paper No 27, 2009), citing Constitutional Court of Columbia decision, C-251/97; Constitutional Court of Columbia decision, SU-225-98; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426; *Government of Republic of South Africa v Irene Grootboom and Petitioners* 2001 (1) SA 46 (CC) (South Africa); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (South Africa). On the reasonableness review and minimum core approach of the South African Constitutional Court, see S Liebenberg, 'Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate', in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 305.

<sup>69</sup> T Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims* (2002) 170–1; African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2010) <<http://www.escri-net.org/docs/i/1599552>> [accessed 30 July 2013].

ance with Covenant rights.<sup>70</sup> There are now various quantitative models and empirical methods for measuring the minimum core content of Covenant rights for particular States, factoring in resource constraints, governmental capabilities, and population needs of each State on a case-by-case basis.<sup>71</sup> In 2012, the United Nations Office of the High Commissioner for Human Rights itself issued its consolidated volume, *Human Rights Indicators: A Guide to Measurement and Implementation*,<sup>72</sup> which established a 'structure-process-outcome' framework<sup>73</sup> of illustrative indicators to measure State compliance with Covenant rights such as the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate food, the right to adequate housing, the right to education, the right to social security, the right to work, and the right to non-discrimination and equality.<sup>74</sup>

## 2.2 Principle of Non-Discrimination

Non-discrimination appears both as a general cross-cutting obligation in the Covenant,<sup>75</sup> as well as a specific obligation textualised within certain Covenant

<sup>70</sup> On the general trend of measurability of human rights compliance, see T Landman, 'Measuring Human Rights: Principle, Practice, and Policy' (2004) 26 *HRQ* 906.

<sup>71</sup> See G S McGraw, 'Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence' (2011) 8 *Loy U Chi ILR* 127; S Kalantry, J E Getgen & S A Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 *HRQ* 253; E Anderson, 'Using Quantitative Methods to Monitor Government Obligations in Terms of the Rights to Health and Education' (Center for Economic and Social Rights Working Paper, November 2008), <<http://www.cesr.org/downloads/Quantitative%20Methods%20for%20Measuring%20ESCR.pdf>> [accessed 30 July 2013]; E Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability' (2008) 9 *Sur-International Journal on Human Rights* 109. On auditing national government policies in light of the ICESCR, see methodology developed in R Balakrishnan & D Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights' (2008) 5 *Essex Human Rights Review* 1.

<sup>72</sup> UN Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation*, UN Doc HR/PUB/12/5, 2012. <[http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf)> [accessed 30 July 2013].

<sup>73</sup> UN Office of the High Commissioner for Human Rights, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, UN Doc HRI/MC/2006/7, 11 May 2006, <<http://daccess-ods.un.org/TMP/9211648.70262146.html>> [accessed 30 July 2013].

<sup>74</sup> *Ibid* (see Annexes to the Article).

<sup>75</sup> Covenant, Art 2(2).

rights.<sup>76</sup> Prior to its 2009 General Comment No 20 on the principle of non-discrimination,<sup>77</sup> the Committee had examined the application of this principle in States Parties' Covenant obligations on housing, food, education, health, water, authors' rights, and social security.<sup>78</sup> The Committee defines discrimination as

[...] any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.<sup>79</sup>

The Committee further distinguishes direct discrimination (an individual treated less favourably from another person in a similar situation for a reason related to a prohibited ground), from indirect discrimination (facially neutral laws, policies, or practices which have a disproportionate impact on the exercise of Covenant rights).<sup>80</sup> Prohibited grounds of discrimination include: group membership, race, sex, language, religion, political and other opinions, national or social origin, property, birth, disability, age, nationality, marital and family status, health status, place of residence, and economic and social situation.<sup>81</sup> While generally a state that fails to abide by the principle of non-discrimination is internationally responsible and in turn, obligated to stop the discriminatory action and compensate any victims for this violation,<sup>82</sup> the Committee has confined the scope of remedies for breaching this principle merely to reminding States Parties to the Covenant that their national legislation and domestic institutions must investigate, provide access, and/or adjudicate harms caused by discrimination in economic, social and cultural rights.<sup>83</sup> The Committee's

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<sup>76</sup> Covenant, Art 3 (on equality in the enjoyment of Covenant rights); Art 7 (on equal remuneration for work of equal value); Art 13 (on compulsory and free primary education).

<sup>77</sup> CESCR, *General Comment No 20*, above n 33, para 37.

<sup>78</sup> *Ibid*, para 6, citing CESCR, *General Comment No 4*; *General Comment No 7*; *General Comment No 12*; *General Comment No 13*; *General Comment No 14*; *General Comment No 15*; *General Comment No 17*; *General Comment No 18*; and *General Comment No 19*, above n 39.

<sup>79</sup> *Ibid*, para 7.

<sup>80</sup> *Ibid*, para 10.

<sup>81</sup> *Ibid*, paras 16–35.

<sup>82</sup> C F Doebbler, *The Principle of Non-Discrimination in International Law* (2007) 12.

<sup>83</sup> CESCR, *General Comment No 20*, above n 33, para 40.

articulation of the principle of non-discrimination is silent on the consequences for the state responsibility for violating or failing to comply with this principle while discharging Covenant obligations—it is not altogether clear if a state's failure to comply with the principle of non-discrimination would constitute a separate breach independently giving rise to international responsibility, or alternatively, would merely be contextually considered when determining the gravity of the state's breach of another Covenant right. To this extent, the influence of this principle on the assessment of state responsibility for Covenant violations appears quite limited.

### 2.3 Principle of Non-Retrogression

The principle of non-retrogression has played an important role in articulating the content of economic, social, and cultural rights since the ratification and entry into force of Covenant.<sup>84</sup> At its core, the principle of non-retrogression serves as an important means to evaluate whether or not states are fulfilling their obligations to 'progressively ensure' the rights protected by the Covenant.<sup>85</sup> Put simply, if a state has taken measures which act to enhance the fulfillment of a particular economic, social, or cultural right protected under the Covenant, then the state cannot ratchet down protection of that right absent compelling circumstances.

The principle of non-retrogression derives, in the first instance, from the nature of the obligations imposed on states that have ratified the Covenant. Prior to articulating the specific rights covered by the Covenant, article 2 defines the nature of the obligations that bind states with respect to all of the rights articulated. Thus article 2(2) imposes on states the obligation to 'guarantee that the rights enunciated in the present Covenant will be exercised without discrimination.'<sup>86</sup> Article 2(3) allows '[d]eveloping countries [...] [to] determine

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<sup>84</sup> See CESCR, *General Comment No 3*, above n 32. General Comment No 3 is the origin of the principle of non-retrogression.

<sup>85</sup> Covenant, Art 2(1) ('Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively, the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.')

<sup>86</sup> Covenant, Art 2(2). This obligation has immediate effect. See CESCR, *General Comment No 20*, para. 7. See also S Ratjen and M Satija, 'Realising Economic, Social and Cultural Rights for All' in E Riedel, G Giacca and C Golay (eds), *Economic Social and Cultural Rights: Contemporary Issues and Challenges* (2014).

to what extent they would guarantee the economic rights [...] to non-nationals.<sup>87</sup>

Article 2(1) imposes on States a different kind of obligation:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative means.<sup>88</sup>

That states must take steps to 'achieve progressively' the rights in the Covenant arguably distinguishes the nature of the obligations in the ICESCR from the other major human rights instruments, in particular the ICCPR.<sup>89</sup> Article 2(2) of the ICCPR, by way of contrast, does not include the language on progressive realization, but rather imposes on states the obligation 'to take the necessary steps [...] to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.'<sup>90</sup> Article 2(1) obligates states to 'undertake to respect and to ensure' the rights protected under the ICCPR.<sup>91</sup> The Committee<sup>92</sup> took on the responsibility of

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<sup>87</sup> Covenant, Art 2(3).

<sup>88</sup> Covenant, Art 2(1). The formulation might generously be called awkward, especially when compared to that of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (*ICCPR*). Compare ICESCR, Art 2(1) and ICCPR, Art 2(2) ('Each State Party to the present Covenant undertakes to take the necessary steps [...] to adopt such laws [...] as may be necessary'); see also ICCPR, Art 2(1). The question of what exactly it means to 'undertake to take steps [...] with a view to achieving progressively the full realization of rights' (emphasis added) is put to one side here, as it seems that the literature and jurisprudence seems to assume that the obligation is in fact to 'undertake to take steps [...] to progressively achieve the full realization of rights' (emphasis added).

<sup>89</sup> See also Convention on the Elimination of All Forms of Discrimination Against Women, 3 September 1981, 1249 UNTS 13, Art 2 (*CEDAW*) ('States Parties [...] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women'); Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 666 UNTS 195, Art 2(1) (*CERD*) (same formulation in the context of racial discrimination).

<sup>90</sup> ICCPR, Art 2(2). This obligation is in addition to the obligations with respect to non-discrimination in the Covenant, which are identical in the ICCPR, and the right to ensure an effective remedy (ICCPR, Art 2(3)).

<sup>91</sup> ICCPR, Art 2(1). The fact of the differing nature of these obligations has, of course, been extensively commented on. See, e.g., A Rosga and M Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27 *Berkeley JIL* 253, 269 (noting that the distinction between the two types of obligations has been 'much-analyzed' and collecting sources).

<sup>92</sup> The precise role of treaty monitoring committees and a full examination of the value of general comments will not be given full consideration here. The value of general comments has been

articulating the nature of state party obligations in General Comment No 3,<sup>93</sup> issued in 1990. General Comment No 3 first notes that Article 2 'must be seen as having a dynamic relationship with all of the other provisions of the Covenant.'<sup>94</sup> This is so, it asserts, because '[i]t describes the nature of the general legal obligations undertaken by States parties.'<sup>95</sup> The Comment proceeds by articulating two obligations in the Covenant which are not susceptible to temporal analysis, but which states are obligated to undertake immediately, namely the non-discrimination elements of the Covenant<sup>96</sup> and the obligation to 'take steps' to ensure that the rights in the covenant are fulfilled, which, the Committee notes, is 'not qualified or limited by other considerations.'<sup>97</sup>

After a discussion of the means by which state parties might fulfill their obligations under the Covenant, be they legislative or judicial, or in certain cases administrative,<sup>98</sup> the Comment turns to the task of defining the meaning of the obligation to 'achiev[e] progressively' the rights guaranteed by the Covenant. The section is worth quoting at some length.

The concept of progressive realization constitutes a recognition of

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described as ranging from 'authoritative interpretations of the relevant treaty norms, through...a de facto equivalent of advisory opinions which are to be treated with seriousness but not more, to highly critical approaches which classify them as broad, unsystematic, statements which are not always well founded'. P Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law', in H J Steiner, P Alston & R Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> edn, 2008) 873, 874. Determining the value of general comments, or indeed taking a position on the value of general comments along the axis described above, is not necessary for present purposes for two reasons. The first is that this work chiefly tries to assess the meaning of the principle of non-retrogression across different treaty bodies. One can assume that a general comment is either binding, or persuasive, or evaluate whether it is well or poorly reasoned, and come to the conclusion that the value of the comment might be imported or exported across treaty bodies. Second, the question of whether the content of a general comment is authoritative or not should not have any bearing on whether it is persuasive or useful in a different context. To the extent that the principle of non-retrogression might be useful in the context of civil or political rights, one need not establish whether it is an authoritative interpretation of the 'progressively ensure' language of the ICESCR. The value of Committee comments might be open to more criticism, however, on the grounds that the Committee was not even envisioned by the Covenant itself, but was an ECOSOC creation, which makes it unique among the treaty-monitoring bodies.

<sup>93</sup> CESCR, *General Comment No 3*, above n 32.

<sup>94</sup> *Ibid.*, para 1.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, para 2.

<sup>98</sup> *Ibid.*, paras 3–8.

the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the ICCPR which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device [...] On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être* of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, *any deliberately retrogressive measures in that regard would require the most careful consideration* and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.<sup>99</sup>

Subsequent to this articulation of the non-retrogression principle, the Committee suggests that states parties are under an obligation to ensure a 'minimum core' of, *inter alia*, foodstuffs, health care, and housing,<sup>100</sup> that is, particular rights that are guaranteed under the Covenant.<sup>101</sup>

<sup>99</sup> Ibid, para 9 (emphasis added).

<sup>100</sup> Ibid, para 10.

<sup>101</sup> Covenant, Arts 11(1)–(2), 12. The concept of the 'minimum core' is one that seems to have eclipsed in importance that of the principle of non-retrogression, at least in terms of the academic literature on economic social and cultural rights. See e.g., S Narula, 'The Right to Food: Holding Global Actors Accountable under International Law' (2006) 44 *Col JTL* 691 (arguing that the minimum core of the right to food may have passed to the status of customary international law); K G Young, 'The Minimum Core of Economic and Social Rights: a Concept in Search of Content' (2008) 33 *Yale JIL* 113 (advocating greater use of indicators and benchmarks in the definition of the minimum core); see generally A R Chapman & S Russell, 'Introduction', in A Chapman & S Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (3rd edn, 2002) 3 ('To contribute to the intellectual development of economic, social, and cultural rights [...] authors were asked to [...] sketch out the basis for the right [...] identify its minimum core content; and [...] describe several common violations of the right'); but see Rosga & Satterthwaite, above n 92, 306 (noting that both non-retrogression and the concept of the minimum core work to clarify the nature of states' obligations with respect to economic social and cultural rights). The concepts of the minimum core and of the principle of non-retrogression share a common

The non-retrogression principle thus, at its first articulation, has at least two important features. The first feature is that it requires an analysis of 'deliberation.' This deliberation is into the nature of any action that a state party takes which would arguably have implications for rights provided for in the Covenant. Incidentally retrogressive measures are arguably not accounted for when taking stock of party obligations under the treaty. The reason for this seems straightforward: the Comment is concerned with, above all, clarifying the nature of state obligations under the Covenant. In this respect, the Comment addresses itself to state decision makers considering not only what steps they must begin taking to fulfill their obligations, but also seeks to make these decision makers aware that actions that they may take, acts of commission in later general comment formulations,<sup>102</sup> may bring states into a breach of their obligations as well.

