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Editorial

Oliver Butler[*] *and Rajiv Shah*[**]

1 Introduction

Issue 5(3) showcases scholarship presented at the 5th Annual Conference of the *Cambridge Journal of International and Comparative Law* held at the Faculty of Law, University of Cambridge on 8th and 9th April 2016. The conference theme, 'Public and Private Power', sought to explore how the landscape of public and private power is changing, where new and important networks and partnerships between public and private power have been developed, and where public power is co-opting or commissioning private power in larger projects. This interconnectivity between public and private power is a trend at all levels. It challenges traditional divisions between public and private bodies. This is being explored in current debates on pluralism and human rights. The theme was especially suited to the international, comparative and EU perspectives of the journal because public and private power raise new problems and opportunities for regulation in each of these areas of law. Presentations at the conference emphasised the role of globalism and pluralism in blurring the public-private divide across a diverse array of fields.

Keynote papers were presented by Professor Horatia Muir Watt, from Science Po, Paris, and Judge Dean Spielmann, former President of the European Court of Human Rights, and now a judge of the Court of Justice of the European Union. The conference was well attended with approximately 100 delegates, made up of academics, students and professionals. 40 presentations were made across 9 panels on standard-setting, tax, economic power, technology, control of private power, food regulation, armed conflict, alternative dispute resolution, and the subjection of public entities to private norms. The conference also launched two books: Mislav Mataija, *Private Regulation and the Internal Market* (2016) and Darryl Keith Brown, *Free Market Criminal Justice* (2016). Six papers, including the keynote presentations, were selected after peer review for publication.

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2 Overview of Issue 5(3)

In the first keynote address, Professor Muir Watt asks whether private international law has continuing relevance to modern legal theory, given radical change in the normative landscape beyond the nation state resulting from globalisation. In particular, she asks 'whether private international law might fit within an ambitious strand of legal pluralism' and argues that private international law has the potential for revival within the context of pluralism as an explanatory and normative framework. She observes that there has been an emergence of 'eminently pluralist understandings of law-making power'. These understandings 'hark back to the body of knowledge which first emerged in a pre-modern context of plural authorities, unchartered territories, and indeterminate boundaries between the public and private spheres'. They mean that private international law has the potential to contribute 'principles with which to govern non-state authority, infuse hybrid normative interactions with ideas of tolerance and mutual accommodation and ensure accountability in the global decision-making processes through deliberation, contestation, and recognition'.

In his article, Verbruggen pursues this 'pluralist understanding of law-making power'. He considers how private bodies contribute to regulation by examining changes in the institutions and practices of food governance since the 1990s. Verbruggen argues that change has occurred in two ways: (1) the subjection of national systems to transnational influences; and (2) the interaction between public food governance and private governance systems. Verbruggen shows how 'an increased level of coordination between public and private regulatory activities, more and more frequently transcending national (jurisdictional) boundaries' is best approached through the lens of New Governance and regulatory enrolment. Verbruggen seeks to show the potential for enrolment as a governance response to the rise of global supply chains where regulation is decentered and a variety of public and private actors build regulatory capacity in new, uncertain and complex circumstances.

However, this 'pluralist understanding of law-making power' can lead to fragmentation and to associated problems. Zhang considers the consequence of such fragmentation for air law with particular relevance to flights over conflict zones. This is an issue that was starkly raised following the downing of flight MH17 over the Ukraine. There is a potential conflict between five sets of norms: (i) the Chicago Convention of International Civil Aviation; (ii) international humanitarian law; (iii) international human rights law; (iv) general international

law; and (v) national laws. Given this fragmentation, how is the use of airspace over a conflict zone to be regulated? The Chicago Convention grants to States the exclusive jurisdiction to regulate its airspace. It states that States are permitted to restrict airspace in case of conflicts but there is no actual duty to do so. However, Zhang argues that under international humanitarian law there is a duty on States to take precautionary measures to avoid injury to civilians. She argues, by analogy with the *Corfu Channel* case, that elementary humanity requires that States secure their airspace for civilians. However, this is rendered difficult by the fact that there might not be a unified State, as many States outsource the responsibility for the regulation of their airspace to private companies. As such, the proper regulation of this area requires a solution that transcends the public/private divide.

Mation considers the position of Sovereign Wealth Funds (SWFs). These are funds owned by States and which invest in foreign countries, and, as such, they straddle the public/private divide. Nonetheless, the literature has tended to look at them through private lenses because they are ostensibly committed to making investment decisions based on economic considerations alone. Mation argues that this purely private model is inadequate for three reasons. First, other actors in the market are suspicious of SWFs and work on the presumption that geopolitical considerations factor in their decision-making. Second, SWFs have started to make decisions based not only on financial return but also on sustainability and development. Third, whilst (notwithstanding the above two points) the private model might describe the external governance of SWFs, it fails to account for the internal governance where SWFs are governed based on domestic and foreign political principles. For these reasons, Mation argues for an approach to SWFs that traverses the public/private divide.

In the second keynote address, Judge Dean Spielmann contributes to discussion on pluralism by considering the position of companies in human rights law. He presents the approaches adopted by the European Court of Human Rights towards companies as potential victims of human rights violations and companies as violators of human rights. He comments on the Strasbourg Court's acceptance of the enjoyment of human rights by companies: an extension of human rights beyond natural persons. The application of human rights to companies has 'never been seriously questioned', despite the apparent oddity of human rights being extended to legal persons who are not human individuals. Nevertheless, companies have been treated as 'non-governmental organisations' for the purposes of the right of individual petition provided by Article 34, and the Court has consistently refused to pierce the corporate veil. Human rights have been applied to companies

not merely where they are explicitly mentioned in Article 1 Protocol 1 and Article 10(1) but also Articles 6, 7, and 8 and Article 4 Protocol 7. Spielmann argues that such an approach is 'essential for upholding the rule of law':

> In a globalised world, distinguishing between individuals and companies, granting fundamental rights to the former but not to the latter would have led to insurmountable practical difficulties.

Spielmann surveys accountability for human rights violations through positive obligations under the Convention and argues that the 'potential development of respect for the fundamental rights of companies should go hand in hand with "corporate accountability"'.

Frost also considers the position of companies in human rights law. An orthodox application of the divide would suggest that they are objects of international human rights law. However, Frost argues that developments in corporate social responsibility should lead us instead to consider them as active regulators of international human rights. She does so by adopting the broad socio-legal paradigm of the legal transplant framework. Under such a framework, the law is not simply the law of the state, but also includes 'standards, regulation, soft-law, treaties, customs and international agreements'. Within that framework, TNCs can be seen as agents of legal change via their corporate social responsibility policies. She illustrates this using a case study of the Rana Plaza disaster in Bangladesh. Due to inadequate standards, a factory which produced garments for a number of western TNCs collapsed and killed 1130 people. Following the disaster, the TNCs got together and agreed to certain standards that would have to be followed and this was implemented in Bangladesh. In that manner, the TNCs became agents of legal change that protect workers' rights.

3 Acknowledgements

The Conference Convenors would like to thank a number of people and organisations for their assistance with the conference. First and foremost, we would like to thank the members of the Faculty of Law at the University of Cambridge, who so willingly offered their expertise and time. In particular, we would like to thank Professor John Bell, Dr Dominic de Cogan, Dr Markus Gehring, Dr Hayk Kupleyants and Dr Oke Odudu, who supported the Conference by chairing its panels and reviewing papers. The Faculty of Law also provided invaluable funding, without which the Conference would not have been possible, and kindly agreed to

host us for the conference. Edward Elgar, Hart Publishing and Oxford University Press kindly supported bookstalls. We also wish to thank Emmanuel College, who generously hosted us for an excellent conference dinner.

We are also extremely grateful to our team of Conference Assistants: Ana Carolina Dall'Agnol, Konstantina Goergaki, Abhijnan Jha, Paige Mason, Su Wai and Tianshu Zhang for their hard and diligent work. Special thanks are due to our Editors-in-Chief, Catherine Gascoigne and Barry Solaiman, who assisted in every way with the project at all of its stages. All members of the Editorial Board contributed to the preparation of this Issue for publication, for which we are very grateful. Finally, we are grateful to all those who attended and participated at the conference and made it the success that it was.

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Jurisprudence Without Confines: Private International Law as Global Legal Pluralism

Horatia Muir Watt[*]

Abstract

This article arises from Professor Muir Watt's keynote address to the CJICL annual conference on 8th April 2016. In her article, she considers whether private international law can offer specific insights into important issues that challenge contemporary legal theory. Specifically, she analyses whether legal pluralism can encompass private international law to craft a jurisprudence beyond borders. She argues that conflict of laws theory can contribute principles, infuse hybrid normative interactions and ensure accountability in the relationship between global law and global justice.

Keywords

Private international law, legal theory, legal pluralism, jurisprudence, conflict of laws

1 Introduction

The radical changes wrought by globalisation in the normative landscape beyond the nation-state,[1] of which this conference provides so many excellent illustrations, invite us to reflect upon whether private international law as a discipline[2] or an

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1 Globalisation is understood here as the specific stretching of time and space which coincides with late modernity, Anthony Giddens, *The Consequences of Modernity* (Polity Press 1991) 64; the coming of 'risk society'; see generally, Ulrich Beck, *La société du risque. Sur la voie d'une autre modernité* (Flammarion 2008); global neo-liberal economics (which will be questioned below); the paradoxical 'return of science', see generally, Philip Pomper and David Gary Shaw (eds), *The Return of Science, Evolution, History, and Theory* (Rowman & Littlefield 2002); in a period of increasing disbelief in the values of modernity; and, with particular relevance to international law (public and private), the 'liquidification' of sovereignty, see generally, Zygmunt Bauman, *L'identité* (l'Herne 2010).

2 What is a legal discipline? See generally, Frédéric Audren, *Qu'est-ce qu'une discipline juridique?* (Sciences Po Press) (forthcoming).

'intellectual style'[3] has specific insights to bring to some of the most significant issues that challenge contemporary legal theory.[4] If there is such a thing as an emerging global legal paradigm,[5] that is, a legal consciousness[6] comprising modes of reasoning and a conceptual structure, it requires an overhauling of the concepts with which to understand (modern) law's foundations and features. It also mandates a reconsideration of the values that constitute law's normative horizon; calls for an adjustment of methodological and epistemological tools with which to understand social complexity; and justifies a renewal of the terms of the debate about legitimacy of political authority. The challenge for legal scholarship is clearly considerable. Arguably, the days of analytical jurisprudence are numbered; more hopeful avenues are opened by interdisciplinary attempts from various directions: studies of sovereignty from a literary or religious perspective;[7] global legal pluralism

3 Ralf Michaels, 'Globalisation and Law: Law Beyond the State' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (2nd edn, Hart 2013) 287; See generally, Karen Knop, Ralf Michaels and Annelise Riles, 'Foreword' (2008) 71(3) Law & Contemp Problems 1.

4 Seeing international law (public and private) as a privileged standpoint from which to view legal theoretical issues is not new. See generally, for an example, Henri Batiffol, *Aspects philosophiques du droit international privé* (Dalloz 1956); Rolando Quadri, 'Le fondement du caractère obligatoire du droit international public' (1952) 80 Recueil des Cours de l'Académie de Droit International 580; but has the modern international lawyer 'rejected theory' as Martti Koskiennemi surmises? See Martti Koskiennemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006) 187; Today the Transnational Legal Theory journal publishes conflicts of law's contributions to legal theory. See generally, Martin Herberg, 'Global Governance and Conflict of Laws from a Foucauldian Perspective: The Power/Knowledge Nexus Revisited' (2011) 2(2) Transnat'l Leg Theory 243 and Horatia Muir Watt, 'Private International Law beyond the Schism' (2011) 2(3) Transnat'l Leg Theory 347; See generally, Horatia Muir Watt, 'La globalisation et le droit international privé' in Vincent Heuzé and others (eds), *Mélanges en l'honneur du Professeur Pierre Mayer* (LGDJ 2015).

5 Benoît Frydman, 'Comment penser le droit global?' (2012) Série des Workings Papers du Centre Perelman de Philosophie du Droit no 2012/01 <http://www.philodroit.be/IMG/pdf/comment_penser_le_droit_global_2011.pdf> accessed 10 July 2016; Michaels (n 3).

6 See generally, Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006).

7 See generally, Pier Giuseppe Monateri, *Geopolitica del diritto. Genesi, governo e dissoluzione dei corpi politici* (Laterza 2013).

from a sociological perspective;[8] and a critique of the contemporary quantitative turn which uses indicators as substitutes for comparative law.[9]

At first glance, it does not seem that private international law—with all of its horizon beyond the state and its complex legal toolbox—has any relevance here at all. It has recently been discredited by Neil Walker as a 'parochial form of boundary-maintenance' among various 'lateral co-ordinate approaches' to global law.[10] However, at this point, it is worth reflecting on a recent, striking statement by Gunter Teubner, which, in stark contrast, elevates the conflict of laws to a meta-constitutional level:

> In a world society with neither apex nor centre, there is just one way remaining to handle inter-constitutional conflicts—a strictly heterarchical conflict resolution. This is not just because of the absence of centralized power, which could be countered by intensified political efforts, but is rather connected with deep structures in society which Max Weber called the 'polytheism' of modernity. Even committed proponents of the 'unity of the constitution' are forced to agree that the unity of the nation-state constitution is now moving toward a 'clash of civil constitutions', toward mutually conflicting rationalities to be defused by a new conflict of laws.[11.]

Could it be, then, that private international law might fit within this ambitious strand of legal pluralism, towards the crafting of a 'jurisprudence beyond borders'?[12] This is the question to which this article attempts to respond. It begins first by tracking the rise of pluralism as an explanatory and normative framework (I). It then seeks to understand why the conflict of laws could be undergoing a revival in this context (II). It finally concludes by attempting to define what pluralism means when translated into the vocabulary of the conflict of laws (III) and by providing an example taken from judicial practice (IV).

8 See generally, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2011); Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

9 See generally, Kevin E Davis and others (eds), *Governance by Indicators: Global Power through Quantifications and Rankings* (OUP 2012); Benoît Frydman and Arnaud Van Waeyenberge, *Gouverner par les standards et les indicateurs. De Hume aux rankings* (Bruylant 2014).

10 Neil Walker, *Intimations of Global Law* (CUP 2015) 106–08.

11 Teubner (n 8) 152.

12 See generally, Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (n 8).

2 Pluralism is in; conflicts are out

Indisputably, globalisation, or its contemporary (fourth?[13]) avatar, is inflicting an identity crisis upon the conflict of laws.[14] One of the reasons for this is that it shows up the link between legal methods elaborated in view of dealing with conflicting norms and the framing of law's origins, functions and objects within a particular legal paradigm. In other words, modes of legal reasoning in the face of conflicting norms and claims to authority reflect various conceptions and expectations as to what law is and does, where it comes from and the types of issues it deals with. Change affecting these assumptions and representations about the world affect established forms of legal knowledge; probing them is a distinctly 'dangerous method'.[15]

Traditionally—that is, in the course of the last century and under the influence of classical legal thought in international law[16]—the ordering of competing normative claims outside any particular domestic system was sought

13 For the first three, see generally, Kennedy (n 6).

14 Understood as a crisis of modernity, it extends to the institution of law in general. However, at the same time, law, particularly international (public and private) law is far from irrelevant or absent from the global scene. On the one hand, the processes that drive the global economy, from commodity and financial markets to global supply chains, are all either embedded in domestic legal orders or public international economic law. This explains why novel claims (of which it will be questioned below) to private transnational authority are all made in specifically legal terms, even if they occur outside the bounds of any supporting institutional system. Symmetrically, the contestation of global inequalities and injustices, whether in the form of human rights violations, environmental concerns, gender inequity, or precarity in the workplace all use legal syntax. Beyond judicial or quasi-judicial fora (national and international, public or private), the emancipatory potential of the language of the law is used in institutions (such as the International Labour Organization and the Organisation for Economic Co-operation and Development) and by activists, in the name of civil society, so that law appears as crucial within the many political projects undertaken with a view to reconstruct a fairer global society. Human rights as the 'last utopia' will be further questioned below. See generally, Samuel Moyn, *The Last Utopia: Human Rights in History* (HUP 2010).

15 'Dangerous method' (as Jung described psychoanalysis) is the topic of the current Private International Law as Global Governance (PILAGG) research project. See 'PILAGG Public International Law as Global Governance' <http://blogs.sciences-po.fr/pilagg> accessed 10 July 2016.

16 'Classical legal thought' is a paradigm identified in US domestic law (see generally, Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books 1975), but its influence stretched across the board (covering all Western systems and into international law).

in (public or private) international law. It was understood both to provide an overall scheme of intelligibility through which to understand other social spheres and to make available operational tools with which to define authority, allocate responsibilities, and guide the conduct of public and private actors. However, the emergence of competing, diffuse (post-Westphalian) forms of authority challenges the law in these ordering functions.[17] In the wake of displacements of power from public to non-state actors,[18] struggles for legitimacy occur between state-bound or endorsed legal systems and other unidentified sources. Moreover, sovereignty, the foundational concept of the international and domestic legal order, appears inverted or subverted, investing in private actors, or indeed signifying obligations towards the international community rather than supremacy.[19] It is difficult to understand what 'law' signifies in this environment, since its existing structure and syntax assume, implicitly, a horizon confined to the nation-state (either within the nation-state, or the interactions between nation-states). From a theoretical perspective, therefore, a new conceptual scheme is required in order to take seriously—whether to legitimise, challenge, or govern—new, diffuse and disorderly expressions of power and normativity; specifically, those of the 'unauthorised' actors of late modernity[20] which do not necessarily fit traditional forms of legal knowledge.

However, the crisis that affects the conflict of laws seems to be more acute than the minor earthquakes suffered by neighbouring legal disciplines. Public international law has adapted to the massive arrival of non-state right-holders by transforming itself into an overarching welfarist system and exploring its own relationship to global justice.[21] Comparative law has left behind its static

17 See generally, Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Edward Elgar 2016).

18 ibid; For an exhaustive study of multinational corporations as regulators, see Anna Beckers, 'Taking Corporate Codes Seriously: Towards Private Law Enforcement of Voluntary Corporate Social Responsibility Codes' (DPhil Thesis, Maastricht University 2014).

19 On the inversion of sovereignty, see generally, Jens Bartelson, *Sovereignty as Symbolic Form* (Routledge 2014).

20 Ulrich Beck and Wolfgang Bonb (eds), *Die Modernisierung der Moderne* (Suhrkamp 2001) 40–41; see generally Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).

21 See generally, Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations*: *A History of International Law* (Christopher Sutcliffe tr, CUP 2014). Moreover, public international law, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. It is progressively taking on the traditional problematics of private international law: see generally, Muir Watt, 'Private International Law beyond the Schism' (n 4).

classifications of family traditions to join forces with the anthropology of legal transfers[22] or contribute to the aesthetics of global spaces.[23] Moreover, while analytical jurisprudence arguably loses its relevance outside the legal order of the nation-state, various schools of legal pluralism have undertaken to 'disborder' jurisprudence[24] so as to grapple with the possible foundations of legal authority beyond state boundaries.[25] Global, cosmopolitan or societal constitutionalism[26] and, more improbably, global administrative law[27] are the result of a similar turn involving a radical overhaul of central disciplinary assumptions. Thus, the complex normative conflicts of our global age have become, arguably, an exciting new discipline, theoretical and empirical, drawing on an array of highly diverse ideas from which private international law, time-worn and bounded, is paradoxically excluded.

This new legal theoretical literature is now self-consciously global; it is also, in its most plausible avatars,[28] largely pluralist. As Paul Berman points out:

> It has now been approximately 20 years since scholars first began pushing the insights of legal pluralism into the transnational and international arena. During those two decades, a rich body of work has established pluralism as a useful descriptive and normative framework for understanding a world of relative overlapping authorities, both state and non-state. Indeed, there has been a veritable explosion of scholarly work on legal pluralism, soft law, global constitutionalism, the relationships among relative authorities, and the fragmentation and reinforcement of territorial boundaries.[29]

22 See generally, Ulrich K Preuß, *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Günter Frankenberg ed, Edward Elgar 2013).

23 See generally, Monateri (n 7).

24 Berman, *Global Legal Pluralism: A Jurisprudence Beyond Borders* (n 8).

25 See generally, Cotterrell and Del Mar (n 17) with various pluralist contributions from Paul Berman, Nico Krisch and Nicole Roughan. The debate focuses on the very nature of law (if it has one), the foundations of law's legitimacy (mythological or otherwise), and the relationship between legal and political authority.

26 See generally, Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20(2) Ind J Global Legal Stud 605; for 'societal constitutionalism' inspired from Luhmann's systems theory, see Teubner (n 8) discussed in detail below.

27 See generally, Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemp Problems 15.

28 See Paul Schiff Berman, 'The Evolution of Global Legal Pluralism' in Cotterrell and Del Mar (eds), *Authority in Transnational Legal Theory* (n 17).

29 ibid.

Competing plural and transnational assertions of authority are singled out as the emblematic feature of our complex world, while the defining problem in contemporary legal thought lies in the interactions of legal traditions, social spheres, cultural values, rights and identities, epistemologies or world-visions. Various responses come in the form of a search for consensus (around constitutional values), the promotion of new utopias (the quest for global justice), the celebration of diversity as competition (law and economics), the devising of methodologies designed to mediate or coordinate (systems theory), or renewed definitions of authority and legitimacy (socio-legal studies).

At first sight, the conflict of laws would appear to fit quite well among these pluralist strands of thought. Indeed, in his impressive panorama of theories of global law, Neil Walker classifies together, as models of a 'lateral-coordinate approach', both the conflict of laws and legal pluralism.[30] From within the discipline of the conflict of laws, this is hardly surprising. The links between pluralism and conflicts are surely ancient; an influential definition of private international law sees its function as management of horizontal pluralism,[31] while the work of Santi Romano has become a controversial reference for unilateralist doctrines.[32] Of these two related disciplines, however, the latter, with its contemporary constitutional overtones, its comparativist pedigree and its connection to transnational societal concerns, is in. Conflict of laws, long a thriving intellectual field,[33] is out. Why, then, has its status so declined as to be reduced to a 'parochial form of boundary-maintenance'[34] while the various brands of legal pluralism flourish? As a descriptive enterprise, 'global legal pluralism is now recognized as an entrenched reality of the international and transnational legal order'.[35] Normatively, or as a theoretical project, it is perhaps the most promising avenue with which to approach contemporary jurisprudential questions dissociated from the domestic legal order.

One explanation might be that the conflict of laws has lost out within its own orbit. This is not to deny that there is a flourishing industry of traditional

30 See Walker (n 10) s 3.4.1.2.

31 See generally, Phocion Francescakis, *La théorie du Renvoi et les conflits de systèmes en droit international privé* (Sirey 1958).

32 See generally, Santi Romano, *L'ordre juridique* (Lucien François and Pierre Gothot trs, 2nd edn, Dalloz 1975).

33 See generally, Ralf Michaels, 'After the Revolution-Decline and Return of U.S. Conflicts of Laws' (2009) 11 YB Private Int'l L 11.

34 Walker (n 10) 108.

35 Berman, 'The Evolution of Global Legal Pluralism' (n 28) 151.

private international rule-craft around the world; indeed, codification seems never to have been so popular.[36] But this does not help to dispel the impression that the jurisprudential vein is elsewhere and that there may no longer be any reason, possibly other than the strength of the professional lobby,[37] to support the survival of the conflict of laws at all costs unless as a sub-department of internationalised contract law, a technical adjunct for intra-European Union market issues, an auxiliary to international commercial arbitration, or a largely strategic tool for cross-border forum-shoppers? Legal issues arising in connection with cross-border collisions of rights and norms seem to fall within the remit of other, more recent, more overbearing or more political principles such as federalism (or free movement in the European Union) or human rights, which both sweep away private international techniques and methods into the great sea of proportionality.[38] Moreover, much high profile cross-border economic litigation is composed of questions of domestic contract law under party autonomy. In other fields, notably of personal status and family relationships, either the idea of recognition[39] suffices, or conflict rules break down under the pressure of public policy. Perhaps, then, the sleeping discipline (dog or beauty?) should be left to lie, as a vestige of the pre-global age.

A further consideration is that it has missed the very turning which it was eminently well placed to take,[40] and which might have invested it both as queen

36 See the panorama of codification in Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (OUP 2014).

37 See generally, Anthony Ogus, 'The Economic Basis of Legal Culture: Networks and Monopolization' (2002) 22(3) Oxford J Legal Stud 419.

38 On the spread of proportionality and its signification, see generally, Duncan Kennedy, *A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought* (forthcoming); This is not to suggest, however, that proportionality itself has a uniform content in these contexts: see generally, Antonio Marzal Yetano, *La Dynamique du Principe de Proportionnalité. Essai dans le contexte des libertés de circulation du droit de l'Union européenne* (Institut Universitaire Varenne, 2014).

39 On recognition as both an element of societal dialogue and a conflict of laws problematic, see generally, Horatia Muir Watt, 'Fundamental Rights and Recognition in Private International Law' (2013) 3 Eur J HR 409; The concept of recognition in Hegel's early social philosophical works (on 'struggle for recognition': *kampf um anerkennung*) is re-interpreted by Axel Honneth, *The Struggle for Recognition: Moral Grammar of Social Conflicts* (Polity Press 1996); Similarly, Charles Taylor's Hegelian scholarship inspires his own work on recognition within a multicultural society (Charles Taylor, *Hegel and Modern Society* (CUP 1979); Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton UP 1994).

40 This point has been developed more extensively elsewhere. See generally, Muir Watt, 'Private International Law beyond the Schism' (n 4).

of the great new issues of jurisprudence in a world of colliding norms, and as provider of the methodological toolbox that composes the new legal paradigm beyond state borders.[41] It might have inspired an authoritative perspective, born of a multi-secular experience, with which to approach unfamiliar expressions of sovereignty or novel assertions of jurisdiction. It might thereby have provided a better understanding of our pluralistic world in which competing non-state norms must find their place among more venerable law-like forms. It might have led the critical stance on informal empire,[42] peopled by multinational corporate actors, contractual cross-border value chains and markets without borders, which are the very stuff of private (international) law. The problem, then, is arguably deeper than mere irrelevance. Its shortcomings, or worse, its darker sides for which it has already come under fire for its role in the modern imperial enterprise, may be the very cause of the great imbroglio beyond the state in which the law itself is losing out in favour of alternative, more credible world-visions.

3 Conflicts are back ... well, sort of

On each of these points, alternative disciplinary vocabularies have arrived on the scene and displaced the conflict of laws with more exciting 'intimations'[43] as to contemporary 'changes of state'.[44] Without theoretical renewal, the once revered conceptual discipline no longer delivers on a world-vision with which to make sense of global chaos—a point on which the promise of legal pluralism is far more ambitious. Whatever the reasons that have led to its current eclipse, however justified its dismissal by current research, and notwithstanding the wealth of its history and potential, the discipline is probably not, or no longer, asking the right questions, proposing the appropriate methods, or using an adequate epistemology. Yet, paradoxically, at the very moment where it might seem to be displaced by competing vocabularies, a closer look shows it to be invested with a new relevance. Pluralist thinking has 'caught on' to conflicts. In many respects, the insights of the

41 See generally, Michaels (n 3).

42 See generally, Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 U Tor LJ 1.

43 Walker (n 10) 148–77.

44 Annabel S Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton UP 2011).

new global thinking have overtones of the reinvention of the wheel—if in a richer, inter-disciplinary mode.

Global constitutionalism is framed as providing for the modes of interaction between overlapping normative systems. Political science calls for 'interface norms'.[45] The central problem singled out by contemporary legal pluralism is framed in terms of competing norms and claims to authority, while proposed solutions for their mutual accommodation take the form of deference, coordination or synthesis, and competition. The diversity thus described, the terms defined, the methods used, the values involved, are all largely familiar to the history of the conflict of laws, in one era or another. The discipline grew out of the concurrence of different claims to authority (religious and secular; political independence); had to confront heterogeneous traditions of law-making (written and oral customs; formal and informal systems); pitted what is generally known as 'conflicts justice'[46] against alternative aspirations such as economic efficiency; dealt variously in individual rights or legal systems; included unrecognised states and indigenous peoples; wheeled between public law and private law; experimented with substantive rules, principles of deference or subsidiarity; became torn between attachment to neutrality and the pursuit of values; oscillated between community-building and the dictates of sovereignty; provided the emblematic space to explore the virtues of rules and standards, security and flexibility; and explored the limits of toleration and still swings constantly from faith in universalism to resignation before irreducible cultural interpretations.

It is hardly surprising, therefore, that private international legal methodology—albeit substantially revisited—has attracted new attention, to the point of being mooted as the only plausible content of 'global societal constitutionalism'.[47] As Paul Berman recognises, 'these [private international law] doctrines become a core way of navigating the interactions, using principles that navigate between legal formalism and political practicality'.[48] In this respect, the conflict of laws contains a sophisticated arsenal of methodological principles that certainly fit the

45 Nico Krisch, 'The Structure of Postnational Authority' in Cotterrell and Del Mar (n 17).

46 See, for instance, Jeunge presenting the conflict of laws not as a discipline devoid of substantive values but as a powerful catalyst for multistate justice. Friedrich K Juenge, *Selected Essays on the Conflict of Laws* (Brill 2001).

47 Teubner (n 8).

48 The flip side of this move is the new prominence of constitutionalism. 'If (...) we see constitutionalism as setting the ground-rules for interaction among relative authorities, constitutionalism becomes more important than ever', Berman (n 28) 166.

pluralist idea of coordination; it is unnecessary to develop it in detail here. Choice of law rules and standards of all sorts, diverse 'approaches', theories of incidental application, renvoi and, with a pinch of imagination, subsidiarity, deference, and deliberative polyarchy are but a few of the techniques at its disposal with which it can offer the navigation map that legal pluralism arguably lacks. Arguably, the conflict of laws would have been able to 'set the ground-rules for interaction among relative authorities',[49] with a little nudging. Nor need it be rejected as merely a clever tool-box. It has a rich jurisprudence of rights (transitory or not), law (including the status of foreign law), comity, sovereignty, coordination or tolerance. Recently, it has appeared as a sophisticated repository for interdisciplinarity,[50] providing a discursive framework that structures thought,[51] an epistemology of complex systems or a new launch-pad for global governance.[52]

Like science,[53] then, the return of the conflict of laws is on the cards. It appears as a serious candidate for occupying a significant governance function in 'global legal space' defined as beyond the reach and out of bounds of state sovereignty or state-endorsed institutions. After all, its line of business has long been making sense of interactions that cross state boundaries and fall between the gaps between domestic sovereignty and public international law. At the same time, however, complacency would be largely misplaced. The conflict of law's contemporary intellectual abeyance certainly warrants a humble detour by the various thriving strands of global legal theory. Indeed, it may have much to learn from other disciplinary vocabularies, either about the definition of conflicts or their modes of resolution, and this could lead in turn to a radical reformulation of its own core issues. Indeed, if encounters between heterogeneous norms or expressions of diverse types of informal authority are central to the understanding of the normative landscape beyond the confines of state sovereignty, the traditional schemes of intelligibility which underlie the conflict of laws need to take on board

49 ibid.

50 See generally, Knop and others (n 3).

51 See generally, Horatia Muir Watt, 'New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help?' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 271.

52 See generally, Horatia Muir Watt and Diego P Fernández Arroyo, *Private International Law and Global Governance* (OUP 2014).

53 On the (paradoxical) 'return of science', see generally, Philip Pomper and David Gary Shaw (eds), *The Return of Science: Evolution, History, and Theory* (Rowman & Littlefield 2002) for a period of increasing disbelief in the values of modernity.

various additional dimensions of global complexity. If it does so and succeeds in living up to this challenge, it may emerge considerably enlightened by global legal theory. The reverse is true, too, however.

4 What pluralism means in this context

Pluralism can be taken to mean many things, as Brian Tamanaha has pointed out.[54] It has been, and can no doubt still be, used to justify the predominance of colonial law over the indigenous[55] as much as it might be harnessed on the contrary to disrupt global trends to smooth out cultural (local) difference.[56] In our specific context, pluralism is understood as distinct from liberalism, in exactly the same way as it can be differentiated from bilateralism (or 'multilateralism'), and likened to unilateralism or neo-statutism, within the conflict of laws. Similarly, as a mode of relationship with other autonomous legal orders, it can be differentiated, in public international law, from monism, or from hierarchical visions of the world legal order.[57] Again, in the context of comparative law, it rejects a presumption of similarity as opposed to a valorisation of difference.[58] What is needed, then, is something in the way of a collaborative, interdisciplinary effort. Several thorny issues or choices confront both the conflict of laws and legal pluralism when they claim relevance outside inter-national or infra-state contexts, respectively. There is a need to explore the ways in which the former can gain from, and contribute to, the newer insights of the latter. The anatomy of 'conflict' needs revisiting, in order to change the perspective from which questions of legal theoretical import are asked.

This exercise leads to the following insights: The use of a conflict of laws analysis within a pluralist framework pushes conflicts to centre-stage[59] in any attempt to

54 See generally, Brian Z Tamanaha, 'Introduction: A Bifurcated Theory of Law in Hybrid Societies' in Matthias Kötter and others (eds), *Non-State Justice Institutions and the Law: Decision-Making at the Interface of Tradition, Religion and the State* (Palgrave MacMillan 2015).

55 See generally, Louis Assier-Andrieu, 'Penser le temps culturel du droit: Le destin du concept de coutume en anthropologie' (2001) 160 *L'Homme. Revue française d'anthropologie* 67; Didier Boden, *L'ordre public: limite et condition de la tolerance, Recherches sur le pluralisme juridique* (Thesis, Paris I 2002).

56 See generally, Monateri (n 7).

57 See generally, Boden (n 55).

58 See generally, Pierre Legrand, 'Antivonbar' (2006) 1 J Comp L 13.

59 See generally, Berman (n 28).

grasp what law 'is' in our contemporary 'world of struggle'.[60] It highlights the ways in which law always springs from contested interests and can always be interpreted in multiple ways. It does not seek to 'fit' the foreign norm into its own scheme, but accepts the other, however different (as long as the threshold of tolerance is not crossed: see below) and works to ensure communication rather than assimilation. This is where pluralism differs from bilateralism, hierarchy and liberalism. Similarly, it allows other claims to law-making authority on their own terms. In other words, it accepts that when space is opened for the application of foreign law, the location of authority lies in the other.[61] Pluralism, therefore, welcomes in the foreign norm, but does not decide in its place when and how it applies. This does not exclude various devices designed to best navigate inevitable gaps or overlaps, such as those developed by neo-statutist doctrines (effectivity, legitimate expectations, return to the forum, or others).[62] It strives for 'loose' coordination on the basis that each autonomous system is at least cognitively open to the potential 'relevance' of the others.[63] The quest for coordination may well be the only conceivable global meta-constitutional principle, as Teubner argues.[64]

Pluralism does not, however, exclude the operation of an exclusionary mechanism when the threshold of tolerance is crossed. This point has been hotly debated,[65] as if pluralism mandated a toleration of the intolerable, but conflict of law versions of pluralist theory show that recourse to the exception of public policy as a last resort ex post is perfectly conceivable in this context; it may even be the very condition for pluralism to work. Pluralism accepts 'hybrids' as inevitable. No foreign institution or claim will be given effect abroad, in another forum, exactly as it was framed initially. Monism, bilateralism, hierarchical visions of

60 David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton UP 2016).

61 See generally, Boden (n 55).

62 On these well-known aspects of statutism, see Dominique Bureau and Horatia Muir Watt, *Droit international privé* (3rd edn, PUF 2014) s 333 ff.

63 Romano (n 32).

64 Teubner (n 8); See in a similar vein, Nicole Roughan, 'From Authority to Authorities: Bridging the Social/Normative Divide' in Cotterrell and Del Mar (n 17); Mireille Delmas-Marty, *Résister, responsabiliser, anticiper* (Seuil 2013).

65 See generally, Alexis Galán and Dennis Patterson, '*The Limits of Normative Legal Pluralism*: Review of Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law beyond Borders' (2013) 11(3) Int'l J Const L 783; in response, Paul Schiff Berman, 'How Legal Pluralism Is and Is Not Distinct from Liberalism: A Response to Alexis Galán and Dennis Patterson' (2013) 11(3) Int'l J Const L 801–08.

international law and similarities-based comparative law all project to some extent the contrary idea: the foreign is introduced and made to fit as it is. But the working hypothesis of the conflict of laws is exactly the contrary: a foreign norm is always transformed through interpretation, or combination with the forum's procedural rules, and so on.[66] Pluralism could also gain from frequenting the conflict of laws by incorporating its intellectual mode (or 'style'), which has excellently been identified as 'as if'.[67] In other words, before any definitive decision can be made on applicability, and articulation of various norms, the outcome has to be tested out. This fits well with the inevitable proportionality assessment of the final outcome, which is in itself a pluralist device.[68] Borrowing from pluralism could help solve the legitimacy conundrum which is increasingly worrisome in the conflict of laws, due to the rise, or increased visibility, of non-state authority and heterogeneous forms of law-making. These are not 'law' in the traditional conflicts of laws paradigm; they are out of bounds as it were, by reason of an ex ante judgment on legitimacy. But under a pluralist approach, legitimacy issues are dealt with ex post: there are no a priori judgments that would serve to exclude certain claims to govern (such as non-State law).

5 Post-scriptum: The conflict of laws in pluralist mode, in practice

It will perhaps come as no surprise that practice has not waited for theory to catch up before making an equally adventurous move. It has already had to confront conflicting claims, values, interests, ideals, and norms that appear beyond the remit of state law, in varied spheres and with diverse stakes and complex dynamics. It is naturally less free than legal theory to break out of conventional vocabularies in order to react appropriately.

A particularly daring example, which both acknowledges the conflicts between expanding autonomous regimes and proposes an equally pluralist response in terms

66 In the *Kiobel* case before the Court of Appeals for the Second Circuit (*Kiobel v. Royal Dutch Petroleum* 621 F. 3d 111 (2nd Cir. 2010)), the status of international law gave rise to a debate that could be framed in exactly these terms; see Horatia Muir Watt, 'Les Enjeux de l'Affaire *Kiobel*: Le Chaînon Manquant dans la Mise en Œuvre de la Responsabilité des Entreprises Multinationales en Droit International Public et Privé' in Comité Français de Droit International Privé, Droit international privé. Années 2010–2012 (Pedone 2013) 233.

67 Knop and others (n 3).

68 Berman (n 28).

of its analysis, can be found in a recent US federal court child slavery case involving cocoa farms in the Ivory Coast. Appropriately, as an illustration of a problem that is emblematically global, it concerns the functioning of world-wide value chains and commodities markets, which are arguably the most potent recipes for destructive externalities in the global social and ecological environment today. The court (US Court of Appeals for the 9th Circuit) refers (for jurisdictional purposes, under the Alien Tort Statute) to the economic leverage exercised by a particular brand in the world commodity market, from which it then draws legal inferences. Thus, in *Doe v. Nestle USA, Inc.*,[69] the Court asserts:

> the defendants had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers. The defendants did not use their control to stop the use of child slavery, however, but instead offered support that facilitated it. Viewed alongside the allegation that the defendants benefitted from the use of child slavery, the defendants' failure to stop or limit child slavery supports the inference that they intended to keep that system in place. The defendants had the means to stop or limit the use of child slavery, and had they wanted the slave labor to end, they could have used their leverage in the cocoa market to stop it (...) the defendants participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as 'slave free.' As an alternative to the proposed legislation, the defendants, along with others from the chocolate industry, supported a voluntary mechanism through which the chocolate industry would police itself.[70]

Remarkably, none of the traditional tools of the modern legal paradigm is part of the legal reasoning used by the Court. Territory, sovereignty, or the requirements of foreign policy are the traditional focus of (private international) law's more familiar approach to the governance of corporate conduct abroad. Here, on the other hand, the power, or leverage, of private actors over the market, through their brands, is acknowledged, as is their capacity to engage in regulatory capture through lobbying, and the triumph of self-regulation. The legal response can be understood in terms of social responsibility, jurisdictional touchdown,[71] victim access to justice (rather than territorial jurisdiction, contract, corporate form, market) and a political

69 766 F. 3d 1013 (9th Cir. 2014).

70 ibid 1025.

71 See generally, Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40(2) Colum J Transnat'l L 209.

horizon in which the pursuit of profit or market efficiency is balanced against other values.

What the Court is clearly attempting to do, within the formal confines of a determination of jurisdiction, is to bring the pressure of the legal system to a point (in various vocabularies, a 'hub', weakest link or 'pressure point', or a point of 'jurisdictional touchdown') in a global production chain. Furthermore, the passage cited draws attention to other normative phenomena involving private power, self-regulation, reputational pressure and certification of compliance to moral standards.

These are eminently pluralist understandings of law-making power. They also hark back to the body of knowledge which first emerged in a pre-modern context of plural authorities, unchartered territories, and indeterminate boundaries between the public and the private spheres. This is why, as a conclusion to these brief remarks, we can hope that an enriched conflict of laws theory has the potential to serve at the problematic heart of global law and its relationship to global justice, by contributing principles with which to govern non-state authority; infuse hybrid normative interactions with ideas of tolerance and mutual accommodation; and ensure accountability in the global decision-making processes through deliberation,[72] contestation,[73] and recognition.[74]

72 See generally, Craig Scott and Robert Wai, 'Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational "Private" Litigation' in Christian Joerges and others (eds), *Transnational Governance and Constitutionalism* (Hart 2004).

73 See generally, Jacco Bomhoff, 'The Constitution of the Conflict of laws' in Horatia Muir Watt and Diego P Fernandez Arroyo, *Private International Law and Global Governance* (OUP 2014) ch 13.

74 See generally, Muir Watt, 'Private International Law beyond the Schism' (n 4).

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Companies in the Strasbourg Courtroom

Dean Spielmann[*]

Abstract

The following article was first presented as an address at the 5th Annual Conference of the Cambridge Journal of International and Comparative Law on 9 April 2016. It concerns themes developed in an earlier study and in a speech delivered in Strasbourg on 28 March 2014 during a seminar concerning new mechanisms of accountability for corporate human rights violations. The article discusses the issues arising under the European Convention on Human Rights in respect of companies in their capacity as holders of rights under the Convention and potential violators of rights guaranteed under the Convention.

Keywords

European Court of Human Rights, European Convention on Human Rights, Companies as Victims of Human Rights Violations, Corporate Accountability for Human Rights Violations

1 Introduction

It is always a great pleasure for me to come to Cambridge. The bonds between this *alumnus* and his *alma mater* are very strong, and so I want to express my thanks to the organising team of the 5th Annual Conference for inviting me to deliver this keynote speech.

This year's annual conference focuses on the changing nature of the landscape of public and private power. In particular, the conference seeks to explore what new controls are necessary or desirable for existing or emerging areas of public and private power. Is the traditional public-private divide still accurate? Can public and private power be subjected to identical, equivalent or similar controls? Should legal

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entities enjoy the same rights as individuals? Should they be subjected to identical obligations? And if so, what is the role of the State?

In this presentation, and in my capacity as former President of the European Court of Human Rights, I would like to present the approaches adopted by the Strasbourg Court as to the status of legal entities under the European Convention on Human Rights.[1] The title of my keynote speech is therefore: 'Companies in the Strasbourg Courtroom'. In the first part of my presentation, I shall try to give an answer to the question: Should companies be regarded as potential victims of human rights violations? In the second part of my speech, I shall endeavour to address the question: Should companies be held accountable for human rights violations?

2 Should companies be regarded as potential victims of human rights violations?

Is it normal for companies to enjoy human rights protection? Or to put it differently, do companies need human rights? The fact that they do actually enjoy human—or fundamental—rights protection today is not in dispute. In 1950, the elevation of the person—natural or legal—on the international scene was revolutionary.[2] Indeed, as early as 1950, the weakness of the argument that only States were to be recognised as subjects of international law—reflecting the prevailing opinion in some quarters when the Convention was being drafted—has been pointed out.[3] It has been rightly emphasised that introducing the right of individual petition was a major development.[4] It was eloquently highlighted that 'the object of the Convention (…) is to protect the rights of the individual citizen—of the man on the Clapham omnibus'.[5]

1 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (hereafter 'Convention').

2 See Dean Spielmann, 'Should companies be regarded as potential victims of human rights violations?' (forthcoming).

3 AH Robertson, 'The European Convention for the Protection of Human Rights' (1950) 27 BYIL 145, 154.

4 ibid 154–55.

5 ibid 154.

However, the idea that the right of individual petition was not only enjoyed by the 'man on the Clapham omnibus', but also by companies, was not really discussed at the time that the right was first introduced. Indeed, the very legitimacy of regarding companies as potential victims of human rights violations has never been seriously questioned. Extensive case-law of the European Court of Human Rights concerning the protection of property,[6] freedom of expression,[7] respect for home and privacy (particularly in the context of search and seizures operated by State authorities)[8] etc, shows that companies have successfully brought claims to Strasbourg and have thereby contributed to the development of the European Convention on Human Rights as a living instrument.

Nonetheless, it might seem odd at first sight to accept that companies can claim that *human* rights abuses have occurred to their detriment and that, as a consequence, they are entitled to compensation for pecuniary or even non-pecuniary damage. Are human rights not meant for human beings alone? Is it self-evident that companies are covered by the right to lodge an individual application? Is it not strange that the *locus standi* of companies has never been seriously disputed? The drafting history of the Convention shows that the text was always intended to include all corporate persons. It is interesting in this context to note that the United Kingdom delayed recognising the right of individual petition until such time as the Burmah Oil Company could no longer bring a case to Strasbourg in respect of an Act of Parliament depriving it of compensation for the destruction of property.[9] It should also be noted that traditional diplomatic protection and the pacific settlement of disputes had developed in the Permanent Court of International

6 For example, *Stran Greek Refineries and Stratis Andreadis v Greece* App no 13427/87 (ECtHR, 9 December 1994); *Sud Fondi Srl and Others v Italy* App no 75909/01 (ECtHR, 20 January 2009); *Centro Europa 7 Srl and di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012); *Conseil et Courtage SA and Christian de Clarens SA v France* App no 70160/01 (ECtHR, 25 January 2007).

7 Eg, *Verlagsgruppe News GmbH v. Austria (no 1 and no 2)* App nos 76918/01 and 10520/02 (ECtHR, 14 December 2006); *Times Newspapers Ltd v the United Kingdom (nos 1 & 2)* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009); *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012); *Financial Times Ltd and Others v the United Kingdom* App no 821/03 (ECtHR, 15 December 2009); *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria* App no 14134/02 (ECtHR, 11 October 2007).

8 Eg, *Saint-Paul Luxembourg SA v Luxembourg* App no 26419/10 (ECtHR, 18 July 2013); *Wieser and Bicos Beteiligungen GmbH v Austria* App no 74336/01 (ECtHR, 16 January 2008); *Société Colas Est and Others v France* App no 37971/97 (ECtHR, 16 July 2002).

9 Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP 2006) 29, relying inter alia on AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004) 1092–201.

Justice, the most celebrated case being the *Chorzow Factory* case,[10] which has been cited on many occasions by the European Court of Human Rights.

In Strasbourg, legal persons, including corporations and other forms of company, provided that they are not emanations of the State, and are in fact treated as 'non-governmental organisations' for the purposes of Article 34 of the Convention (right of individual petition).[11] State-run corporations, if they are emanations of public authorities are, however, excluded.[12] At the European Union level, the situation is different. A recent ruling in *Bank Mellat v Council* (judgment of the General Court,[13] recently confirmed by the Court of Justice),[14] is interesting in this respect. In that case, the applicant was an Iranian bank which contested a Council Regulation imposing sanctions on it. The Council and the Commission claimed that the bank was an emanation of the Iranian State. The General Court dismissed this argument as follows:

> Neither in the Charter of Fundamental Rights of the European Union nor in European Union primary law are there any provisions which state that legal persons who are emanations of the States are not entitled to the protection of fundamental rights. On the contrary, the provisions of the Charter that are relevant to the pleas raised by the applicant, and in particular Articles 17, 41 and 47, guarantee the rights of 'everyone', a wording which includes legal persons such as the applicant.[15]

Companies come to Strasbourg as emancipated actors. Shareholders are normally not entitled to step in as applicants. As the Court has said on numerous occasions, the piercing of the corporate veil or disregarding of a company's legal personality will be justified only in exceptional circumstances. These include where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or—in the event of liquidation—through its liquidators.[16]

10 *Factory at Chorzów (Germany v Poland*) (Merits) [1928] PCIJ Rep Series A No 17, 47.

11 M Kučera, 'Convergence and Conflicts between Investment Law and Human Rights Law: A Dispute Settlement Approach—Jurisdiction *ratione personae*' in W Ben Hamida and F Coulée (dir.), Convergences and Contradictions between Investment Law and Human Rights Law, A Litigation Approach (Proceedings of the *Journée d'études de l'Institut International des Droits de l'Homme*, Paris, 27 November 2015) (Pedone 2017) 41–64.

12 For many examples, see ibid.

13 Case T-496/10 *Bank Mellat v Council* ECLI:EU:T:2013:39.

14 Case C-176/13 P *Council v Bank Mellat* ECLI:EU:C:2016:96.

15 *Bank Mellat v Council* (n 13) para 36.

16 *Agrotexim and Others v Greece* (1995) Series A no 330-A. See also Kučera (n 11).

But what about the enjoyment of human (or should I say, fundamental) rights? Are companies entitled to benefit from the full range of Convention rights? Applications lodged by companies have contributed to the development of the case law of the European Court of Human Rights. Admittedly, some provisions, such as article 2 (the right to life), article 3 (the prohibition against torture or inhuman and degrading treatment and punishment) and perhaps also article 9 (freedom of thought, conscience and religion), as well as article 12 (the right to marry), cannot be invoked by companies to their benefit. In particular, the wording of article 12 applies to 'men' and 'women' and even a more dynamic interpretation of this provision, extending it to 'mergers' and 'acquisitions' of companies, would amount to an absurd result. However, two provisions explicitly apply to companies. Article 1 of Protocol No 1 to the Convention applies equally to 'natural persons' and 'legal persons', and article 10(1), third sentence, of the Convention refers to media 'enterprises'. Moreover, article 1 of the Convention provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention'. Many provisions explicitly state that they are for the benefit of 'everyone'.

Article 10 of the Convention has often been invoked by companies: *Sunday Times* is probably the first and most prominent example.[17] Other Convention provisions that are frequently applied by the Strasbourg Court in cases concerning companies are, not only article 1 of Protocol No 1, but also article 6 (right to a fair hearing), article 8 (right to respect for private life), article 4 of Protocol No 7 (double jeopardy or *ne bis in idem*) and more recently, article 7 (no punishment without law).

Companies have provided the Court with the possibility of developing its case law. Suffice it to mention the developments bringing commercial speech within the ambit of article 10 of the Convention (*Markt Intern and Klaus Beerman v Germany*)[18] and the admission that business premises are considered to be a company's 'home' within the meaning of article 8 of the Convention (*Société Colas Est and Others v France*).[19] Turning to the protection of property, the relevant provision (article 1 of Protocol No 1) explicitly states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'. Intellectual property cases often involve corporations. The Court held in *Anheuser-Bush v Portugal* that

17 *Sunday Times v UK* (1979) Series A no 30.

18 *Markt Intern GmbH and Klaus Beerman v Germany* (1989) Series A no 165.

19 *Société Colas Est and Others v France* App no 37971/97 (ECtHR, 16 July 2002).

intellectual property fell under the protection of article 1 of Protocol No 1.[20] Since a 'legitimate expectation' of obtaining an asset will itself be protected under that Article in certain circumstances, it was held in *Centro Europa 7 v Italy* that, by granting the applicant company a television broadcasting licence without allocating it any broadcasting frequency, Italy was in breach of this provision.[21] Other cases concern tax-related issues. In the case of *Yukos*,[22] a case concerning *inter alia* tax assessment proceedings, the Court found that the assessment of the penalties in respect of the year 2000 and the doubling of the penalties for 2001 were unlawful and in breach of article 1 of Protocol No 1. In the enforcement proceedings against the applicant company, the domestic authorities had failed to strike a fair balance between the legitimate aim of these proceedings and the measures employed, in breach of the same Convention provision. The Court further held that, in the 2000 tax assessment proceedings, the applicant company had not had sufficient time for preparation of the case at first instance and on appeal, in breach of article 6 of the Convention.

In its judgment on the application of article 41, the Court decided that the finding of a violation constituted in itself just satisfaction for the non-pecuniary damage sustained by the applicant company. It held, however, that the respondent State was to pay the applicant company's shareholders, as they stood at the time of the company's liquidation; and, as the case may be, their legal successors and heirs, the sum of EUR 1,866,104,634 in respect of pecuniary damage. It also decided that the respondent State was to pay EUR 300,000 in costs and expenses, which sum was to be paid to the Yukos International Foundation, at the request of the applicant company.

However, non-pecuniary damage is not necessarily excluded in cases concerning companies. Indeed, a major development in the Court's case-law has consisted precisely in awarding sums in respect of such damages to companies. In *Comingersoll SA v Portugal*[23] the applicant was a company involved in enforcement proceedings. This was not a particularly complicated case, involving mainly a 'length of proceedings' issue. After several years the applicant had complained of the length of the civil proceedings in question. The Court found a breach of article 6 of the Convention. The Court also held, however, that a company had a right

20 *Anheuser-Busch Inc. v Portugal* App no 73049/01 (ECtHR, 11 January 2007).

21 *Centro Europa 7 Srl and di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012).

22 *OAO Neftyanaya Kompaniya Yukos v Russia* App no 14902/04 (ECtHR, 31 July 2014).

23 *Comingersoll SA v Portugal* App no 35382/97 (ECtHR, 11 January 2007).

under article 41 to compensation for non-pecuniary damage sustained as a result of a violation of article 6 of the Convention. This is probably the most significant development. Awarding moral damages to a company under the European Convention of Human Rights might be perceived as rather artificial, although domestic courts have in the past awarded such damages.

To conclude the first part of my intervention: the crux of human rights at its inception was to 'protect the weak'—human beings—from the abuses of the strong and powerful—the state. It is certainly true that the underlying value of individual dignity in the Convention system can hardly be mobilised to justify the openness with which companies have been received in Strasbourg. In a globalised world, distinguishing between individuals and companies, granting fundamental rights to the former but not to the latter would have led to insurmountable practical difficulties. It is my submission that accepting companies in the Strasbourg courtroom is essential for upholding the rule of law, as many cases eloquently demonstrate.

This brings me to my second query.

3 Should companies be held accountable for human rights violations?

It is, by this stage, clearly established that the Convention has very real implications for private parties—including corporations—who interfere with the human rights of others. Companies may violate human rights by employing child labourers; discriminating against certain groups of employees (such as union members and women); attempting to repress independent trade unions and discouraging the right to bargain collectively; failing to provide safe and healthy working conditions; and limiting the broad dissemination of appropriate technology and intellectual property. Companies also dump toxic wastes, and their production processes may have consequences for the lives and livelihoods of those people in neighbouring communities.[24] Many attempts have been made at the level of the United Nations

24 David Weissbrodt, 'Roles and Responsibilities of Non-State Actors' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (OUP 2013) 726–27.

to hold companies and transnational corporations to account by drawing up codes and guidelines.[25]

In an article that I contributed to a study entitled *Human Rights and the Private Sphere*, I wrote (and this was in 2007) that the horizontal effect of Convention rights—*Drittwirkung*—had been extended by the Court, but had not as yet been fully conceptualised.[26] Since then, the number of such cases has increased significantly, and this in relation to many Convention rights. But the legal or theoretical basis for the indirect horizontal effect of Convention rights remains the same.

To begin with, it derives from the text of the Convention itself. We need not dwell on the obvious point that the Convention binds only the Contracting States as a matter of classic treaty law, so that no other party or person can be called to account before the European Court of Human Rights. That is determinative of the admissibility of any application, of course, but our interest today is in the *substance* of human rights. It is article 1 that provides the textual 'hook' upon which to hang indirect horizontal effect—States 'shall secure to everyone within their jurisdiction' the rights set forth in the Convention. This provision grounds the doctrine of positive obligations, which makes the link between the acts of private parties, including corporate entities, and State responsibility under the Convention.

I would mention also article 13. Although the Court appears not to have had the occasion to explore this particular point, on a straightforward reading of this provision, it requires the State to ensure that for every violation of human rights there is an effective remedy. I do not read the last part of the provision—'notwithstanding that the violation has been committed by persons acting in an official capacity'—as limiting its scope so as to exclude the acts or omissions of private parties. As the Court has said, article 13 requires the provision of a domestic

25 See UN Human Rights Council, *United Nations Guiding Principles on Business and Human Rights* (OHCHR 2011), UN Doc HR/PUB/11/04; UN Human Rights Council, *The Corporate Responsibility to Protect Human Rights: An Interpretive Guide* (OHCHR 2012), UN Doc HR.PUB.12.2; UN Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (OHCHR 2008), UN Doc A/HRC/8/5; United Nations, 'The Ten Principles of the United Nations Global Compact' <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 6 August 2016).

26 Dean Spielmann, 'The European Convention on Human Rights' in Dawn Oliver and Jörg Fedtke (eds), *Human Rights in the Private Sphere: A Comparative Study* (Routledge-Cavendish 2007) 427–64.

remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief.

Also relevant here is the cardinal principle of interpretation that protection of Convention rights must be practical, concrete and effective, and not illusory or theoretical. It is not the only principle of interpretation that bears on the issue. The 'living instrument' doctrine also informs the Court's approach, and leads it to have regard to standards developing at both national and international levels. In this way, new legal tendencies can inform the meaning of the Convention.

In the same general sense, I would also refer to the important dictum in the *Selmouni* case, where the Court said that:

> It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[27]

It is a potent statement of the Court's determination to ensure the continuing effectiveness of the Convention in safeguarding human rights.

The Court's case law contains many cases which have, as their origin, the acts or omissions of a private party, or in any event a non-State entity. Such cases have arisen under many different provisions of the Convention and the Protocols. I have selected a small number of them for the purposes of our discussions today.

The first of these is the case *Rantsev v Cyprus and Russia*,[28] decided in 2010. I was part of the Chamber that decided the case, and I believe that it must be seen as a landmark judgment of this Court. It is particularly relevant to our theme today since the subject-matter was a very serious one—human trafficking. And the context was the well-known, indeed flagrant, sexual exploitation of young women from Eastern Europe in Cyprus. The perpetrators were commercial operators, the owners of night clubs and other establishments taking part in the sex trade. So we can regard it as a paradigm case on the subject of corporate accountability. The unfortunate victim, Ms Rantseva, was just 20 years old when she died, and that tragedy eventually brought the situation in Cyprus to the international scrutiny of the Court. In its reasoning, the Court placed article 4 in the same category as articles 2 and 3, these three provisions embodying the basic values of democratic society. It followed from this that there was a very strong positive obligation on the

27 *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999) para 101.

28 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010).

State. This included the duty—already established in the case *Siliadin v France*[29]—to have robust criminal law provisions and to apply them with all rigour.

The obligation also extended to taking measures to prevent and combat trafficking, and to protect its victims. Here the Court drew on the relevant, recent international instruments addressing the problem—the Palermo Protocol of the United Nations[30] and the Anti-Trafficking Convention of the Council of Europe.[31] The Court drew on the rigorous standards developed under articles 2 and 3 to require the authorities to take operational measures to protect victims and potential victims: if the authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at real and immediate risk, then a failure to take appropriate measures of protection amounts to a violation of article 4. In the same way as for article 2, there are some limits to this obligation—it does not place impossible or disproportionate burdens on the national authorities. But the assessment of what is proportionate is informed by the measures that are laid down in the relevant international treaties against trafficking.

The Court went further and derived a strong procedural obligation on the State to investigate potential trafficking situations, along the same lines as investigations into deaths and allegations of ill-treatment under article 3. It also addressed the transnational character of the phenomenon, requiring States to engage in international co-operation as necessary. This, I would observe, is a point of particular importance regarding the activities of corporations, which are frequently on a multinational or indeed global scale. On the facts before it the Court held that Cyprus had very clearly failed to put in place an adequate legal and administrative framework to combat sex trafficking, and had failed to take protective measures for Ms Rantseva. Russia was also found to have violated article 4, by its failure to investigate what happened on its territory when the victim was recruited to go to Cyprus.

I consider that this case stands out as a very good illustration of the strong duty that the Convention places on States to adopt a robust and rigorous approach to the risk—and the reality—of violations perpetrated by private actors of the most

29 *Siliadin v France* App no 73316/01 (ECtHR, 26 October 2005).

30 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 12 December 2000, entered into force 25 December 2003) (2001) 40 ILM 335.

31 Council of Europe Convention on Action Against Trafficking in Human Beings (adopted 3 May 2005, entered into force 1 February 2008) CETS 197.

fundamental rights safeguarded by the Convention. I mention also *Siliadin*,[32] which arose in the setting of what is called domestic slavery, and I would also mention the more recent case of *C.N. v United Kingdom*.[33] In both of those cases, the respondent State was found to have violated article 4 owing to the shortcomings in the domestic criminal law, which lacked the necessary specificity and rigour, with the effect that the perpetrators were not properly held to account for their actions. So we see that the criminal law, and the vigour with which it is applied to private parties, are important elements of the positive obligation that can arise in relation to articles 2, 3 and 4.

In relation to other provisions of the Convention, the focus can be different, with more emphasis on civil or administrative aspects such as licensing, authorising, monitoring and inspection.

I take as my example a case, *Vilnes and others v Norway*.[34] Its interest for present purposes lies in its subject-matter, safeguarding the health and safety of workers in a high-risk profession—deep-sea diving. It, too, can be seen as a paradigm, as it concerns human rights, commercial interests and the role of the domestic authorities. The Court considered the case under articles 2 and 8. Regarding article 2, it recalled the positive obligation to take all appropriate steps to safeguard life, which entails, above all, a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. It said:

> The Court considers that this obligation must be construed as applying in the context of *any* activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous. In the particular context of dangerous activities special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.[35]

32 ibid.

33 *C.N. v UK* (2013) 56 EHRR 24.

34 *Vilnes and Others v Norway* App nos 52806/09 and 22703/10 (ECtHR, 5 December 2013).