A second feature of the principle of non-retrogression, especially relevant for the purposes of this argument, is that it suggests that acts of commission undertaken by States Parties that may bring them into breach of their treaty obligations must be analyzed by reference to all of the rights protected under the Covenant. The justification for expanding this frame seems to be a concern that gains made in the area of one area, health for example, are not to be made at the expense of other areas, for example water. What is particularly important here is that at its genesis the principle of non-retrogression is explicitly formulated in the context of obligations under the ICESR, which are in some sense opposed to the nature of obligations under the ICCPR. It is enough at this point to point out that the logic of analyzing retrogressive measures with respect to other ESCRs would also seem to imply that states should be obligated to analyze retrogressive measures in the area of all rights protected under both Covenants, rather than only the ICESCR, assuming that states are parties to both Covenants. There is no principled reason to believe otherwise, as it is axiomatic that all rights are interdependent and mutually reinforcing.<sup>103</sup> Rights to health and water also have

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heritage, of course. To the extent that one has been pursued at the expense of the other, the arguments set forth here attempt to remedy this balance.

<sup>102</sup>See e.g. above n 37.

<sup>103</sup>See e.g., UN Commission on Human Rights, *Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights*, UN Doc E/CN.4/RES2001/30, 20 April 2001, para 4(d) (reaffirming 'the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms').

a bearing on the right to not be arbitrarily deprived of one's life, for example.<sup>104</sup> That the principle of non-retrogression may have been unnecessarily provincial at its first articulation does not, however, rob it of its force. Rather, it only speaks to the necessity of examining its scope in more detail.

The history of the application of the principle of non-retrogression in the general comments of the CESCR has roughly two stages. In the first stage, the principle is put into the background, as the Committee takes up other matters in its comments. The second, far more important stage for the purposes of this argument, is a process of institutionalizing the principle of non-retrogression, in which the committee gives it a wide scope of application, and fills out its jurisprudential value. Throughout this process the Committee has also been engaged in making particular recommendations, and voicing particular concerns, to state parties regarding their implementation of Covenant obligations, an engagement that often manifests itself in the concluding remarks offered by the Committee to state parties at the conclusion of those countries periodic reports, though has manifested itself in other ways as well. This process has also added greater depth to the principle.

Beginning with General Comment No 14, on the right to health, issued in 2000,<sup>105</sup> the principle of non-retrogression has become a recurring element of CESCR general comments. The initial reformulation and redeployment of the principle of non-retrogression in the context of a particular right protected under the Covenant in General Comment No 14 reads as follows.

As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the state party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of rights provided for in the Covenant in the context of the full use of the state parties maximum available resources.<sup>106</sup>

This exact same formulation has been deployed in subsequent general

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<sup>104</sup>ICCPR, Art 6; see also Human Rights Committee, *CCPR General Comment No 6: The Right to Life*, UN Doc HRI/GEN/1/Rev.1, 30 April 1982 (*HRC General Comment No 6*) (noting that the interpretation of the rights protected under article 6 were unnecessarily circumscribed early in the application of the treaty, but that the treaty might also impose obligations on states to combat high rates of infant mortality or epidemics).

<sup>105</sup>CESCR, *General Comment No 14*, above n 39.

<sup>106</sup>*Ibid*, para 32.

comments on the right to water,<sup>107</sup> the right to enjoy the benefits of scientific progress,<sup>108</sup> the right to work,<sup>109</sup> and the right to social security,<sup>110</sup> the only modification being the definition of the right at issue in the given general comment.<sup>111</sup>

Two elements of the formulation common to the vast number of general comments deploying the principle of non-retrogression are worth commenting on. The first is the introduction of the consideration of alternative measures into the analysis of the Committee. If the initial formulation of the principle of non-retrogression spoke in terms of a state-of-mind requirement, by focusing on *deliberately* retrogressive measures, the principle of non-retrogression has, in subsequent years, developed to employ a proportionality analysis as well. This is so to the extent that it requires states to consider alternatives to retrogressive measures and choose the alternative that will least restrict enjoyment of the substantive rights provided for by the Covenant. A second element of the enhanced principle of non-retrogression is the introduction of legal presumptions into the analysis. While the initial formulation of the principle of non-retrogression spoke of the need for states to 'fully justif[y]' deliberately retrogressive measures, the more recent formulations of the CESCR arguably go further. While previously it might have been argued that states would need to justify retrogression only when a challenger to a state policy discharged a burden to prove that a state action was retrogressive, either the Committee, for example, or alternatively a rights-bearer,

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<sup>107</sup> CESCR, *General Comment No 15*, above n 39, para 19.

<sup>108</sup> CESCR, *General Comment No 17*, above n 39, para 27 ('there is a strong presumption that retrogressive measures taken in relation to the right to the protection of the moral and material interest of authors are not permissible').

<sup>109</sup> CESCR, *General Comment No 18*, above n 39, para 21.

<sup>110</sup> CESCR, *General Comment No 19*, above n 39, para 42.

<sup>111</sup> General comments relating to discrimination are the exception to the way the principle of non-retrogression has been formulated more recently. Thus, in General Comment No 16, on the equal rights of men and women, the Committee opines that '[t]he adoption and undertaking of any retrogressive measures that affect the equal right of men and women to the enjoyment of all the rights set forth in the Covenant constitutes a violation of article 3' (CESCR, *General Comment No 16*, above n 39, para 42). A similar formulation appears in General Comment No 21, on the right of everyone to take place in cultural life. CESCR, *General Comment No 21*, above n 39, para 65 ('Any deliberately retrogressive measures in relation to the right to take part in cultural life would require the most careful consideration and need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'). The only exception to the unanimous references to the principle of non-retrogression in the Committee's General Comments since 2000 is General Comment No 20, also on non-discrimination obligations under the Covenant (CESCR, *General Comment No 20*, above n 33).

the principle of non-retrogression now imposes a burden of persuasion on states to prove that a retrogressive measure was in some sense necessary.

## 2.4 Synthesizing the Normative Lattice

Using the three elements of the foregoing normative lattice for the treaty interpreter's starting point, the process of assessing whether a state has violated a Covenant obligation can thus proceed to the examination of how the state ultimately complied with its fundamental obligation to 'progressively realize' Covenant rights under Article 2(1), in relation to the specific Covenant right or rights at issue. This minimum social protection baseline is the 'absolute international minimum' applicable at all times,<sup>112</sup> beyond which a state party is obligated to respect, protect, and fulfill Covenant rights only through reasonably expected economic measures and policies applicable during normal business cycles.<sup>113</sup> Notably, the higher standard of Covenant protection beyond the minimum social protection baseline would *not* automatically apply to a state party crippled by severe economic crises or fiscal emergencies.<sup>114</sup> The assessment of a

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<sup>112</sup> M Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2009) 66–7.

<sup>113</sup> See B Stark, 'At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement' (2011) 20 *Trans L & Contemp Probs* 107, 141 ('First, there are many contexts in which economic rights are plainly justiciable. If such rights are assured in a discriminatory manner, for example, courts can and have ordered relief. The CESCR has identified several rights that require immediate implementation and are thus capable of judicial determination. These rights include, for example, Article 3's assurance of equal rights for men and women and Article 7's assurance of equal pay for work of equal value. Second, even where the issue is not discrimination, a judicial determination that the state is or is not meeting its obligations certainly seems within a court's competence. If the state is not meeting its obligations, the appropriate legislature or regulatory agency can determine exactly how it should do so. Matthew Craven notes that while it was argued during the drafting of the Covenant that "it would be impossible for a supervisory body to decide whether or not a State is acting in conformity with its obligations under the Covenant," this view has largely been rejected. Craven concludes, accordingly, that "there is, in fact, a justiciable core to every human right," a conclusion that the recent entry into force of the Optional Protocol confirms').

<sup>114</sup> The Committee clarified: 'Where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances....even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes. The undertaking by a State party to use the "maximum" of its available resources [...] entitles it to receive resources offered by the international community [it] refers to both the resources existing within the State as well as those available from the international community through international cooperation and assistance.' See CESCR, *An Evaluation of the Obligation to Take Steps to the 'Maximum*

state party's potential responsibility for Covenant violations would have to take place in a case-to-case dialogic basis between the Committee and the state party involved. It would be for the Committee to determine if the state party's lower level of Covenant protection is justifiable given the exigencies of an economic crisis and the state party's proffered reasons.

The foregoing analysis admittedly draws heavily from the dialogic practices of the Committee with states parties to the Covenant. We show in the following Part II that these practices similarly resonate with other institutions adjudicating questions of Covenant violations and the corresponding responsibility of states parties and non-state actors for such violations.

### 3 Expanding Universes: Covenant Interpreters and Violations by State and non-State Actors

#### 3.1 Covenant Interpreters

International tribunals as well as domestic courts have directly applied and interpreted the Covenant, with some differences among them as to the scope of the questions they accept to adjudicate.<sup>115</sup> In this sense, these institutions approach justiciability also from a functional standpoint, where the institution self-reflexively examines the parameters of its interpretive and/or adjudicative competence in relation to the subject-matter of the alleged Covenant violation. National, regional, and international courts have long been litigating economic, social, and cultural rights in parallel with the Committee's development of concepts of the 'minimum core' of these rights, principles of non-discrimination, reasonableness, proportionality, and non-retrogression.<sup>116</sup> While there is no hard and fast hierarchy among international tribunals, agencies, and domestic courts interpreting the Covenant, one could nevertheless expect to find instances of 'cross-judging'<sup>117</sup> among them on similar issues of Covenant rights.

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*of Available Resources' under an Optional Protocol to the Covenant*, UN Doc E/C.12/2007/1, 21 September 2007, paras 4–5.

<sup>115</sup> See D Marcus, 'The Normative Development of Socioeconomic Rights through Supranational Adjudication', (2006) 42 *Stanford JIL* 53, 88.

<sup>116</sup> International Commission of Jurists (*ICJ*), 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability' (Human Rights and Rule of Law Series, Working Paper No 2, 2008) 23-64, <<http://www.refworld.org/docid/4a7840562.html>> [accessed 1 January 2014].

<sup>117</sup> See R Teitel & R Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order', (2008-2009) 41 *NYUJILP* 959, 990 ('international legal order will resemble the

Certainly not all institutions interpreting the Covenant possess strictly judicial functions, even if their institutional practices ultimately involve some assessment of a state's potential or actual responsibility for Covenant violations. Among these institutions, it is the Committee that has proven demonstrably influential in the development and interpretation of the Covenant, short of having a strict adjudicative procedure at its disposal long before the passage of the Optional Protocol to the Covenant in May 2013. The Committee has been lauded for

us[ing] relatively scant financial and political resources to good effect, rapidly bringing the Covenant's monitoring processes up to current treaty body standards, advancing its own political fortunes, and gaining greater general acceptance for the justiciability of economic, social and cultural rights through careful attention to norm development.<sup>118</sup>

It is not a court *stricto sensu*, but rather acts as the monitoring body of the Covenant, wielding powers under Part IV of the Covenant, after the delegation of authority made to it by the Economic and Social Council.<sup>119</sup> Composed of 18 independent experts meeting three times a year, the Committee conducts the periodic review of state reports required in Articles 16 and 17 of the Covenant.<sup>120</sup> While the Committee's work in the state reportage process certainly engages its interpretive functions with respect to the Covenant, the Committee actively provides guidance on the interpretation and application of Covenant norms through its issuance of General Comments, which 'give further substance to the norms and provisions found in the Covenant...outlining the content, intent, and legal meaning of the subjects they address.'<sup>121</sup>

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messy, porous, multiple-value, and constituency politics of democratic pluralism, which is nevertheless underpinned by a more absolutist baseline commitment to the preservation of the human').

<sup>118</sup> B Lyon, 'Discourse in Development: A Post-Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights' (2002) 10 *American University Journal of Gender, Social Policy and the Law* 535, 543.

<sup>119</sup> Economic and Social Council Resolution 1985/17.

<sup>120</sup> J Mertus, *The United Nations and Human Rights: a Guide for a New Era* (2<sup>nd</sup> edn, 2009) 83.

<sup>121</sup> UN Office of the High Commissioner for Human Rights, *Handbook for National Human Rights Institutions*, above n 17, 6.

While the degree of interpretive and authoritative weight of the General Comments may be disputed,<sup>122</sup> it is nonetheless significant that no state party to the Covenant has ever objected to the Committee's institutional practice of issuing General Comments, notwithstanding the occasional challenges to the scope and reach of some of these interpretations.<sup>123</sup> Furthermore, the Committee has made ample use of its authority to issue Statements, which are intended to assist states parties in 'clarifying and confirming its position with respect to major international developments and issues bearing upon implementation of the Covenant'.<sup>124</sup> Under the new Optional Protocol to the Covenant, the Committee gained a further competence to issue Views,<sup>125</sup> which are responses to individual communications, that could also be a potential source for further interpretive (as well as a form of pseudo-jurisprudential) guidance on the implementation of the Covenant.

Generally, courts and other tribunals are not required or compelled to defer to the Committee's interpretations of the Covenant, quite unlike common law doctrines of 'administrative deference' or 'primary jurisdiction'<sup>126</sup> which accord primacy to the interpretations or rulings of an administrative agency based on the latter's specialized expertise. However, while we expect domestic courts to continue to look towards the parameters of their own institutional competences when resolving the justiciability of attempted domestic applications of Covenant norms, it is still difficult to assume and generalize that domestic courts would always and necessarily act under a sharp line of separation from the political branches' commitments and representations to the Committee in the state reportage process of the Covenant.<sup>127</sup> While some domestic courts have opted

<sup>122</sup>For the argument that General Comments should be viewed as 'authoritative interpretative instruments that give rise to a normative consensus on the meaning and scope of particular human rights', see C Blake, 'Normative Instruments in International Human Rights Law: Locating the General Comment' (NYU Center for Human Rights and Global Justice Working Paper No 17/2008), <<http://chrgi.org/wp-content/uploads/2012/07/blake.pdf>> [accessed 30 July 2013].

<sup>123</sup>U Khaliq & R Churchill, 'The Protection of Economic and Social Rights: a Particular Challenge?', in H Keller & G Ulfstein (eds), *UN Human Rights Treaty bodies: Law and Legitimacy* (2012) 199, 207.