35 ibid para 219 (emphasis added). The Court relied on its previous case law.

The facts of the case are rather complex—so I will not try to summarise them. It suffices to say that the Court found a problem with regard to just one point, namely the fact that 'decompression tables' used by companies (vital to ensuring the safety of divers) were not standardised at the time the applicants were working as divers. This meant that the different companies could set their own standards, and therefore could 'cut corners' with employee safety. There was also a degree of opacity about the tables that made it difficult for the applicants to evaluate the risks they faced; and this at a time when the long-term effects of their professional activities on their health were unknown.

On this issue, the analysis moves to article 8, and it becomes a question of the right to respect for private life, and the corresponding positive obligations on the State. The Court recalled the relevant case law about the obligation to provide individuals with access to information about health risks, and—significantly—identified a duty in certain circumstances to go further and to *provide* information. Here the authorities had fallen short. The labour inspectorate and the petroleum directorate had authorised diving operations without sight of the important decompression tables. The judgment states:

> It seems that the diving companies were left with little *accountability* vis-à-vis the authorities, and were allowed to deal with the tables as their business secrets and thus enjoyed for a considerable period a wide latitude in opting for decompression tables that offered competitive advantages serving their own business interests.[36]

Corporate accountability—at the national level of course—is thus the real point in this case, approached via the positive obligations on the State. The Court concluded:

> In the Court's view it would therefore have been reasonable for the authorities to take the precaution of ensuring that the companies observe full transparency about the diving tables used and that the applicants, and other divers like them, receive information on the differences between tables, as well as on their concerns for the divers' safety and health, which constituted essential information that they needed to be able to assess the risk to their health and to give informed consent to the risks involved. This the authorities could have done when, for example, granting authorisation of diving operations and upon inspections. Had they done so they might conceivably have helped to eliminate sooner the use of rapid tables as a means for companies to promote their own commercial interests, potentially adding to the risks to divers' health and safety.[37]

36 ibid para 238 (emphasis added).

37 ibid para 244.

The *Vilnes* judgment draws on some of the Court's key rulings on environmental issues—that is a very important body of case law that is also highly relevant to our theme today. I refer to cases such as *Guerra v Italy*,[38] *López Ostra v Spain*,[39] *Budayeva v Russia*,[40] *Kolyadenko v Russia*[41] and *Muñoz Díaz v Spain*.[42] That is not an exhaustive list by any means. One would add the cases *Tătar v Romania*,[43] *Fadayeva v Russia*[44] and *Grimkovskaya v Ukraine*[45] (to name just three).

Very briefly, what emerges from this case law is the procedural dimension of article 8 when there are risks to lives and homes from industrial activity or man-made hazards. This includes the obligation to evaluate the risks beforehand, and to do so in an open, accessible way so that the persons who stand to be affected can be fully informed of the risks and can participate in the decision-making process. The right to challenge the decisions taken by the authorities effectively before an independent body should be available. These requirements were derived by the Court in the light of the Aarhus Convention,[46] cited in many cases. Ongoing monitoring and inspection is also required. All of these elements go to the need for accountability in the environmental field so that article 8 rights are effectively protected.

Let me add that, just as the scope for corporate interferences with Convention rights is broad, so may a corresponding positive obligation arise on the State to ensure effective exercise of, and protection for, human rights.

Under article 9, for example, the Court found a violation of the State's positive obligation in the *Eweida* case, when the first applicant was forbidden to wear a cross at work.[47] Or the issue may well present as a negative obligation, ie, an interference

38 *Guerra and Others v Italy* (1998) 26 EHRR 357.

39 *López Ostra v Spain* (1994) Series A no 303-C.

40 *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008).

41 *Kolyadenko and Others v Russia* App nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 28 February 2012).

42 *Muñoz Díaz v Spain* App no 49151/07 (ECtHR, 8 December 2009).

43 *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009).

44 *Fadayeva v Russian Federation* (2007) 45 EHRR 10.

45 *Grimkovskaya v Ukraine* App no 38182/03 (ECtHR, 21 July 2011).

46 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

47 *Eweida and Others v UK* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 27 May 2013) (extracts).

that calls for justification. See, for example, the case of *Heinisch v Germany*,[48] concerning the dismissal of a whistle-blower by a company running homes for the elderly. As you know, the difference between positive and negative obligations is not especially significant, since the relevant considerations are similar.

Finally, although there is not enough time to develop the point, let me simply note that the Convention can help to secure corporate accountability through the exercise of article 10 rights. It affords a high level of protection to those who play a watchdog function—above all the press and non-governmental organisations—and to speech that concerns matters of public concern. As the case law has established, the Convention affords protection to journalistic sources, and also ensures a right to receive information. These are valuable safeguards in holding up to public scrutiny possible violations of human rights, at home or abroad, by corporate entities.

4 To conclude

The potential development of respect for the fundamental rights of companies should go hand in hand with 'corporate accountability'. Positive obligations of the State authorities, calling for regulation of corporate activities, as well as increased awareness of the need to provide for essential counterbalancing factors, should play a role in this connection. Robust safeguards in holding up to public scrutiny possible violations of human rights, at home and abroad, by corporate entities are as necessary as the inclusion of companies amongst the beneficiaries of human rights protection.

48 *Heinisch v Germany* (2014) 58 EHRR 31.

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Understanding the 'New Governance' of Food Safety: Regulatory Enrolment as a Response to Change in Public and Private Power

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Abstract

Profound changes in the landscape of food governance fundamentally challenge the capacity of individual regulators (national, international, public and private alike) to devise legitimate and effective systems of food safety governance. As a result, we observe an increased level of coordination between public and private regulatory activities, more and more frequently transcending national (jurisdictional) boundaries. This contribution aims to develop a better understanding of how such coordination is taking place, why and at what level. It argues that the concept of 'regulatory enrolment' provides a proper analytical lens through which the nature, properties and dynamics of regulatory regimes can be better understood. Regulatory enrolment offers a strategy for coping with change in regulatory capacities and power, and increasing regime complexity. Accordingly, regulators in the domain of food safety, and perhaps others, might harness their own legitimacy and effectiveness in ensuring regulatory outcomes.

Keywords

Food safety governance, public and private regulatory activities, regulatory enrolment

1 Introduction

The governance of food safety has changed dramatically since the 1990s. The outbreak of recurrent major food safety crises, including Bovine Spongiform Encephalopathy (BSE), the globalisation of food supply chains and the growing concentration of economic power amongst food retailers have made fertile ground for changes in the institutions and practices of food governance. At the same time, a general perception of failing public regulation and new concerns amongst consumers about animal welfare, dietary habits, the environment and fair trade

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created strong demands for regulatory change.[1] These changes have occurred across two key dimensions: (i) *national* systems of food governance have been increasingly subject to *transnational* influences, and (ii) *public* food governance has been challenged, complemented, or at times superseded, by *private* governance systems. Both transitions fundamentally challenge the capacity of individual regulators (national, international, public and private alike) to devise effective and legitimate systems of food safety governance. As a result, we observe an increased level of coordination between public and private regulatory activities, more and more frequently transcending national (jurisdictional) boundaries. In the literature on international relations, political economy and governance, this shift from a traditional command-and-control style of regulation towards a more coordinated, bottom-up approach has been coined 'New Governance'.[2]

This contribution aims to develop a better understanding of how such 'New Governance' and related coordination between public and private actors is taking place within the domain of food safety, why and at what level. To that end, it builds on the concept of 'regulatory enrolment' developed by Black.[3] Regulatory enrolment can be seen as a governance response to regulatory change and regime complexity. It presupposes that the capacity for regulatory governance is dispersed among a variety of actors, none of which holds such a central position in the regulatory arena that they can unequivocally determine outcomes. In this decentred conception of regulation, enrolment provides 'a normative framework for considering ways in which the capacity of the system as a whole might be enhanced effectively and legitimately by the careful deployment within it of the regulatory capacity of different actors'.[4]

1 Terry Marsden, Robert Lee, Andrew Flynn and Samarthia Thankappan, *The New Regulation and Governance of Food. Beyond the Food Crisis?* (Routledge 2010) 3–23; Tetty Havinga, Donal Casey and Frans Van Waarden, 'Changing Regulatory Arrangements in Food Governance' in Tetty Havinga, Frans Van Waarden and Donal Casey (eds), *The Changing Landscape of Food Governance* (Edward Elgar 2015) 3–18; Paul Verbruggen and Tetty Havinga, 'Introduction to the Special Issue on the Patterns of Interplay between Public and Private Food Regulation' (2015) 6 EJRR 482, 482–84.

2 See generally, Orly Lobel, 'New Governance as Regulatory Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP 2012) 65; Ken Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 Vand J Transnat'l L 501.

3 See generally, Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (2003) Pub L 63.

4 ibid 91.

This article argues that regulatory enrolment, and the decentred analysis of regulation it builds on, provide a proper analytical lens through which the nature, properties and dynamics of regulatory regimes can be better understood. Regulatory enrolment then offers a strategy for coping with change in regulatory capacities and power, and increasing regime complexity. To make this claim, the article will first provide in Section 2 a deeper account of the concept of regulatory enrolment and its relationship to notions of 'polycentric regulation' and 'regulatory capacity' as developed in the literature on regulatory governance. Section 3 will provide a brief, yet systematic overview of the actors currently involved in the regulatory governance of food safety, by which their relative regulatory capacity and potential for enrolment are identified. Section 4 then offers insights into how regulatory enrolment is currently taking place, between which actors, why this occurs and at what level. Next, Section 5 considers the potential for enrolment—and its proper design—as a governance response to a key change in the regulatory domain of food safety, namely the rise of global supply chains. As such, it discusses the ways in which regulatory enrolment might harness the effectiveness and legitimacy of (some) actors in ensuring regulatory outcomes. Here, the article draws on previous empirical research conducted on the interplay between various actors concerned with the regulatory governance of food safety. Section 6 concludes with the analytical and strategic importance of regulatory enrolment.

2 Conceptualising regulatory enrolment

2.1 Regulatory regimes: functions, actors and space

In the literature on regulatory governance, we find many accounts of coordination between public and private regulatory activities through enrolment of various actors in regulatory regimes. These regimes can be defined as systems of collective control attempting to influence the behaviour of businesses according to predefined standards and goals.[5] These systems are considered to be organised around three elements or *functions*, namely a set of normative standards and goals of some kind (standard-setting), processes for detecting deviation from these standards and

5 For the definition of regulation, see generally, Philip Selznick, 'Focusing Organizational Research on Regulation' in Roger G Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press 1985) 363; Julia Black, 'Critical Reflection on Regulation' (2002) 27 AJLP 26.

objectives (monitoring), and mechanisms for correcting non-compliant behaviour (enforcement).[6]

Regulatory regimes comprise a variety of different *actors*, each fulfilling different regulatory functions depending on their relative capacity. These actors might be categorised by using a very rough analytical distinction based on their institutional background, namely public (state) and private (market, non-state) actors. Regulatory regimes administered by state actors comprise standards developed through legislative processes and administrative decision-making, and that are monitored by regulatory agencies that can sanction non-compliant behaviour through legal sanctions. The archetype of a public regulator is said to be a regulatory agency in the United States ('US'), to which frequently all three regulatory functions are delegated by primary legislation.[7] Consequently, a public regulator cannot only set its own standards, but also has legal powers to monitor and enforce compliance by the regulated entities (regulatees). Non-state, market-based regimes, by contrast, are driven by private actors such as firms, associations, non-government organisations (NGOs) or combinations of these. Regimes of 'pure' or 'voluntary' self-regulation are free from active state involvement and may comprise the creation of industry codes of conduct that are monitored by peers and enforced through reputational market sanctions.[8]

Examples of these stylised and purely 'public' or 'private' regimes are hard to come by in practice, however. Almost inevitably, regulatory regimes will involve different kinds of actors in relation to one or more regulatory functions. For example, practices of notice and comment, public consultation and negotiated rule-making with regulatees are now common among US regulatory agencies in order to strengthen scientific and technical expertise and facilitate participation from industry and NGOs.[9] Similarly, robust and effective regimes of private self-regulation are seldom void of state interference as their creation is often coerced by the threat of government action.[10]

6 Christopher Hood, Henry Rothstein and Robert Baldwin (eds), *The Government of Risk* (OUP 2001) 20–35.

7 For a comparative institutional view, see generally, John Francis, *The Politics of Regulation: A Comparative Perspective* (Blackwell 1993).

8 Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 MLR 24; Margot Priest, 'The Privatization of Regulation: Five Models of Self-regulation' (1997) 29 Ottawa L Rev 233, 245.

9 David Weimer, 'The Puzzle of Private Rule-Making: Expertise, Flexibility and Blame Avoidance in US Regulation' (2006) 66 Publ Admin Rev 569, 570–73.

10 See generally, Guy Halfteck, 'Legislative Threats' (2008) 61 SLR 629; Adrienne Héritier and Sandra Eckert, 'New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe' (2008) 28 J Pub Policy 113. More generally, see Neil Gunningham and

These empirical observations draw attention to the increasingly 'fragmented'[11] and 'hybrid'[12] character of regulation: regulation is not the product of a single regulator, but is the outcome of a process involving a multitude of regulatory actors or different sites of regulation that interact in 'complex, fluid and multi-dimensional ways'.[13] One of the most powerful accounts of this development is provided by Black. She promotes a 'decentred' analysis of regulation, which:

> involves a move away from an understanding of regulation which assumes that governments have a monopoly in the exercise of power and control, that they occupy a position from which they can oversee the actions of others, and that those actions will be altered pursuant to government's demand.[14]

As Black explains in later writings, this analysis 'draws attention away from individual regulatory bodies, be they at the national or global level, and emphasises instead the multitude of actors which constitute a regulatory regime in a particular domain'.[15] While a decentred analysis of regulation thus denies the centrality of the state as a regulator and seeks to draw attention away from it, a polycentric approach more positively highlights the existence of multiple sites of regulation, either at sub-national, national or transnational level. At the core of both analyses is the claim that there is no 'centre' of regulation, no one position of an ultimate overseer or controller that a state or non-state actor can hold.

The understanding of regulation as decentred or polycentric invites the image of a regulatory *space* that is occupied by a variety of actors. The analytical construct of a regulatory space was first developed by Hancher and Moran[16] based on Crouch's metaphor of 'polity space'.[17] The regulatory space is defined as 'the range of regulatory

Joseph Rees, 'Industry Self-regulation. An Institutional Perspective' (1997) 19 L & Pol'y 363.

11 Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) Pub L 329, 334–38.

12 David Levi-Faur, 'Regulation and Regulatory Governance' in D. Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011) 3.

13 Marie-Laure Djelic and Kerstin Sahlin-Andersson, 'Institutional Dynamics in a Re-ordering World' in Marie-Laure Djelic and Kerstin Sahlin-Andersson (eds), *Transnational Governance: Institutional Dynamics of Regulation* (CUP 2006) 375, 386.

14 Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-regulatory" World' (2001) 54 CLP 103, 112.

15 Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regul'n & Governance 137, 139–40.

16 Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher, Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (OUP 1989) 271.

17 Colin Crouch, 'Sharing Public Space: States and Organized Interests in Western Europe' in John Hall (ed), *States in History* (Basil Blackwell 1986) 177.

issues subject to public decision', including issues of safety or pricing in a particular domain.[18] Because it is a space, it can be occupied and divided between different actors possessing different resources for regulation. However, understanding who occupies the space 'involves examining the outcomes of competitive struggles, the resources used in those struggles, and the distribution of those resources between different involved institutions'.[19] Of the many factors determining the shape of the regulatory space, and the relative position of the actors occupying it, Hancher and Moran draw attention to the importance of national legal culture in allowing access to the space, the element of timing and the organisational capacity of the actors.[20]

Again, the construct of the regulatory space emphasises that the capacity and resources for regulation are dispersed and fragmented among a wide range of actors.[21] We might attempt to locate the different actors in the regulatory space by reference to two key analytical dimensions drawn in relation to these actors in the decentred and polycentric analysis of regulation, and the metaphor of regulatory space. The two dimensions are those of public-private and national-transnational. Accordingly, four 'quadrants' are distinguished occupying different actors possessing different capacities for regulation.[22] It should be emphasised, however, that any depiction of the regulatory space is only a representation of the actors at a given time. These actors, their interests and interrelationships, are not static and are subject to change over time.[23] Understanding how these interests and interrelationships evolve is now a key topic for study by scholars of regulation. Moreover, the distinction between public-private actors is problematic as one of

18 Leigh Hancher and Michael Moran (n 16) 277.

19 ibid 277.

20 ibid 279ff.

21 Scott (n 11).

22 See Figure 1 below. Also Abbott and Snidal provide an influential mapping of the regulatory space or landscape. Focusing on transnational standard-setting regimes, they draw a 'governance triangle', the three angles of which are formed by states, firms and NGOs. Towards the centre of the triangle, different mixes of regimes are identified, leading to a total of seven separate areas of standard-setting. In this article this conceptualisation of the regulatory space is not taken as a starting point, since, in the domain of food safety, NGOs have so far played no relevant role. Using NGOs as a separate actor would therefore have little distinguishing function. What appears more important is the variety of actors and contested interests among private market actors, that is, between retailers, ie supermarket chains, manufacturers, ie major brand-name companies, farmers, and audit service providers as certification bodies. See Ken Abbott, Duncan Snidal (n 2); See in detail Tetty Havinga, 'Conceptualizing Regulatory Arrangements: Complex Networks and Regulatory Roles' in Havinga, Casey and Van Waarden 2015 (n 1) 24–25.

23 Leigh Hancher and Michael Moran (n 16) 283.

the key insights provided by a decentred analysis of regulation is that the socio-political distinction between public-private regulation and governance has collapsed.[24] Instead, we see a rise of 'hybrid' organisations combining state and non-state actors in multiple ways.[25] Also the distinction between national and transnational actors might not be so clear given the insights of contemporary studies into global governance and regulation. As observed, such regulation in fact often constitutes a multi-level affair, in which transnational standards operate in, and are subject to, domestic legal orders. It must thus interact with national rules and institutions in order to have effect.[26]

Therefore, what we need to study are the interactions between the various actors in the different quadrants of Figure 1. These interactions are essential for a fuller understanding of the regulatory regime. Regulatory enrolment, as will be argued below, provides a nexus through which different actors are linked in a regulatory space.

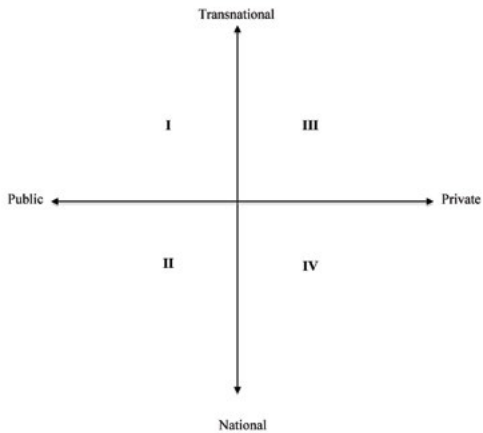

Figure 1. Regulatory space (own elaboration)

24 Julia Black (n 14) 110.

25 David Levi-Faur (n 12) 8–9.

26 See generally, Tim Bartley, 'Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards' (2011) 12 Theoretical Inq L 517; Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton UP 2011); Paul Verbruggen, 'Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation' (2013) 7 Regul'n & Governance 512.

2.2 Regulatory capacity and regulatory enrolment

It has been noted that a decentred analysis of regulation—including accounts of the regulatory space—has little prescriptive edge and remains descriptive for the better part.[27] Proponents of this analysis simply argue for a more holistic approach to the matter of regulation, stressing the relative regulatory capacity of different actors. Normativity appears to enter the analysis only in as far as it is suggested that government should be more 'modest' in setting its regulatory objectives, for the outcomes are not a function of their regulatory activities only.[28] The theory of 'smart regulation' as advanced by Gunningham and Grabosky can be seen as an early attempt to provide more normative guidance into how different actors—State, industry and civil society—and their relative regulatory capacities can and should be combined, either sequentially or simultaneously, to achieve regulatory outcomes most effectively.[29] Their analysis, however, is first and foremost concerned with the deployment of enforcement capacity of actors to respond to and deter future non-compliant behaviour by the regulatees, rather than to the use of other regulatory functions such as the drafting, implementation and adoption of standards by regulatees.

A more sophisticated and systematic analysis of the way in which regulatory functions could or should be distributed between actors given the relative regulatory capacity they possess now and in the future for regulation to be effective is offered by Black.[30] Building on her notion of regulation as something that is fundamentally decentred and comprises the elements of standards and goals, monitoring and enforcement, she highlights the relative capacity of the actors concerned in a regulatory regime to contribute to the purposes of those seeking to regulate (the regulators). *Regulatory capacity*, as she notes, refers to 'the actual or potential possession of resources plus the existence of actual and potential conditions that make it likely that those resources will be deployed both now and in the future in such a way as to further the identified goals of those seeking to regulate (…)'.[31]

27 Colin Scott (n 11) 352.

28 Julia Black (n 3) 65.

29 Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (OUP 1998).

30 Julia Black (n 3).

31 ibid 72.

Capacity thus not only refers to the possession of resources but also to the ability and willingness of the actors to put them to use.[32]

Six key resources for performing regulatory functions are suggested: information, expertise, wealth, authority and legitimacy, strategic position, and organisational capacity.[33] Each regulatory function requires a different configuration of resources to be performed effectively. While standard-setting typically requires a high need for information, expertise and authority and legitimacy, effective enforcement appears to create greater demands for strategic positioning and authority and legitimacy.[34] Clearly, the resources for fulfilling a regulatory function are not evenly distributed amongst the actors concerned with a regulatory regime. Some may have many, others few and, again, others may possess only pivotal resources for a particular regulatory function.

The actors' possession of resources is also not static. It is subject to change, much like the configuration of actors in the regulatory regime. The assessment of regulatory capacity must thus take into account the resilience of regulatory capacity and its susceptibility to changes in the underlying resources.[35] Moreover, actors may possess resources directly, while they may also have indirect access to them through another actor. These properties of regulatory capacity—dispersal, change, indirect availability—invites suggestions regarding ways in which one actor possessing a different kind and degree of regulatory capacity can be functionally linked to another so as to enhance the capacity of both actors. By joining, borrowing or alternating resources, actors may strengthen the capacity of any in achieving the regulatory goals. Accordingly, the effectiveness of the regime as a whole can also be increased.

32 Cafaggi and Pistor offer a different approach under the header of 'regulatory capabilities'. Adopting the work by Nussbaum, they embark on an assessment of the impact of regulatory regimes designed by others on individuals, collectives and entities, and their relative ability to express their preferences, choose alternative forms of regulation or determine how best to govern interdependencies between different regulatory regimes. Accordingly, their concept is much more focused on regulatees and their ability to choose to be subject to the regulatory regime, in the sense of self-determination. See generally, Fabrizio Cafaggi and Katarina Pistor, 'Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation' (2015) 9 Regul'n & Governance 95.

33 Julia Black (n 3) 73ff; See generally, Colin Scott (n 11); Daniel Esty, 'Toward Optimal Environmental Governance' (1999) 74 NYU L Rev 1495.

34 Cf Julia Black (n 3) 81.

35 ibid 80.

Regulatory enrolment is essentially a strategy for linking actors possessing a different configuration of regulatory capacity in a regulatory regime so as to enhance the capacity of both.[36] Identifying who the actors are and what regulatory capacity they possess is thus a key task for those actively seeking to interlink with others. Enrolment can occur consciously or unconsciously, implicitly or explicitly, and with or without changes to the formal legal structures underpinning the regulatory regime. It does not imply a level of hierarchy between the actor enrolling the other and the actor being enrolled. In fact, enrolment is frequently mutual. As Black explains, often an actor is relying on, or seeking to deploy resources of, another actor in order to achieve its own goals, while the actor being enrolled is doing the same.[37]

Regulatory enrolment does not, of course, guarantee regulatory outcomes, nor does it offer full control to the actor doing the enrolling over the activities of the actor being enrolled. The advantages of the strategy are to be found in the increased regulatory capacity of individual actors or the regime as a whole to achieve regulatory goals at a given moment. For example, by being able to work with more detailed information about regulatory non-compliance provided by private auditing firms, State actors may determine what type of enforcement action is required more accurately and better refine their approach to secure compliance.[38] Furthermore, the ability to use or rely on additional resources may also enhance the transnational reach of public regulatory activities, which are typically confined to territorial borders.[39] In Black's view, a focus on regulatory capacity and their enrolment allows for 'considering ways in which the capacity of the system as a whole might be enhanced effectively and legitimately by the careful deployment within it of the regulatory capacities of different actors'.[40]

36 ibid 84.

37 ibid 85.

38 John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar 2008) 96.

39 Peter Drahos, 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach' (2004) 77 Temple L Rev 401, 418–19.

40 Julia Black (n 3) 91.

2.3 Distinguishing enrolment from other theories on regulation

The concept behind regulatory enrolment has been discussed by many others. Braithwaite and Drahos, Abbott and Snidal, and Levi-Faur speak of 'enlisting' other actors and their capacities for regulatory purposes.[41] More generally, regulatory enrolment clearly links to other theories in regulation concerning the inter-connectedness of actors and (regulatory) capacity. *Network theory*, for example, stresses that relationships between different actors in the network—or 'webs'—are informal, complex and unstable, with no real centre of authority and power.[42] However, while the linkages between different actors might thus be relatively fluid and weak, their capacity for action can be enhanced by being part of the network.[43] Drahos and Braithwaite have each argued individually that a network itself may be helpful in overcoming weaknesses in regulatory capacity. They contend that the resources provided by third parties can create network effects, allowing others—either state or non-state actors—to enhance their regulatory capacity.[44] As Black explains, however, regulatory enrolment 'does not necessarily imply that the actors exist in a network relationship, nor does it imply that this is an unqualified superior form of arrangement to other types of inter-relationship'.[45]

Regulatory enrolment also closely lines up with the theory of *orchestration* as presented by Abbott and Snidal.[46] This theory provides a normative framework for states and international governmental organisations (IGOs) to use their limited capacities for regulation at transnational level to support and empower other actors—firms, NGOs, intermediaries such as certification bodies, and multi-stakeholder schemes—to deploy their capacity to regulate firms and industries. As for IGOs, orchestration occurs when 'an IGO enlists and supports

41 John Braithwaite and Peter Drahos, *Global Business Regulation* (OUP 2000) 491; Ken Abbott and Duncan Snidal (n 2) 525; David Levi-Faur (n 12) 9.

42 Frans van Waarden, 'Dimensions and Types of Policy Networks' (1992) 21 EJPR 29, 30–31.

43 Mark Granovetter, 'The Strength of Weak Ties' (1973) 78 Am J Sociol 1360, 1377–78.

44 Peter Drahos (n 39) 418–19; John Braithwaite (n 38) 83–84.

45 Julia Black (n 3) 85.

46 Ken Abbott and Duncan Snidal (n 2).

intermediary actors to address target actors in pursuit of IGO governance goals'.[47] Such orchestration can be 'indirect' because the orchestrator works through intermediaries to influence regulated entities ('targets'), and 'soft' because the orchestrator lacks authoritative control over intermediaries and targets. Abbott and Snidal consider orchestration to be particularly close to regulatory enrolment. As they note, 'Orchestration is a specific strategy of enrolment'.[48]

However, orchestration differs from regulatory enrolment as it departs from the assumption that state actors still hold a central position in the (transnational) regulatory space, enabling them—at least in part—to direct, steer and control social phenomena, however indirectly that may be. A purist decentred or polycentric analysis of regulation, on which Black's understanding of regulatory enrolment is cast, denies such centrality. Moreover, the theory of orchestration was developed in response to perceived gaps in the ability of state actors to respond to apparent failures to address production externalities in global markets. It is also primarily focused on, or limited to, the function of standard-setting. While regulatory enrolment is responsive to the changing role of the state in regulating global markets and its diminishing capacity for standard-setting, its application is not limited to transnational governance and standard-setting as such. It may also involve national and local-level interaction between different actors across the full range of regulatory functions in a domain.

3 The regulatory space of food safety

The regulatory space of food safety, including hygiene, may be dissected into spheres populated by public and private actors. In turn, each of these spheres may, again for analytical purposes only, be partitioned into a transnational and national sphere. Based on this categorisation, actors involved in the regulation of food safety may occupy a particular position within one of the four quadrants as illustrated by Figure 2.

47 Kenneth W Abbott, Philipp Genschel, Duncan Snidal and Bernhard Zangl, 'Orchestration: Global Governance Through Intermediaries' in Kenneth W Abbott, Phillip Genschel, Duncan Snidal and Bernard Zangl (eds), *International Organizations as Orchestrators* (CUP 2015) 4.

48 Ken Abbott and Duncan Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations' (2013) 7 Regulation & Governance 95, 98.

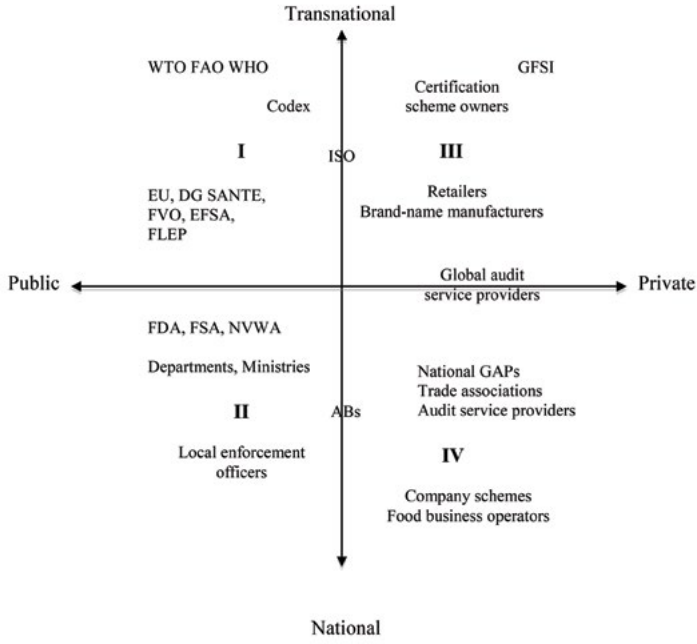

Figure 2 Regulatory space of food safety (own elaboration)

Abbreviations (in alphabetical order): ABs (accreditation bodies), Codex (Codex Alimentarius Commission), DG SANTE (Directorate General for Health and Food Safety—Direction Générale Sanité et Sécurité Alimentaire), EU (European Union), EFSA (European Food Safety Authority) FDA (US Food and Drug Administration), FLEP (Food Law Enforcement Practitioners), FSA (Food Standards Agency), GFSI (Global Food Safety Initiative), ISO (International Standardization Organization), NVWA (Netherlands Food and Consumer Product Safety Authority—Nederlandse Voedsel- en Warenautoriteit), WHO (World Health Organization), WTO (World Trade Organization).