<sup>124</sup>Ibid, 208.

<sup>125</sup>See Optional Protocol, Arts 8 and 9.

<sup>126</sup>See J W Hilliard, 'Tapping Agency Expertise: The Doctrine of Primary Jurisdiction' (2008) 96 *Illinois Bar Journal* 256.

<sup>127</sup>As one scholar puts it, '[o]bstacles to the judicial application of international law within domestic legal systems, based on its "diplomatic" and "inter-state" nature, should in principle be dismissed today. International law is no longer a law governing only the principle "external" relations of states...it governs the lives of individuals within states, all the more so at a time when the right

to deny the direct applicability of the Covenant as a source of independent rights susceptible to causes of action,<sup>128</sup> on the other hand, courts in other jurisdictions have permitted direct actionability for certain Covenant rights.<sup>129</sup> Notably, a 2004 survey by the International Law Association found that the output of human rights treaty bodies had generally 'become a relevant interpretative source for many national courts.'<sup>130</sup> On balance, we observe that while other institutions are not obligated to defer to the Committee's interpretations of the Covenant,<sup>131</sup> as a practical matter the Committee's interpretations could foreseeably figure within the adjudicative and interpretive calculus of other institutions seized of disputes involving allegations of a state's violation of the Covenant.<sup>132</sup>

We do not assert that the Committee's evaluation of state responsibility is

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of access to court is increasingly seen as a basic human right. ...Questions of non-justiciability are properly limited to those in which the court declines to exercise jurisdiction because the question pertains to inter-state relations and has no judicial or objective standard to decide it.' C Focarelli, *International Law as Social Construct: the Struggle for Global Justice* (2012) 345.

<sup>128</sup>Courts in Osaka, Japan, Belgium and the Netherlands have denied direct applicability of particular Covenant norms in a few cases. See Y Iwasawa, 'International Human Rights Adjudication in Japan', in B Conforti & F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997) 223, 249–250. Inconsistencies have been observed between representations made by Canadian political branches to the Committee (on the judicial enforceability of the Covenant in domestic courts) and the actual rulings of Canadian courts. See G Brodsky, 'The Subversion of Human Rights by Governments in Canada', in M Young, S B Boyd, G Brodsky & S Day (eds), *Poverty: Rights, Social Citizenship, and Legal Activism* (2007) 355, 365.

<sup>129</sup>Courts in Colombia, Serbia, Kenya and the Netherlands, for example, have directly applied some Covenant norms. See E Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (2012) 151–3; S Djajić, 'Serbia', in D Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (2011) 526, 536; C Ryngaert, 'The Role of Human Rights in the Dutch Legal Order', in R Arnold (ed), *The Universalism of Human Rights* (2012) 237, 241; A Nollkaemper, *National Courts and the International Rule of Law* (2011) 42.

<sup>130</sup>R van Alebeek & A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law', in Keller & Ulfstein, above n 123, 356, 357.

<sup>131</sup>See G Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (2007) 99 ('By deciding on complaints, the treaty bodies give concrete meaning to specific human rights norms in concrete circumstances and thereby build up a kind of "jurisprudence", which can guide governments, NGOs and inter-governmental organizations in interpreting and understanding the content and relevance of international human rights norms').

<sup>132</sup>States assume the burden to justify to the Committee any absence of legal remedies to enforce Covenant rights. See M Langford & J A King, 'Committee on Economic, Social and Cultural Rights: Past, Present and Future', in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477, 496. Domestic courts, for example, could contribute to the implementation of states' international responsibility for Covenant violations by giving effect to principles of cessation and reparation. See A Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *AJIL* 760.

in any way a legal precondition to lodging inter-state claims involving Covenant violations to international adjudication.<sup>133</sup> Rather, we are of the view that the strengthened capacity and interpretive competences of the Committee in the assessment of alleged Covenant violations in the Optional Protocol could, at the very least, be a significant incentive for the International Court of Justice to use its authority to call upon the Committee as a relevant expert under Article 50 of the Court's Statute.<sup>134</sup> After all, it is a well-known phenomenon in its fact-finding practices throughout its jurisprudence that the Court has scarcely acted *motu proprio* to obtain information from specialized agencies of the United Nations, tending mostly to resolve evidentiary issues on the basis of the information submitted by the states parties to a contentious dispute.<sup>135</sup> Should a Covenant violation be brought to the Court in the future, the complexity of the normative and evidentiary issues therein would be one occasion for the Committee to contribute useful expert opinion and information in a contentious proceeding.

Furthermore, the establishment of three new Committee procedures (e.g. an individual and/or group communications procedure, a fact-finding inquiry procedure that could be initiated *proprio motu*, and an inter-state communications procedure) through the entry into force of the Optional Protocol to the Covenant on 5 May 2013 critically affects the landscape of Covenant interpretation in two ways. First, we find that, as regards the collective operation of procedures under the Protocol and the state reportage system in the Covenant, the interpretive process has been usefully streamlined to coalesce around the Committee's assessment techniques and procedures for determining state responsibility for Covenant violations.

Second, we submit that while the Committee's role in interpreting the Covenant has been reinforced through the new procedures in the Protocol, the latter does not diminish the broader forensic role of the plural interpretive communities whose inter-subjective judgments and observations ultimately influence the evaluation of a state's compliance with Covenant obligations. We refer to 'interpretive communities' according to the two senses famously coined by Ian Johnstone with respect to treaty practice:

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<sup>133</sup> *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, ICJ Reports 2011 p 70, 120–9.

<sup>134</sup> ICJ Statute, Art 50 ('The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or an expert opinion').

<sup>135</sup> S Rosenne, *Essays on International Law and Practice* (2007) 235–50 (on fact-finding at the International Court of Justice).

the [narrow] community of interpreters directly responsible for the conclusion and implementation of a particular treaty, and a broader, international community consisting of all experts and officials engaged in the various professional activities associated with treaty practice.<sup>136</sup>

Insofar as the determination of state responsibility for Covenant violations is concerned, the narrow interpretive community would be comprised of the Committee, as well as international and domestic courts that directly interpret and implement the Covenant. The 'broader' interpretive community, on the other hand, spans an assemblage of experts, other UN specialized agencies, governmental and nongovernmental organizations from whom all relevant and necessary information can be obtained when assessing a state party's measures or conduct affecting compliance with its duty to respect, protect, and fulfill economic, social, and cultural rights in the Covenant.<sup>137</sup>

Third, we note that the new procedures available under the Optional Protocol could afford the Committee the distinct opportunity to fully clarify and explicate the operational parameters of what it holds to be the actual extraterritorial scope of states parties' Covenant obligations.<sup>138</sup> A case of first impression, such as the complex question of whether a state party has the duty to control the conduct of transnational corporations and ensure that the latter does not cause that state party to breach its Covenant obligations,<sup>139</sup> could be one example of an interpretive issue that could be cautiously brought for

<sup>136</sup>I Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1990–1991) 12 *Mich JIL*. 371, 385.

<sup>137</sup>See CECSR, *Report on the Forty-Fourth and Forty-Fifth Sessions*, UN Docs E/2011/22 & E/C.12/2010/3, 3 May 2011, para 44 ('On various occasions in the past, the Committee has received information, mainly from non-governmental organizations, after consideration of the State party's report and adoption of concluding observations thereon. In fact this was follow-up information on the Committee's conclusions and recommendations. Not being in a position to consider and act upon such information without reopening its dialogue with a State party (except in cases specifically addressed in concluding observations), the Committee will consider and act upon the information received from sources other than a State party only in cases where such information has been specifically requested in its concluding observations').

<sup>138</sup>See F Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social, and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', (2011) 11(1) *HRLR* 1.

<sup>139</sup>Academic literature on the Covenant remains tentative and under-theorised on the subject of state parties' duties as members of international financial institutions that issue decisions with development consequences for other states, as well as for state parties' duties as 'home states' of transnational corporations whose conduct may injure economic, social, or cultural

Committee clarification and early dialogue between states Parties under the Protocol's inter-state procedure, without ripening into a full-blown contentious case leading to a direct finding of international responsibility (and the corollary reparations consequences), to which states might be more loathe to give consent.

Finally, while we recognize the proliferation of Covenant interpreters beyond the Committee to other national, regional, and international courts and tribunals, UN specialized agencies and other treaty bodies (and each with their respective evidentiary procedures and jurisdictional competences), we submit that the consolidation of information with the Committee would assist in substantiating and verifying future claims of international responsibility arising from Covenant violations. The bedrock of information now open to the Committee from the new Protocol procedures as well as the periodic reports submitted by states parties to the Covenant, together create a most authoritative and comprehensive aggregate index of states' subsequent practices in the interpretation and application of the Covenant.<sup>140</sup> Localizing this wealth of information with the Committee through the Covenant reporting process and the Protocol procedures, carries, in our view, great potential for better harmonization of the Covenant's interpretive process, as well as clearer coordination and cross-referencing between the narrow and broad interpretive communities on economic, social, and cultural rights. The breadth of information now available through nearly five decades of the Committee's reporting process, the Committee's new *proprio motu* fact-finding mandate under the Optional Protocol to the Covenant, as well as the Committee's long-standing policy of openness to information from other experts, specialized agencies and non-governmental organizations certainly ensures, at the very least, that other Covenant interpreters could design appropriate forms of reparation or mechanisms for remedying violations of Covenant rights,<sup>141</sup> in keeping with the

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rights in other jurisdictions. For an interesting set of recent proposals, however, see S Narula, 'International Financial Institutions, Transnational Corporations and Duties of States', in Langford, Vandenhole, Scheinin, & Van Genugten, above n 38, 114-152 (arguing that international financial institutions (IFIs) and transnational corporations (TNCs) can be held indirectly accountable for Covenant violations in three ways – by requiring member states in IFIs to take the Covenant into account when participating in IFI decision-making processes; applying a 'decisive influence' and 'due diligence' standard to the relationship between the home state and the TNC as would make the home State accountable for TNC violations of the Covenant; and by requiring the home States of TNCs to enact domestic legislation applying the Covenant with extraterritorial reach).

<sup>140</sup>VCLT, Art 31(3)(b).

<sup>141</sup>See D Otto, 'Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with its International Obligations?', in T Campbell, J Goldsworthy, & A Stone

fundamental obligation in Article 2(1) of the Covenant to realize all Covenant rights by 'all appropriate means'.

### **3.2 State and Non-State Violators of the Covenant**

States and non-state actors alike could violate the Covenant.<sup>142</sup> In order to 'respect' Covenant rights, States have to

guarantee conformity of their laws and policies regarding corporate activities...ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of Covenant rights by those who depend on or are negatively affected by their activities.<sup>143</sup>

States 'protect' Covenant rights in relation to the conduct of corporate actors when they establish 'appropriate laws, regulations, as well as monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations.'<sup>144</sup> States fulfill Covenant rights with the corporate sector when the latter's support is enlisted towards the progressive realization of Covenant rights, including encouraging corporations to 'assist, as appropriate, including in situations of armed conflict and natural disaster, host states in building capacities needed to address the corporate responsibility for the observance of economic, social and cultural rights.'<sup>145</sup> Even as members of international organizations, states parties to the Covenant are expected to ensure that their actions remain consistent with respecting, protecting, and fulfilling Covenant rights.<sup>146</sup> More direct obligations to promote universal respect for and observance of human rights may likewise apply to specialized agencies of

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(eds), *Protecting Human Rights: Instruments and Institutions* (2003) 281, 288. Remedies for Covenant violations need not necessarily require judicial remedies when administrative remedies are adequate, 'accessible, affordable, timely and effective.' CESCR, *General Comment No 9*, above n 39, para 9.

<sup>142</sup>See CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1, 20 May 2011 (*Statement Regarding the Corporate Sector*).

<sup>143</sup>Ibid, para 4. See also R McCorquodale, 'International Organisations and International Human Rights Law: One Giant Leap for Humankind', 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) 141, 183.

<sup>144</sup>CESCR, *Statement Regarding the Corporate Sector*, above n 142, para 5.

<sup>145</sup>Ibid, para 6.

<sup>146</sup>See CESCR, *General Comment No 15*, above n 39, para 36; UN High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights*, UN Doc. E/C.4/Sub.2/2002/9, 25 June 2002, para 5.

the United Nations,<sup>147</sup> as well as potentially international organizations (such as international financial institutions)<sup>148</sup> who are also 'subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'<sup>149</sup> International organizations, after all, can also be held responsible for committing internationally wrongful acts or omissions.<sup>150</sup>

In evaluating international responsibility for breach of any of the specific individual rights in the Covenant – such as those under Articles 6 (the right to work), 7 (the right to enjoyment of just and favourable conditions of work), 8 (the right to form and join trade unions), 9 (the right to social security), 10 (family rights), 11 (the right to adequate standard of living such as food, clothing, housing, and continuous improvement of living conditions), 12 (the right to enjoy the highest attainable standard of physical and mental health), 13 (the right to education), and 15 (the right to take part in cultural life, enjoy benefits of scientific progress and its applications, the protection of moral and material interests resulting from scientific, literary, or artistic production) – the joint or separate conduct of states as well as non-state actors could be comprehensively considered insofar as they affect the processes and transactions for the realization of these rights.<sup>151</sup> Beyond these specific Covenant rights, however, states and non-state actors such as international organizations are also bound to give effect to the obligation of 'international assistance and cooperation' that applies to all Covenant rights.<sup>152</sup> The operative obligation in the Covenant, Article 2, invokes not only the obligation to 'progressively ensure' rights, but

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<sup>147</sup> See Charter of the United Nations, Arts 50 and 55 (*UN Charter*).

<sup>148</sup> See F Gianviti, 'Economic, Social and Cultural Human Rights and the International Monetary Fund', in P Alston (ed), *Non-State Actors and Human Rights* (2005) 113.

<sup>149</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980 p 73, 89.

<sup>150</sup> See Draft Articles on the Responsibility of International Organizations, ILC *Ybk* 2011/II(2).