3.1 Public sphere

The public sphere of the regulatory space of food safety (Quadrants I and II) is populated by global, regional, national and local state actors.[49] At a global level, the WTO is a key player. The international trade agreements developed by the WTO regulate global trade in food. More specifically, the Agreement on Sanitary and Phytosanitary Measures (SPS) determines the conditions under which Member States can adopt measures for the protection of the health of humans, animals and plants. One of those conditions concerns the equivalence of the measures adopted with standards developed by Codex, an expert body created by the United Nations Food and Agriculture Organization (FAO) and World Health Organization (WHO) to devise international standards and guidelines for food. Compliance by Member States with Codex standards infers compliance with the SPS Agreement. One of the key standards adopted by Codex related to food safety is the Hazard Analysis and Critical Control Points (HACCP) standard, which provides a systematic method for identifying and controlling hazards associated with food operations in the supply chain.

At a regional level, the European Union (EU) is a key institutional actor in the public sphere. The outbreak of the BSE crisis in 1996 in the United Kingdom (UK) and later in the EU can be seen as the birth of modern EU food safety law. The crisis revealed significant dysfunctions both in industry practices and the public systems supervising those practices. It also set off a process of harmonisation of national food safety laws and the creation of EU agencies in the field of food safety.[50] Regulation 178/2001/EC currently provides the general legal framework for food safety regulation in the EU.[51] This Regulation also created ESFA with the principal aim of providing EU Institutions and Member States with scientific and technical opinions on the adoption of EU food legislation and policies, and on the resolution of food safety incidents. To ensure effective monitoring and enforcement of the

49 See, for an overview, Caoimhín MacMaoláin, *Food Law. European, Domestic and International Frameworks* (Hart 2015) 45.

50 Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis' (2000) 23 J Consum Policy 227.

51 Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 lays down the general principles and requirements of food law, establishes the European Food Safety Authority and lays down procedures in matters of food safety [2002] OJ L31/1.

Regulation, the EU has adopted secondary legislation detailing the obligations of Member States and their authorities to control food safety. The European Commission carries out inspections in Member States through its Health and Food Audits and Analysis Directorate, formerly known as the Food and Veterinary Office. This service seeks to ensure that effective official control systems are in place and evaluate compliance with EU food safety laws within the EU. The Health and Food Audits and Analysis Directorate resides under the Directorate General for Health and Food Safety (DG SANTE) of the European Commission. This Director General also drafts and proposes EU laws on product and food safety. The Food Law Enforcement Practitioners (FLEP) provides an informal network for food law enforcement practitioners in Europe to exchange information, foster learning and cross-border co-operation, and develop mutual trust in the resolution of practical control problems. Accordingly, this network presents a subtle cross-over between the transnational (EU) and national sphere.

At a national level, food safety regulation is set and administered by ministries and departments, and national food safety agencies. These agencies take the form of independent regulatory agencies, for example, the Food and Drug Administration in the US, the Food Standards Agency in the UK, or as an executive service of a ministry, like the NVWA in the Netherlands. Food safety agencies, at least in Europe, liaise with each other either through formal institutions, such as the European Food Safety Authority (EFSA) or informal networks, such as FLEP. Enforcement of food safety laws may be the responsibility of the agencies or ministries, or they may share such responsibility with local enforcement officers at state, city or commune level.

3.2 Private sphere[52]

The private sphere of the regulatory space (Quadrants III and IV) is occupied by a range of different actors operating at transnational—global and regional—and

52 NGOs squarely belong to the private sphere. Nonetheless, they are absent in the discussion here. As noted above (n 22), NGOs do not play a role of significance in the domain of food safety, in sharp contrast to social and sustainability aspects of the production, sourcing and marketing of food.

national level. Certification scheme owners have become principal institutional actors in the governance of food safety.[53] Schemes like British Retail Consortium (BRC), Food Safety System Certification 22000 (FSSC 22000), Global Partnership for Good Agricultural Practices (GLOBALG.A.P.), International Food Standard (IFS), Safe Quality Food (SQF) dominate agri-food supply chains and food manufacture. In a survey held among quality and safety directors of major food retailers in The Organization for Economic Cooperation and Development (OECD) countries, the respondents estimated that between 75 and 99 per cent of all food products supplied were certified on the basis of the private food standards part of the schemes.[54] The schemes are governed by major retailers—for instance, Ahold/Delhaize, Carrefour, Tesco, Wal-Mart etc, multi-national brand-name manufacturers, like Kraft, Nestlé, Unilever etc, and/or global audit service providers, like Bureau Veritas, Lloyds, Société Générale de Surveillance, etc. To ensure more coordination amongst these schemes and reduce costs of multiple—and partly overlapping—audits for food business operators, scheme owners established Global Food Safety Initiative (GFSI). This organisation benchmarks individual schemes in order to provide a level playing field among these schemes, such that, once a food business is certified for one scheme, its certification is accepted under other schemes as well.[55] Nonetheless, retailers and brand-name companies have been observed continuing to impose their own food safety assurance systems on actors in their global supply chains and foreign subsidiaries, mainly through strategies of Corporate Social Responsibility.[56]

The private standards adopted under transnational certification schemes require implementation at national, local level. Audit service providers, including auditors, certifiers, consultants, are key players in this implementation process.[57]

53 Spenser Henson and John Humphrey, 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes', Paper Prepared for FAO/WHO (2009), <http://www.fao.org/docrep/012/i1132e/i1132e00.pdf> accessed 15 January 2016.

54 Linda Fulponi, 'Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries' (2006) 31 Food Policy 1, 6.

55 Paul Verbruggen and Tetty Havinga, 'The Rise of Transnational Private Meta-Regulators' (2016) 21 Tilburg L Rev 116; Fabrizio Cafaggi, 'Transnational Private Regulation: Regulating Global Private Regulators' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 212.

56 Spenser Henson and John Humphrey (n 53) 4.

57 Paul Verbruggen and Tetty Havinga, 'Food Safety Meta-Controls in the Netherlands' (2015) 6 EJRR 512.

Transnational schemes may also have national spin-offs or accept national standards as equivalent. An example is provided by GLOBALG.A.P., the most widely implemented transnational food safety standard for agri-food in the world, which has devised a benchmarking process through which it has recognised national schemes to be equivalent to GLOBALG.A.P. certification for the module against which it was successfully benchmarked. Such national standards include ChiliGAP, ChinaGAP and KenyaGAP, as well as the 'Red Tractor Farm Assurance' scheme in the UK, the *Qualität und Sicherheit* (Quality and Safety) scheme in Germany and the *IKB Varken* (IKB Pigs) scheme in the Netherlands.[58] In addition there are national assurance schemes administered by national trade associations or audit service providers, such as the American Institute of Baking in the US and *RiskPlaza* in the Netherlands. Finally, we can distinguish individual companies in the food industry, known as food business operators, that are the ultimate targets of food safety legislation. To implement these laws, however, they may design firm-specific systems of food safety control (HACCP systems) that in turn can be enforced by national food safety agencies.[59]

3.3 Hybrids

The allocation of the actors' position in the regulatory space of food safety as set out in Figure 2 might be said to be quite arbitrary for—as we will see in detail in Section 4—actors may influence and enrol other actors positioned in different quadrants of the space. There are also a number of actors that are part of the regulatory regime of food safety that are difficult to classify as either public or private, working at national or transnational level. They are 'hybrids', either residing at the intersection of the public-private sphere, the national-transnational sphere, or even both.

Accreditation bodies (ABs) are an example of a public-private hybrid. Accreditation can be defined as an attestation that a certification body meets the requirements to carry out specific conformity assessment activities. The

58 GLOBALG.A.P., 'Benchmarked Resembling Schemes' <http://www.globalgap.org/uk_en/what-we-do/the-gg-system/benchmarking/BM-Resembling/index.html> accessed 15 January 2016.

59 Robin Fairman and Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27 L & Pol'y 491.

organisations providing the attestation—ABs—are key actors in the regulatory space. All the GFSI benchmarked schemes require that the certification bodies that perform the audit under the scheme have been accredited. Put simply, accredited third-party certification is now the industry standard.[60] The nature of these ABs is unclear, however. In the EU, Regulation 765/2008/EC on accreditation and market surveillance lays down general principles for the operation and organisation of national ABs.[61] Article 4(5) of this Regulation requires that if accreditation is not directly provided by a public authority, the Member States are held formally to recognise the accreditation activities of the national AB as a public authority activity. This implies that if accreditation is provided by a private law organisation, for example, a foundation or a corporation, it is attributed a semi-public law status upon formal recognition. While ABs might thus be private sector bodies, by their regulatory function, they should be considered public as far as accreditation services are concerned.

An example of a national-transnational hybrid is provided by global audit service providers. The rise of transnational private food standards has created a demand for firms that can provide audit and inspection services across the globe. Blair, Williams and Lin speak of 'a rapidly growing global army of privately trained and authorised inspectors and certifiers'.[62] This industry of audit service providers consists of multi-national firms such as the Bureau Veritas Group, *Det Norske Veritas*, Lloyds, *Registro Italiano Navale*, *Société Générale de Surveillance*, and the *Technischer Überwachungsverein* that have national subsidiaries or contracted auditors and inspectors on all continents.[63] While these actors and their

60 Maki Hatanaka, Carmen Bain and Lawrence Busch, 'Third Party Certification in the Global Agrifood System' (2005) 30 Food Policy 354.

61 These requirements include conditions of independence, impartiality, objectivity and competency. See Articles 8 to 12 Regulation (EC) 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L 218/30.

62 Margaret Blair, Cynthia Williams and Li-Wen Lin, 'The New Role for Assurance Services in Global Commerce' (2008) 33 J Corp L 325, 329.

63 Société Générale de Surveillance, for example, notes to have 'over 1,800 offices and laboratories and more than 85,000 employees around the world'. See <http://www.sgs.com/en/Office-Directory.aspx> accessed 15 January 2016.

subsidiaries are all incorporated into national legal orders, their service provision is cross-border.[64]

Finally, the International Organization for Standardization (ISO) can be considered to involve a variation of hybridisation in the regulatory space of food safety. ISO develops voluntary standards that apply to a wide variety of domains, including food safety, and are available on payment of a fee. A key standard for food is the ISO 22000 standard on 'Food Safety Management Systems – Requirements for Any Organisation in the Food Chain', which was adopted in 2005 and has served as a baseline for other standards in the domain, including the GFSI's benchmarking document and FSSC 22000. Furthermore, ISO provides private standards for certification and accreditation services, including ISO/IEC 17021:2006, ISO/TS 22003, and ISO 17011:2004 which are widely used by scheme owners, ABs and even state actors to assess whether certification bodies are equipped to carry out certification services. ISO itself, however, is a private association under Swiss civil law whose membership is comprised of national standardisation bodies, which may be public, quasi-public or private in nature.[65] Therefore, ISO constitutes a meta-organisation of national–public or private standardisation bodies that has, as its main objective, setting transnational standards.

4 Strategies for enrolment

Regulatory enrolment is a strategy that is frequently applied in the domain of food safety by different actors, for different regulatory functions, and with a view to enrolling different types of resources. We can distinguish between six different

64 Société Générale de Surveillance, for example, notes in a marketing communication on 'food safety, quality and sustainability solutions' the following: A Global Reach with A Local Touch: 'Our approach for delivering services to our clients is harmonised, leveraging the largest independent network of experts in the world. With a presence in nearly every single region around the globe, our experts speak the local language, understand the culture of the local market and operate globally in a consistent, reliable and cost-effective manner.' <http://www.sgs.com/~/media/Global/Documents/Brochures/SGS%20CTS%20Food%20Brochure%20Hyb%20EN%202013.pdf> accessed 15 January 2016.

65 Codex Alimentarius Commission, 'Consideration of the Impact of Private Standards, Joint FAO/WTO Food Standards Programme', Report presented at 33rd Session Geneva, Switzerland, 5–9 July 2010 (CX/CAC 10/33/13) <ftp://ftp.fao.org/codex/Meetings/CAC/cac33/cac33_13e.pdf> accessed 15 January 2016.

avenues or strategies for such enrolment—either one-directional or mutual—across the dimensions of the regulatory space of food safety, as set out by Figure 3.

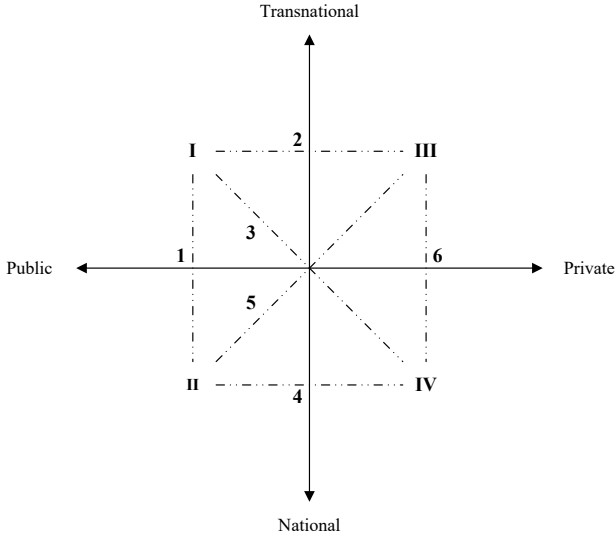

Figure 3 Regulatory enrolment in food safety (own elaboration)

The analysis below will provide examples of the avenues for enrolment, detailing the actors and resources that are enrolled, why this is taking place and how enrolment occurs, ie, consciously or unconsciously, implicitly or explicitly, and with or without changes to formal legal structures.

4.1 Transnational public – national public

The influence of international public law and IGOs on national food safety laws is a topic that has been well studied by scholars of food law and governance. That influence has been noted as being pervasive, in particular in the EU. As MacMaoláin observes for the UK, 'it is the EU membership which has led to the vast majority of food safety laws as they stand (...)'.[66] The same is true for other

66 Caoimhín MacMaoláin (n 49) 10.

EU Member States. The current design of EU food safety law depends heavily on a multi-level system of governance in which the EU and its independent agency ESFA enrol national governments and food safety authorities to ensure uniform and coherent application of food safety rules across EU territory.[67] Accordingly, they enrol the resources of national public actors such as information, wealth, strategic positioning and organisational capacity. As regards information, for example, the European Commission has set in place a 'Rapid Alert System for Food and Feed', which enables information to be shared efficiently between EU-28 national food safety authorities, the Commission, EFSA and other stakeholders within the European Economic Area. Accordingly, notifications of food safety risks and related outbreaks enable the EU and national authorities to devise swift, collective and efficient strategies for addressing these incidents. Conversely, national public agencies have enrolled the EU to enhance their regulatory capacity in terms of authority and legitimacy and expertise. One of the key considerations underpinning the new design of EU food safety law was the lack of trust and confidence of the general public in the capacity of national authorities to deal with cross-border food safety outbreaks in the aftermath of the BSE crisis.[68] The creation of strong EU institutions and the ability to work with them would thus enhance the authority and legitimacy of national agencies. The creation of EFSA also responded to the need for national governments to have objective scientific and technical information for the resolution of food safety incidents.[69] Expertise was thus sought as a resource.

4.2 Transnational public – transnational private

An example of the enrolment occurring between actors positioned in Quadrants II and III concerns the interplay between Codex and transnational private certification schemes as regards Codex standards. As noted, a key standard adopted by Codex is the HACCP standard, which provides a systematic method for identifying and controlling hazards associated with food operations in the supply chain. In 1969,

67 Ellen Vos and Frank Wendler, 'Food Safety Regulation at the EU Level' in Ellen Vos and Frank Wendler (eds), *Food Safety Regulation in Europe. A Comparative Institutional Analysis* (Intersentia 2006) 65.

68 Ellen Vos (n 50) 228, 242; Caoimhín MacMaoláin (n 49) 132–33.

69 Harry Kuiper, 'The Role of Scientific Experts in Risk Regulation of Foods', in Michelle Everson and Eleen Vos (eds), *Uncertain Risks Regulated* (Routledge-Cavendish 2009) 389.

Codex adopted the International Code of Practice General Principle of Food Hygiene, which promoted the use of the HACCP standard.[70] This Code has had a strong influence not only on the design of national food safety laws, but also on the scope and content of (transnational) private food safety regulation. Like states, private certification scheme owners have based their respective schemes on Codex's HACCP standard. Other standards adopted by Codex relating to food safety, such as standards for Good Agricultural Practice and Good Manufacturing Practice, have also been used as a basis for these schemes.[71] In fact, the Food Safety System Certification 22000 scheme and Safe Quality Food Institute 2000 Code even make explicit reference to Codex as one of the authoritative sources on which their standards are based.[72] Also the GFSI Guidance Document, which is used to perform the GFSI benchmarking process, is said to contain substantive elements of four different Codex standards.[73]

We thus observe a strong reliance by transnational private certification schemes on Codex standards in relation to the regulatory function of standard-setting. Resources that they seek to enrol to strengthen their own regulatory capacity are primarily related to authority and legitimacy, and to expertise. These schemes face an immediate legitimacy deficit because of an apparent lack of democratic process of participation or a delegation of statutory powers by national governments or IGOs. Such deficits are accentuated by the fact that traditional accountability mechanisms such as parliamentary committees, auditors, courts or ombudsman schemes do not readily apply to these private regimes.[74] Being legitimate has been said to have been particularly valuable to private regulatory

70 Codex Alimentarius Commission, 'Recommended International Code of Practice General Principle of Food Hygiene' (CAC/RCP 1-1969, Rev. 4-2003).

71 Spenser Henson and John Humphrey (n 53) 37.

72 See FFSC, 'FSSC 22000 Certification, Part I – Requirements for Organizations that Require Certification' (Version 3.2, February 2015), at 3 <http://www.fssc22000.com/documents/pdf/certification-scheme/fssc22000_part1_v3.2_2015.pdf> accessed 15 January 2016; SQFI, 'SQF Code' (Edition 7.2, July 2014) at 1, 45, 56 <http://www.sqfi.com/wp-content/uploads/SQF-Code_Ed-7.2-July.pdf> accessed 15 January 2016.

73 These are the International Code of Practice-General Principles of Food Hygiene (2003), Principles for Food Import and Export Inspection and Certification (1969), Guidelines for the Validation of Food Safety Control Measures (2008) and Principles for Traceability/Product Tracing as a Tool within a Food Inspection and Certification System (2006). See Kevin Swoffer, 'GFSI and the Relationship with Codex' (Presentation to CIES International Food Safety Conference, Paris 2009). See Spenser Henson and John Humphrey (n 53) 39.

74 Deirdre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38 J Law & Soc 163.

regimes because they require that those parties affected by their authority accept these regimes and modify their behaviour in accordance with the regulatory norms or goals they set.[75] WTO members have also expressed their concern that private food standards are not science-based.[76] Therefore, building on well-established and widely accepted standards developed by an expert body created by United Nations organisations—FAO and WHO—has been a key strategy for responding to legitimacy deficits and helping to bolster the authority and capacity of the private certification schemes.[77]

4.3 Transnational public – national private

Enrolment of national private actors by a transnational public actor occurs in the case of the promotion of 'Guides to Good Hygienic Practice' by the EU and the European Commission. Regulation 852/2004/EC lays down the general hygiene requirements to be respected by food business operators in the food supply chain.[78] One of the principal obligations for these operators based on Article 5(1) of this Regulation is to 'put in place, implement and maintain a permanent procedure based on [HACCP] principles'. In the literature it has been noted that the design and implementation of a HACCP system is particularly troublesome for Small and Medium-sized Enterprises (SMEs), as this approach demands great expertise and financial resources, which this type of food business operators typically lack.[79] Since SMEs make up the larger part of the food industry in the EU,[80] Regulation 852/2004/

75 Julia Black (n 15) 148.

76 WTO – Committee on Sanitary and Phytosanitary Measures, 'Summary of the Meeting of 24 October 2005, resumed on 1–2 February 2006' G/SPS/R/39 (2006) 38.

77 For the strategy pursued by GLOBALG.A.P., see Donal Casey, 'The Legitimation of Non-State Regulatory Organisations: The Case of GLOBALG.A.P.'s Management of Legitimacy, 1996-2011' (PhD thesis, University College Dublin 2014) 234–71, 281–94.

78 Council Regulation (EC) 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs [2004] OJ L226/3.

79 See generally, Robin Fairman and Charlotte Yapp (n 59); Ladina Caduff and Thomas Bernauer, 'Managing Risk and Regulation in European Food Safety Governance' (2006) 23 Rev Pol'y Res 153.

80 Approximately 14.5 million farmers and 310,000 food and drink producing companies exist in the EU. 99% of these food and drink companies are SMEs, which collectively represent about 42% of the revenues of the European food production market. See European Commission, 'European Industry in a Changing World. Updated Sectoral Review 2009', SEC (2009) 1111, 69–70.

EC assists operators in ensuring compliance with the HACCP requirement in that it offers these firms the choice either to develop and implement their own company-specific food safety management system or adopt an applicable 'Guide to Good Hygienic Practice'. At a national level, such guides are adopted and implemented by the food industry or a specific sector within it, subject to approval by a national competent government authority, such as a ministry or an independent food safety agency. The European Commission runs a registration system in which the national guides are made publicly available. In 2015, over 400 national guides were registered in this system.[81] Collectively, these guides help to provide cost-efficient alternatives for food business operators to design individual company HACCP management systems. As the European Commission notes: 'Guides to good practice for hygiene and for the application of the HACCP principles developed by the food business sectors themselves should help businesses to implement HACCP-based procedures tailored to the characteristics of their production.'[82] Accordingly, these guides may assist food businesses to comply with procedural obligations expressed in the EU laws.

The inclusion of Guides to Good Hygienic Practice within the EU regulatory framework on food safety had the clear overall objective to enhance the capacity of food business operators, in particular SMEs, to comply with the newly introduced legal HACCP requirements. By enrolling national private actors involved in the adoption of these guides, the EU and European Commission sought to build on resources within the food industry to work towards implementation of the HACCP standard. An important resource these actors possess concerns information about current industry practices and demands for guidance on how to gain compliance. Trade associations indeed serve as pivotal communication channels in the supply and demand of such information as they are strategically positioned to gather input about concerns over compliance. That also makes them key actors for the adoption of common standards on HACCP compliance. As membership organisations, trade associations can be said to enjoy a strong degree of legitimacy of food business operators. Experience with the development and use of national guides provides

81 European Commission, 'Register for National Guides to Good Practice' (last updated 11 November 2015) <http://ec.europa.eu/food/food/biosafety/hygienelegislation/docs/register_national_guides_en.pdf> accessed 15 January 2016.

82 European Commission, 'Guidance document on the implementation of certain provisions of Regulation (EC) No 852/2004 on the hygiene of foodstuffs' (18 June 2012) at 13 <http://ec.europa.eu/food/food/biosafety/hygienelegislation/docs/guidance_doc_852-2004_en.pdf> accessed 15 January 2016.

another argument for relying on private industry actors in the implementation of EU law. In the Netherlands, for example, guides on good hygiene practice have been a widely used instrument in non-industrial food sectors for over 25 years.[83] Enrolment of national guides by the EU legislature within the EU framework of food safety law also provides benefits to the private actors involved in the adoption of such guides. Approval and recognition as part of that framework also grants a greater degree of authority and legitimacy to the standard-setting activities of the private actors.

4.4 National public – national private

Related to the implementation of the HACCP requirements as set out by Regulation 852/2004/EC in the EU, is the interplay between national public authorities for food safety enforcement and food business operators. As Article 5(2) of this Regulation stipulates, the HACCP standard requires all food businesses along the supply chain to have in place self-assessment systems that are tailored to their business processes to identify the potential hazards concerned within their individual operations, implement and monitor controls, and document this process. This requirement does not apply to primary producers, such farmers and growers. Public food safety authorities enforce compliance with these privately established systems. This arrangement of company-level self-regulation that is approved and enforced by public actors has been discussed in the literature under the concepts of 'enforced self-regulation' and 'management-based regulation'.[84] The introduction of the HACCP standard as a regulatory requirement for food business operators in EU food safety law has been said to have triggered the widespread use of enforced self-regulation throughout the EU.[85]

83 Tetty Havinga, 'National Variations in the Implementation and Enforcement of European Food Hygiene Regulations. Comparing the Structure of Food Controls and Regulations between Scotland and the Netherlands' (2014) 35 Recht der Werkelijkheid - Cahiers d'Anthropologie du Droit 32, 38.

84 See generally, John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80 Mich L Rev 1466; Cary Coglianese and David Lazer, 'Management-based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37 Law Soc Rev 691.

85 Marian Garcia Martinez, Andrew Fearne, Julie Caswell and Spencer Henson, 'Co-regulation as a Possible Model for Food Safety Governance: Opportunities for Public-Private Partnerships' (2007) 32 Food Policy 299.

Enforced self-regulation is a regulatory strategy in which the regulatory resources of national public and private actors are combined and mixed to enhance the effectiveness and efficiency of regulatory outcomes. As regulatory standards are adopted by the firm itself and approved by the public agency, they are claimed to be more closely attuned to the business operations than to state regulation, more comprehensive and easier to amend. They also enjoy greater acceptance, induce fewer compliance costs for firms and thus lead to higher levels of compliance.[86] In other words, by deploying the strategy of enforced self-regulation, national public agencies tap into key resources of the regulated firm to attain compliance. These resources first of all concern information about compliance. While public regulators may possess such information, and lots of it, they cannot possibly know as much as the firm itself. Also assessing and understanding the information might be more complicated for agencies than for the firm itself. In addition, the agency relies on the resources of expertise, wealth and authority of regulated firms to implement legal requirements in business processes and its staff members. Conversely, the individual firm may seek to enrol a public agency by applying for approval of its HACCP system in order to receive information about how to gain regulatory compliance. Approval also provides the firm with authority and legitimacy in pursuing its company policy vis-à-vis staff members internally, and suppliers and buyers externally.

However, the implementation of enforced self-regulation has proven to be not without its problems. While its deployment was intended to create efficiency in the allocation of scarce public enforcement resources, the regulatory strategy has been reported to be very time-consuming and laborious for individual enforcement officers, in particular when carrying out inspections at SMEs.[87] The success of enforced self-regulation is fundamentally dependent on the capacity of the firms concerned to understand and manage HACCP-based systems. However, resources to do so, in particular those of expertise and funding, are typically lacking among SMEs.[88] Consequently, public agencies need to allocate more time to educate food business operators on food safety hazards, which in turn leads to a situation in which the original objective of the approach—ie, efficiency—is undermined. Here, the analytical framework for regulatory enrolment as proposed by Black could provide better insight into how to overcome these problems.

86 John Braithwaite (n 84) 1474–83.
87 Robin Fairman and Charlotte Yapp (n 59) 516.
88 ibid 504.

4.5 National public – transnational private

Enrolment of transnational private actors by national public actors is in the process of development. In the past decade, public enforcement agencies in jurisdictions such as Canada, the Netherlands, the UK and the US, have designed various collaborative regulatory arrangements with private assurance schemes to deploy their resources in more efficient and innovative ways.[89] So far, these assurance schemes have been primarily national in scope. A recent development has been the coordination of public food safety controls with transnational private certification schemes. A key actor in this development is the Netherlands Food and Consumer Product Safety Authority (NVWA), which has recently developed a policy of assessing private systems of food safety controls so as to use these private systems in its own enforcement activities. Compliance under private regulatory systems would lead to a reduction in the frequency of official inspections, or sometimes, the complete absence of such inspections.[90] NVWA is considering extending this policy to transnational private certification schemes benchmarked by GFSI. By doing so, it seeks to enrol the key resources these schemes possess, including information, wealth, strategic position and organisational capacity. A principal explanation by NVWA for pursuing this policy is related to the fact that its own capacity to regulate food safety has come under pressure due to the globalisation of food supply chains, and recurrent institutional reforms and budget cuts.[91]

GFSI, on the other hand, has been keen to engage with national and transnational public actors. Through its 'Global Regulatory Affairs Working Group' it has sought to encourage governments to understand and recognise the credibility of the GFSI process and to gain recognition by public regulators in Canada, the EU and US of GFSI-benchmarked schemes as an accepted tool to help them prioritise their food safety compliance resources and factory inspection.[92] By pursuing this strategy of engagement, GFSI seeks to enrol the authority and legitimacy of public actors, while sharing information on how they might design

89 For an overview of the developments of collaborative regulatory arrangements in these countries, see Marian Garcia Martinez, Andrew Fearne, Julie Caswell and Spencer Henson (n 85); Paul Verbruggen and Tetty Havinga (n 57).

90 Paul Verbruggen and Tetty Havinga (n 57) 521–22.

91 ibid 514.

92 Tetty Havinga and Paul Verbruggen, 'The Global Food Safety Initiative and State Actors: Paving the Way for Hybrid Food Safety Governance' in Paul Verbruggen and Tetty Havinga (eds), *Hybridization of Food Governance: Types, Trends and Results* (Edward Elgar, forthcoming).

accreditation programmes for enrolling GFSI-benchmarked schemes in inspection and enforcement policies. It has been widely acknowledged that third-party certification schemes benchmarked by GFSI face problems in terms of auditor competence and auditor independence.[93] Enrolling national governments and IGOs in its regime is part of a wider effort to address these issues.[94]

4.6 Transnational private – national private

Finally, transnational and national private actors may enrol each other's resources to strengthen their capacity to achieve their respective regulatory goals. An example is provided by GLOBALG.A.P., which, as noted above, provides for a benchmarking process through which national schemes are recognised to be equivalent to GLOBALG.A.P. certification for the module against which they have been successfully benchmarked. As a result, farmers certified by the benchmarked national schemes benefit from the worldwide application and acceptance by GLOBALG.A.P. of certification in markets for primary produce, including fruit and vegetables, dairy, beef, poultry, pigs and plants. This is a dominant motivation for national schemes to apply for the benchmarking process. As some observers have noted, GLOBALG.A.P. benchmarking is 'a marketing instrument to expand export market'.[95] After all, if national schemes succeed in being benchmarked, they can offer their (potentially) certified farmers the prospect of being able to access global supply chains for primary produce and enter the most profitable markets (EU, North America, Australia), which are typically dominated by major Western supermarket chains.[96] The key resources these national schemes thus enrol concern the strategic positioning, organisational capacity, and authority and legitimacy of GLOBALG.A.P. as the world's biggest certification scheme for primary produce. For GLOBALG.A.P., on the other hand, the incentive to organise enrolment through its benchmarking process is to be able to coordinate its own regulatory activities with

93 Timothy Lytton and Lesley McAllister, 'Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest' (2014) Wis Law Rev 289, 297–304.

94 Tetty Havinga and Paul Verbruggen (n 92).

95 Olga Van der Valk and Joop van der Roest, 'National Benchmarking against GlobalG.A.P.: Case Studies of Good Agricultural Practices in Kenya, Malaysia, Mexico and Chile' Report 2008–079 (April 2009) <http://edepot.wur.nl/11453> accessed 15 January 2016.

96 Paul Verbruggen, *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety* (Edward Elgar 2014) 181–82.

different and, at times, competing national private food safety regimes. Moreover, it enrols resources such as information, expertise and strategic position from local actors to be included in the GLOBALG.A.P. standard-setting procedures headed by its national technical working groups. Also such enrolment has been considered a key strategy of GLOBALG.A.P. in managing its legitimacy vis-à-vis state and non-state actors.[97]

5 Regulatory enrolment as a governance response to change

A key contention of the detailed analysis of the regulatory capacity and related resources of different actors constituting a regulatory regime, and in turn the potential for mutual regulatory enrolment is that it provides 'a normative framework for considering ways in which the capacity of the system as a whole might be enhanced effectively and legitimately by the careful deployment within it of the regulatory capacity of different actors'.[98] Such an analysis also provides a lens through which governance response to regulatory change can be designed. As noted, both the configuration of actors and their relative resources are subject to change.[99] Changes may thus require the search for enrolment of other and new actors, or other and newly acquired resources.

The domain of food safety has been subject to tremendous changes in the last two decades that have affected both positively and negatively the regulatory capacity—or power if you will—of actors in that domain.[100] One transformation stands out, however, and that is the rise of global supply chains. In the following subsection, this change is discussed in greater detail, as well as the potential for the strategy of regulatory enrolment as a response to it.

5.1 Global chains and national enforcement agencies

The food industry consists of firms that are concerned with the farming and production, packaging and distribution, and retailing and catering of food and

97 Donal Casey (n 77) 257–60.
98 Julia Black (n 3) 91.
99 ibid 80.
100 Terry Marsden, Robert Lee, Andrew Flynn and Samarthia Thankappan (n 1) 3–23; Tetty Havinga, Donal Casey and Frans Van Waarden (n 1) 3–18.

beverages. Food supply chains link the operations of these firms and include, at one end, a strongly fragmented market for producers, including farmers, growers and, at the other end, a very concentrated market dominated by major retailers, ie, supermarket chains. In the US, the top five supermarket chains accounted for almost 40% of retail food turnover in 2000, while in 1993 they accounted for some 25%.[101] In most European countries the five largest retailers account for between 50% to over 70% of retail food.[102] In addition, retailers in Western capitalist economies have been increasingly sourcing food products and ingredients across geopolitical boundaries, thus increasing the distance over which food is shipped and the number of jurisdictions they cross.[103] These trends combined have created an environment in which 'global food retailing increasingly resembles an international oligopoly composed of a limited number of multinationals with minor brand producers and non-branded producers being obliged to comply with the requirements and conditions set by retailers'.[104]

For a single public enforcement agency, the global scope of supply chains poses major challenges for its regulatory capacity to ensure safe food. While these chains have become increasingly global and frequently involve stages of production in different foreign territories, its own jurisdiction remains territorially defined. Furthermore, the sheer volume of trade in food products makes compliance with food safety regulation more troublesome and costly. In the Netherlands, for example, this is considered a serious problem since the country plays a significant role in the global trade of food. It leads global trade in vegetables—ranked highest with some 12% of global trade—while for other food products its share is significant too.[105] To retain this position, the Netherlands has a strong interest in ensuring the safety of imported food, yet this task might simply be impossible for a single public agency to meet adequately.

The loss of strategic positioning by national food safety agencies in a global context and a lack of authority and legitimacy to regulate food production in other

101 Lawrence Busch and Carmen Bain, 'New! Improved? The Transformation of the Global Agrifood System' (2004) 69 Rural Sociol 321, 330.

102 OECD, 'Private standards and the shaping of the agro-food system', Doc. No. AGR/CA/APM(2006)9/FINAL (Paris 2004) 11–12.

103 Linda Fulponi (n 54), 6–7.

104 Codex Alimentarius Commission (n 65) 5.

105 UN International Merchandise Trade Statistics 2011, 'Vegetables, fresh, chilled, frozen, simply preserved; roots 054' <http://comtrade.un.org/pb/FileFetch.aspx?docID=4527&type=commoditypagesnew> accessed 15 January 2016.

countries invites these agencies to think about ways in which they could strengthen their regulatory capacity by enrolling the resources of others. In this context, transnational private certification schemes have entered the scene.[106] Prominent agencies such as the FDA in the US, the Canadian Food Inspection Agency and NVWA in the Netherlands are engaging with GSFI and its individual benchmarked schemes to pave the way for the integration of these schemes in official inspection and enforcement policies.[107] State actors thus seek to enrol critical resources of information, wealth, strategic position and organisational capacity in ever more globalising supply chains.

However, the enrolment of these transnational private certification schemes by national food safety agencies raises important questions about the design of such enrolment and the consequences in terms of democratic accountability of the agency doing the enrolling. For one thing, compliance with these schemes does not provide an absolute warranty for regulatory compliance under the legal framework. Public concern has increased following incidents of false and fraudulent certification within the food industry. A study carried out by the Dutch NVWA indicates that violations of food safety laws are still regularly observed amongst the firms that are certified for GFSI-recognised schemes, including the BRC Global Standard, IFS and FSSC 22000.[108] Furthermore, auditors working under these schemes are paid by the audited food business operators, a situation which constitutes a structural conflict of interest between the financial interests of the auditor and protecting the public from food safety incidents that needs addressing.[109] Also the fact that the functions of third party audits do not overlap with those of official inspections and that certain methodologies, such as sample testing, are not used limits the use of private schemes by public actors.

Public actors are thus challenged to create operational frameworks within which they can assess and control how and under what conditions they integrate GFSI-benchmarked certification schemes into their policies for official inspection and enforcement. One key condition appears to be adequate information-sharing arrangements so that relevant changes in the status of certified firms are instantly

106 Errol Meidinger, 'Private Import Safety Regulation', in Cary Coglianese, Adam M. Finkel and David Zaring (eds), *Import Safety: Regulatory Governance in the Global Economy* (University of Pennsylvania Press 2009) 233.

107 Havinga and Verbruggen (n 92).

108 Hans Beuger, 'Overheidstoezicht en certificatie: Verhogen betrouwbaarheid vergt inspanning van alle betrokkenen' (2012) VMT 20, 21.

109 Timothy Lytton and Lesley McAllister (n 93) 304.

communicated between the agency and a certification scheme.[110] Reliable data on the status of individual certified firms and periodic meta-data on changes made to the substantive standards of the schemes, licenses and accreditations of certification bodies performing compliance audits are fundamental to ensuring trust between the agency and the scheme, and indeed to the effectiveness of the enrolment strategy. It has been observed that legal obstacles, eg, the professional confidentiality obligations of private auditors incorporated into the service contracts signed with food business operators, constitute institutional obstacles to ensuring the proper exchange of information between private schemes as regards non-compliance.[111] This example also points to the limits of regulatory enrolment. As noted, the strategy does not offer full control to the actor doing the enrolling over the actor being enrolled.

6 Conclusion

Regulatory enrolment can be seen as an important contemporary governance response to changes in regulatory power. The study of, and engagement with, different actors occupying the regulatory space possessing a different configuration of resources for regulation allows actors to build their own regulatory capacity in new, uncertain and complex circumstances. The domain of food safety provides a wealth of information and examples of how, why and at what level actors enroll others for the purpose of achieving their regulatory goals. The principal strength of the concept of regulatory enrolment as developed by Black lies in the detailed analytical assessment it proposes of the actors, their relative capacity and underlying resources for regulation, as well as their deployment of such resources for specific regulatory functions. 'New Governance' is thus broken down into manageable units of analysis, without losing sight of the interplay between actors and their capacity to engage in regulatory activities. The disentangling of the properties of actors and the dynamics between them in a regulatory regime offers a proper analytical lens through which the nature of a regulation regime can be better understood and the capacity of that regime as a whole can be enhanced in smart and innovative ways.

110 Paul Verbruggen (n 96) 251.
111 Verbruggen and Havinga (n 57) 522.

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Humanitarian Considerations in International Air Law

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Abstract

The downing of civil aircraft over conflict zones presents serious challenges for current international air law, especially regarding powers and responsibilities of public and private entities. Considering the extensiveness of areas experiencing current hostilities, the question of whether public or private entities should take responsibility following such accidents has become a highly topical issue. Under Article 9 of the Chicago Convention, States exercising complete and exclusive sovereignty over their territory are allowed the right to close their flight-paths. Consequently, a critical question arises as to whether States are obliged to close their airspace during times when their territories endure ongoing armed conflicts. In this author's view, the problem results from the varying perceptions concerning fragmentation within the international law system. To protect the safety of civilians in the sky, this article scrutinises the legality of allowing open airspace over conflict zones. It questions the role of 'elementary considerations of humanity' in order to draw closer towards a potential harmonisation between the secondary rules of special regimes—air law and humanitarian law.

Keywords

Use of Airspace, Conflict Zones, Humanity

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1 Introduction

On 17 July 2014, flight MH17 from Amsterdam to Kuala Lumpur was downed in the territory of eastern Ukraine controlled by hostile groups.[1] Afterwards, an investigation[2] was carried out pursuant to International Civil Aviation Organisation (ICAO) Annex 13 which states that '[t]he sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability'.[3] Therefore, this paper will not probe into who might be the perpetrator, but will instead endeavour to clarify the legal issues regarding the safe use of airspace over conflict zones in order to prevent similar accidents from taking place.

To analyse this issue, the paper will begin by setting out the law. Rules with respect to aviation risks within conflict zones are much more comprehensive than one might infer from the discussions of military strategists and political scientists. The reason for this is that, in reality, accidents never occur in such a way that they can fit comfortably into the application scope of a single branch of international law. Those branches are established by dividing international rules for the convenience of scholars. As a result, the range of applicable legislation could be considered in the following five categories:

(i) The *lex specialis*—the Chicago Convention on International Civil Aviation and its Annexes which relate specifically to the use of airspace.[4]
(ii) The international law applicable generally to armed conflicts—the *jus in bello*, often referred to as the 'international humanitarian law'.

1 Matthew Weaver and Shaun Walker, 'MH17: Dutch to Unveil Official Crash Report' *The Guardian* (London, 13 October 2015) <http://www.theguardian.com/world/2014/dec/25/mh17-russia-claims-to-have-airfield-witness-who-blames-ukrainian-pilot> accessed 14 May 2016.

2 Dutch Safety Board, Crash of Malaysia Airlines Flight MH17 (The Hague, October 2015) <http://www.safetyboard.nl> accessed 15 May 2016.

3 International Civil Aviation Organisation, Annex 13 to the Convention on International Civil Aviation, *Aircraft Accident and Incident Investigation,* para 3.1.

4 Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (the Chicago Convention). Its Annexes can be found on <http://www.icao.int/safety/safetymanagement/pages/sarps.aspx> accessed 11 October 2016.

(iii) The international human rights law—all fundamental freedoms and all basic social, economic and cultural rights provided to each individual independent of nationality.[5]

(iv) The entire corpus of international law that governs State obligations and rights generally, which may affect airspace policy in particular circumstances.

(v) National/regional law, both constitutional and statutory, which may apply to decisions on airspace by national authorities.

All of these will be addressed in the ensuing discussion, and the focus will be to reconcile rules relating to the use of airspace by clarifying the confusion caused by the fragmentation within international law. The international community has made great efforts to address this issue. During the ICAO 203rd Council Session in 2014 and ICAO High-Level Safety Conference in February 2015, it was concluded that '[s]tates continue to have the responsibility to ensure the safety of operations in their sovereign and delegated airspace; and airspace users have the ultimate responsibility to decide where they are able to operate safely.'[6] Therefore, airspace users, airlines and passengers, are imposed with 'ultimate responsibility'. However, this is far from practical when one considers the power conferred on States and airspace users respectively. This paper begins with an assessment of whether the decisive power concerning flight-paths should be controlled by public or private power. On the public side, there are State and air traffic control agencies[7] that may

5 Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 3; Further, the International Court of Justice observes that the protection of human rights law does not cease in times of war, see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 25 ('*Nuclear Weapons*').

6 ICAO, 'Task Force on Risks to Civil Aviation Arising from Conflict Zones, Appendix A, Chairman's Report' (8 September 2014) C-WP/14220 para 2.1; ICAO, 'Sharing Information on Risks to Civil Aviation Arising From Conflict Zones' (2 January 2015) HLSC/15-WP/13 para 2.1 <http://www.icao.int/Meetings/HLSC2015/Lists/WorkingPapers/DispForm.aspx?ID=48&ContentTypeId=0x0100A6F97857FE53F64A97ABE90D99F972A4> accessed 14 May 2016.

7 In addressing activities relating to Air Traffic, the most important ones are:
- Air Traffic Management (ATM) encompasses the functions needed to ensure safe and efficient movement of aircraft during all phases of operation: air traffic services, airspace management and air traffic flow management;
- Air Traffic Services (ATS), which is a part of ATM, is a generic term meaning variously flight information service, alerting service, air traffic advisory service and air traffic control service; and
- Air Traffic Control (ATC) is a service operated by the appropriate authority to promote the safe, orderly and expeditious flow of air traffic.

sometimes be corporatised or even privatised; while the private side consists of airspace users, airlines and passengers.

2 The public and private power divide

Put simply, the most specific and relevant rules relating to the present problem can be found in the Chicago Convention. For example, Article 1 of the Chicago Convention recognises that every State has 'complete and exclusive' sovereignty over the airspace above its territory. Therefore, this denotes that the State is the only legitimate and competent entity to collect safety intelligence regarding conflicts in its territory; in contrast, airspace users can only relay national authorities' information to make decisions.

Notably, in terms of privatised Air Traffic Control, it is necessary to clarify that they belong to the domain of public power because their conduct can be attributed to the State. Firstly, according to Article 28 of the Chicago Convention, States have the obligation to provide an air navigation service, meaning that it is an inherently public function. Secondly, according to customary international law that is enshrined in the Articles on Responsibility of States for Internationally Wrongful Acts (ASIWA), the conduct of an individual shall be considered an act of a State if the person in fact acts on the instructions of, or under the control of, that State.[8] Air traffic control agencies performing these public functions are exercising government power, and therefore, their conduct shall be attributed to the State. The jurisprudence of the Überlingen collision case has effectively confirmed this point. In this particular case, an accident occurred in German airspace and the air navigation services were provided by a Swiss-based company. The court ruled

See David McMillan and Roderick van Dam, 'EUROCONTROL and the EU Single European Sky' in Daniel Calleja Crespo and Pablo Mendes de Leon (eds), *Achieving the Single European Sky: Goals and Challenges* (Kluwer 2011) 67–68 ('Single European Sky').

8 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) II(2) Ybk ILC 26, 38–40; It refers to the case concerning the difference between New Zealand and France regarding the interpretation or application of two agreements concluded on 9 July 1986 and which related to the problems arising from the *Rainbow Warrior (New Zealand v France)* (1990) 82 ILR 499; See also Ruwantissa Abeyratne, 'State Liability for Negligent Acts of Autonomous Air Navigation Service Provider' (2006) 22 Professional Negligence 176, 183–92.

that responsibility exclusively rested upon Germany on the grounds that air traffic control is a sovereign task and it must be performed by State authorities.[9]

Moreover, regarding the judgment of the Cagliari collision case,[10] the traffic controllers, considered to be the 'guarantors' of aviation safety, have the obligation proactively to eliminate the risky elements of the flight-plan once they notice that an aircraft is in a 'dangerous' situation.[11] The Court took the view that failing to prevent an incident where the traffic controllers had a legal obligation to do so is equivalent to causing it with culpability.[12] According to State practice, national authorities are the only reliable provider of intelligence upon which the potential risks over certain areas are assessed.[13] The very purpose of reducing aviation risks is to deliver safe flights, which could help to connect countries with one another. This process requires support from States for a specialised technical management of air traffic flow. The government involvement in aviation safety supervision ensures that only public power will be able to make reasonable decisions on whether it is safe enough to fly over certain areas. In conclusion, allocating the decisive power to the public sphere is both legally sustainable and practically viable, and the ultimate responsibility should rest upon States rather than airspace users.

9 The orginal text is: 'Flugsicherung und Luftaufsicht gem. §§ 27c, 29 Abs. 1 LuftVG obliegen, wie oben ausgeführt,der Beklagten innerhalb ihres Staatsgebietes als hoheitliche Aufgabe'. Landgericht Konstanz, *Bashkirian Airlines v Bundesrepublik Deutschland* (27 July 2006) 48.

10 On 24 February 2004, a Cessna 550 inbound to Cagliari at night requested and was approved for a visual approach without crew awareness of the surrounding terrain. It was subsequently destroyed by terrain impact and all on board were killed. The Investigation concluded that the accident was mainly because the crew lacked adequate visual references. The Final Report of the investigation published on 1 July 2009 was not made available in English translation but an unofficial and partial translation into English may be found on <http://www.skybrary.aero/index.php/C550,_vicinity_Cagliari_Sardinia_Italy,_2004> accessed 8 January 2015.

11 Carmelo Starrantino and Marcello Finocchiaro, 'The 2004 Cagliari Accident and Afterwards: The Judicial Aftermath' (2013) 18 Hindsight Winter 70, 76.

12 ibid 76–77; Also in *Öneryildiz v Turkey*, the ECtHR adjudge and declare the State is held responsible even if the victim has knowingly chosen to live in the vicinity of a dangerous area. The Court held that '[i]t was the public authority's default in observing the law that precipitated and induced the subsequent default by the individual (…) It would be hard for the Government to maintain legitimately that any negligence or lack of foresight should be attributed to the victims of the accident'. See *Öneryildiz v Turkey* (2005) 41 EHRR 20, paras 103–06.

13 For instance, in Europe, the function of European Aviation Crisis Coordination Cell (EACCC) relies on information provided from National Focus Point. See Eurocontrol, 'The EACCC: Coordinating Europe's Crisis Response' <http://www.eurocontrol.int/articles/european-aviation-crisis-coordination-cell-eaccc> accessed 3 March 2016.

3 The legality of use of airspace over conflict zones

Having clarified the rules relating to the divide of public and private power in airspace usage, this paper will now turn to the more specific issue of allowing open airspace over conflict zones.

3.1 Current international law rules

This paper will first address the question of whether there are specific rules within international law concerning the legality of airspace usage over conflict zones per se. It will then examine the question at hand in light of the law applicable in armed conflicts proper, ie, the principles and rules of humanitarian law applicable in armed conflicts.

3.1.1 International air law

Article 9 of the Chicago Convention declares that States may, 'for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory.' The permissive language of Article 9 is in line with a State's sovereignty over its airspace as specified in Article 1 of the Chicago Convention.[14] States have the right to decide whether or not to use certain

14 During ICAO Special Group's Meeting on Reviewing the Application of ICAO Treaties Relating to Conflict Zones in Montreal from 13 to 15 July 2015, one delegation recalled the permissive language of Article 9 and proposed to replace the word 'may' with 'shall' in order to clearly establish the responsibility of States with regard to the risks posed by military or other hazardous activities. But other delegations remarked that the permissive language of the Article correctly reflected a State's sovereignty over its airspace as specified. In the end, most States agree that sovereignty is the stepping stone of the Chicago Convention. Therefore, States have the 'freedom' to establish any restrictions to their own airspace, and the word 'may' in Article 9 should be kept as it is. However, for the problems exposed, some delegations stressed the solutions are to develop guidance materials, such as Cir.330 and Doc.9554 to de facto improve the oversight of safe use of airspace. See ICAO, 'Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones' (18 September 2015) SGRIT-CZ/1 Draft Report, paras 2.6–2.9.

airspace at their own discretion.[15] Until now, the legality of allowing open airspace over conflict zones has not been addressed by the Chicago Convention.

3.1.2 International humanitarian law

This paper will examine other disciplines of international law with the minimum degree of detail necessary to attract further considerations. It is noted that international customary and treaty law does not contain any specific prescription authorising the use of airspace over conflict zones for civil aviation. However, nor is there any principle or rule of international law which would make the legality of airspace usage dependent on a specific authorisation. Such legality does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition.

Therefore, it is imperative to examine whether there is any prohibition or suspension of flight over conflict zones. As such, it is first important to identify whether there is a conventional prescription to this effect.

As the prevailing regime governing armed conflicts, established humanitarian rules have a very ancient lineage spanning thousands of years. Through the ages, many civilisations have contributed to the mould in which modern humanitarian law has been formed, revealing the effort of the human conscience to mitigate the brutalities and dreadful sufferings created by armed conflicts.[16] This body of fundamental principles exists in addition to over 600 specific provisions within the four Geneva Conventions and their Additional Protocols. It is thus a crucial body of law in its own right, and this new aviation case in a sense puts it to the test.

Normally, a humanitarian law application starts with discussing whether the armed conflict is international or non-international, assessing to what extent foreign support could escalate an internal armed conflict, and deciding whether Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I)[17] or Protection

15 Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Springer 2014) 13–45.

16 *Nuclear Weapons* (n 5) 443 (Dissenting Opinion Judge Weeramantry).

17 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('AP I').

of Victims of Non-International Armed Conflicts (AP II)[18] should apply. The significance of such typology lies with the grant of 'combatant status' and prisoner of war (POW) treatment as well as international rights and obligations deriving from the classification.[19] However, this is of less pertinence in the present case, since this paper focuses on the protection of passengers on a civil aircraft, and arguably, they deserve protection in either scenario. Specifically, such protection is crystallised in Article 58 of AP I, which provides for additional precautions to be taken.[20] This article expresses a general obligation under customary international law to protect civilians against widespread and devastating damage which may be expected to cause the loss of civilians.

In addition, in order to examine customary international law and determine whether limitations of airspace usage over conflict zones flow from the said source of law, this paper then looks 'primarily in the actual practice and opinio juris of States'.[21] It is clear that a number of States adhere to the practice of advising their airlines not to fly over conflict zones. Major airlines, including all US commercial airlines, British Airways, Qantas and Cathay Pacific had been avoiding Ukrainian

18 As *lex specialis* applicable to non-international armed conflicts, 'AP II' (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609) ('AP II') has a much higher threshold. The threshold can be found in Part I of APII, which Ukraine has ratified. Due to the lack of evidence, it is not possible to check if all the preconditions are fulfilled. The author was present at the briefing meeting on MH17 accident investigation given by Dutch Safety Board in ICAO headquarters on November 6, 2015. There were rebuttals to the validity of key evidence and no international consensus on this issue was ever reached.

19 There is a distinction between international armed conflicts and non-international armed conflicts (and within non-international armed conflicts, the difference between Common Article 3 and AP II conflicts with their different thresholds). The treaty law is very different and, despite the attempts of the ICRC and the ICTY, even the customary law has key differences. See, for instance, Jelena Pejic, 'Unlawful/Enemy Combatants: Interpretations and Consequences' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Martinus Nijhoff 2007) 335–57; Horst Fischer, 'Protection of Prisoners of War' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) 396–411.

20 Article 58 of AP I is titled 'Precautions Against the Effects of Attacks' (emphasis added).

21 *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, para 27.

airspace for months before the downing of MH17 after receiving a Notice to Airmen (NOTAM).[22]

With respect to opinio juris, its existence may be proved by UN General Assembly Resolutions which may have normative value, especially those in certain formulations that contain the term 'should'.[23] General Assembly Resolution 2444 (XXIII) and Resolution 2675 (XXV) reinforced the general view that every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilians.[24] These expressions amount to a confirmation of customary law relating to precautionary measures in armed conflicts.

Further, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated in the Kupreškić case: 'each party to the conflict, to the extent feasible, to remove civilian persons and objects under its control from the vicinity of military objectives in both international and non-international armed conflicts.'[25] Addressing the reality that AP I is not yet binding on all States in its entity, the tribunal declared that these principles spelled out in Article 58 are now part of customary international law.[26] In view of this, as a corollary of the principle of distinction between civilian and military targets,[27] the airspace usage over conflict zones is compromised by the obligation under international law to take precautionary measures.

These obligations are powerful constraints for all the States having subscribed to the cause of maintaining peace and security. Notably, in the present case of flight over conflict zones, civilians are on board an aircraft and from third States. The legal significance of this is that they deserve special, arguably higher, protection

22 The NOTAM reads: FDC 4/2182 (A0025/14)–null AIRSPACE SPECIAL NOTICE UKRAINE POTENTIALLY HAZARDOUS SITUATION -SIMFEROPOL (UKFV) AND DNEPROPETROVSK (UKDV) FLIGHT INFORMATION REGIONS (FIR). See also Rupert Neate and Jessica Glenza, 'Many Airlines Have Avoided Ukrainian Airspace for Months' *The Guardian* (London, 18 July 2014) <http://www.theguardian.com/world/2014/jul/18/airlines-avoid-ukraine-airspace-mh17> accessed 14 May 2016.

23 *Nuclear Weapons* (n 5) para 70.

24 UNGA Res 2444 (XXIII) (19 December 1968), UN Doc A/7218 (adopted unanimously with 111 votes); UNGA Res 2675 (XXV) (9 December 1970), UN Doc A/RES/2675 (adopted by 109 votes in favour; none against and 8 abstentions).

25 *Prosecutor v Kupreškić et al* (Trial Judgment) ICTY-95-16-T (14 January 2000) para 524 ('*Prosecutor v Kupreškić*').

26 ibid.

27 Rules 1 and 7, cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005).

than those civilians on ground. The reason is that by no means can passengers on a civil aircraft 'directly participate'[28] in conflicts as well as the fact that they cannot be associated with any 'military advantage anticipated'.[29]

The commitments set out in humanitarian instruments lead to the security assurances given by the international community to civilians. These treaties bear witness to the recognition of a rule on precautionary measures. These jurisprudences confirm that the humanitarian obligation requires the application of certain control and restriction to the use of airspace. It seeks to protect civilians from the expansion of armed conflicts where airspace is used in a negligent manner.

The compromise of subjecting airspace management to civilian protection is also consistent with general principles of international law. In the famous *Corfu Channel* case, which involved British ships that struck mines in Albanian waters, the perpetrator who had laid the mine remained unknown and Albanian knowledge of the mine was abstract, yet its responsibility was nonetheless established. The court reckoned that the obligation to disclose the existence of a minefield and warn approaching British warships was based on 'elementary considerations of humanity'.[30]

The *Corfu Channel* statement is significant in two particular ways. First, it takes note of the need to safeguard the safety and security of transportation.[31] Second, it highlights the importance of a general norm in respect of human protection. At the time when the UN Charter had just entered into force and no human rights law regime was in place, such 'considerations of humanity' were in fact 'related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy'.[32]

28 See, eg, Article 13(3) of AP II.

29 See, eg, Article 51(5)(b) of AP I.

30 *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 15–23.

31 The *Corfu Channel* doctrine was later reiterated and developed in the law of the sea cases, eg, The *M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* (Merits) [1999] ITLOS Rep 10, para 155 ('*Saiga*'); *The 'Juno Trader' Case (Saint Vincent and the Grenadines v Guinea)* (Merits) [2004] ITLOS Rep 17, para 77; *Maritime Boundary Arbitration* (*Guyana v Suriname*) (2007) 139 ILR 566, para 405; *The Arctic Sunrise Arbitration (Netherlands v Russia)* (2015) 55 ILM 1, para 191.

32 Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 27.

Notably, the phrase 'elementary considerations of humanity' is echoed and emphasised in subsequent domestic and international decisions.[33] It was invoked in humanitarian, environmental, human rights and maritime law cases.[34] This established the basis of what some consider to be a constitutionalist, value-oriented formulation of international law.[35]

However, the connotation of 'elementary considerations of humanity' is not unequivocal. Those seeking further enlightenment as to the nature and status of the principle or how the judges reached their conclusion in the *Corfu Channel* case find little assistance in the judgements or arguments put to the ICJ.[36] In other tribunals, decisions can vary in what exactly those 'considerations of humanity' are as well as their legal implications. For some judges, the expression is considered to be indicative of fundamental human rights and dignity, serving the purpose of protecting individuals.[37] However, others seemed to consider it as a matter that

33 Matthew Zagor, 'Elementary Considerations of Humanity' in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The enduring impact of the* Corfu Channel *case* (Routledge 2012) 264.

34 ibid 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, para 215; *Nuclear Weapons* (n 5) para 79; *Prosecutor v Kupreškić* (n 25) para 524. Especially, in *Husayn (Abu Zubaydah) v Poland*, the European Court of Human Rights held that Poland violated Articles 3, 8 and 13 of the European Convention of Human Rights because Poland made no attempt to prevent those violations of human rights from happening: see *Husayn (Abu Zubaydah) v Poland* App no 7511/13 (ECHR, 24 July 2014) 876; See also *Osman v UK* (2000) 29 EHRR 245, para 116; *Z and Otherrs v UK* (2002) 34 EHRR 97, para 73; *Velásquez Rodriques v Honduras* (Merits) IACtHR Series C No 4 (29 July 1988) paras 172–75; Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edn, CUP 2015) 472–73, 804; Sandra Krähenmann, 'Positive Obligations in Human Rights Law During Armed Conflicts' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 170.

35 Zagor (n 33) 264.

36 ibid 266; As to the doctrine's place in the topology of international law sources, there has been quite voluminous discussion, eg Fitzmaurice aligned 'an obligation to act in accordance with elementary considerations of humanity' in the context of discussing 'general principles of good conduct', see Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Substantive Law' (1950) 27 BYIL 4; Michael Akehurst, 'Equity and General Principles of Law' (1976) 25 ICLQ 801; Martti Koskenniemi, 'The Pull of the Mainstream' (1990) 88 Michigan LR 1946; Humphrey Waldock, 'General Course on Public International Law' (1962) 106 Recueil des Cours de l'Académie de Droit International 63; Francesco Francioni, 'International "Soft Law": A Contemporary Assessment' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 169; Fabián Raimondo, 'The International Court of Justice as a Guardian of the Unity of Humanitarian law' (2007) 20 LJIL 593.

37 *Saiga* (n 31) para 20 (Separate Opinion Judge Mensah).

underpins the *lex lata,* yet at the same time, a matter which leads to a more human-oriented *lex ferenda*.[38] Importantly, the background behind both schools of thought is that these 'considerations of humanity' were invoked solely by individuals against allegedly unlawful action exercised by the State.[39] This is the anchor point at which the present issue of airspace usage can relate to considerations of humanity. Considering the contentious and ever-lasting debate over the nature and application of these 'considerations of humanity', this paper will not endeavour to further elaborate on its normativity, but rather argue that this formulation may offer the idea that it is not impossible for air law discussions to take humanitarian law into account.

3.2 Re-examination of the doctrine of *lex specialis*

As has been demonstrated, international law has evolved into a sophisticated yet fragmented[40] structure, in which multiple factions govern the legal consequences of flights over conflict zones. In reaction to such specialisation, William Jenks observed that the rule of *lex specialis derogat legi generali* was gaining an ever-

38 *Saiga* (n 31) para 90 (Dissenting Opinion Judge Ndiaye).

39 Traditionally, such 'considerations of humanity' are applied to cases where the rights of people are on one side and State obligation is on the other. However, the *Enrica Lexie* case presents a different situation, in which the rights of two groups of humans oppose each other and they both invoke humanitarian arguments. A distinction is carefully drawn here. See *The 'Enrica Lexie' Incident (Italy v India)* (Provisional Measures) Order of 24 August 2015, ITLOS Reports 2015, 133. On the one hand, Italy invokes considerations of humanity to protect its marines from the alleged breaches of due process; on the other hand, India put forward humanitarian considerations to bring to trial Italians who have allegedly killed two Indians. As Judge Paik has observed, 'there are differences between the present case and those other cases, the most critical one being the difference in terms of the gravity of the offence allegedly committed by the accused': see ibid para 7 (Declaration Judge Paik).