<sup>151</sup> See CESCR, *Globalization and Economic, Social and Cultural Rights*, 18<sup>th</sup> session, 27 April–15 May 1998, para 5 ('the Committee wishes to emphasize that international organizations, as well as the governments that have created and manage them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights. It is particularly important to emphasize that the realms of trade, finance and investment are in no way exempt from these general principles and that the international organizations with specific responsibilities in those areas should play a positive and constructive role in relation to human rights').

<sup>152</sup> Covenant, Arts 2(1), 11 and 12.

does not do so without first requiring that states take these steps ‘individually and through international assistance and co-operation, especially economic and technical.’<sup>153</sup> No comparable reference to international engagement exists, for example, in the ICCPR, which restricts obligations by focusing in great detail on the rights of individuals in the jurisdiction of a state party.<sup>154</sup> Rather, the Covenant contemplates states that actively engage in respecting, protecting, and fulfilling Covenant rights both domestically and in their actions as members of the international community.<sup>155</sup> For those states pursuing technical or economic assistance in conjunction with another state party to the Covenant there is also a question, to our knowledge under-theorized at this point,<sup>156</sup> as to the precise nature of the obligation of a state that is in a position to provide such assistance.<sup>157</sup> In a progressive reading of its new mandate under the Optional Protocol to the Covenant, one can therefore expect the Committee to assert its *motu proprio* fact-finding competence to seek relevant information,<sup>158</sup> such as actions taken by a state party to fulfill its obligations of cooperation.

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<sup>153</sup> Covenant, Art 2(1).

<sup>154</sup> ICCPR, Art 2(1).

<sup>155</sup> On states parties’ control of extraterritorial conduct by private actors in relation to the states’ duties to provide access, not to impede access or not to tolerate private actors’ conduct that impedes access, see CESCR, *General Comment No 15*, above n 39, paras 23–4; CESCR, *General Comment No 18*, above n 39, para 25; CESCR, *General Comment No 19*, above n 39, paras 45 and 54.

<sup>156</sup> We note that General Comment No 2 (on international technical assistance matters) bypasses this question altogether: CESCR, *General Comment No 2*, above n 39.

<sup>157</sup> Although we note the Committee’s recently increasing practice of issuing statements on topical applications of the Covenant in states’ economic policy-making, see CESCR, *Statement regarding the corporate sector*, above n 142 (holding, among others, that ‘[r]especting rights requires States Parties to guarantee conformity of their laws and policies regarding corporate activities with economic, social and cultural rights set forth in the Covenant...States Parties shall ensure that companies demonstrate due diligence to make certain they do not impede the enjoyment of Covenant rights by those who depend on or are negatively affected by their activities’ (para 4); ‘Protecting rights means that States Parties effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws, regulations, as well as monitoring, investigation, and accountability procedures to set and enforce standards for the performance of corporations’ (para 5); ‘Fulfilling rights entails that States Parties undertake to obtain the corporate sector’s support to the realization of economic, social and cultural rights’ (para 6)); letter of the Chairperson of the Committee on Economic, Social and Cultural Rights in relation to the protection of Covenant rights in the context of economic and financial crisis (Office of the High Commissioner for Human Rights, *Open letter from the Chairperson of the Committee on Economic, Social and Cultural Rights*, 16 May 2012, <<http://www2.ohchr.org/english/bodies/ceschr/docs/LetterCESCRtoSP16.05.12.pdf>> [accessed May 2014].

<sup>158</sup> See Optional Protocol, Art 11.

In sum, we submit that the plurality of Covenant interpreters did not create utterly dissonant interpretations or methods of determining international responsibility for Covenant violations. Rather, precisely because state and non-state compliance with the programmatic, evolutive,<sup>159</sup> and transactional nature of Covenant rights could only be fully and comprehensively determined by accessing broad bases of information over time,<sup>160</sup> it is now inevitable that Covenant interpreters would refer to the Committee not just for the authoritative interpretation of the content of Covenant rights (as set forth in its General Comments, statements, and other views), but also for the comprehensive evidentiary resources now made available from the state periodic reporting processes, as well as the new competences of the Committee under the Optional Protocol procedures. The modern paradigm for determining international responsibility for Covenant violations thus denotes a steady integration of information and interpretation, and not normative or institutional fragmentation.

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<sup>159</sup>K D Beiter, *The Protection of the Right to Education by International Law* (2006) 232 ('[t]he travaux préparatoires of the ICESCR show that the drafters of the Covenant intended that its rights provisions should be framed in rather general terms and that it should be the task of the Specialised Agencies to transform these into detailed rules'). As defined by the International Court of Justice, 'evolutive interpretation' applies to treaties containing terms intended by treaty parties to evolve and allow for future developments in international law as well as factual phenomena altering the meaning of a norm. *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ Reports 2009 p 213, 242–3 (see also in particular para 66 where the Court declared that 'where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning').

<sup>160</sup>In the practice of the European Court of Human Rights, the principle of evolutive interpretation 'allows for variations in time' or 'that the meaning of a concept can change over time...a kind of autonomous interpretation in its broad, organic sense, because it imposes a uniform interpretation of contested concepts'. E Brems, *Human Rights: Universality and Diversity* (2001) 396. The ICESCR is a prime candidate for the technique of evolutive interpretation, precisely because its normative content is indeed expected to change over time. Rights to 'the highest attainable standard of health', an 'adequate standard of living', 'social security', 'education', among others, manifestly contemplate that interpreters of the Covenant assume an ongoing project of contextual assessment.

## 4 Conclusion: Reframing State Responsibility for Covenant Violations

Covenant interpreters seeking to determine international responsibility for violations of the Covenant inimitably engage the dynamism of norms and facts. As we discussed in Part I, such dynamism need not (and should not) be equated with a situation of complete normative indeterminacy, since treaty interpreters could well locate the applicable criteria in their assessment, first tracing a state party's compliance with the Covenant beginning with the 'normative lattice' of minimum core obligations, the principle of non-discrimination, and the principle of non-retrogression all collectively operating as the minimum social protection baseline for a state party to the Covenant; then expanding the analysis outwards with respect to the state party's 'progressive realization' of Covenant rights. Neither should, as we showed in Part II, factual or informational dynamism breed license for the Covenant's interpretive communities to engage in hopelessly Protean (and ultimately arbitrary) exercises in inter-subjective judging. The *de facto* reference to the Committee's interpretive guidance by other tribunals suggests to us that, with the entry into force of the Protocol and the expansion of the Committee's interpretive competences, there is even greater potential for outcome-determinative coordination between institutions tasked with Covenant interpretation. The expansion of the Committee's mandate to include institutional oversight and soft quasi-adjudicative interpretation within the Protocol's cooperative framework of inter-state and individual communications procedures, administratively complements the well-settled reportage and information-gathering functions under the Covenant's periodic reporting system in operation for nearly five decades since the entry into force of the Covenant.

The assessment of internal responsibility for Covenant violations is, at its core, a discursive process<sup>161</sup> containing an internal logic shared by its plural interpretive communities. There is less of the spectral fear of 'judicial activism'<sup>162</sup> where evolutive interpretation is adopted for Covenant rights, because the broad bases of information inevitably associated with these rights enables a conceivable transparent and continuing dialectic between narrow interpretive

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<sup>161</sup> We subscribe to Jurgen Habermas' conception of the discourse theory of law proceeding from the question of 'how constitutional rights and principles must be conceived and implemented if in the given context they are to fulfill the functions normatively ascribed to them.' See J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1998) 194.

<sup>162</sup> See P Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in E Canizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (2011) ch 7.

communities (international courts, domestic courts, or the Committee) and the broader interpretive communities (groups, individuals, governmental or nongovernmental organizations, third states) that are themselves interested in the enforcement of economic, social and cultural rights. This continuing dialectic is precisely what makes the new collective index of subsequent practices available from both the Covenant reporting system and the Protocol's innovative procedures more reliable for future assessments of international responsibility for Covenant violations.<sup>163</sup>

The modern integrated paradigm for determining international responsibility arising from Covenant violations owes its emergence from nearly five decades of dialectical achievements since the Covenant entered into force. The Committee's General Comments helped fulfill a quasi-legislative purpose originally envisaged in the Covenant's *travaux préparatoires*, where 'the drafters of the Covenant intended that its rights provisions should be framed in rather general terms and that it should be the task of the Specialised Agencies to transform these into detailed rules.'<sup>164</sup> The widespread adjudication of economic, social and cultural rights by various national, regional, and international courts and tribunals, in turn, contributed to the content and normative development of dynamic norms, rights, and obligations in the Covenant.<sup>165</sup> Decades of participation by states, international organizations, other UN specialized agencies and other non-state actors in the Committee's reportage procedures under the Covenant have also helped pave the way for the recent adoption of uniform empirical methodologies for determining state and non-state compliance with the Covenant.<sup>166</sup> All of these incidents, in our view, pull our assessment of international responsibility for Covenant violations towards a path of integrated interpretation and evidentiary substantiation.

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<sup>163</sup>A Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law* (2013) 30-1 ('taking account of subsequent developments in relation to the treaty – such as subsequent practice and subsequent agreements that relate to the treaty – has a firm standing in the interpretation of international human rights law as it allows for a "dynamic" or "evolutive" interpretation of the law in the context of "present day conditions". Many aspects of the content of human rights norms have become clear only after the relevant treaties have been adopted, especially through the (interpretative) work of UN treaty bodies and regional human rights courts/commissions').

<sup>164</sup>Beiter, above n 159, 232.

<sup>165</sup>International Commission of Jurists (ICJ), 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability' (Human Rights and Rule of Law Series No 2, 2008), 23–64, <<http://www.refworld.org/docid/4a7840562.html>> [accessed 1 January 2014].

<sup>166</sup>Ibid; also above nn 73–4.

Admittedly, the process of ascertaining state responsibility for Covenant violations introduces a further temporal dimension that could conceivably strain the treaty interpreter's legal and factual imagination. A Covenant violation is not an easy conclusion to draw, given the broad, manifold, and somewhat porous ways for states to 'respect', 'protect', and 'fulfill' Covenant rights, coupled with the continuing normative task of the treaty interpreter to observe due regard for the particularities of a state's capacities, capabilities, conditions, and contexts at the time of the assessment of the alleged Covenant violation. This is where both the forensic contributions from broader interpretive communities, as well as the 'cross-judging' influences of narrow interpretive communities, could ameliorate the difficulties in the process of evaluating whether a state party to the Covenant or a non-state actor incurs international responsibility. Reframing our analysis of state responsibility for Covenant violations is thus a signal opportunity for those of us within either narrow and/or broad interpretive communities to revolutionize the logics of engagement between our internal and external discourses on economic, social, and cultural rights.

## BOOK REVIEWS

*State Responsibility: The General Part.* By JAMES CRAWFORD.  
Cambridge, Cambridge University Press, 2013. 912 pp. £90.00  
(hardcover).

In one of his early books, the salacious and less than classic *That Uncertain Feeling* (1955), Kingsley Amis let one of his characters muse on why it was that he liked certain things so much. Insisting in his examination of the question, the character ended his enquiry with an italicized culmination: 'I was clear on why I liked them, thanks, but why did I like them *so much?*' That mood is the correct one in which to approach an appraisal of James Crawford's latest book, *State Responsibility: The General Part*. One is clear why one likes it, thanks, but why does one like it *so much?*

It is convenient to begin by putting divergent concerns to one side and focusing instead of what Crawford terms *The General Part*. It is not clear whether this choice of title is a nod to Glanville Williams, *Criminal Law: The General Part* (1953; 2nd edn, 1961), where the stated aim was 'to search out the general rules of the criminal law, i.e. those applying to more than one crime'(2nd edn, v), or rather to the works of Sir Hersch Lauterpacht, whose collected papers (1970) began with *International Law: The General Part*, in which section Lauterpacht dealt with topics such as the definition, the sources, and the subject of international law as well as its relationship with domestic law. Whichever way the nod goes (and the ambiguity may very well be intended), the gesture is a nice one.

One reason why the book is so good, of course, is the considerable ground-work laid for it in the author's earlier works. The fact that Crawford, after all these years, could draw on the debates and criticisms not only of the actual work in the ILC, but also the edited collection, by himself, A Pellet, and S Olleson, *The Law of International Responsibility* (2010), of course has stood him in good stead. It is one of Crawford's many impressive traits that he does not only play to his own, considerable, strengths, but also to those of others.

In searching out the general rules of the law of state responsibility, that is, those applying to more than one delict, Crawford in turn deals with six topics. In Part 1 he deals with the framework of responsibility; in Part 2 he turns to attribution; in Part 3, to breach. Part 4 deals with collective and ancillary responsibility; Part 5, with cessation and reparation; whilst Part 6 deals with the implementation of responsibility. It is impossible here to deal with even a fraction of the questions which Crawford subjects to impressive analysis.

Two of Crawford's academic predecessors, in the preface of the first published volume of what would later continue as the *International Law Reports*, observed, in a Tennysonian mode not unknown to Crawford, that they suspected 'that there is more international law already in existence and daily accumulating "than this world dreams of"' (A D McNair & H Lauterpacht, *Annual Digest of Public International Law Cases 1925–26* (1929) ix). That was in the 1920s. There is little to suggest that the 'widening and thickening' identified by Rosalyn Higgins ((2006) 55 *ICLQ* 791, 792) which international law has seen since then has made the law of state responsibility less rich and, potentially, difficult to make sense of.

It is easy, in the wilderness of cases and examples of state practice making up the field of state responsibility, to become perplexed. Some parts of the field could be thought to be sparse. But the fact that expressions of an underlying principle are sparse, or even exiguous, does not mean that the principle is not there. On the contrary the coherence and the uniformity is there for those who are willing, and able, to see. A good example of this is how the International Court of Justice in *Diallo*, on the issue of claim for compensation for non-material injury suffered by an individual, referred to the 1923 award by the umpire in *Lusitania*, who relied on 'mental suffering, injury to [a claimant's] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation' (*Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation, ICJ Reports 2012 324, 333 at [18]; *Lusitania* (1923) VII RIAA 32, 40). The International Court went in the same paragraph on to find expression of the same principle in the jurisprudence of the Inter-American Court of Human Rights (*Gutiérrez-Soler v Colombia* (2005) IACHR Series C No 132, para 82). One of the things Crawford does so well in the book under review, through both diachronic and intra-systemic analysis, is to bring out, and subject to thorough criticism, the underlying principle of the law. Many examples could be given; one will have to do.