40 On 'fragmentation', among a volume of literature, see, in particular, ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification of International Law' (1 May–11 August 2006) UN Doc A/CN.4/L.682; Matthew Craven, 'Unity, Diversity and the Fragmentation of International Law' (2003) 14 Finnish Ybk Intl L 36; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553; Mario Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation' (2006) 17 Finnish Ybk Intl L 1; Sahib Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 LJIL 23.

increasing amount of attention.[41] The normative distinction between general and special laws is important in maintaining a systematic reconciliation. In principle, the special secondary rules of the regime will prevail.[42]

However, a problem with the *lex specialis* principle is that it is based on a particular fiction of unified State conduct—the presumption that States act with a unified legislative will when they conclude treaties or enact customary rules.[43] Yet the reality is, far from reflecting the ideal presentation of unified legislative intent, treaty negotiations of air law and humanitarian law fall within the competences of two different domestic ministries—civil aviation authorities and ministry of defence respectively. Unfortunately, the communication between the two systems is limited.[44]

Moreover, as Martti Koskenniemi noted in his 2006 Preliminary Report for the International Law Commission, the creation of a new international norm may not be as thoughtful a process as legal theory suggests, since 'there is no single legislative will behind international law'.[45] Treaties and customs come about as a result of conflicting motives and objectives—they are 'bargains' and 'package-deals' and often result from spontaneous reactions to events in the environment.[46] In the face of competing secondary rules and/or general international law governing the same issue, a further question is whether such an exclusion of competing norms is in fact intended by that specialised regime in question. In short, there is no objective or neutral approach to issues of fragmentation. In turn, 'whether this question is answered in the affirmative […] may depend on whether international

41 Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 BYIL 401, 405; Bruno Simma, 'Self-Contained Regimes' (1985) XVI Netherlands Ybk Intl L 111; Heinrich Wilting von Wilhelm, *Vertragskonkurrenz im Volkerrecht* (Carl Heymans Verlag 1996); See also the International Law Commission's treatment of the notion of lex specialis, Martti Koskenniemi, 'Study on the Function and Scope of the lex specialis Rule and the Question of "Self-Contained Regimes"' (2004) Preliminary Report by the Chairman of the Study Group submitted for consideration during the 2004 session of the International Law Commission, Doc. ILC(LVI) SG/FIL/CRD.1 and Add. 1, available from the Codification Division of the UN Office of Legal Affairs.

42 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483, 485.

43 ibid 489.

44 See (n 61) below.

45 ILC, 'Fragmentation of International Law' (n 40) para 34.

46 ibid.

law is conceived as a unified legal order or as the sum total of loosely interrelated subsystems.'[47]

According to ILC Article 55, which is based on an interpretation of international law shared by many esteemed lawyers, international law is a unified and, to a certain extent, hierarchical legal order.[48] 'L'unité de l'ordre juridique', as Pierre-Marie Dupuy named his General Course at the Hague Academy,[49] is a sociological fact or, at least, a normative postulate.[50] Mireille Delmas-Marty stated that unity is an inherent characteristic of law, since '[l]aw does not like multiplicity; it represents order, unified through hierarchy and symbolized by Kelsen's pyramid of norms, built for eternity—not by clouds, even if they are organised'.[51]

For the sake of legal clarity and certainty, unity requires normative reconciliation. As Judge Simma and Dr. Pulkowski have noted, '[i]t would be too simple, however, to assert that a fallback on general international law follows "automatically" from a mechanical application of the *lex specialis* maxim. Rather, normative considerations are ultimately decisive.'[52] In this case, there are two competing lex specialis regimes. The Chicago Convention is *lex specialis* in terms of aviation, while the Geneva Conventions are also a specific regime regarding armed conflicts. This presents that the use of the permitted airspace over conflict zones could produce consequences of such an inhumane nature as to clash with the basic principles of humanitarian law.

The international community thus cannot avoid having to understand how such secondary rules concerning airspace management relate to another system of international humanitarian law and the general international law. To answer this question, Judge Simma argued that '[a]s a consequence of relying on a presumption

47 Simma and Pulkowski (n 42) 495.

48 ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April–10 August 2001) UN Doc A/56/10 paras 356–59.

49 Pierre-Marie Dupuy, 'L'unité de l'Ordre Juridique International' (2002) 297 Recueil des Cours de l'Académie de Droit International 9. See also Simma and Pulkowski (n 42) 485.

50 Similarly, Karl Zemanek, 'The Legal Foundations of the International System' (1997) 266 Recueil des Cours de l'Académie de Droit International 62. See text to (n 54) et seq of this article.

51 Mireille Delmas-Marty, *Global Law: A Triple Challenge* (Naomi Norberg tr, Transnational Publishers 2003) 74. The original text is as follows: '[l]e droit a l'horreur du multiple. Sa vocation c'est l'ordre unifié et hierarchisé, unifié parce que hierarchisé. Et l'image qui vient à l'esprit des juristes, c'est la pyramide des normes, construite pour l'éternité, plutôt que celle des nuages, fussent-ils ordonnées'. See Mireille Delmas-Marty, *Trois défis pour un droit mondial* (Seuil 1998) 104 (translated in Simma and Pulkowski (n 42) 495).

52 Simma and Pulkowski (n 42) 485.

in favour of completeness, the threshold for resorting to rules outside the regime should be much higher'.[53] Following this line of thought, in considering air law cases, reference to another regime needs to be sustained by special justification. That is to say, international humanitarian law does not generally offer gap-filling options, which would automatically supplement air law. Rather, humanitarian law only applies in exceptional cases, to the extent that two such specific regimes may overlap and contradict each other. Therefore, it is imperative to examine the justification for possible harmonisation.

3.3 Harmonisation—a clarification of the law

Despite discussing the difficulties regarding the *lex specialis* doctrine caused by the fragmentation of international law, this paper will now try to harmonise air law with humanitarian law. The issue is not whether one discipline pre-empts another, but whether the obligations arising from the humanitarian law regime can also be applied in the context of airspace management during armed conflicts.

3.3.1 Renvoi

The aforementioned perceptions and approaches, promising the very basis of a unified international legal system, call for a careful examination of the context of the aviation treaty. The first justification for harmonisation lies in Article 89 of the Chicago Convention. According to Article 89, the provisions of the Convention shall not affect States' conduct in case of war and national emergency.[54] Among several possible constructions, the principle of effective interpretation[55] requires

53 ibid 505.

54 See Article 89 of the Chicago Convention.

55 Judge Simma states: '[t]aking the Vienna Convention on the Law of Treaties as a starting point, the effectiveness principle (or the maxim ut res magis valeat quam pereat) is reflected either in the duty to interpret "in the light of [a treaty's] object and purpose" or in the notion of good faith. The notion of good faith may be the more convincing solution: the principle of effective interpretation precludes a state from frustrating the obligations assumed by invoking a formal circumvention of the conditions under which the norm would apply'. Simma and Pulkowski (n 42) 508; cf Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP 1984) 115; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Longman 1992) 1280.

the adoption of the perspective that best gives effect to the norm in question. Article 89 expressly states that a war does not entail the obligation to notify the ICAO Council, whereas only a national emergency does.[56] Such differentiation invites a comprehensive clarification of the international law corpus.

When considering the term 'war', it is notable to highlight that the Chicago Convention was drafted in 1944 whilst the Second World War was still ongoing. Once the War had ended, it was agreed that the legal translation of war should be 'armed conflict'.[57] Consequently, this article can be interpreted as a 'renvoi', which now leads to another set of rules applicable to armed conflicts—humanitarian law. It is the use of force in a warlike manner that defines the applicability of humanitarian law. Whether the parties to the conflict recognise themselves as being at war or not is irrelevant.[58] Therefore, even if a State did not declare war or notify ICAO Council, but was undoubtedly participating in hostilities, it is legally engaged in 'armed conflict' and humanitarian rules apply automatically. This interpretation confirms the rationale of Article 89, where, in a state of war, there is no need to notify the ICAO Council. This construal of Article 89 links the Chicago Convention with the international humanitarian law applicable to armed conflicts. This approach is also supported by ICAO diplomatic conferences.[59] The acceptance

56 There have been some cases where States have notified ICAO of a state of emergency in their countries. In these situations, States have proclaimed that under Article 89 of the Chicago Convention, they were not able to comply with their obligations under the Convention. These cases include Honduras in 1957, India in 1962, Pakistan in 1965, Pakistan and India in 1971, and Iraq in 1973. See ICAO, 'Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones' (26 June 2015) SGRIT-CZ/1-WP/1, para 2.7.

57 International Committee of the Red Cross, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (ICRC Opinion Paper, March 2008) <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> accessed 28 April 2015; See also the International Law Association Committee on the Use of Force, 'Initial Report on the Meaning of Armed Conflict in International Law' (ILA, 2008) <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> accessed 28 April 2015; Mary Ellen O'Connell, 'Defining Armed Conflict' (2009) 13 JCSL 393.

58 ibid.

59 During ICAO Special Group's Meeting on Reviewing the Application of ICAO Treaties Relating to Conflict Zones in Montreal from 13 to 15 July 2015, the consensus was that Article 89 is in fact two Articles consolidated into one. In 1944 (during the Second World War) there existed two bodies of laws: those that applied to peace and those that applied to war. States involved in war, the 'belligerents', would notify the fact to the 'neutral' States so that they could exercise their rights and obligations, including those associated with aviation. However, today the division between the two bodies of law is completely different, having evolved into the law applied to armed conflicts. Given that Article 89 does not provide an answer to the very

of Article 89 confirms and reinforces the solid reasoning upon which the treaty is based. This article could not have been included in the Chicago Convention without the acknowledgement that there would be circumstances in which war rules would prevail over the Chicago Convention.

When the Chicago Convention was drafted, the main purpose of it was to promote the prosperity of the budding aviation industry. The interpretation held by this paper regarding the drafters' intention is that, in 1944, States' delegations proposed to open as large an airspace as possible, as well as taking into account that war norms would be more appropriate to deal with possible restrictions of airspace. This interpretation is reified by a consensus in ICAO's conference in 2015.[60] Due to the background of the present case, armed conflicts, war norms and other legal documents should also be applicable to the situation, alongside the Chicago Convention. As a result, Article 9 of the Chicago Convention, which allows States the choice to close their airspace, is not a complete statement.

It is also important to note that the Chicago Convention was designed to regulate 'civil' aviation during peace time. Until the advent of armed conflicts, it was thought that, however differently States may manage their airspace, the territorial government could still control and guarantee the safety of their air paths. Whereas in the case of armed conflicts, a different situation is reached in that the *de facto* control of the airspace is lost. Therefore, the Chicago Convention does not cover the loss of control over its airspace because of armed conflicts. Neither does it expressly prohibit, nor permit, airspace to be left open during armed conflicts. Violation of international law per se, whether by treaty or custom, does not become lawful simply because it is undertaken within the context of aviation under the Chicago Convention.

The fact that States went through the cumbersome multilateral treaty-making process to draft out Article 89 suggests that this article is of particular importance. It goes without saying that States included this special norm of international law precisely with a view to bridge the divide between air law and international

diverse scenarios of armed conflicts, this delegation posited that the legal answer may have to be sought in other bodies dealing with international law as applied to armed conflicts. ICAO, 'Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones' (18 September 2015) SGRIT-CZ/1 Draft Report, paras 7.13–7.14.

60 ICAO, 'Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones' (18 September 2015) SGRIT-CZ/1 Draft Report, para 2.15.

humanitarian law. With this clear indication, we should not presume that States are unwilling to live up to their commitments regarding armed conflicts in the aviation field.

Article 89 could therefore be seen as foreshadowing a future arrangement regarding the use of airspace in armed conflicts in the form of a *renvoi* provision. This emphasises the need to break away from the peace-aligned legislation and go beyond the literal interpretation of Article 9 of the Chicago Convention.

In the light of the aforementioned, it can be concluded that the most directly relevant and applicable law governing this specific question is that which relates to precautionary measures within armed conflicts, particularly those which regulate the conduct of hostilities. It may now be safely concluded that the drafters of the Chicago Convention and the 191 contracting states do not hesitate to pursue the 'unity' of international law, especially when rules outside the regime appear to better serve the safety priority of the aviation legal system. Air law therefore cannot be considered to be fully comprehensive in and of itself. It may be compelled to readjust its attitudes and face the new reality by collaborating with humanitarian rules.

3.3.2 Application to aviation

In order correctly to apply the law to the present case, this section begins with some characteristics of aviation, and in particular, the nature of international transportation. As a sui generis organisation specialised in aviation regulation, ICAO regulates international civil aviation relations with its own dispute resolution mechanisms.[61] In practice, most aviation disputes are resolved through negotiation, and, depending on the relative strength of the aviation trading partners, unilateral coercion.[62] Thus, the substance of air law interacts infrequently with other international law rules.

61 Chapter XVIII of the 1944 Chicago Convention authorised the Council of the ICAO to decide upon any dispute concerning the interpretation of the Convention. See Peter Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (Kluwer 2003) 17. In practice, State delegations to ICAO treaty-drafting conferences are mostly comprised of aviation professionals. Military personnel or humanitarian law experts rarely get involved.

62 At the time of writing, only six aviation disputes have been submitted to arbitration, five have been submitted to the ICAO for adjudication, and twelve have been filed with the ICJ. See Paul Dempsey, 'Flights of Fancy and Flights of Fury: Arbitration and Adjudication of

3.3.2.1 Sovereignty concern

As discussed, Article 9 of the Chicago Convention may not in itself limit the carte blanche of States in managing its airspace in all circumstances. Certain States have in diplomatic conferences suggested the use of airspace be examined in the light of sovereignty. They contended that precautionary measures, if they exist, are subject to the sovereignty principle, and States have full freedom regarding their airspace.[63] According to this view, there is a legal paradox revealing that the full competency of a State could even prevail over international law per se. To accept that States have absolute freedom in their airspace usage is tantamount to recognising that military activities can be undertaken without any constraint in all circumstances.

It is not necessary to embark upon the voluminous discussion of sovereignty,[64] which is not in favour of such assertion either;[65] instead it suffices to note that the very purpose of aviation is to connect geographically distant countries together via safe and reliable flights. Since its inception, aviation has imbued the public mind with feelings of amazement accompanied by an exaggerated fear regarding its

Commercial and Political Disputes in International Aviation' (2004) 32 Ga J Intl & Comp L 231, 304–05; Dimitri Maniatis, 'Conflict in the Skies: The Settlement of International Aviation Disputes' (1995) 20 Annals Air & Space Law 185; Jon Bae, 'Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication' (2013) 4 J Intl Dispute Settlement 65.

63 ICAO, 'Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones' (26 June 2015) SGRIT-CZ/1-WP/1; ICAO Legal Committee, 'The Report of the 36th Session of the Legal' (4 December 2015) LC36-WP/9-1, paras 8.4–8.9.

64 The connotation of sovereignty, which not only has a negative side but also a positive side, is to assure the minimum of protection established by international law, as put forward by Max Huber in *Island of Palmas*. See *Island of Palmas (Netherlands v USA)* (1928) II RIAA 829, 839. Further, in the *Lotus* case, Judge Moore stated that '[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people'. Therefore, the exclusive competence of a State over its territory is subject to the limitation established by international law. See also Judge Moore's dissenting opinion in *Lotus (France v Turkey)* (1927) PCIJ Rep Series A No 10, 88.

65 For further discussion of the development of State sovereignty in airspace, see Myres McDougal, Harold Lasswell and Ivan Vlasic, *Law and Public Order in Space* (Yale UP 1963) 257–67; David Johnson, *Rights in Airspace* (Manchester UP 1965) 23–24; Ivan Vlasic (ed), *Explorations in Aerospace Law: Selected Essays by John Cobb Cooper, 1946–1966* (McGill UP 1968) 55–136; Albert Moon, 'A Look at Airspace Sovereignty' (1963) 29 J Air L & Commerce 328; Jacob Denaro, '"States" Jurisdiction in Aerospace Under International Law' (1970) 36 J Air L & Commerce 688; Robert Jennings, 'International Civil Aviation and the Law' (1945) 22 BYIL 191; Farooq Hassan, 'The Shooting Dawn of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers' (1984) 33 ICLQ 712, 714.

associated dangers.[66] In response to these latter concerns, States have made safety and security a priority of global regulation. States have surrendered their sovereign authority over the subject to an extent far beyond that which has been done in other fields of international law.[67]

It would create a dilemma if international air law, a system intended to promote aviation safety and security, should have a place that could allow for the total destruction of a civil aircraft without impunity. A factor concealing this contradiction is the use of euphemistic language to divert attention from the loss of hundreds of innocent passengers, who then become reduced to diplomatic expressions, such as 'collateral damage'. Clinically detached from their human context, euphemistic terms bypass the sphere of human suffering, out of which humanitarian law has sprung.[68] Consequently, the present problem is not an abstract, purely intellectual topic which can be pursued in a spirit of scholarly detachment from the cruel realities that lie at the very core of the issue. Far from being mere exercises in logic and black-letter law, such realities cannot be logically or intellectually disentangled from their terrible context.[69] Distasteful though it may be to contemplate the brutalities surrounding these legal questions, this issue can only be squarely addressed when those brutalities are brought into vivid focus.[70]

3.3.2.2 The reality of suffering

The sufferings of innocent passengers from a third State tend to be hidden behind a veil of generalities and platitudes. As such, aviation is unique in that, by itself it has special risks from the very beginning and States retain their final say nonetheless. A close and straightforward picture is required of the actual brutalities involved, and of the manifold threats to aviation. Given the exceedingly difficult issues that arise in applying the Chicago Convention as well as the plethora of legislation applicable in armed conflicts, it is vital to consider one further aspect of the question—a broader context.

66 Brian Havel and Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (CUP 2014) 173–75.

67 ibid 176–216.

68 This aspect is touched upon in a volume of contemporary philosophical explorations of the problem of war. See *Nuclear Weapons* (n 5) 451 (Dissenting Opinion Judge Weeramantry).

69 ibid 444.

70 ibid.

At present, there are 13 States suffering from armed conflicts.[71] Maybe our mind is numbed by such abstract figures and cannot comprehend them. The graphically concrete description would be '[d]ozens of passenger planes are still flying over war zones and conflict areas (…) on a daily basis'.[72] As aviation naturally needs to traverse great areas, it is highly probable that thousands of people fly over conflict zones that are left open by the territorial State every day. As clarified in the first section,[73] the ultimate power should rest in the public sphere. The improper use of this airspace will affect the credibility of international air transportation and thus may damage the industry.

In the long run, international air law, and the stability of the international aviation relations which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the use of airspace over conflict zones. It is consequently important to put an end to this situation: the establishment of the long-waited precautionary measures appear to be the most appropriate means of achieving that goal. As a result, humanitarian principles could then respond appropriately and clarify the ambiguity caused by the fragmentation of international law. The ICJ in their *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion said:

> The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in

71 International Civil Aviation Organisation, Conflict Zone Information Repository <http://www.icao.int/czir/Pages/posts.aspx?state=default> accessed 14 May 2016; Uppsala Universitet, UCDP/PRIO Armed Conflict Dataset <http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset> accessed 1 May 2016; Council on Foreign Relations, Global Conflict Tracker <http://www.cfr.org/global/global-conflict-tracker/p32137#!/> accessed 10 May 2016; The International Institute for Strategic Studies, Armed Conflict Database <https://acd.iiss.org> accessed 10 May 2016; European Aviation Safety Agency, 'List of Safety Information' (Cologne, 14 May 2016) <http://ad.easa.europa.eu/sib-docs/page-1> accessed 14 May 2016.

72 Janene Pieters, 'Passenger Jets Still Flying Over Conflict Zones' (*NL Times*, 14 July 2015) <http://www.nltimes.nl/2015/07/14/passenger-jets-still-flying-over-conflict-zones> accessed 5 May 2016; Arguably, not all armed conflicts could affect air space and some conflicts present no missile capability so far. However, the MH17 accident was also considered astonishing in that the conflict should expand to airspace above the flight level 320. See Dutch Safety Board, *Crash of Malaysia Airlines flight MH17* (The Hague, October 2015) <http://www.safetyboard.nl> accessed 15 May 2016. A full examination of risk assessment and management is beyond the scope of the normality discussion this paper hopes to offer.

73 See text to n 10.

> the codification instruments have never been used, have provided the international community with a corpus of treaty rules (…).[74]

The great majority of these treaty rules have already become customary and have reflected the most universally recognised humanitarian principles.[75] These rules indicate the normal conduct and behaviour expected of States.

The conscience of the international community has also responded accordingly in the Security Council Resolution,[76] with the sufficiently demonstrated collective will to eliminate such external risk to civil aviation. It does not hold back in a fashion of ivory-tower detachment, drawing its conclusions from sophisticated exercises in legal logic. In reality, common people took note of the conclusion that ultimate power rests on private entities with dissatisfaction in Dutch Parliament Hearing on 22 January 2016.[77] The fact testifies to a growing awareness of the need to liberate the aviation industry and passengers from dangers, especially those resulting from the misunderstanding that unsafe airspace can nonetheless be utilised. This misinterpretation fails to comprehend established international law rules on combating risks from conflict zones.

If this liberation is not achieved, how many more civil aircraft will need to be destroyed over conflict zones in order to awaken the international community's sense of responsibility. Safety is not a zero-sum game where the adoption of certain rules would provide benefits to the airlines of some States while posing threats to the carriers of others.[78] It is beneficial to all States to enhance aviation safety and security by surrendering authority over safety regulation and conforming to a universally applicable set of standards and practices.

4 Some special European aspects

After clarifying the legal norms with respect to the use of airspace, this paper will now raise some financial and institutional concerns of practice. By implementing national legislation and regulation consistent with the Chicago Convention and

74 *Nuclear Weapons* (n 5) para 82.

75 ibid.

76 UNSC Res 2166, UN Doc S/RES/2166 (21 July 2014).

77 Tweede Kamer der Staten-Generaal, MH17 Hoorzitting, Beleidsreactie Onderzoeksrapporten over MH17, <https://www.tweedekamer.nl/vergaderingen/commissievergaderingen/details?id=2015A05483> accessed 14 May 2016.

78 Havel and Sanchez (n 66) 175.

its Annexes, air traffic management (ATM) in Europe have traditionally been regulated at a global level.[79] However, a new level of ATM regulation was developed in Europe in the 1960s through the establishment of the European Organisation for the Safety of Air Navigation (Eurocontrol)[80] and more recently, the European Union (EU).[81]

The provisions of ATM have traditionally been in the domain of public power. Pursuant to Article 28 of the Chicago Convention, mentioned above, these services have been organised and implemented by the relevant public entities, for instance, ministries of transport and civil aviation authorities. In essentially the same way as with private railways and power plants etc, some European States have corporatised or privatised their provision of air traffic management services for financial reasons.[82] The service provision in these States has been separated from the national public administration with the purpose of better responding to the needs of airspace users in order to provide safe, quality and cost-effective services without unduly delays.[83] It is predicted that commercially oriented management service providers will be able better to carry out such functions with minimal expenditure.

With this background in view, a practical concern regarding the (partial) closure of airspace is that such precautionary measures may reduce considerable en-route traffic. It can deprive a private service provider of a substantial part of its financial income and the economic loss cannot be compensated from the State under the current legal framework. Additionally, regarding the sharing of intelligence, it was argued that the competency of the European Common

79 Calleja Crespo and Mendes de Leon (n 7) 67.

80 EUROCONTROL is an intergovernmental organisation with 41 State parties committed to building, together with its partners, a Single European Sky that will deliver the air traffic management (ATM) performance required for the twenty-first century and beyond.

81 By adopting the initiative of the Single European Sky (SES) in 2004, EU has obtained legislative competence in the field of ATM and has been prompting an in-depth reform of ATM in Europe at the Pan-European level. See Regulation (EC) No 549/2004; Regulation (EC) No 550/2004; Regulation (EC) No 551/2004; Regulation (EC) No 552/2004; For a detailed elaboration of SES, see Calleja Crespo and Mendes de Leon (n 7). The term 'pan-European' was used to draw a line between EU member States and that of Eurocontrol.

82 Government Accountability Office, 'Air Traffic Control: Preliminary Observations on Commercialized Air Navigation Service Providers' <http://www.gao.gov/assets/120/111542.pdf > accessed 4 May 2015.

83 ibid. Another strong financial motivation has been the viability for States to transfer financial liabilities associated with the provision of air navigation services to corporate or private entities.

Transport Policy is presently mixed, rather than exclusive to the EU.[84] It could be worthwhile to discuss whether safety and security issues, particularly the airspace management policy, should be harmonised by the EU.

Currently, the European Aviation Safety Agency (EASA)[85] disseminates recommendations concerning conflict zones on behalf of both EASA and the Eurocontrol Network Manager in the form of Safety Information Bulletins (SIB) to European national aviation authorities and aircraft operators.[86]

Some are of the opinion that the present European institutional structures would not allow for a US FAA-type system to be put in place.[87] The most important difficulty would be created by the absence of a true supranational regulator,[88] and further complicated by the ongoing reluctance of member States to transfer sovereignty with respect to safety and security issues. Also, a further consideration is whether a possible supra-national approach in aligning and harmonising flight safety management could be realised through some other public actor. This possibility could be further examined, together with other practical methods, to discover a profound approach for mitigating risks to aviation from conflict zones.

5 Conclusion

The ultimate responsibility for the safe use of airspace falls upon the public power. Regarding the issue of fragmentation generally, there is no definite solution identified so far. It has to be examined on a case-by-case basis. Air law is not a hyper-specialised institution that stands with clinical detachment from the rest of international law. On this particular issue of flights over conflict zones, and on a purely normative plane, the potential conflict between air law and humanitarian law has to be reconciled by 'elementary considerations of humanity'. This *Corfu Channel* doctrine may present support for the application of a normative humanism

84 ibid.

85 The European Aviation Safety Agency (EASA) is an agency of the European Union (EU) with regulatory and executive tasks in the field of civilian aviation safety.

86 European Aviation Safety Agency, 'Information on Conflict Zones' <https://www.easa.europa.eu/easa-and-you/air-operations/information-on-conflict-zones> accessed 1 May 2016.

87 The Federal Aviation Administration (FAA) is the national aviation authority of the United States, with powers to regulate all the aspects of American civil aviation.

88 Roderick van Dam, 'Conflict Zones in International Civil Aviation' (2015) 1 Tijdschrift voor Internationale Handel en Transportrecht 23, 30–33.

to the regulation of international transport relations, thus maintaining the value of promoting aviation safety and security.

Novel as it is to introduce humanitarian rules into the Chicago Convention, various sources of international law support the conclusion that humanitarian law rules should be properly taken into account by governments in the implementation of activities during armed conflicts, with aviation as no exception. This clarification is also consistent with the intention of the drafters of the Chicago Convention in 1944 when incorporating Article 89.

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Regulating Sovereign Wealth Funds: When States Become Entrepreneurs

Gisela Mation[*]

Abstract

The rise of sovereign wealth funds and other forms of state-owned investments challenges the traditional role of the State and has generated unease at the global financial system. Are sovereign wealth funds motivated by purely commercial considerations? Could they be used to advance political interests? How should they be regulated? Most of the scholarship on the subject and the initiatives to regulate them advance the idea that the adequate behaviour for a state-owned fund is to act just as a private investor would. The 'privatisation' (understood as having the State behave like a private investor) of this type of investor is a way to deal with the practical consequences of their operation and also stabilise the standard theoretical conceptions on the market and the state. Although some 'privatisation' can be helpful, I propose to examine some of the consequences of looking at sovereign wealth funds solely through the lens of private law and private interest, in order to highlight possible pitfalls of this approach. In particular, suspicion about sovereign wealth funds has polarised the debate on their motivations: they are seen through a binary code of the good 'commercially-based investment strategies' or the bad 'politically-driven' moves. This paper presents a more nuanced perspective on the non-commercially based considerations of sovereign wealth funds, in particular those considerations related to socio-economic development. Moreover, it advances the idea that the problem of governance of state-owned funds can be seen both from an external perspective—concerning the relation between the fund and the companies (or countries) receiving its resources—and from an internal perspective—concerning the relation between the fund and its constituents, such as the citizens of the investor state. While 'privatization' might provide good answers to deal with external governance, it is insufficient to tackle internal governance issues.

Keywords

Sovereign wealth funds; privatisation; private law; private interest; socio-economic development.

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1 Introduction

During the past decade, the total amount of investments made by states in the form of sovereign wealth funds (SWFs) has increased dramatically, both in number and size. The total amount of assets managed by SWFs amounted to USD 11.3 trillion in 2015 and is expected to reach 15.3 trillion by 2020.[1] Additionally, over the past few years these funds have substantially changed their traditional investment policy of focusing on sovereign debt to include cross-border corporate transactions, seeking a diversified portfolio and higher returns.[2] Their role as a source of capital in the aftermath of the 2008 financial crisis was critical,[3] and at the time, 'the more common reaction to the expanded role of SWFs in the global financial system among the general public reflected a kind of collective unease'.[4]

In many ways, the rise of SWFs has challenged the traditional role of the state and its relationship with the private sector. The privatisation of state-owned companies around the world, starting in the 1980s, was based on the argument that governments were not efficient managers and that state-owned business performed worse than those run by private actors. This privatisation movement might generate the impression that the state's participation in the economy, apart from its regulatory functions, was to be significantly reduced. The truth, however, is that while states have been selling their controlling interest in domestic companies, there has been a dramatic increase in their non-controlling equity stake in companies at home and especially abroad.[5]

1 PWC, 'Sovereign Investors 2020' (2016) 7 <http://www.pwc.com/gx/en/sovereign-wealth-investment-funds/publications/assets/sovereign-investors-2020.pdf> accessed 22 November 2016.

2 Ronald Gilson and Curtis Milhaupt, 'Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism' (2008) 60(5) Stan L Rev 1345, 1354.

3 For instance, after the beginning of the subprime mortgage crisis in 2007 until Jan 2008 alone, 'such funds have gambled almost $69 billion on recapitalising the rich world's biggest investment banks': see 'Leaders: The Invasion of the Sovereign-Wealth Funds; Capital Markets' *The Economist* (London, 17 January 2008).

4 Kyle Hatton and Katharina Pistor, 'Maximizing Autonomy in the Shadow of Great Powers: The Political Economy of Sovereign Wealth Funds' (2011) 50 Colum J Transnatl L 1, 3.

5 See Bernardo Bortolotti, Veljko Fotak and William Megginson, 'The Rise of Sovereign Wealth Funds: Definition, Organization and Governance' in Stefano Caselli, Veronica Vecchi and Guido Corbetta (eds), *Public Private Partnerships for Infrastructure and Business Development* (Palgrave Macmillian 2015) 295: '[O]ver the 2001–2012 period governments acquired more assets through stock purchases (US$1.52 trillion) than they sold through share issue privatizations and direct sales (US$1.48 trillion)'.

As investments by SWFs expand, many important questions arise: Are SWFs motivated by purely commercial considerations? Could they be used to advance political interests? How do they affect the relationship between 'home' countries (that own the funds) and 'host' or 'recipient' countries? Drawing the line between public and private power in SWFs' behaviour is at the heart of these questions, which become even more pressing with the increase and diversification of investments by SWFs.