In Chapter 6.3, he deals with Article 10 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA; ILC *Ybk* 2001/II(2)), entitled 'Conduct of an insurrectional or other movement'. Article 10 provides that:

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a

pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Crawford clearly sets out that, as a general rule, a state is not held responsible for the acts of insurgents, as such a movement, by definition, cannot be considered to be aligned to the interests of the state against which it is fighting (170). The presumptive non-attribution of the acts of insurgents to the states they oppose is, as Crawford shows, amply supported in the early arbitral awards. It is only if the movement is successful in creating either a new government or even a new state that, on a limited basis, state responsibility may arise (171). Whereas the rule in Article 10(1) is uncontroversial, the one contained in Article 10(2) could be thought to be more controversial. Did the ILC, in Article 10(2), simply codify customary international law or is the provision, as one commentator (P Dumberry, *State Succession to International Responsibility* (2007) 234) has observed, more of 'a doctrinal construction than one based on actual State practice'? It was also queried by Serbia (CR 2014/14, 41–2 (Mr Tams)) in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* for being based on state and judicial practice that is too sparse for the conclusion to be reached that the provision simply codifies customary international law. As Crawford shows in his book, however, several examples bear out the well-foundedness of Article 10(2).

During the American Civil War, Phillimore, for the British Law Officers, advised that in the event that the rebels were to succeed in separating from the Union, responsibility would be attributable to the resulting new state (Opinion of 16 February 1863, extracted in A D McNair (ed), *International Law Opinions*, vol 2 (1956) 257). The US Supreme Court took the same view when called upon to determine the responsibility of the Union for acts of the Confederacy (*Williams v Bruffy*, 96 US 176, 186 (1877)). The same is clear from several decisions by the French *Conseil d'État* in connection with the independence of Algeria in 1962, where the acts committed by the insurrectionist *Front de Libération Nationale (FLN)* were, in principle, attributed to the new state of Algeria. France was not responsible for these acts; the compensation of the damages attributable to the insurrectional movement 'concerns the Algerian State' (*Perriquet*, case no 119737, 15 March 1995). The *Conseil d'État*, which until very recently would never make a

finding of international law without first having consulted the Legal Department of the French Ministry of Foreign Affairs, plainly held that the internationally wrongful acts committed by the FLN before Algeria became independent were attributable to the future State of Algeria (*Hespel*, case no 11092, 5 December 1980; *Perriquet*, case no 119737, 15 March 1995; *Grillo*, case no 178498, 28 July 1999). An example from an international tribunal is *Socony Vacuum Oil Company* (1955) 21 ILR 55, where the US International Claims Commission, *obiter*, indicated that in the case of successful secession the new State was responsible for the acts of the insurrectional movement during the revolution. In addition to these examples comes that of the conduct of the Polish National Committee before the recognition in 1919 of the new Polish State, cited during the drafting of what became Article 10(2) as support of the rule being well-established (ILC *Ybk* 1998/I, 248).

It seems to follow, by necessary implication, from Crawford's chapter that the fact that the situation envisaged in Article 10(2) only rarely comes to a head cannot in itself mean that there is no principle governing the situation. One is reminded here of the old debate about *non liquet*. On the occasions upon which domestic and international courts and legal advisers have had to deal with the hypothesis set out in Article 10(2), the answer has been clear, and there seems to be no counter examples. It may be that a particular rule of international law rests on a foundation of state and judicial practice which is best described as sparse. Sparseness in itself does not, however, undermine the principle expressed in the rule.

As Crawford demonstrates in his book, the function of the legal scholar is not simply to record practice and to refrain from teasing out principles from practice in areas where the questions are of such a nature that they only rarely come to a head. Rather the role of the scholar is to taxonomize and rationalize the law and to expose its underlying structures and values, or, as Denning once felicitously put it ((1952) 1 *ICLQ* 1, 1), 'to move freely over the boundaries, which seem to divide these fields of law and to bring out the underlying unities'.

International law plainly relies on principles and inferences from them. The point is borne out by the fact that the International Court, in for example *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, ICJ, Order of 3 March 2014, para 27 and *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, ICJ Reports 2102 p 99, 123–4, built on the principle of the sovereign equality of states and derived from it the rules on the basis of which the two cases were decided. In the latter the principle had found many expressions, not least in the decisions of domestic

courts; in the former the incidents of the principle were rather more exiguous, but the principle applied with no less force for that reason. Inferences from principle are, perhaps, more typical of the Civil than of the Common Law. Crawford shows the breadth of his range by embracing this type of reasoning, and he does so in the manner of the open-minded common lawyer, showing how those principles have broadened slowly down from precedent to precedent. The marrying of these two registers is how one avoids international law ending up by being no more than a sum of so many incidents of state and judicial practice.

The general part of the law of state responsibility is no longer 'a code-less myriad of precedents'. By expertly and elegantly bringing out the principles under-girding the law, Crawford in *State Responsibility: The General Part* shows us that the law of state responsibility is so much more than a Tennysonian 'wilderness of single instances'. Perhaps that is why one finds it impossible not to like it *so much*?

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DOI: 10.7574/cjicl.03.02.207

*Basic Documents on the Settlement of International Disputes.*

Edited by CHRISTIAN J TAMS AND ANTONIOS TZANAKOPOLOUS.

Hart, Oxford, 2012. 838 pp. £45.00 (paperback).

As a general rule, the study of law centres on the study of texts. Within municipal legal systems this realization has long resulted in the production of the statute book, a helpful resource that collects the core documents of a certain discipline—contract law, tort law, public law, etc.—in the one place. Within such series, 'international law' is frequently the subject of a single volume (see e.g. M Evans, *Blackstone's International Law Documents* (10<sup>th</sup> edn, 2011)) and whilst this may be helpful at an undergraduate level, the international law academic or practitioner must often roam wider afield. Moreover, in the past 20 years or so, the notion of a coherent 'international law' has begun to break down, and the field is subjected to the same kind of specialization—terrorism, law of the sea, investment law, etc.—that has long been the hallmark of domestic legal systems. As such, the idea of a single volume of documents concerning international law generally is no longer helpful in more than an introductory capacity.

For this reason, the reviewer has been delighted in the past few years to observe the emergence of Hart's collection of specialized international law

statute books, *Documents in International Law*. Although such volumes have existed previously (particularly when considering human rights: see e.g. S Ghandi, *Blackstone's International Human Rights Documents* (8<sup>th</sup> edn, 2012)), Hart's efforts—to the best of the author's knowledge—are the first contemporary attempt to produce a coherent series along these lines. There are presently six volumes in the series, with more presumably to follow. This review focuses on one of the most recent and admirable of these, *Basic Documents on the Settlement of International Disputes*.

A word first on the topic itself. In the early 1980s, one might have been forgiven for thinking that the core texts of international dispute settlement could be arranged in a clear, bright line beginning with the Statute of the International Court of Justice (*ICJ Statute*) and stretching back to the Statute of the Permanent Court of International Justice (*PCIJ Statute*) and the 1899 and 1907 Hague Conventions on the Pacific Settlement on International Disputes (*Hague Conventions*). More esoteric or obsessive editors might even have allowed their memories to recede gracefully into the darkness with the 1871 Treaty of Washington that led to the *Alabama Claims (US v UK)* (1871) 29 RIAA 125, and the 1794 Jay Treaty that settled a range of disputes between the UK and US—even if after its conclusion it was so unpopular that Chief Justice Jay is said to have remarked that he could have ridden from Boston to Philadelphia solely by the light of his burning effigies. But the modern reality of international dispute settlement is different. In the past three decades, international law has seen an explosion of international courts and tribunals with the advent of dispute settlement under the UN Convention for the Law of the Sea (*UNCLOS*), the creation of the World Trade Organization (*WTO*) and its Dispute Settlement Understanding (*DSU*) and the vast expansion of investment treaty arbitration under a range of bilateral and multilateral investment agreements. Although on the one hand this has created apprehension as to the possible 'institutional fragmentation' of international law (see e.g. the results of the *MOX Plant* series of cases: R R Churchill, 'MOX Plant Arbitration and Cases', in R Wolfrum (gen ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2007)), on the other it has enabled the study of international dispute settlement as a unified system and prompted the development of a range of specialist texts and other materials in the area (see e.g. J Collier & A V Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999); J G Merrills, *International Dispute Settlement* (5<sup>th</sup> edn, 2011); J Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn, 2012) ch 32).

In *Basic Documents on the Settlement of International Disputes*, Tams and

Tzanakopolous seek to aid and enhance the study of that system. As they acknowledge in their preface (v), such an aid has not previously existed beyond the two-volume (and extremely expensive) collection prepared by the Max Planck Institute in 2001 (K Oellers-Frahm & A Zimmermann (eds), *Dispute Settlement in Public International Law*, 2 vols (2<sup>nd</sup> edn, 2001)). The volume is divided into two broad parts: Part A on international dispute settlement in general, including the documents pertaining to the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA) and their predecessors; and Part B, which examines selected sectoral regimes.

Part A is divided into four further sections, the first of which deserves special comment. Entitled 'Foundational Documents', Section I helpfully sets out some of the earliest agreements pertaining to international dispute settlement, including the aforementioned Jay Treaty (Doc 1; 3) and Treaty of Washington (Doc 2; 7). Particularly encouraging is the inclusion of the Convention for the Establishment of the Central American Court of Justice (Doc 4; 35), the world's first permanent and international tribunal of plenary jurisdiction. The Court has been largely forgotten by modern international law, but proved particularly influential in the drafting of the PCIJ Statute (see further R R Cortado, 'Central American Court of Justice', in R Wolfrum (gen ed), *Max Planck Encyclopedia of International Law* (online edn, 2013)). The Section further includes the 1907 (though not the 1899) Hague Convention (Doc 3; 20), the 1928 General Act for the Pacific Settlement of International Disputes (Doc 5; 40), a series of General Assembly Resolutions concerning the settlement of international disputes, such as the Friendly Relations Declaration (Doc 7.a; 57), and a number of other influential instruments, such as the 1948 Pact of Bogotá (Doc 8; 69). However, a number of documents that might have been included were omitted—doubtlessly due to considerations of length. The Section does not include the PCIJ Statute itself—although given the similarities between the PCIJ and ICJ Statutes, this is understandable. In addition, and given its significance, one could perhaps complain that the procedural ordinances of the Central American Court of Justice were not included (see 1911 Regulations of the Central American Court of Justice (1914) 8 *AJIL Supp* 179; 1912 Procedural Ordinance of the Central American Court of Justice (1914) 8 *AJIL Supp* 194). A further potential addition might have been an example of the 1925 Locarno Treaties concluded between Germany and various Allied powers that influenced the 1928 General Act (further: J Lindley-French, 'Locarno Treaties', in R Wolfrum (gen ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2007)). But on the whole, the Section is an excellent introduction to the early years of international dispute settlement, and any

attempt by the reviewer to suggest additions could fairly be described as captious.

Section 2 of Part A contains a collection of documents pertaining to the settlement of international disputes by diplomatic means (i.e. through conciliation or fact-finding commissions of inquiry) and has a particular focus on the various Rules produced by the PCA (Docs 10 and 14; 87 and 104). Curiously, although the Section includes the 1904 Agreement of Submission between the UK and Russia that led to the *Dogger Bank* inquiry (Doc 11; 92), it does not an example of the arguably more influential series of peace treaties concluded between the US and other nations at the instigation and direction of US Secretary of State William Jennings Bryan (further: G A Finch, 'The Bryan Peace Treaties' (1916) 10 *AJIL* 882; H-J Schlochauer, 'Bryan Treaties (1913–1914)', in R Wolfrum (gen ed), *Max Planck Encyclopedia of Public International Law* (online edn, 2007)), although this could be because these were activated only once and possessed little in the way of practical impact (see *Re Letelier and Moffitt (Chile v US)* (1992) 88 ILR 727). The Section also includes the full suite of documents concerning conciliation produced by the Organization for Security and Co-operation in Europe (Docs 16.a–d; 111–35).

Sections 3 and 4 concern the ICJ and PCA respectively. Section 3 is impressively thorough, including not only the Court's Statute (Doc 17.a; 137), Rules of Procedure (Doc 17.b; 148), Practice Directions (Doc 17.c; 177) and other framework documents, but examples of the ways in which the ICJ's jurisdiction might be activated. The Section includes the Special Agreements used in *Gabčíkovo-Nagymaros Project (Hungry/Slovakia)*, ICJ Reports 1997 p 7 (Doc 18.a; 188) and *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969 p 3 (Doc 18.b; 190) and three examples of compromissory clauses, namely the 1971 Montreal Convention (Doc 19.a; 193), the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations (Doc 19.b; 194) and the 1955 US–Iran Treaty of Amity, Economic Relations and Consular Rights (Doc 19.c; 195). It further includes a number of Optional Clause declarations, some recently contested (Docs 20.a – e; 195–199), and several requests for advisory opinions (Docs 21.a–c; 201–203). With respect to the latter, Tams and Tzanakopolous might be chastised slightly for not including more recent examples—neither the reference giving rise to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 p 136 nor *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010 p 403 have been included. The editors should, however, be praised for including the two requests underpinning *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996 p 66 and *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports

1996 p 226, giving readers the opportunity to contrast the failure of the former with the success of the latter.

Section 4 on the PCA has already been rendered sadly out of date by the conclusion of the 2012 PCA Arbitration Rules (<[pca-cpa.org/](http://pca-cpa.org/)> [accessed 27 October 2013]), but the editors cannot be held responsible for this given the likely publication deadline and at any rate, the Rules are easily accessed electronically. The Section is commendable, however, for its inclusion of two agreements activating the PCA's jurisdiction under the 1907 Hague Convention and concluded some 78 years apart: the 1925 agreement that led to the celebrated decision of Arbitrator Huber in *Island of Palmas (US v Netherlands)* (1928) 2 RIAA 829 (Doc 23.a; 219) and the 2003 submission on which the award in *Iron Rhine (Belgium v Netherlands)* (2005) 27 RIAA 35 was based (Doc 23.b; 222). These, in their own way, subtly demonstrate the longevity of the PCA, as well as its resurgent relevance after a long period of hibernation.