In this context, a lot of debate has arisen on the issue of how such investments should be regulated, especially in the aftermath of the 2008 financial crisis. The general view was that SWFs should act as private investors would, and this is reflected in the main multilateral initiative to promote standards for the conduct of SWFs: the Santiago Principles. Created in 2008 by the International Working Group of Sovereign Wealth Funds, with the support of the International Monetary Fund, the Santiago Principles sought to 'demonstrate—to home and recipient countries, and the international financial markets—that the SWF arrangements are properly set up and investments are made on an economic and financial basis'.[6] Thus, one of the main objectives of SWFs, under the Santiago Principles, is to 'invest on the basis of economic and financial risk and return-related considerations'.[7]

In this article, I refer to these efforts to have SWFs' behaviour mimic that of a private investor as 'privatisation'. Thus, when used in quotation marks, I will not be referring to the ordinary meaning of the words privatisation or privatise—as they related to the transfer of a business, industry, or service from public to private ownership and control—but to initiatives, to have SWFs' behaviour match, as closely as possible, that of private investors. As is further explained below, the process of defining a regulatory framework or standards of behaviour for SWFs requires navigating the (sometimes artificial) separation between the realms of public and private powers, as well as theoretical conceptions of the market and the state. And while the 'privatisation' method can be helpful in designing rules to apply to this diverse array of entities classified as SWFs, I propose to examine three consequences of looking at SWFs solely through the lens of private law and private interest, in order to highlight possible pitfalls of this approach that seem to have been sometimes neglected in the policy debate.

6 International Working Group of Sovereign Wealth Funds, 'Generally Accepted Principles and Practices: "Santiago Principles"' (October 2008) 4 <http://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> accessed 22 November 2016.

7 ibid.

The first issue that arises from this current trend of privatisation is that, because of the fear about the motivations of state-owned funds, a 'presumption of bad intentions' might be created which would subject the funds to more scrutiny and limitations than private actors. This might hinder the general objective of making SWFs act as if they were private investors and might lead to market inefficiencies. Second, the suspicion directed at SWFs has created a false polarisation of their motivations: they are seen through a binary code of the good 'commercially-based investment strategies' or the bad 'politically-driven' moves. I wish to present a more nuanced perspective on the non-commercially based considerations of SWFs, in particular on those related to development.

Finally, the problem of governance of state-owned funds can be seen both from an external perspective—which concerns the relationship between the fund and the companies receiving its resources—and from an internal perspective—concerning the relationship between the fund and its constituents, such as the citizens of the investor state. 'Privatisation' might provide good answers to deal with external governance, but it is unclear how much it contributes to internal governance. In part, this seems to be due to the fact that the majority of proposals for the regulation of SWFs has been created and discussed in 'host' countries, and is thus based on the perspective and concerns of countries receiving capital. Thus, more research is required from the perspective of 'investor' states, which are more concerned with addressing issues of internal governance.

2 Sovereign wealth funds: Problematic definitions

When discussing the definition of SWFs, Stephen Grenville makes reference to a line by Humpty Dumpty in Lewis Carroll's *Through the Looking Glass*: 'A word means what you choose it to mean, neither more nor less'.[8] This demonstrates that the term has been used to make reference to several types of institutions that tend to behave very differently. Some argue that the term SWFs 'began as an externally imposed category in search of a definition' and 'gained prominence in part because, as a group, they stand at the intersection of so many urgent governance concerns

8 Stephen Grenville, 'What is a Sovereign Wealth Fund?' in Renée Fry, Warwick McKibbin and Justin O'Brien (eds), *Sovereign Wealth: The Role of State Capital in the New Financial Order* (Imperial College Press 2011) 17.

at once'.[9] The definition of SWFs is thus particularly fluid and contentious, and the developments in the institutions themselves seem to affect the definitions and categories used to describe them, as highlighted below.

Although no universal definition exists, ownership by the state seems to be the main common feature between the different classifications of state-owned funds. This is also a result of the diversity of entities and structures that could be considered state-owned funds: 'Sovereign investment vehicles embrace a large and protean class of organs, entities, and actions, whose principal point of commonality is the ownership, control, or management by a sovereign'.[10] Apart from pointing out the ownership by the state as a feature of SWFs, many definitions also make reference to the specific functions of state-owned funds and distinguish these institutions from other pools of assets owned by the government, such as official reserves managed by a central bank for the purposes of liquidity.

Although the term 'Sovereign Wealth Funds' was coined only in 2005 by Andrew Rozanov,[11] the use of funds by sovereign states to invest in the financial markets is not a new phenomenon. The first SWFs were created in the 1950s, by countries with significant reserves of natural resources, such as Kuwait (established in 1953) and Kiribati (established in 1956). These SWFs were created with the intention of protecting their economies from destabilisation of commodity prices and also as a means for preserving the benefits of non-renewable resources for future generations.[12]

SWFs have been established in a variety of forms, and since the 2000s, with the accumulation of foreign reserves that has happened in many of the emerging and the commodity exporting economies, the number of SWFs established by countries or even states (such as the Alaska Permanent Fund, in the US, and the Alberta Heritage Savings Trust Fund, Canada) grew significantly.[13] It should be noted that some countries have established more than one SWF, usually

9 Anna Gelpern, 'Sovereignty, Accountability, and the Wealth Fund Governance Conundrum' (2010) 3 <http://ssrn.com/abstract=1639119> accessed 22 November 2016.

10 Larry Catá Backer, 'Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-owned Enterprises, and the Chinese Experience' (2010) 19 Transnatl L & Contemp Problems 3, 59.

11 The creation of the term is attributed by several authors to Andrew Rozanov, in an article written in 2005. See Andrew Rozanov, 'Who Holds the Wealth of the Nations?' (2005) 15 Cent Banking J 52, 52–53.

12 Grenville (n 8) 18.

13 See, eg, 'Sovereign Wealth Fund Rankings' *Sovereign Wealth Fund Institute* <http://www.swfinstitute.org/sovereign-wealth-fund-rankings/> accessed 16 January 2017.

with different investment strategies, as is the case in the United Arab Emirates,[14] Singapore[15] and Venezuela.[16]

The important features of the historical development of SWFs encompass not only their significant growth in size and volume, but also a change in their investment strategies. Traditionally, foreign reserves would be invested in government bonds and treasury bills from developed economies. As a way to maximise return on their foreign reserves, states started to deviate from this traditional investment strategy focused on sovereign debt and began to invest in a 'much broader array of assets, including stocks, bonds, fixed assets, commodities, derivatives, and alternative investments, such as real estate and hedge funds'.[17] Investments by SWFs are now much more profiled and risky.

Moving beyond ownership by the state as a baseline for defining SWFs, it should be noted that, as Gilson and Milhaupt explain, SWFs are just one among the diverse types of vehicles of state investment. These vehicles include central banks on one end of the spectrum and state-owned enterprises on the other.[18] Thus, the numerous definitions and classifications that have been proposed can include or exclude different types of vehicles of state investment. Besides ownership by the state, some definitions establish specific functions for SWFs, or even classify them in terms of the source of their funds or even by region.

The functions attributed to SWFs are very diverse, and the following list, from Kozack et al, seems to encompass most of the different objectives and functions referred to by the literature on SWFs:

> (i) insulating the budget and economy from excess volatility in revenues; (ii) helping monetary authorities sterilize unwanted liquidity; (iii) building up savings for future generations; (iv) accumulating funds to meet future public pension obligations;

14 Abu Dhabi Investment Authority and Corporation, Mubadala Development Company and Istithmar.

15 Temasek Holdings and Government of Singapore Investment Corporation.

16 Macroeconomic Stabilization Fund and National Development Fund.

17 Martin A Weiss, 'Sovereign Wealth Funds: Background and Policy Issues for Congress, Congressional Research Service Report' (15 January 2009) 2 <http://www.everycrsreport.com/files/20090115_RL34336_a7ea655551d2435a8e05992d4ac1b1367b3e3635.pdf> accessed 22 November 2016; Gilson and Milhaupt (n 2) 1347–48.

18 Gilson and Milhaupt (n 2) 1354.

(v) increasing the return on reserves; and/or (vi) promoting economic and social development.[19]

The great diversity of the institutions that could be put under the term 'sovereign wealth fund' is of particular relevance for regulatory policies. Regulatory measures that are fit to deal with problems of one type of SWFs might be unsuited to regulate others.[20] Thus, some of the challenges when discussing regulation of SWFs lie in designing regulations and definitions that are adequate to deal with their diversity of forms and functions.

3 Clash of ideas: Concepts on the role of the state in the market economy

SWFs have raised a great deal of concern about both their theoretical implications and their practical consequences, both of which will guide the policy debate. From a theoretical standpoint, SWFs could be understood as challenging the traditional concepts of the market economy and affect the 'proper' workings of capitalism that could impose barriers to SWFs. Such restrictions will, in most cases, inhibit the free flow of trade and capital, and this is what could be considered 'anti-capitalist'. Thus, one of the main challenges that regulators face when designing and discussing policies to regulate SWFs is the balance between addressing the different types of concerns that these funds raise and adopting measures that are in one way or another protectionist and contradict the idea of an open market.

Over the 20th century, a lot of effort has been devoted to debating and defining the role of the state in a capitalist economy. As state-owned funds are one of the instruments for state intervention in the economy, the debate on SWFs is embedded in this general discussion. Part of the fuss about the rise of SWFs is due to the fact that, to certain authors and government officials, their mere existence can be interpreted as putting into question some of the 'most basic assumptions about the structure and functioning of our economies and the international financial

19 Julie Kozack, Doug Laxton and Krishna Srinivasan, 'Sovereign Wealth Funds and Global Capital Flows: A Macroeconomic Perspective' in Renée Fry, Warwick McKibbin and Justin O'Brien (eds), *Sovereign Wealth: The Role of State Capital in the New Financial Order* (Imperial College Press 2011) 26–27.

20 Grenville (n 8) 17.

system'.[21] With new forms of government intervention, the 'conventional premise of political and economic organization (…) that state actors regulate markets in which non-state actors participate—is now challenged by the activities of states that participate in markets and non-state actors that seek to regulate'.[22]

Gilson and Milhaupt argue that the controversy surrounding state-owned funds is one of the results of the interaction between two different conceptions of the role of the state in a capitalist economy: 'state capitalism' and 'market capitalism'.[23] State capitalism is often identified with the approach that some emerging economies have taken in the role of government for economic development.[24] Others define state capitalism more generally as 'a system in which the state dominates markets, primarily for political gain' and argue that every country 'features both direct government involvement in regulating the economic activity and some market exchange that exists beyond the state's reach'.[25]

This general debate on the role of the state in the market economy and on different types of capitalism is easily translated into SWFs. As Christopher Cox, former Chairman of the US Securities and Exchange Commission stated:

> These differences in the way we see the role of government—in America's case, as neutral arbiter and enforcer of the rules of the market, and in many other countries, as both player and referee—can have significant implications for the workings of the free market itself.[26]

One of the novelties that SWFs bring to the debate on the role of the state is that the state regulating the financial sector and the state acting as a private player in the market are usually not the same state. As explained above, the discussions of the role of the state usually assume a single state, and not the interaction between different sovereign states. This has implications, not only for the theories of state

21 Sovereign Wealth Fund Acquisitions and Other Foreign Government Investments in the United States: Assessing the Economic and National Security Implications: Hearing Before the Senate Committee on Banking, Housing and Urban Affairs, 110th Congress (2007) (testimony of Edwin M Truman, Senior Fellow, Peterson Institute for International Economics) cited by Gilson and Milhaupt (n 2) 1347.

22 Backer, 'Sovereign Investing in Times of Crisis' (n 10) 16.

23 Gilson and Milhaupt (n 2) 1346.

24 ibid.

25 Ian Bremmer, *The End of The Free Market: Who Wins the War Between States and Corporations* (Penguin 2010) 43.

26 Christopher Cox, 'The Rise of Sovereign Business' (5 December 2007) <http://www.sec.gov/news/speech/2007/spch120507cc.htm> accessed 22 November 2016.

intervention in the economy, but also for international relations and world politics. Other authors argue that SWFs seem not only to challenge the traditional ideas of the role of government in the economy, but also to blur the distinctions between public and private in a new fashion, arising from the 'usurpation of *private* power by *foreign public* actors that *reach across borders*'.[27]

Knowing whether SWFs are a challenge to the neoliberal paradigm of intervention of the state in the government or whether they are actually the ultimate realisation of neoliberalism, since even the states would be operating as private players, is critical to the debate on their regulation. If SWFs are understood to be like private actors in the market, the regulatory approach could be giving states the same treatment as private entities. If SWFs are understood as extensions of state national power, the solution for regulating these institutions might have to be political.[28] In this sense, the theoretical framework that informs the debate on SWFs borrows from the discussions of private agents maximising their interests to the detriment of the company in which their investment is made. As discussed in Part IV below, fiduciary duties that operate under corporate law are one way of preventing this type of behaviour.

Even those who contend that the idea of the state acting as a private investor in the market departs from the neoliberal paradigm of state intervention seem to recognise that, on the other hand, restricting foreign state investment would be a type of protectionism, which in turn, would not be aligned with neoliberal policies. This poses a dilemma for regulatory policies in financial markets, and requires regulatory agencies to find a fine balance between what could be seen as protectionism and allowing for a (foreign) state to be a significant player in the market. This balance is rendered even more difficult to achieve in a time of crisis, as any policy restricting investment by foreign state-owned funds would outflow capital in a time when its scarcity is yet another problem that regulators have to deal with. As Rose puts it, '[w]hile equity investments by SWFs raise serious political and economic concerns, the converse problem of no investment from these very wealthy funds may also pose serious long-term threats to sustained economic prosperity'.[29]

In this theoretical framework about the workings of the market, the debate on regulating SWFs is very frequently informed by the binary code of SWFs

27 Backer, 'Sovereign Investing in Times of Crisis' (n 10) 19–20.

28 ibid 5.

29 Paul Rose, 'Sovereigns as Shareholders' (2008) 87 North Carol LR 83, 90–91.

behaving either as: (i) rational wealth-maximising agents (and thus being good for the market); or (ii) states advancing their political goals (which, as explained above, would be considered particularly threatening to some). Among the few who present an alternative view, Hatton and Pistor state that SWFs are 'autonomy-maximizing institutions',[30] and are used by ruling elites 'to secure their domestic political dominance against both internal and external threats'.[31] This means that SWFs are not rational wealth-maximising agents, but they are also not advancing their home countries' geopolitical agenda. While some other explanations of the motivation of SWFs beyond the binary code of wealth-maximising and geopolitical agendas are presented, I contend that more focus is needed on non-commercial purposes of SWFs which are unrelated to these so-called geopolitical goals.

4 Regulatory framework on state-owned funds

In most recipient countries, a diverse array of domestic rules affect the operations of SWFs in their territories. In a broader sense, these funds are obviously subject to all rules of regulation of financial markets and corporate law that would apply to any investor in a company incorporated or listed in that country. Moreover, some countries, such as the US, have established a specific regime governing foreign investment (made by a private party or by a foreign government), with particular concerns for national security.[32] For the purpose of this article, however, I will focus on what is considered to be the most relevant regulatory framework that applies specifically to SWFs, which has been created at a transnational level.

The most prominent initiatives to promote regulation of SWFs have taken place on the multilateral fora of the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD). In both cases, the institutions have attempted to influence the regulatory landscape by soft law, producing guidelines or reports on best practices for voluntary compliance. In

30 Hatton and Pistor (n 4) 3.

31 ibid.

32 Section 721 Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007, establishes the authority to review mergers, acquisitions, and takeovers that could result in foreign control or control by foreign governments, in regard to its effect to the national security of the US. This review is performed by the Committee on Foreign Investment in the United States ('CFIUS'), created in 1975 by the Executive Order 11858 with the mandate to carry out Section 721.

terms of their direct audience, they are each at one end of the regulatory spectrum: the IMF is focused on best practices for SWFs themselves, whereas the guidelines of the OECD report are meant for capital-receiving countries. Even before these institutions addressed the specific issue of SWFs, they already had more general guidelines with principles that could be applied to SWFs or inspire their specific regulation—the IMF established the 2001 Guidelines for Foreign Exchange Reserve Management,[33] and the OECD created the 2005 Guidelines on Corporate Governance of State-Owned Enterprises.[34] It should be noted that, before the guidelines and best practices established by the IMF and the OECD, the European Commission had already published a report on SWFs, which contains some of the main principles of the subsequent initiatives.

It is suggested that the US Treasury had an important influence over the international initiatives of regulating SWFs. In June 2007, US Under Secretary for International Affairs, Clay Lowery, claimed that the issue should be discussed in multilateral fora, and that 'the IMF and World Bank could take a very constructive step through the drafting of best practices for Sovereign Wealth Funds'.[35] After that, Secretary of the Treasury, Henry Paulson, is said to have included the topic in the agenda of the G7 by 2007 and 'nudged' the IMF, OECD and the World Bank to 'take on the task of overseeing the development of the SWFs' "best practices" project'.[36]

It should be noted that, at the same time as the US sought to develop a set of best practices within international organisations, it also tried to establish agreements directly with SWFs. It secured an agreement with the SWFs of Abu Dhabi and Singapore, issued on March 2008 and based on their 'common interest in an open and stable international financial system'.[37] This agreement seems to

33 International Monetary Fund, 'Guidelines for Foreign Exchange Reserve Management' (2001) <http://www.imf.org/external/np/mae/ferm/eng/index.htm> accessed 22 November 2016.

34 Organization for Economic Cooperation and Development, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (2005) <http://www.oecd.org/daf/ca/oecd-guidelines-corporate-governance-soes-2005.htm> accessed 22 November 2016.

35 US Department of the Treasury, 'Remarks by Acting Under Secretary for International Affairs Clay Lowery on Sovereign Wealth Funds and the International Financial System' (21 June 2007) <http://www.treasury.gov/press-center/press-releases/Pages/hp471.aspx> accessed 18 September 2016.

36 Joseph Norton, 'The "Santiago Principles" for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes' (2010) 13 J Intl Econ L 645, 651.

37 US Department of the Treasury, 'Treasury Reaches Agreement on Principles for Sovereign Wealth Fund Investment with Singapore and Abu Dhabi' (20 March 2008) <http://www.treasury.gov/press-center/press-releases/Pages/hp881.aspx> accessed 22 November 2016.

enunciate the main principles that were later developed in the international fora. With regard to SWFs, it states that 'investment decisions should be based solely on commercial grounds'; 'SWFs should have in place strong governance structures, internal controls, and operational and risk management systems'; 'SWFs and the private sector should compete fairly'; and 'SWFs should respect host-country rules by complying with all applicable regulatory and disclosure requirements'.[38] The part of the agreement that concerns disclosure is much less specific, simply stating that:

> Greater information disclosure by SWFs, in areas such as purpose, investment objectives, institutional arrangements, and financial information—particularly asset allocation, benchmarks, and rates of return over appropriate historical periods—can help reduce uncertainty in financial markets and build trust in recipient countries.[39]

With regard to receiving countries, the agreement says that they 'should not erect protectionist barriers to portfolio or foreign direct investment'; should 'ensure predictable investment frameworks'; should 'respect investor decisions by being as unintrusive as possible, rather than seeking to direct SWF investment'; and 'should not discriminate among investors'.[40] Moreover, it discusses the issue of national security, saying that '[a]ny restrictions imposed on investments for national security reasons should be proportional to genuine national security risks raised by the transaction'.[41] As shown below, these principles sum up the main elements established by the IMF and the OECD when providing guidelines and best practices for regulating SWFs.

By the end of 2007, the IMF organised a roundtable with sovereign asset and reserve managers and started a comprehensive study on the practices and organisation of the existing SWFs. On February 2008, it established a 'Work Agenda' for SWFs that would guide the creation of best practices. In this framework, the International Working Group of Sovereign Wealth Funds (IWG) was created in May 2008 at a meeting of countries with SWFs, in addition to countries and international organisations who participate in the capacity of observers. The goals of the IWG are: (i) 'to help maintain a stable global financial system and free flow of capital and investment'; (ii) 'to comply with all applicable regulatory and disclosure requirements in the countries in which they invest'; (iii) 'to invest on the basis of

38 ibid.
39 ibid.
40 ibid.
41 ibid.

economic and financial risk and return-related considerations'; and (iv) 'to have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability'.[42]

The IWG started discussions on the creation of best practices for SWFs and met three times—in Washington, Singapore, and Santiago (Chile)—for this purpose. The Generally Accepted Principles and Practices, also known as 'Santiago Principles' or 'GAPP' were published in October 2008 by the IWG. It is an instrument of soft law, as it is 'a voluntary set of principles and practices that the members of the IWG support and either have implemented or aspire to implement',[43] and each of the principles is accompanied by an explanation and commentary.

The Santiago Principles are divided into three sections: Principles 1 to 5 deal with the legal framework, objectives and coordination with macroeconomic policies; Principles 6 to 17 refer to the institutional framework and governance of SWFs; and finally, Principles 18 to 24 deal with the investment policy and risk management framework. They require determination and disclosure of the fund's legal structure;[44] policy purposes;[45] procedures and rules for funding, withdrawal, and spending operations;[46] source of funding;[47] procedure for appointing governing authorities;[48] and accountability framework.[49] The guidelines also broadly concern governance:

> The governance framework for the SWF should be sound and establish a clear and effective division of roles and responsibilities in order to facilitate accountability and operational independence in the management of the SWF to pursue its objectives.[50]

The principles establish a set of reporting requirements, such as an annual report and accompanying financial statements, as well as an annual audit.

On July 2011, almost three years after the publication of the Santiago Principles, the International Forum of SWFs (IFSWF), a global network that succeeded the IWG, published a report on the 'IFSWF Members' Experiences in the Application of

42 International Working Group of Sovereign Wealth Funds (n 6) 4.
43 ibid 5.
44 ibid Principle 1.
45 ibid Principle 2.
46 ibid Principle 4.
47 ibid Principle 4.1.
48 ibid Principle 7.
49 ibid Principle 10.
50 ibid Principle 6.

the Santiago Principles', analysing results self-reported by its members. The report is, overall, positive, in the sense that it conveys that a strong level of compliance with the Santiago Principles exists. With regard to transparency, the report finds that 'most Members disclose their legal basis and structure to the public' as well as their policy objectives. More than half of the funds do not have a procedure for coordinating their policies with those of monetary and fiscal authorities, 'mainly because they are not directly involved in or do not affect macroeconomic policies'.[51]

Interestingly, most members report that they were already in compliance with the Santiago Principles before they were created.[52] Members of the International Forum of Sovereign Wealth Funds have reported that disclosure of their legal basis and structure to the public 'facilitates public understanding and trust of management, and therefore it has a positive impact on domestic legitimacy'.[53]

At the request of G7 Finance Ministers and as part of an ongoing project on 'Freedom of Investment and National Security and Strategic Industries', the OECD prepared its report on 'Sovereign Wealth Funds and Recipient Countries',[54] published in October 2008. It should be noted that the report is relatively general, and is not on the same level of specificity as the rules of the Santiago Principles. The report advocates for policies of fair treatment of investment and principles of 'non-discrimination, transparency [regarding the information on restrictions on foreign investment] and liberalisation'[55] as well as a standstill commitment not to introduce new restrictions,[56] which already existed in previous OECD investment instruments in a more general fashion. It recognises the members' right to take actions necessary to protect national security, expressed in Article 3 of the OECD Codes of Liberalisation of Capital Movements and Current Invisible Transactions, but it has been stressed that its members 'have agreed that [it] should be applied

51 International Forum of Sovereign Wealth Funds, 'IFSWF Members' Experience in the Application of the Santiago Principles' (2011) 14 <http://www.ifswf.org/sites/default/files/Publications/stp070711_0.pdf> accessed 22 November 2016.

52 ibid 17.

53 ibid 13.

54 Organization for Economic Cooperation and Development, 'Sovereign Wealth Funds and Recipient Countries — Working Together to Maintain and Expand Freedom of Investment' (11 October 2008) <http://www.oecd.org/investment/investment-policy/41456730.pdf> accessed 22 November 2016.

55 ibid 1.

56 ibid 3.

with restraint and should not be a general escape clause from their commitments to open investment policies'.[57]

The report provides specific guidance for: investment policy measures designed to safeguard national security in the areas of (i) non-discrimination; (ii) transparency/predictability, which includes the codification and publication of rules, giving prior notice of a country's intention to change investment regulation policies and allowing for consultations; (iii) regulatory proportionality. It is for each country to decide on what the measures necessary to protect national security are.

While both the Santiago Principles and the OECD recommendations in its 'Sovereign Wealth Funds and Recipient Countries' report advance transparency and accountability within SWFs, this is generally done through the perspective of governance and accountability between funds and their invested companies or the home states in which such assets are located. As will be highlighted below, the increasing use of SWFs for goals other than wealth maximisation puts the comprehensiveness and relevance of this regulatory framework into question.

5 'Privatising' the state

As explained above, the debate on the regulation of SWFs has been dominated by a general assumption that they need to become as close to non-state investors as possible, as if they were 'sovereigns pretending to be non-sovereigns in their participation in global private economic markets'.[58] Despite the diversity of the debate regarding the regulation of investments by the state, there seems to be a consensus that SWFs should be acting like rational financial profit-maximising agents in order to engage with the capitalist economy because:

> effectively, if a sovereign wealth fund acts like a private investor, if it ceases to exercise its authority as a regulator rather than a participant, then it ought to be

57 Organization for Economic Cooperation and Development, 'Sovereign Wealth Funds and Recipient Countries — Working Together to Maintain and Expand Freedom of Investment' (11 October 2008) <http://www.oecd.org/investment/investment-policy/41456730.pdf> accessed 22 November 2016; Carolyn Ervin, 'Sovereign Wealth Funds — Should sovereign wealth funds be treated differently than other investors? An OECD project has set out to answer this question' (2008) OECD Observer No 267 <http://oecdobserver.org/news/archivestory.php/aid/2610/Sovereign_wealth_funds.html> accessed 16 January 2017.

58 Backer, 'Sovereign Investing in Times of Crisis' (n 10) 20.

> viewed as a benign instrument useful to the development of global financial markets, and regulated as such.[59]

This attempt to 'privatise' SWFs poses significant challenges. First, there is the question of whether SWFs can really be 'privatised'; in other words, can SWFs truly conduct themselves as private investors would (A). Second, there is the issue of dealing with non-commercial goals of SWFs—which are, as stated above, not necessarily advancing a geopolitical agenda (B). Third, we must examine whether the governance of SWFs can be dealt with satisfactorily through the lens of private power (C).

5.1 Not so 'private': Challenges of the 'fiduciary state'

The first challenge to the 'privatisation' of SWFs has both theoretical grounds and practical considerations. Can SWFs really act as private investors? In answering the theoretical question, many scholars and commentators seem to have adopted a realist approach, in the sense that states are viewed as always maximising their own national political interests, and incapable of acting simply to maximise financial gains. The debate in the US Congress summarises the general idea: 'By definition, these funds are extensions of the state, and should always be viewed as maximizing their nation's strategic interests, in addition to maximizing profits'.[60] This would, in turn, put in to question the very logic of this regulatory attempt to 'privatise' these investment vehicles:

> The current SWF form seems to be the source of looming institutional contradictions. On the face of it, these funds swear off national, or strategic investment strategies in deference to Western sensibilities. Nevertheless, they ultimately exist to serve the sovereign sponsor. Gelpern (2010) articulates this dilemma in the following way: 'Reading between the lines of SWF definition and commentary reveals a jumble of contradictions: public money that pledges to act private, vast pools of capital that

59 Larry Catá Backer, 'Sovereign Wealth as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment' (2010) 41 Geo J Intl L 425, 430.

60 Chairman Gutierrez, 'Sovereign Wealth Funds: New Challenges from a Changing Landscape: Hearing before the Subcommittee on Domestic and International Monetary Policy' (10 September 2008) Trade and Technology of the Committee on Financial Services, US House of Representatives, 110th Congress, Serial No 110–37 <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg45621/pdf/CHRG-110hhrg45621.pdf> accessed 22 November 2016.

> promise not to move markets, non-controlling investors that manage centrally controlled economies, and public fiduciaries that balk at corporate governance of their investment targets.' While SWFs claim to pursue financial profit alone, there nonetheless remains the long-term interest of the nation-state in using its sovereign wealth to advance status and fortunes of the sponsoring nation as a whole.[61]

Despite this view that SWFs would always maximise the interest of their nation-states and as much as they are feared, it is hard to find examples of misconduct in their investment strategies. Moreover, they are often considered to be relatively conservative investors, focused on the long-term and with 'buy and hold' investment strategies.[62] After the financial crisis, it has been suggested that this has partially changed, with certain funds taking on more aggressive strategies and investing in private equity and hedge funds, 'indirectly financing highly leveraged strategies'.[63] However, no hard evidence of misuse of SWFs has been presented. Not only have SWFs not 'misbehaved', but an argument could be made that they could not do so even if they wanted to: in general, SWFs have been investing in minority stakes, which would give them limited ability to influence management.

First, there is the theoretical challenge of knowing whether SWFs would be capable of acting as private investors (or whether they would always actively use their investments as means of exercising their political power). Second, many have questioned whether, at the other end of the spectrum, they would be subject to such strict scrutiny that they would become more passive than private investors. In that sense, this shift from the state as an owner of companies to the state as an investor has given rise to the 'fiduciary state'.[64] But will the state exercise its fiduciary duties to the companies in which it invests in the same way that private investors would?

Bernstein et al have conducted detailed research on the strategies of SWFs between 1984 and 2007, analysing 2,662 investments and examining 'the propensity of the funds to invest domestically, the equity price levels at the time of their investment, the changes in equity prices after their investment, and the size of

61 Gordon L Clark, Adam D Dixon and Ashby HB Monk, *Sovereign Wealth Funds: Legitimacy, Governance and Global Power* (Princeton UP 2013) 8.

62 Kozack, Laxton and Srinivasan (n 19) 31.

63 ibid.

64 Bernardo Bortolotti, Veljko Fotak and William Megginson, 'The Rise of Sovereign Wealth Funds: Definition, Organization and Governance' in Stefano Caselli, Veronica Vecchi and Guido Corbetta (eds), *Public Private Partnerships for Infrastructure and Business Development* (Palgrave Macmillian 2015) 296.

the acquired stakes'.[65] According to the study, SWFs from Asia and the Middle East tend to acquire bigger stakes in the capital-receiving companies than their Western counterparts.[66] Moreover, the study finds that funds operated by external managers have a slight tendency to invest in smaller stakes.[67]

It is clear that, even in the cases in which SWFs hold a greater stake, they are under strict political scrutiny, and the consequences of participating in transactions that could potentially be seen as politically motivated go beyond the specific operation at hand, as it could be taken into account by the CFIUS when analysing other future deals. Thus, 'SWFs should rationally seek to avoid uncertainty and potentially heavy regulatory burdens that would result from a deviation from a default investment posture'.[68]

The debate on the rise of SWFs has put them in the spotlight in the exercise of their activities. The level of disclosure that is expected of SWFs (by domestic regulation, by international instruments of soft law, like the Santiago Principles, and by the media) is considerably higher than that applicable to private investors. SWFs are encouraged not to behave as active investors, and their transactions are subject to much higher scrutiny.