Part B of the volume concerns the various sectoral regimes that underpin concerns surrounding the fragmentation—substantive and institutional—of international law (see J Crawford, *Chance, Order, Change: The Course of International Law* (2013) ch 9). The Part comprises eight Sections, each dealing with a different field, and it is here that the reviewer senses that the editors' task in determining which texts to include became truly invidious. Section 5, concerning human rights, reflects this quandary. Subsection (a) includes documents pertaining to the investigative frameworks under the major universal human rights conventions (International Covenant for Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights et al) (Docs 26.a–30.b; 232–284), When considering the major regional mechanisms, subsection (b) includes documents pertaining to the European Convention on Human Rights (Docs 31.a–c; 285–337), the African Charter on Human and People's Rights (Docs 32.a–b; 337–48), and the American Convention on Human Rights (Doc 33; 348–57), but there appears to have been insufficient space to include documents detailing the procedure of the African Court on Human and Peoples' Rights or the Inter-American Court of Human Rights. Subsection (c), for its part, contains those documents establishing and elaborating on the UN Human Rights Council (Docs 34.a–b; 358–78).

Sections 6–8 delve into issues concerning international economic law and regional integration. Section 6 contains the expected range of documents concerning the WTO and DSU (Docs 35.a–d; 379–419), whilst Section 7 concerns international investment law. Focus in this respect is properly placed on the documents surrounding the International Centre for the Settlement of Investment Disputes (*ICSID*) (Docs 36.a–e; 421–71), but the reviewer was surprised to see that the ed-

itors included only the 2010 iteration of the Arbitration Rules of the UN Commission on International Trade Law (*UNCITRAL Rules*) (Doc 37; 471) when the original 1976 version remains embedded in a large number of bilateral and multilateral investment agreements. Whilst it is to be expected that the editors would be somewhat forward-looking in selecting documents, it seems likely that the 1976 *UNCITRAL Rules* will continue their dominance as the default procedural ordinance in non-ICSID investment arbitration for some time to come—absent the contrary agreement of the parties in individual cases (see e.g. *Philip Morris Limited Asia Limited (Hong Kong) v Australia*, PCA Case No 2012-12 (Procedural Order No 1, 7 June 2012) para 4.1). The Section also includes excerpts from the major multilateral investment agreements—the North American Free Trade Agreement (Doc 38; 487) and the Energy Charter Treaty (Doc 39; 498)—but understandably excludes other, less well-arbitrated regimes. Less understandable is the decision to exclude from the series of examples of dispute settlement provisions in bilateral investment agreements (*BITs*) (Docs 40.a–d; 509–26) any excerpt from the 1997 Netherlands Model BIT that has underpinned a large number of subsequent agreements. But such omissions are on the whole inconsequential, and in any event, readers requiring greater depth in investment law may be directed to the equally excellent collection in the same series, M Paparinskis (ed), *Basic Documents on International Investment Protection* (2012). Section 8 concerns dispute resolution in regimes of regional and sub-regional integration. Unsurprisingly, this includes the basic documents on the European (Docs 42.a–c; 531–54) and African Unions (Docs 43.a–b; 554–66), as well as those relating to the Economic Community of West African States (Docs 44.a–b; 566–72) and the Gulf Cooperation Council (Docs 45.a–b; 572–4).

Sections 9 and 10 contain a broad range of documents concerning dispute resolution in the law of the sea and environmental law. The former contains the optional dispute settlement protocol connected to the 1958 Geneva Conventions produced at the First UN Conference on the Law of the Sea (Doc 46; 575), as well as excerpts from *UNCLOS* concerning the International Tribunal for the Law of the Sea (*ITLOS*), and arbitration under Annexes VII and VIII (Docs 47.a–f; 576–638). It further includes excerpts from the Straddling Stocks Agreement (Doc 48; 638) as an example of an agreement bestowing jurisdiction on *ITLOS* per *UNCLOS* Article 288(2), as well as an agreement that frustrated the jurisdiction of an Annex VII tribunal (see *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)*, Jurisdiction and Admissibility (2000) 119 ILR 508), the Convention for the Conservation of Southern Bluefin Tuna (Doc 49; 640). As with the Section on investment law, readers seeking a more detailed understanding on

the area should refer to A V Lowe and S A G Talmon (eds), *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (2009). Section 10 contains excerpts concerning dispute resolution for a number of relevant environmental law regimes, including on climate change (Docs 50.a–d; 645–66), the ozone layer (Docs 51.a–d; 666–72), the trade in endangered species (Docs 52.a–d; 672–83) and the marine environment (Docs 53.a–b; 683–97).

Finally, Sections 11 and 12 concern disarmament, arms control and non-proliferation and the aftermath of crises. As might be expected, the former is concerned with the various treaty regimes concerning the control of forbidden and otherwise regulated arms, i.e. biological weapons (Doc 54; 699), chemical weapons (Docs 55.a–b; 700–15) and land mines (Doc 58; 753). The bulk of the Section, however, is given over to the various documents concerning nuclear non-proliferation (Docs 56.a–57.b; 715–53). The latter Section deals with *inter-state* dispute resolution following conflict—for this reason the constituent documents of the signal international criminal tribunals and the International Criminal Court have been excluded, perhaps to the benefit of another volume in the series. Encouragingly, the Section includes the relevant provisions of the 1919 Treaty of Versailles that established the inter-war mixed arbitral tribunals that influenced modern investor-state arbitration (Doc 59; 759). Beyond this, the Section largely concerns the influential international claims and compensation bodies, i.e. *ad hoc* bodies established to assess claims and compensation between states arising out of a specific situation of conflict (*Brownlie's Principles*, above, 733–4). The Section accordingly addresses, *inter alia*, the Iran-US Claims Tribunal (Docs 62.a–b; 766–89), the UN Compensation Commission (Docs 63.a–c; 789–805) and the Eritrea-Ethiopia Claims and Boundary Commissions (Docs 64.a–c 805–28).

What then, to conclude? Put simply, the reviewer acknowledges the difficult task with which the editors of *Basic Documents on the Settlement of International Disputes* were faced—how to deal with a newly-emergent and cross-cutting discipline within international law in a manner that is comprehensive but not unwieldy? In the reviewer's opinion, Tams and Tzanakopolous have succeeded admirably in their task. No substantive area of international dispute settlement has been left untouched, and one is left with the impression that a considered expertise has been brought to bear in the selection of the material.

The reviewer—who spends a not inconsiderable amount of time engaged in a similar field—is happy to have this volume within arm’s reach, and encourages others interested in the field to do the same.

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DOI: 10.7574/cjic1.03.02.195

## CASE NOTE: *JONES v THE UNITED KINGDOM*: ARTICLE 6(1) ECHR AND THE IMMUNITIES OF STATES AND THEIR OFFICIALS FOR ACTS OF TORTURE

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### Keywords

State Immunity, Public Officials, Torture, Right of Access to a Court

The issue brought before the Fourth Section of the European Court of Human Rights (*ECtHR*) in *Jones v United Kingdom*<sup>1</sup> (*Jones v UK*) was whether the right of access to a court guaranteed by Article 6(1) of the European Convention on Human Rights<sup>2</sup> (*ECHR*) was breached by the United Kingdom when its national court granted immunity to both the Kingdom of Saudi Arabia and its public officials in civil proceedings for torture. The four applicants claimed that they had been the victims of sustained and systematic torture carried out by agents of the Saudi Arabian state at a time when they were detained in a prison for involvement in criminal activities. Proceedings were subsequently initiated before the courts of England and Wales by the applicants who were of British and Canadian nationality—and it appears that the Canadian national had become a dual British national by the time of Strasbourg’s judgment. The Court of Appeal<sup>3</sup> had held that while Saudi Arabia enjoyed immunity from civil jurisdiction in proceedings involving allegations of torture, it was unable to successfully plead immunity *ratione materiae* on behalf of its named officials involved in the same proceedings. The House of Lords<sup>4</sup> unanimously overturned this decision on appeal and held that both the foreign state and its officials were entitled to claim immunity. The applicants thereafter brought a case before Strasbourg challenging this decision.

Strasbourg dealt with the issue of whether ECHR Article 6(1) was engaged in a largely unsatisfactory manner. Doubt had been expressed in the House of Lords on whether Article 6(1) applied when a domestic court granted immunity

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<sup>1</sup> *Jones & Ors v United Kingdom* [2014] ECHR 32.

<sup>2</sup> 4 November 1950, 213 UNTS 222 (as amended).

<sup>3</sup> *Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia); Mitchell and Others v Al-Dani and Others* [2004] EWCA Civ 1394.

<sup>4</sup> *Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia); Mitchell and Others v Al-Dali and Others* [2006] UKHL 26 (*Jones v Saudi Arabia*).

in accordance with international law. Nonetheless, their Lordships proceeded on the assumption that it was given that was the position taken by the Grand Chamber in its earlier decision in *Al-Adsani v United Kingdom*<sup>5</sup> (*Al-Adsani v UK*), and that it made no difference to the overall outcome of the case. The UK government invited Strasbourg to reconsider its finding in *Al-Adsani v UK*, submitting that a state could not be considered to have denied access to a court in a situation where it would be contrary to international law for the court to hear the claim. More specifically, it stated that ECHR Article 6(1) 'could not require a State to arrogate to itself powers of adjudication which, under international law, it did not possess. As a consequence, a State could not be considered to have denied access to a court where it had no access to give'.<sup>6</sup> This argument was not addressed by Strasbourg which simply endorsed the finding made in *Al-Adsani v UK* that Article 6(1) was applicable in claims for damages brought against a State. While this may not be unsurprising, the position taken is unsatisfactory since the Grand Chamber in *Al-Adsani v UK* did not deal with this argument itself and a confused principle of ECHR jurisprudence appears to have been established which presumes that a domestic court has jurisdictional competence to adjudicate disputes involving foreign states (and their officials) when the finding is made that ECHR Article 6(1) is engaged. Such a presumption is erroneous and the better approach to determine whether Article 6(1) applies is to consider whether international law requires a national court to grant immunity in the given factual circumstances to bar its adjudicative jurisdiction over the alleged dispute.

The allocation of immunity was identified by the Chamber in *Jones v UK* as pursuing the legitimate aim of complying with international law to promote comity and good relations between States. On the issue of whether a grant of immunity was proportionate, it had been recognised in *Al-Adsani v UK* that 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court'.<sup>7</sup> The applicants submitted in *Jones v UK* that employing this variation of the proportionality test was wrong for two reasons. First, it was alleged that the allocation of immunity completely bars any judicial determination of the dispute brought before the domestic court and does not allow for the competing interests at stake to be structurally balanced against each other. Support for this argument

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<sup>5</sup> *Al-Adsani v United Kingdom* [2002] 34 EHRR 11.

<sup>6</sup> *Jones v UK*, above n 1, para 162.

<sup>7</sup> *Al-Adsani v UK*, above n 5, para 56.

(although not cited in this case) could be found in the Dissenting Opinion of Judge Loucaides in *Al-Adsani v UK*, who stated that ‘courts should be in a position to weigh the competing interests in favour of upholding an immunity or allowing a judicial determination of a civil right, after looking into the subject matter of the proceedings’.<sup>8</sup> In addition, it was argued, secondly, that this variation of the proportionality test failed to consider whether there existed an alternative means of redress allowing the applicants to pursue their civil claim, and that the balancing exercise was the appropriate test in which due consideration was to be given to this issue. Reference was made to the decision in *Waite and Kennedy v Germany* where Strasbourg had held that a ‘material factor’ in determining the proportionality of an interference in a case involving the immunity of an international organisation was whether the applicants had available to them reasonable alternative means to effectively protect their rights.<sup>9</sup> In this regard, the applicants in *Jones v UK* claimed that they did not enjoy an alternative means of redress as the courts in Saudi Arabia were neither independent nor impartial, and they were unable to return to the place where they had been tortured in order to bring their claim.

The Chamber in *Jones v UK* declined to depart from the variation of the proportionality test used in *Al-Adsani v UK* because of the need ‘to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part’.<sup>10</sup> This was an important finding (although one that has been made on previous occasions). In a similar vein to the comments already advanced above, the ECHR cannot create exceptions to the rules of state immunity that are not recognised by international law. State immunity is a doctrine of international law which gives effect to the horizontal nature of the legal system and the equality of independent sovereigns. The International Court of Justice (ICJ) in the *Jurisdictional Immunities of the State* case made clear that the principle of sovereign equality from which immunity derives is one of the fundamental principles of the international legal order.<sup>11</sup> States therefore enjoy a general right under international law not to be involved in judicial proceedings before the courts of another State without their consent. This general rule is subject, however, to clearly defined exceptions that are firmly established and widely accepted by states in either customary international law or a treaty. On

<sup>8</sup> *Al-Adsani v UK*, above n 5 (Judge Loucaides, diss).

<sup>9</sup> *Waite and Kennedy v Germany* [2000] 30 EHRR 261, para 68.

<sup>10</sup> *Jones v UK*, above n 1, para 195.

<sup>11</sup> *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, ICJ, Judgment of 3 February 2012, para 57 (*Jurisdictional Immunities*).

this basis, Strasbourg could only employ a test of proportionality which led to any potential finding that it reached under the Convention being compatible with international law, which, at one and the same time, placed separate and additional obligations on the respondent state. Its decision to use a variation of the test which broadly considered whether the interference to ECHR Article 6(1) was rationally connected to the legitimate aim of complying with the international rules of state immunity, instead of one that balanced the competing interest, was therefore correct.

When arriving at its conclusion to follow the proportionality test laid down in *Al-Adsani v UK*, the Chamber in *Jones v UK* did not engage with either of the arguments raised by the applicants advocating for a variation of the test which provided for a substantive assessment. In any event, these arguments are unconvincing and should have been rejected by Strasbourg. The first argument which claimed that it was wrong for the House of Lords to not have balanced the competing interests against each other misunderstands how domestic courts determine whether to grant immunity when it is pleaded. The matter is well explained by Lord Bingham in the underlying case when identifying that: '[w]here applicable, state immunity is an absolute preliminary bar, precluding any examination of the merits. A state is either immune from the jurisdiction of a foreign court or it is not. There is no [...] scope for the exercise of discretion.'<sup>12</sup> In relation to the second argument claiming that the proportionality test should consider whether there existed an alternative remedy, the ICJ confirmed in the *Jurisdictional Immunities of the State* case that any entitlement to immunity under international law is not 'dependent upon the existence of [an] effective alternative means of securing redress'.<sup>13</sup> It was somewhat surprising that reference was not made to this particular finding of the ICJ given that Strasbourg had cited it with approval in *Stichting Mothers of Srebrenica v Netherlands*, where it had specifically held that 'it does not follow [...] that in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court'.<sup>14</sup> In reconciling this decision with *Waite and Kennedy v Germany*, it was further held in *Stichting Mothers of Srebrenica v Netherlands* that the lack of an alternative means of redress was only a 'material factor' and one that could not be interpreted in absolute terms.

Having determined which variation of the proportionality test to employ,

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<sup>12</sup> *Jones v Saudi Arabia*, above n 4, para 33.

<sup>13</sup> *Jurisdictional Immunities*, above n 11, para 101.

<sup>14</sup> *Stichting Mothers of Srebrenica v The Netherlands* [2013] 57 EHRR SE10, para 164.

the first question that Strasbourg considered under this test was whether the decision of the House of Lords to grant immunity to Saudi Arabia in civil proceedings for torture was in accordance with the international rules of State immunity. As is well known, the Grand Chamber in *Al-Adsani v UK* had been split by a very narrow majority over this question with the Joint Dissenting Opinion taking the view that the violation of a peremptory norm of *jus cogens* 'deprives the rule of sovereign immunity of all its legal effects.'<sup>15</sup> The inherent difficulty with this argument, as acknowledged by the majority, is that *jus cogens* are norms of customary international law, and at the time that *Al-Adsani v UK* was decided there was no widespread and consistent practice supporting this consequential effect ensuing from their violation. Rather than examine international practice to determine whether custom had evolved since this decision was handed down in 2001, the Chamber in *Jones v UK* referred with deference and approval to the judgment of the ICJ in the *Jurisdictional Immunities* case which had recently considered this matter in detail and similarly held that there was nothing inherent in the concept of *jus cogens* displacing the rules of state immunity.<sup>16</sup> Customary international law was found to have only bestowed the substantive prohibition with a peremptory status, and this did not conflict with the rules of state immunity which are procedural in nature. It is also worth noting that the ICJ further held that custom did not recognise an exception to the jurisdictional immunities enjoyed by a state in cases involving serious violations of human rights committed outside the territory of the forum state.<sup>17</sup> Accordingly, Strasbourg was right in finding that the House of Lords' decision to uphold the immunity of a foreign state in civil proceedings for torture did not amount to a disproportionate interference to ECHR Article 6(1).

*Al-Adsani v UK* had been concerned with the immunity from jurisdiction enjoyed by a State under international law. The second question Strasbourg considered under the test of proportionality (and the one which the case will receive attention for) was whether the decision to allow the Kingdom of Saudi Arabia to successfully plead immunity *ratione materiae* on behalf of its officials for acts of torture reflected generally recognised rules of international law. Strasbourg approached this issue by making the initial finding that 'in principle [...] officers of a foreign State [enjoy] protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself.'<sup>18</sup> This

<sup>15</sup> *Al-Adsani v UK*, above n 5, para 4 (Joint Diss Op).

<sup>16</sup> *Jurisdictional Immunities*, above n 11, para 95.

<sup>17</sup> *Ibid*, para 91.

<sup>18</sup> *Jones v UK*, above n 1, para 204.

finding recognises that international law regards actions brought against State officials for acts performed in an official capacity to be, in effect, actions brought against the State. This is because an act cannot be carried out by a State itself and may only be performed by an individual acting on its behalf. Article 2(1)(b)(iv) of the UN Convention on Jurisdictional Immunities of States and their Property,<sup>19</sup> which codifies international practice on this point, reflects this by providing that the term 'State' means 'representatives of the State acting in that capacity'. Whilst Strasbourg's finding is correct an important caveat to note is that, strictly speaking, immunity *ratione materiae* is a subject matter immunity that attaches to the official act and not to the individual public official. The plea of immunity before the domestic court is invoked by the foreign state on behalf of its representative implicated in the proceedings because it is the state, and not the official, who enjoys the immunity. On this basis, any denial of immunity *ratione materiae* in respect of acts attributable to the state would in practice circumvent the other and separate immunities enjoyed by the state under international law. Having identified that immunity *ratione materiae* will only be granted in respect of official acts, consideration then turned to determine whether acts of torture are committed in an official or private capacity. Although Strasbourg did not offer a firm view on this matter it is clear that, according to Article 1 of the UN Convention against Torture<sup>20</sup> (CAT), torture is by definition an act 'inflicted by [...] a public official or other person acting in an official capacity'. Moreover, and with respect to the underlying facts of this particular case, the alleged acts of torture had taken place in state-owned premises and had been committed by public officials as part of their duties to interrogate the applicants for involvement in serious criminal activities.

The Chamber identified that there was 'some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials'.<sup>21</sup> State practice was found to be 'in a state of flux' and '[i]nternational opinion on the question may be said to be beginning to evolve'.<sup>22</sup> This is perhaps an overstatement. The practice offering an exception to immunity *ratione materiae* in civil proceeding for torture (rather than criminal proceeding for torture) is largely to be found in certain cases decided in the United States. As recently demonstrated by the US

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<sup>19</sup> UN Doc A/59/508 (2 December 2004).

<sup>20</sup> 10 December 1984, 1465 UNTS 85.

<sup>21</sup> *Ibid.*, para 213.

<sup>22</sup> *Ibid.*

Court of Appeals for the Fourth Circuit in *Yousuf v Samantar*,<sup>23</sup> these decisions take the position that although the acts may well be committed in the course of an official's employment, their heinous nature both exceeds that which might be considered to be within the lawful scope of the official's authority and cannot properly be characterised as an official act of the sovereign state. The United States' practice is not uniform and any weight attributed to these cases needs to be balanced against conflicting judicial decisions<sup>24</sup> as well as statements made by the Government.<sup>25</sup> In any event, Strasbourg was nonetheless correct in observing that the 'bulk of the authority'<sup>26</sup> is to the effect that immunity *ratione materiae* is to be granted in civil proceedings for torture as evidenced by cases decided in Australia,<sup>27</sup> Canada<sup>28</sup> and New Zealand.<sup>29</sup> The better understanding of the state practice is that there are a few instances of judicial decisions of limited weight supporting such an exception to state immunity, rather than a trend beginning to evolve and emerge. It is also worth mentioning that this limited practice is premised on false reasoning. In the *Jurisdictional Immunities* case the ICJ held that, notwithstanding their unlawfulness, serious violations of the law of armed conflict were sovereign acts under the law of state immunity.<sup>30</sup>

As a final argument, the applicants submitted that any grant of immunity *ratione materiae* in civil proceedings for torture had been abrogated by the CAT (which both the United Kingdom and Saudi Arabia were parties to). It was contended that CAT Article 14(1) established a framework of universal civil jurisdiction that required contracting parties to provide an enforceable right to compensation in their domestic legal systems for acts of torture that had been committed extra-territorially and had no nexus with the forum state. Following the reasoning of the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte (No 3)*,<sup>31</sup> it was further submitted that immunity *ratione materiae* could not co-exist with universal jurisdiction over torture and, therefore, had been set aside by Article 14(1). This argument was not explored in any detail by Strasbourg which, rather dismissively, simply observed that

<sup>23</sup> *Yousuf v Samantar*, 699 F.3d 763 (2012).

<sup>24</sup> See e.g. *Matar v Dichter*, 563 F.3d 9 (2d Cir, 2009).

<sup>25</sup> See e.g. Brief for the United States of America as Amicus Curiae in Support of Affirmance, *Matar v Dichter*, No 07-2579-cv (19 December 2007).

<sup>26</sup> *Jones v UK*, above n 1, para 213.

<sup>27</sup> *Zhang v Zemin* [2010] NSWCA 255.

<sup>28</sup> *Islamic Republic of Iran v Hashemi* [2012] QCCA 1449.

<sup>29</sup> *Fang v Jiang* [2007] NZAR 420.

<sup>30</sup> *Jurisdictional Immunities*, above n 11, para 60.

<sup>31</sup> [2000] 1 AC 147.

the ‘question whether the Torture Convention has given rise to universal civil jurisdiction is [...] far from settled’.<sup>32</sup> Nonetheless, the proper reading of CAT Article 14(1) is that it does not establish universal civil jurisdiction. Although the provision is silent with regard to its territorial application, state practice (as demonstrated by the submission made by the United Kingdom to the ECtHR in *Jones v UK*) has interpreted the right enforceable before a national court to only cover the harm occurring in the territorial jurisdiction of the contracting party.

Strasbourg concluded that the House of Lords’ decision to allow Saudi Arabia to plead immunity *ratione materiae* on behalf its officials in civil proceedings for torture reflected generally recognised rules of international law, and was therefore not a disproportionate interference to ECHR Article 6(1). Although the judgment in *Jones v UK* lacked detail in places by not fully engaging with some of the arguments raised, the overall conclusions drawn were both correct and unsurprising. The decision will of course be disappointing to the applicants who have sought redress for the violation of their fundamental rights over many years. It is important to recall that while international law may bar the domestic courts of a state from adjudicating a claim involving a foreign state, it does not absolve the responsibility of that foreign state from providing a remedy in an appropriate forum. One can only sympathise with the position that individuals find themselves in when they are denied a remedy by the responsible state and are unable to have access to the domestic courts of another state by the law.

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<sup>32</sup> *Jones v UK*, above n 1, para 208.

## CASE NOTE: QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA

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### 1 Introduction

The International Court of Justice issued its first decision of 2014 following a request for provisional measures filed by the Democratic Republic of Timor-Leste in a dispute against the Commonwealth of Australia on the seizure and detention of certain documents and data.<sup>1</sup> The facts of the case are curious, but the legal questions are certainly not less worthy of attention. The order on provisional measures of 3 March 2014 is a good example of legal consistency and jurisprudential coherence, even if the Court could have gone further by granting, on the basis of the same reasoning, the provisional measures sought by Timor-Leste.

### 2 The Facts of the Case

The dispute before the ICJ arose in the broader context of the Timor Sea Treaty arbitration, initiated on 23 April 2013 by Timor-Leste pursuant to Article 23 of the Timor Sea Treaty,<sup>2</sup> concluded in 2002 and regulating the regime of exploitation of the natural resources in the Timor Sea. Timor-Leste instituted arbitral proceedings requesting that the 2002 Treaty be declared void on the grounds that Australia had bugged Timor-Leste's Cabinet room during the negotiations. The arbitral tribunal will hear the oral arguments in September 2014.

The ICJ dispute concerns, as the name of the case indicates, the seizure and detention by Australia of certain documents and data allegedly belonging to Timor-Leste and relating to the Timor Sea Treaty arbitration. The seizure

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<sup>1</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, ICJ, Provisional Measures, Order of 3 March 2014 (*Certain Documents and Data*).

<sup>2</sup> Timor Sea Treaty, 20 May 2002, 2258 UNTS 3.

of such documents was conducted pursuant to a warrant issued under s 25 of the Australian Security Intelligence Organisation Act 1979 (Cth), and occurred on the premises of 5 Brockman Street, Narrabundah, in the Australian Capital Territory, on 3 December 2013.<sup>3</sup> The documents removed and detained by the Australian authorities were under the custody of Mr Bernard Collaery, one of Timor-Leste's legal advisers in the Timor Sea Treaty arbitration.

Timor-Leste claimed that Australia had breached its sovereign rights over the property seized, entitled to immunity as state property. It also contended that Australia had violated Timor-Leste's right to confidentiality in the communications between itself and its legal counsels, maintaining that legal professional privilege is a general principle of law.<sup>4</sup> In particular, Timor-Leste's concern was that Australia could avail itself of the information contained in the seized documents in relation to the Timor Sea Treaty arbitration.<sup>5</sup>

For its part, Australia argued that Timor-Leste's property over the documents seized is yet to be proved. Even if the property were proved, Australia contends that there is no general principle of inviolability of state papers and property, and, accordingly, Timor-Leste's claimed rights are not plausible. Furthermore, were a principle of inviolability of state documents be found to exist, Australia contended that it could not be absolute, as it cannot apply where the matter to which the documents relate concerns national security.<sup>6</sup>

Before the delivery of the order on provisional measures, the ICJ had been requested by Australia to stay the proceedings initiated by Timor-Leste until the settlement of the Timor Sea Treaty arbitration. In its order of 28 January 2014, the Court did not accede to such request,<sup>7</sup> since the application of Timor-Leste to the ICJ concerned a subject-matter sufficiently distinct from that of the Timor Sea Treaty arbitration.<sup>8</sup>

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<sup>3</sup> *Certain Documents and Data*, above n 1, para 1.

<sup>4</sup> *Ibid*, para 24.

<sup>5</sup> *Certain Documents and Data*, Timor-Leste: Request for Provisional Measures, 17 December 2013, para 6.

<sup>6</sup> *Certain Documents and Data*, above n 1, para. 25.

<sup>7</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Australia)*, Order of 28 January 2014.

<sup>8</sup> *Certain Documents and Data*, above n 1, para 17.

### 3 The Order of 3 March 2014

In its decision on Timor-Leste's request for provisional measures, the Court analysed in turn the requirements for the indication of provisional measures under Article 41 of its Statute: *prima facie* jurisdiction, plausibility of the rights claimed and link between such rights and the mainline proceedings, risk of irreparable prejudice, and urgency.<sup>9</sup>

The Court began by analysing the least controversial requirement, *prima facie* jurisdiction. In its application, Timor-Leste founded the Court's jurisdiction on '[...] the declaration it made [...] under Article 36, paragraph 2, of the Statute, and on the declaration Australia made [...] under the same provision [...]'.<sup>10</sup> The Court concluded that those grounds appeared to afford a basis on which jurisdiction could be asserted.<sup>11</sup> The question was easily settled also due to Australia not raising any objections to jurisdiction, reserving its arguments on the matter for the subsequent phases of the case.<sup>12</sup>

The Court subsequently turned to the question of the rights claimed by Timor-Leste. Provisional measures can be indicated only if the rights claimed by the applicant on the merits are plausible, and if there is a connection between those rights and the provisional measures sought.<sup>13</sup>

The rights claimed by Timor-Leste were the inviolability and immunity of its property pursuant to the principle of sovereignty, and the confidentiality it is entitled in the communications with its legal advisers under a general principle of law. Australia rejected Timor-Leste's contentions. The parties did not dispute that at least part of the documents related to the Timor Sea Treaty arbitration, and the Court noted that the right to immunity and inviolability of property invoked by Timor-Leste did appear to flow from the general principle of sovereign equality of States, enshrined in Article 2(1) of the Charter of the United Nations.<sup>14</sup> The ICJ also added that sovereignty must be respected when the States concerned are in the process of peacefully settling a dispute, such as in the case of the Timor Sea Treaty arbitration, in accordance with Article 2(3) UN Charter.<sup>15</sup> The Court

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<sup>9</sup> K Oellers-Frahm, 'Article 41', in A Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, 2012) 1026, 1038.

<sup>10</sup> *Certain Documents and Data*, above n 1, para 19.

<sup>11</sup> *Ibid*, para 21.

<sup>12</sup> *Ibid*, para 20.

<sup>13</sup> *Ibid*, paras 22–3.

<sup>14</sup> Under Art 2(1) of the UN Charter '[t]he Organization is based on the principle of the sovereign equality of all its Members'.

<sup>15</sup> Under Art 2(3) of the UN Charter '[a]ll Members shall settle their international disputes by

thus found that the rights invoked by Timor-Leste were plausible.

As to the link between the rights claimed and the provisional measures requested, in light of the purpose of the measures sought by Timor-Leste, namely to prevent further access by Australia to the documents and interference in the communications between Timor-Leste and its legal advisers, the Court held that the provisional measure requested were '[...] by their nature [...] intended to protect Timor-Leste's claimed rights [...]'<sup>16</sup> Therefore, the provisional measures requested were linked to the rights claimed.

The Court analysed in turn what proved to be the most controversial issue of the provisional measures phase, the risk of irreparable prejudice to the rights claimed and the urgency of the situation.

Irreparable prejudice was examined by the Court in light of the unilateral commitments made by Australia on 21 January 2014, by which it undertook not to divulge the content of the documents seized on 3 December 2013, as well as not to avail itself of the information contained therein for any purpose relating to the Timor Sea Treaty arbitration. Australia maintained that the undertaking, presented to the ICJ by its Attorney-General, Senator George Brandis, was enough to dispel any doubt as to the protection of Timor-Leste's rights pending the dispute. Timor-Leste, for its part, contended that the Australian undertaking was not sufficient to preserve its rights, and that it certainly did not remove the urgency of the request for provisional measures.<sup>17</sup>

The Court held that if Australia '[...] failed to immediately safeguard the confidentiality of the material seized', the '[...] right of Timor-Leste [...] could suffer irreparable harm',<sup>18</sup> and that '[a]ny breach of confidentiality may not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information.'<sup>19</sup> The ICJ analysed the Australian undertaking, and affirmed that '[...] the Court has no reason to believe that the written undertaking [...] will not be implemented by Australia.'<sup>20</sup> Nevertheless, the undertaking alone was not deemed enough to safeguard Timor-Leste's rights, as it presented a significant carve-out under which the documents could be used by the Australian government for national

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peaceful means in such a manner that international peace and security, and justice, are not endangered.

<sup>16</sup> *Certain Documents and Data*, above n 1, para 30.

<sup>17</sup> *Ibid*, para 41.

<sup>18</sup> *Ibid*, para 42.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*, para 44.

security purposes. In light of this, the Court found that there remained a risk of disclosure, which led to the conclusion that despite the undertaking making '[...]' a significant contribution towards mitigating the imminent risk of irreparable prejudice [...],<sup>21</sup> it did not remove that risk entirely. The Court thus concluded that the requirement of irreparable prejudice was met.<sup>22</sup>

The Court went on to the final part of the order by considering the measures appropriate in the circumstances. Exercising its power under Article 75(2) of its Rules, the ICJ indicated measures different in part from those requested, namely that the seized materials must be kept '[...]' under seal until further decision of the Court.<sup>23</sup> In addition, the Court indicated a provisional measure to the end that Australia must not interfere with any communication between Timor-Leste and its legal advisers with regard to the Timor Sea Treaty arbitration, the ICJ proceedings to which provisional measures are incidental, and any future bilateral negotiation concerning maritime delimitation between the two countries.<sup>24</sup>

## 4 Comment

The Court seems to have issued a balanced order, which does not accede completely to Timor-Leste's request, and which arguably pursues the aim of avoiding the exacerbation of the dispute. However, if certain points of the Court's analysis, such as *prima facie* jurisdiction, are unassailable, the plausibility of the rights invoked by Timor-Leste and irreparable prejudice appear more controversial. The disagreement over these issues within the Court itself is apparent in light of the not negligible number of dissents (Judges Keith and Greenwood, Judge *ad hoc* Callinan) and of separate opinions (Judges Cançado Trindade and Donoghue).

The issue of the plausibility of the rights invoked by Timor-Leste was addressed by Judge *ad hoc* Callinan's dissent, which stated that '[t]he existence of a sovereign inviolability of documents in the possession of a lawyer in another country is a large claim and [...] possibly novel'.<sup>25</sup> Judge *ad hoc* Callinan's point is sound, and an answer to the questions can only be reached after the oral arguments on the merits have been heard. However, the Court appears to have

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<sup>21</sup> Ibid, para 47.

<sup>22</sup> Ibid, para 48.

<sup>23</sup> Ibid, para 51.

<sup>24</sup> Ibid, para 52.

<sup>25</sup> Ibid, para 25 (Judge *ad hoc* Callinan, diss).

treated the question of the plausibility of the rights correctly, as it recognised that at provisional measures stage it is not called upon to decide definitively on the matter, having to make a mere *provisional* finding on the existence of such rights.<sup>26</sup> A parallel can be drawn between the questions of jurisdiction and of the existence of rights claimed by the applicant, as in both cases the Court is only required to make *prima facie* decision, which in no way prejudices the more accurate analysis conducted later in the proceedings.

The most controversial part of the order of the Court concerned the Australian undertaking. Given the Court's previous jurisprudence,<sup>27</sup> both parties probably expected that the Court would deliver an order accepting Australia's undertaking, with the outcome being either the decline to indicate provisional measures, or the indication of a provisional measure indicating that Australia must comply with the terms of its very undertaking. The decision of the Court arguably took both parties by surprise, and certainly Australia.

The undertaking was made by the Australian Attorney-General, who had the power to bind his country as a matter of both Australian and international law.<sup>28</sup> The Court appeared satisfied with such undertaking, expressing its conviction that it would be respected,<sup>29</sup> yet it indicated provisional measures nonetheless.

The decision of the Court was criticised in two different ways in the opinions appended to the order. On one hand, Judges Keith, Greenwood, Donoghue, and Judge ad hoc Callinan, criticised the limited reliance of the Court on the Australian undertaking, which, in their view, dispelled any risk of irreparable prejudice, with the consequence that provisional measures should not have been indicated. On the other hand, Judge Cançado Trindade criticised the decision

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<sup>26</sup> Ibid, para 26. See also P Tomka & G Hernández, 'Provisional Measures in the International Tribunal for the Law of the Sea', in H Hestermeyer *et al* (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (2012) 1764.

<sup>27</sup> The Court has relied on unilateral undertakings in other previous cases. See, for instance, *Legal Status of the South-Eastern Territory of Greenland (Norway v Denmark)* (1932) PCIJ Series A/B No 48, 21ff, where the PCIJ denied the Norwegian request for provisional measures in light of the reciprocal undertakings of Denmark and Norway. ITLOS also relied on unilateral undertakings, most notably in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, Provisional Measures (2003) 126 ILR 503, where the Tribunal prescribed, as provisional measures, that the undertakings by Singapore should have been respected. In *Nuclear Tests (Australia v France)*, ICJ Reports 1974 p 253, 260 ff., the question was that of mootness of the dispute due to the French undertaking not to carry out further nuclear experiments in the Pacific; however, such a question was dealt with in the merits, and not at provisional measures stage.

<sup>28</sup> *Certain Documents and Data*, above n 1, para 44.

<sup>29</sup> Ibid.

on the grounds that any degree of reliance on the Australian undertaking would have been a mistake.<sup>30</sup> For her part, Judge Donoghue distinguished between the provisional measures indicated by the Court. While on one hand she disagreed with operative paragraphs 1 and 2, stating that they were covered by the Australian undertaking, she voted in favour of operative paragraph 3, as the question of the communication between Timor-Leste and its legal advisers was not addressed by the undertaking.<sup>31</sup>

Notwithstanding the criticism directed towards the Court's order, it appears that the Court reached the most appropriate decision. In support of their contention that provisional measures should not have been indicated due to the undertaking binding Australia as a matter of international law, the dissenting judges cited the order on provisional measures issued in *Obligation to Prosecute or Extradite*, where the Court refused to exercise its powers under Article 41 of the Statute since Senegal had assured that it would not allow former President of Chad Hissène Habré to leave the country pending ICJ proceedings.<sup>32</sup> However, the reliance on that case is misplaced, as there exists a fundamental difference between the Senegalese and the Australian undertaking. While the Senegalese undertaking was absolute in character, entailing that Hissène Habré would not be allowed to leave the country under *any* circumstances,<sup>33</sup> the Australian undertaking provided for a substantial carve-out allowing Australia to use the information in the seized documents for purposes of national security. The Court correctly saw in this saving clause the possibility that Timor-Leste could in fact suffer irreparable prejudice to its rights pending the judgment, also in view of the flexible character of the national security exception. In the author's view the Court acted consistently with its jurisprudence, as the two cases are different, and thus do not require the same solution.

At the other end of the spectrum, the opinion of Judge Cançado Trindade displays his typical attitude of furthering the progressive development of international law through the exercise of the Court's judicial function. In a flamboyantly drafted opinion, Judge Cançado Trindade questions the Court's reliance on unilateral undertakings, arguing that *ex factis jus non oritur*, and that the Court should stop acting as a diplomatic *amiable compositeur* and take up behaving as

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<sup>30</sup> Ibid, paras 13ff (Judge Cançado Trindade).

<sup>31</sup> Ibid, para 5 (Judge Donoghue).

<sup>32</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Provisional Measures, ICJ Reports 2009 p 139, 154.

<sup>33</sup> Ibid.

a court of law.<sup>34</sup> As it sometimes occurs, Judge Cançado Trindade's view appears to be ahead of its time and is certainly interesting, but it would contradict long-standing state practice, which has consistently placed reliance on unilateral undertakings.<sup>35</sup> Moreover, Judge Cançado Trindade's idea that provisional measures are *autonomous* in the context of international procedure contradicts the quasi-unanimous opinion that provisional measures are an *incidental* feature of the proceedings.<sup>36</sup> Contrary to what he states, the rights claimed by the parties on the merits are exactly those requiring protection at provisional measures stage. If the contrary were true, the very nature of provisional protection would be jeopardised, since provisional measures can only be granted if connected to the rights claimed on the merits.<sup>37</sup> In addition, the undisputed fact that the obligations of compliance flowing from an order on provisional measures and from a judgment are different, does not entail that provisional measures are autonomous. The fact that provisional protection is incidental to the mainline proceedings is confirmed by the fact that orders on provisional measures usually lapse with the delivery of the final judgment.<sup>38</sup>

The Court did not directly mention urgency in its order, seemingly basing its analysis on irreparable prejudice. However, a close reading of the order shows that urgency was well in the judges' minds, as demonstrated by the reference to the 'imminent risk of irreparable prejudice'.<sup>39</sup> *Imminence* of the prejudice is but a different manner to refer to urgency.

As a final aspect, one must note that in operative paragraph 3, the Court indicated, as provisional measures, that Australia '[...] shall not interfere in any way in communications between Timor-Leste and its legal advisers' in connection with matters concerning the Timor Sea Treaty arbitration, with future negotiations between the parties on maritime delimitation, or with the pending case before the ICJ. Timor-Leste had not specifically requested such a provisional measure, and little evidence was presented to the Court on the question. However, this decision was attended by very little dissent: only Judge *ad*

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<sup>34</sup> *Certain Documents and Data*, above n 1, para 17 (Judge Cançado Trindade).

<sup>35</sup> C Goodman, *Acta Sunt Servanda: A Regime for Regulating the Unilateral Acts of States at International Law* (2006) 25 *Australian YIL* 43.

<sup>36</sup> Sh Rosenne, *Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea* (2005) 9; G Fitzmaurice, *The Law and Practice of the International Court of Justice*, vol 2 (1986) 533.

<sup>37</sup> L Collins, *Provisional and Protective Measures in International Litigation* (1992) 234 *Hague Recueil* 232.

<sup>38</sup> J Sztucki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (1983) 198.

<sup>39</sup> *Certain Documents and Data*, above n 1, paras 32, 48.

*hoc* Callinan incidentally raised the point,<sup>40</sup> while even Judge Donoghue, critical of the Court's order, declared herself in agreement with operative paragraph 3.<sup>41</sup>

## 5 Conclusion

The Court could have dared to grant the measures requested by Timor-Leste and demand that Australia deliver the sealed documents at the Peace Palace, as in this manner the risk of irreparable prejudice could be avoided more efficiently. However, this does not change the fact that the Court's reasoning is an example of consistency and coherence with the Court's previous jurisprudence. The decision to grant the measures requested by Timor-Leste in full would not, in the author's opinion, have changed the reasoning of the Court. The only change would have been the manner in which the Court exercised its discretion as to the provisional measures to indicate under Article 41 of the Statute.

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<sup>40</sup> *Ibid*, paras 27, 32 (Judge ad hoc Callinan, diss).

<sup>41</sup> *Ibid*, para 5 (Judge Donoghue).