One of the possible effects of this process is that SWFs will be less willing to engage in corporate governance than a private investor would, making management in the recipient company more powerful and less accountable. An example of this phenomenon could be observed in the purchase of Citibank stocks by the Abu Dhabi Investment Authority. As a condition to the transaction, the fund agreed 'not to own more than a 4.9% state in Citi, and will have no special rights of

65 Shai Bernstein, Josh Lerner and Antoinette Schoar, 'The Investment Strategies of Sovereign Wealth Funds' (2009) 3 <http://www.hbs.edu/research/pdf/09-112.pdf> accessed 22 November 2016.

66 ibid 24.

67 ibid 27. It should be noted that a few exceptions to this general rule of minority participation exist. In 2006, for instance, Tamasek Holdings (owned by the Government of Singapore) and a group of Thai investors purchase a 49.6% stake in Shin Corp (Thailand's largest telecommunications company and at the time seventh largest listed company) from Thailand's Prime Minister Thaksin and his family, which triggered a mandatory offer for the remaining stocks. This resulted in Temasek and its partners having a 96% stake in Shin Corp; See 'Temasek Sells Down Thai Telecom Asset At Loss' *Forbes* (19 August 2011) <http://www.forbes.com/sites/simonmontlake/2011/08/19/temasek-sells-down-thai-telecom-asset-at-loss/#5e3ecac54d03> accessed 16 January 2017; 'Corporate Structure of Shin Corporation Public Company Limited' *Siam Premier* (Bangkok, 7 January 2007) <http://siampremier.com/corporate-structure-of-shin-corporation-public-company-limited/> accessed 16 January 2017.

68 Rose (n 29) 101.

ownership or control and no role in management or governance of Citi, including no right to designate a member of the Citi Board of Directors'.[69]

In the same vein, in trying to solve the problem of the potential conflict of interest of SWFs when exercising their ability to influence management, Gilson and Milhaupt have proposed that voting rights be suspended while the respective stocks are owned by a foreign state. According to the authors:

> The result is to separate control from investment value, the expected returns to a foreign-sovereign equity investor remain identical to those of other shareholders, yet the foreign government entities lose direct influence over management through voting.[70]

Supposedly, state-owned funds motivated solely by financial returns would still invest, and those interested in pursuing political goals would not.

Although this proposal and the limitation on the Abu Dhabi Investment Authority's influence on Citibank's management could possibly prevent a SWF from unduly interfering with the company's business, it also imposes a passive investment behaviour that has been so criticised in the American reality of disperse share ownership. Moreover, SWFs might refrain from taking actions that maximise the company's profit simply because they might potentially look suspicious in the public eye. As Rose explains, '[t]he suspicion surrounding SWFs will likely cause SWFs to act hypercautiously'.[71] As an example, he refers to the situation in which:

> [U]nlike other investors not operating under political suspicion, SWFs may fear that suggesting cost-cutting measures could be viewed as a politically motivated effort to encourage outsourcing (perhaps to the SWF's home country). Because of fears that the SWF will be used as a political tool of the state, the SWF must consider the potential political effect of any action or statement it or the sovereign makes regarding its investment.[72]

In other words, the general discomfort with SWFs that apparently motivates the attempt to 'privatise' these institutions and their behaviour could backfire; all the

69 Citigroup Inc, 'Citi to Sell $7.5 Billion of Equity Units to the Abu Dhabi Investment Authority' (26 November 2007) <http://www.citigroup.com/citi/news/2007/071126j.htm> accessed 22 November 2016.

70 Gilson and Milhaupt (n 2) 1352.

71 Rose (n 29) 102.

72 ibid.

suspicion against government investment vehicles could lead them to behave inefficiently.

5.2 Different types of non-commercial motivations of SWFs

As explained in Part IV above, a lot of the discussion on the regulation of SWF has been driven by the idea that these investment vehicles would be used for 'political' motivations. The idea of 'political' interests in this case is very negatively charged, and is associated with the misuse of the stake in a foreign country for measures of foreign policy and to advance geopolitical causes that concern national security. A dichotomy is established between purely financial considerations and political interests, as if these were the only two options of behaviour of a SWF. This paper wishes to propose a more nuanced look at the considerations that a SWF could take into account in the elaboration of its investment strategy. Apart from saying that there is more than the binary code of SWFs being driven by maximising the return on investment they receive by dividends or increase in share value versus geopolitical objectives, it wishes to show that certain types of non-commercial objectives by SWFs are not to be feared. In this sense, if we accept that SWFs might take on purposes that are not limited to those 'commercially motivated', their form and regulation can change dramatically. As Clark and Monk put it:

> The form of SWFs may not be stable over the long-term; the challenge facing SWFs is, in part, about transcending traditional forms of investment management in favour of a genuine commitment to long-term investment in the interest of both the SWF and the sovereign.[73]

SWFs can receive benefits from their investment by a variety of means. Dividends and an increase in share values are not the only types of return a SWF could expect from an investment. For instance, a state-owned fund could choose to invest in a company producing technology that is needed in the home country, or to allocate capital to firms willing to open branches in its country and develop the local economy. As shown below, this is very different from a fund using its investment abroad to illegally gain knowledge about technology or to exercise influence over the capital receiving country. Rose discusses this argument by elaborating on the

73 Gordon Clark and Asby Monk, 'Sovereign Wealth Funds: Form and Function in the 21st Century' (2010) 4 <http://ssrn.com/abstract=1675091> accessed 22 November 2016.

possibility that a fund would encourage a company to build a factory in a country in order to 'provide jobs, diversify the economy, and strengthen the country's tax base', without it representing a breach of fiduciary duties.[74] It should be noted that, among the non-profit maximisation goals that a SWF could choose to pursue, is the inclusion of social responsibility requirements in its investments. In fact, this type of non-commercial objective of a SWF not only already exists in practice, but no concerns seem to be raised about the fact that the logic behind the fund's behaviour is not exclusively wealth-maximisation.

The Norwegian Government Pension Fund, often cited as the role model for sovereign funds' accountability and transparency, is one of the most prominent examples of SWF with social and environmental requirements imposed on capital-receiving companies.[75] Companies in which the Norwegian Government Pension Fund holds stakes may be excluded or put under observation if there is an unacceptable risk that the company contributes to or is responsible for a wide array of wrongful conducts, including human rights violations, environmental damage, unacceptable greenhouse gas emissions, corruption and 'other particularly serious violations of fundamental ethical norms'.[76]

Moreover, the Norwegian fund is not allowed to invest in companies that produce tobacco or weapons, or mining or power companies deriving 30% or more of their income from thermal coal or basing 30% or more of their operations on thermal coal.[77] Currently, this SWF owns more than 2% of all listed shares in Europe and over 1% of listed shares globally.[78] In addition to rules on acceptable conduct, the Norwegian fund has focused a significant part of its investments in companies contributing to three areas of sustainability: children's rights, climate change and water management.

Apart from promoting social responsibility, another benign non-commercial objective to be pursued by SWFs—which has been gradually recognised by

74 Rose (n 29) 112.

75 See Simon Chesterman, 'The Turn to Ethics: Divestment from Multinational Corporations for Human Rights Violations — The Case of Norway's Sovereign Wealth Fund' (2008) 23 Am U Intl LR 577.

76 Norges Bank Investment Management, Guidelines for the Observation and Exclusion from the Fund (9 February 2016) Section 3 <http://www.nbim.no/en/the-fund/governance-model/guidelines-for-observation-and-exclusion-from-the-fund> accessed 21 September 2016.

77 ibid Section 2.

78 'Norway's Global Fund – How Not to Spend It' *The Economist* (London, 24 September 2016) <http://www.economist.com/news/business-and-finance/21707435-norways-global-fund-its-tough-small-democracy-run-worlds-biggest> accessed 27 November 2016.

scholarship and international organisations—could be development. In 2009, the IMF released a working paper on the practical issues involved when establishing a SWF, and, while classifying the funds in accordance with their objectives, acknowledged explicitly 'development funds that use their returns to invest for development purposes'.[79]

In practice, however, SWFs have increasingly invested in infrastructure[80] and made their investment decisions based on development goals. More recent studies on the practice and organisation of SWFs used a taxonomy that encompasses developmental goals.[81] This shows that the existing guidelines on SWFs' conduct must be further developed, in particular, to make clear whether development constitutes a legitimate objective for SWFs and how to regulate and assess such goals.

Furthermore, when we consider the use of SWFs for development purposes, it is important to remember that these funds are usually not directed solely at investment abroad; they might also invest domestically and any regulatory policy should take that into account. One such example is the Mubadala Development Company, established by the Abu Dhabi government to 'generate sustainable profits over the long-term', while delivering 'strong social returns to Abu Dhabi and the United Arab Emirates'.[82]

The Bernstein et al study mentioned above shows some interesting findings regarding domestic and foreign investment which indicate that 'SWFs where politicians are involved in governance have a much greater likelihood of investing at home, while those relying upon external managers display a lower likelihood'.[83] One possible explanation for investing more in the internal market is that politicians

79 Udaibir S Das, Yinqiu Lu, Christian Mulder and Amadou Sy, 'Setting Up a Sovereign Wealth Fund: Some Policy and Operational Considerations' (August 2009) 9 <http://www.imf.org/external/pubs/ft/wp/2009/wp09179.pdf> accessed 22 November 2016.

80 Colin Smith, 'The Influence of Direct Investors in Infrastructure Investing' (May 2015) 2 <http://www.pwc.com/gx/en/sovereign-wealth-investment-funds/publications/assets/pwc-the-influence-of-direct-investors-in-infrastructure-investing.pdf> accessed 22 November 2016: 'The most obvious shift in recent years has been the appetite of Sovereign and State-owned investors to invest in Western infrastructure assets'.

81 See, eg, Khalid A Alsweilem, Angela Cummine, Malan Rietveld and Katherine Tweedie, 'A Comparative Study of Sovereign Investor Models: Sovereign Fund Profiles' (2015) <http://projects.iq.harvard.edu/files/sovereignwealth/files/fund_profiles_final.pdf> accessed 22 November 2016.

82 Mubadala Development Company, 'Overview' <http://www.mubadala.com/en/who-we-are/overview> accessed 22 November 2016.

83 Bernstein, Lerner and Schoar, 'The Investment Strategies of Sovereign Wealth Funds' (n 65) 1.

would be 'more sensitive to the social needs of the nation' and 'willing to accept investments which have high social returns but low private ones'.[84]

Regardless of the influence of national politicians on funds investment decisions, there are multiple scenarios in which SWFs could perform in ways that deviate from the traditional goals of wealth-maximisation, stabilisation, savings and reserve investment. For example, (i) funds may invest in industries abroad that bring benefits to the home country that are different from what would be considered the financial return on the investment (from dividends and increase in share value); (ii) development banks that also invest simply for profit might decide to direct their capital to foreign companies; (iii) even the entities that are traditionally considered to be SWFs (and thus that should be following commercial objectives, according to the 'privatising' approach) invest both domestically and abroad, and their decision on where to invest may be motivated by what will foster economic growth at their home country; and (iv) SWFs might decide to invest in development in other countries out of humanitarian considerations, as promoted by the World Bank.[85]

The relevance of recognising this potential shift in the policy goals of SWFs is that it implies a potential tension with the prevailing regulatory framework:

> The central insight that may be derived from a functional examination of SWFs in developing states (whether or not resource management related), is that the expansion of the use of SWFs may be creating a fundamental tension within the current formal analytic framework, as the consequences of the form and function of SWFs established as a governance device may begin to deviate in substantial respect from the more traditional SWFs established as an instrument of macroeconomic policy.[86]

In addition to this 'fundamental tension' in the analytical framework of SWFs, resulting from the differences in policy purposes, some authors have pointed to potential negative impacts of SWFs' investments in development, such as 'de-stabiliz[ing] macroeconomic management', 'undermin[ing] both the quality of

84 ibid 4.

85 Amy Stilwell and Geetanjali S Chopra, 'Sovereign Wealth Funds Should Invest in Africa, Zoellick Says' (2 April 2008) <http://web.worldbank.org/archive/website01016/WEB/0__C-278.HTM> accessed 22 November 2016.

86 Larry Catá Backer, 'International Financial Institutions (IFIs) and Sovereign Wealth Funds (SWFs) as Instruments to Combat Corruption and Enhance Fiscal Discipline in Developing States' (June 2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2444308> accessed 22 November 2016.

public investments and the wealth objectives of the fund' and 'bypassing budgetary controls'.[87] Among the proposed solutions to these risks is the strengthening of governance structures and maintaining wealth-maximisation as the primary (while not exclusive) guideline for investment strategies. In other words, economic or social 'externalities' could not be the primary justification for an investment at the risk of losing a primary measure of accountability for fund managers.[88]

5.3 Challenges of internal governance

Looking at SWFs through the logic of private law has important consequences for their accountability mechanisms. If a SWF is like a private agent, then its accountability mechanisms gravitate around the idea that its main purpose is to maximise wealth. The implications of this logic for the governance of SWFs can be seen from two perspectives: one is concerned with the relationship between the fund and the capital recipient company. Another perspective is that of the relationship between the fund and its own constituents, which we refer to as 'internal' governance.

A private investor would be subject to the accountability mechanisms of its own shareholders, who might also be corporations owned by another set of shareholders, and so on and so forth until the ultimate shareholders are natural persons. The common trait in this logic is that the measure of accountability in all of the steps of the chain is maximisation of wealth: this is the base for the agency relationship established between the investor and the ones in charge of managing the investment. Thus, the Santiago Principles have been criticised for focusing on 'financial accountability' rather than 'public accountability'.[89]

In the case of SWFs, however, the chain of reasoning does not necessarily flow through all steps. First of all, because SWFs could be established for non-commercial purposes, as explained above, the criteria for verifying whether the fund is acting within the mandate given by its principal is different. Secondly,

87 Alan Gelb and others, 'Sovereign Wealth Funds and Long-term Development Finance: Risks and Opportunities' (2014) 2–3 <http://documents.worldbank.org/curated/en/788391468155724377/Sovereign-wealth-funds-and-long-term-development-finance-risks-and-opportunities> accessed 22 November 2016.

88 ibid 11.

89 Afshin Mehrpouya, 'Instituting a Transnational Accountability Regime: The Case of Sovereign Wealth Funds and "GAPP"' (2015) 44 Accounting, Organizations & Society 15.

because the further we move up the chain of agency in the case of SWFs, the closest we get to the logic of public law and public interest. SWFs are ultimately figures of government, and their formation 'represents inevitably, a political moment in the life of a nation state'.[90] Moreover, they are often figures of specific governments that do not follow the same neoliberal approach to the economy as the countries in which they are investing: '[M]ost SWFs are state-owned actors in state-dominated economies; yet when they go abroad, they claim forcefully to act as if they were private firms'.[91]

As much as the literature on SWFs has increased dramatically over the past few years, it has not sufficiently dealt with this problem. Some of the initiatives that focused on the internal accountability of SWFs, such as the Santiago Principles, end up creating positive effects for matters of external governance, since they advocate for more transparency in respect of the fund's activities. However, those initiatives are not sufficient measures to deal with such a complex matter.

Thus, regulation of SWFs should seek to harmonise the different stakeholders that might be affected by their activities. Looking at their investment only through the lens of private law and private investment will not provide an adequate regulatory framework to deal with the many difficulties that arise. It is true that firms are often faced with similar issues, in the sense that they deal with a variety of stakeholders affected by their activities. However, what is unique about SWFs is precisely the relationship between the fund and its constituents at the home country. This is a challenge that private firms do not face (as their constituents will follow the logic of private law) and thus more attention needs to be focused on developing best practices for the internal governance of SWFs.

6 Conclusion

Since the recent growth in size and number of SWFs, a lot of attention has been focused on how these funds should be regulated. In particular, the potential use of these funds by their owners to advance political objectives has raised a lot of concern. Moreover, many scholars have argued that SWFs challenge the traditional

90 Gordon Clark and Asby Monk, 'Sovereign Wealth Funds: Form and Function in the 21st Century' (n 73) 3.

91 Gelpern (n 9) 3.

concepts about the role of the state, as well as the division between public and private law.

These concerns have given rise to regulation that operates under the basic assumption that SWFs should behave as if they were private investors. Thus, until very recently, the vast majority of the regulation initiatives and proposals for SWFs looked at their activities only through the lens of private law and private investment. The main argument made in this paper is that there are specific circumstances where looking at SWFs solely through the lens of private law and private interest has proven to be disadvantageous.

First, even if SWFs were strictly wealth-maximising entities, a presumption against SWFs seems to exist, as if they were meant to advance the home country's geopolitical agenda (despite there being no strong evidence of SWF misbehaviour). This, in turn, leads to their activities being monitored under much stricter scrutiny than those of private investors. In a sense, the excessive fear of SWFs may lead to certain market inefficiencies, which is contrary to the very idea that SWFs should behave like private investors. SWFs are not only subject to transparency requirements that private investors are not, but they are also subject to strong political scrutiny at the recipient country that goes beyond the legal regulatory framework for foreign investment. Furthermore, either by political pressure or by specific regulation that seeks to protect the company from the fund's influence, ie, by preventing the fund from exercising voting rights, the presumption against SWFs might lead them to be a more passive investor, failing to fulfil its fiduciary duties towards the invested company. This would give even more power to the company's management and could allow it to take courses of action that do not maximise the value of the company.

While the concerns with SWFs' behaviour might have initially led to a binary approach to their motivations, as if they could only be either motivated (i) solely by the financial return on their investment (by dividends or increase in share value); or (ii) by geopolitical interests, of exercising influence over a certain region, country or sector, practice has proven this taxonomy wrong. Especially from 2010 onwards, many SWFs have started to make investment decisions that are expressly based, not only on financial return, but sustainability and development. Thus, a SWF's return on its investment can be beyond the mere financial benefit that it receives in the form of dividends or increase in share value.

In this sense, because of these non-commercial considerations and because of their particular ability to sustain long-term investment strategies, SWFs have proven to be important players in the financial market, precisely for the possibility

of acting in spaces and opportunities that would not attract private investors. Furthermore, these types of investment, even though not based strictly on wealth-maximising considerations, have been performed without threatening the integrity of financial markets. Thus, 'privatising' SWFs and analysing their behaviour only through the lens of private law and private interest does not seem to be a comprehensive approach to their regulatory framework.

This article also seeks to highlight that the governance of SWFs is a complex matrix that involves several stakeholders. Most of the current proposals and discussions on regulating sovereign wealth funds are focused on the governance between the fund and the company in which it invests. There are, however, complex issues to be addressed in the governance relationship between the fund and its constituents in the home country where public law is of critical importance. Thus, the private law and private interest lens are not sufficient to deal with the internal governance of the fund. 'Privatisation' might provide good answers to deal with external governance, but it is unclear how much it contributes to internal governance. In part, this seems to be due to the fact that the majority of proposals for regulation of SWFs has been created and discussed in 'host' countries, and is thus based on the perspective and concerns of countries receiving capital.

While in practice SWFs have, over the past few years and especially with the increase of infrastructure and development-focused investments, blurred the lines between private and public power, solutions to increase internal accountability and to address the regulation of such non-commercial goals will probably not succeed if focused only on the 'public' feature of these funds, which are uniquely placed at the intersection of the public/private and national/international distinctions.

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Transnational Corporations as Agents of Legal Change: The Role of Corporate Social Responsibility

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Abstract

This article draws on sociological studies of corporate social responsibility, new governance and legal transplant theories to reconsider the role of transnational corporations (TNCs) as regulators and agents of change in the field of human rights. The article demonstrates the potentials of transnational corporations as vehicles for the transplanting of human rights sensibilities in post-colonial settings through the use of corporate social responsibility practices. It does so by reconsidering the institutional role of transnational corporations, not as objects of international human rights regulation, but as actual regulators in this field.

Keywords

Corporate social responsibility, transnational corporations, human rights

1 Introduction

Most international human rights law textbooks focus on the state as the primary regulator of human rights and the individual as the subject of those rights.[1] This statist paradigm which stands at the centre of human rights law is linked to a command-and-control type governance that considers the state as the sole duty-bearer and authority with regard to regulation of human rights within its sovereign territory.[2] Due to this structure, the role of international law in relation to corporate

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1 Philip Alston, Ryan Goodman and Henry J Steiner, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2007) 1385.

2 Doreen Lustig, 'Three Paradigms of Corporate Responsibility in International Law: The Kiobel Moment' (2014) 12 JICJ 593, 595; See also Robert Baldwin, Martin Cave and Martin Lodge, 'Introduction: Regulation – The Field and the Developing Agenda' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 6–10.

actors has primarily been to define the rights and obligations of *states* in the context of investment issues,[3] while failing to impose any respective direct international obligations on corporations regarding their involvement in human rights abuses.

This statist paradigm is similarly prevalent in the sociology of human rights and legal transplants and diffusion theories. These theories typically examine the appearance, development and institutionalisation of legal regimes and centre on the social, political and cultural conditions in which legal norms are consolidated and violated.[4] Sociologists of human rights who explore the multiple ways in which international human rights regimes may influence the design and structuring of domestic regimes primarily centre on legal instruments such as inter-state treaties and on governmental and civil society agents in their assessment and analysis of the various ways in which human rights are mobilised and institutionalised. Their inquiries focus on the ways in which international law shapes state behaviour, the effectiveness of treaty regimes in changing such behaviour, the relationship between ratification of treaties and domestic human rights practices, and the mechanisms of social influence through which states and institutions affect the behaviour of other states.[5]

These studies posed a ground-breaking challenge to the assumption that international human rights law does not make a difference and lacks any real influence in the world. They exposed the importance of international human rights law through their concentration on its influence on mobilisation processes within states: how agents of change and transnational networks used international human rights law to penetrate the sovereign veil and instigate domestic processes of change through social processes other than traditional compliance, such as the changing of political agendas, creating collective action problems and influencing

3 Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2011).

4 Matthieu Deflem and Stephen Chicoine, 'The Sociological Discourse on Human Rights: Lessons from the Sociology of Law' (2011) 40(1) Development and Society 101.

5 See, eg, Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale LJ 1935; Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) Duke LJ 621; Oona Hathaway, 'Why do Countries Commit to Human Rights Treaties?' (2007) 51(4) J Conflict Resol 588; Beth A Simmons, *Mobilizing Human Rights: International Law in Domestic Politics* (CUP 2009); Sally Engle Merry, 'Gender Justice and CEDAW: The Convention on the Elimination on all Forms of Discrimination Against Women' (2011) 9 Journal of Women of the Middle East and the Islamic World 49; Richard A Nielsen and Beth A Simmons, 'Rewards for Ratification: Payoffs for Participating in the International Human Rights Regimes?' (2015) 59(2) ISQ 197.

legal decisions.[6] However, the focus of these human rights scholarships has thus far been mostly on state-driven, public human rights processes as the main source for social change, while often marginalising the role of transnational corporations (TNCs) as agents of change in processes relating to human rights diffusion and institutionalisation.

The present article challenges the prevalent perspectives regarding TNCs' role in international human rights law. Through the analysis of corporate social responsibility practices implemented in Bangladesh following the Rana Plaza disaster, it explores whether TNCs could be considered important players in the acts of ordering the field of human rights. Drawing on the theoretical frameworks of legal transplants, sociological studies of corporate social responsibility, and novel regulatory models,[7] the article suggests conceptualising TNCs as potential carriers of human rights norms to post-colonial settings, potentially initiating bottom-up changes in human rights standards.

This article explores the way in which TNCs may act as agents of legal change in the transnational arena although not formally possessing public power, and how they may contribute—alongside and in collaboration with states—to the design and enforcement of human rights regimes rather than simply posing a threat to them. This perspective undermines the archetypical dichotomy between public-statist regulation and market self-regulation in the form of soft law, and offers a collaborative public-private approach to global regulation of human rights. Conceptualising transnational corporations as important regulatory actors in the field of human rights could also serve as a platform to rethink some of the prevailing normative assumptions of the relationship between TNCs and human rights, and raise significant questions regarding our understanding of human rights theories and doctrines in an era of dominant private transnational corporate power.

The article proceeds as follows. Part 2 reviews discussions regarding the primary regulatory actors involved in the designing and structuring of human rights regimes, first from the perspective of classical international human rights law and sociology of human rights, then from the perspective of new governance theories. Drawing on the new governance models, this part will examine TNCs' role as regulatory actors in the field of human rights through means of corporate social responsibility practices. Part 3 characterises this role through the theoretical

6 Simmons (n 5).

7 Orly Lobel, 'New Governance as Regulatory Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP 2012).

frameworks of legal transplants and sociology of corporate social responsibility. Part 4 exemplifies this analysis through the Rana Plaza disaster case study, and Part 5 will conclude.

2 The public/private divide in international human rights discourse and its challenges

The centrality of the state is one of the most significant characteristics of classic international law.[8] According to this traditional view, given that states are the primary subjects of international law and its authority is derived from their consent, they retain complete discretion with regard to their sovereign jurisdiction, and have a claim on the monopolistic use of force within their boundaries.[9] Consequently, human rights were originally perceived as a matter belonging to the domestic sphere,[10] often in the context of protecting individuals from the potentially harmful and abusive power of the state,[11] thereby limiting states' power.[12] As one international scholar put it:

> Human rights are ultimately a profoundly *national*—not international—issue. States are the principal violators of human rights and the principal actors governed by the regime's norms; international human rights are concerned primarily with how a government treats inhabitants of its own country.[13]

In congruence with this view, the traditional instruments used to set human rights standards and protections are international covenants that oblige states, and

8 Alston, Goodman and Steiner (n 1) 1385.

9 Lustig (n 2) 595.

10 Michelo Hansungule, 'Chapter One: The Historical Development of International Human Rights' in Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan (eds), *An Introduction to International Human Rights Law* (Brill 2010) 2.

11 August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP 2005) 38; See also Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 Hum Rts Q 56, 58–59; Nigel Rodley, 'Non-State Actors and Human Rights' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 523.

12 Reinisch (n 11) 37–38.

13 Jack Donelly, 'International Human Rights: A Regime Analysis' (1986) 40(3) Int'l Org 599, 616.

states only, as the contracting parties.[14] Accordingly, the emphasis in this type of treaty-regime is the sovereign's limited renunciation of national authority and the retention of discretion with regard to the implementation of these internationally agreed upon norms.[15]

Nonetheless, in the face of globalisation processes, privatisation of governmental functions, global mobility of capital and trade liberalisation, as well as the growth of transnational civil society and fragmented centres of power, non-state actors began to pose new challenges to the traditional state-oriented nature of international human rights law and to the state-individual relationship's centrality in this regime.[16] TNCs with immense economic powers moved their production sites to places in which local laws were most favourable for them, hence enabling them maximum profit with minimum legal liabilities.[17] Gradually scholars, law-makers, civil society agents, activists, and workers' unions called for greater accountability and liability of corporations in international law, especially in the context of labour and human rights in postcolonial settings. The main thrust of their critique was that transnational corporate actors, no less than political governments, pose serious threats to human rights conditions, alongside the limited capacity or unwillingness of some states to introduce domestic legal measures to tame corporate activity.[18] The recognition that entities other than states and state agents

14 The International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights refer, in their preamble and the ensuing articles, to *state parties* as those responsible for ensuring the respect and protection of the human rights promoted by the treaties. Such state responsibility is to be employed through the use of states' political power and prerogative, namely legislative, administrative and enforcement powers. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); See also Reinisch (n 11) 39.

15 Jack Donelly, 'State Sovereignty and International Human Rights' (2014) 28(2) Ethics & International Affairs 225, 229.

16 Alston, Goodman and Steiner (n 1) 1385.

17 See, eg, Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001–2002) 111 Yale LJ 443; Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley J Int'l L 45; David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003–2004) 44 Virginia J Int'l L 931; Ronen Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility' (2004) 38 Law & Society Review 635.

18 Shamir (n 17).

can affect human rights created the need to formulate non-state actors' obligations under international law, holding them liable for violations of human rights.[19]

Accordingly, the legal framework and instruments used in this new human rights discourse had to be adapted to a more diverse analysis of non-state behaviours, among others, those of TNCs operating in multiple jurisdictions.[20] It is against this backdrop that a wide range of regulatory initiatives tackling the problem of corporate social responsibility emerged as a central concern for international human rights lawyers. These initiatives are categorised by the international human rights scholarship as either hard law mechanisms of statist-public regulation, or soft law mechanisms of private ordering. Within the realm of hard law and public regulation, one can find the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, which were eventually rejected by the UN Commission on Human Rights a year after their drafting,[21] and national legislations such as the Alien Tort Claims Act attempting to impose extra-territorial liability on corporations for violations of human rights overseas.[22]

Alongside such hard law mechanisms, instruments of private ordering proliferated as well. Among these, the human rights scholarship differentiates between soft law, self-regulatory mechanisms, such as voluntary corporate codes of conduct drafted by TNCs themselves, and multi-stakeholder initiatives such as

19 Rodley (n 11) 542; These efforts can be traced back to the trials of leading German industrialists for war crimes after the Second World War. See Ratner (n 17) 448.

20 Reinisch (n 11) 40–42.

21 The Draft Norms were drafted in 2003 by a working group established by the UN Sub-Commission on the Promotion and Protection of Human Rights with the purpose of creating a treaty-like mechanism which imposed on transnational corporations corresponding legal duties to those of states in their 'respective spheres of activity and influence'. Although imposing independent legal obligations on corporations, states and other international bodies such as the UN remained responsible for assuring corporations' compliance: UN Sub-Commission on the Promotion and Protection of Human Rights, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2; See also John G Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) AJIL 819.

22 Proposals of bills in Australia, the US and the UK regarding corporate conduct were met with little success, Peter T Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2010) 526; and the *Kiobel* judgment brought an end to American attempts to hold corporations liable for gross violations of human rights under the Alien Tort Claims Act: *Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659 (2013); Shamir (n 17).

the United Nations' Global Compact and the Global Reporting Initiative.[23] The large corpus of legal academic literature on corporate social responsibility which emerged in the 1990s concentrated on the normative justifications for such voluntary soft law initiatives and their effectiveness in comparison to the more traditional hard law regulatory frameworks.[24]

In other disciplines, such as management, business ethics or sociology, scholars explore the business case for corporate social responsibility, including different theories conceptualising the interface between business and society, and exploring both theoretically and empirically the financial and social benefits of 'sustainable businesses' and 'good corporate citizenship',[25] as well as providing social and critical accounts of the meaning and influence of such practices.[26]

23 See the UN Global Compact Office, 'The Ten Principles of the Global Compact' (2004) <http://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 27 September 2016; The Global Reporting Initiative <http://www.globalreporting.org/Pages/default.aspx> accessed 27 September 2016; Another interesting multi-stakeholder initiative is the Montreux Document, ratified in Switzerland in 2008. The Document was the fruit of a joint initiative of the Swiss government and the International Committee of the Red Cross. The Document is not legally binding and does not affect the existing legal obligations of states under international law, but rather provides states with good practices to promote the compliance of private military and security companies with international humanitarian and human rights law: The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (2008) <https://http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf> accessed 23 December 2016.

24 See, eg, Ratner (n 17); Stephens (n 17); Kinley and Tadaki (n 17); Shamir (n 17).

25 See, eg, Elizabeth C Kurucz, Barry A Colbert and David Wheeler, 'The Business Case for Corporate Social Responsibility' in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 83; Patricia Illingworth, 'Global Need: Rethinking Business Norms' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape*; *Moving Forward, Looking Back* (CUP 2016) 175.

26 See, eg, Ronen Shamir, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 Theoretical Inquiries in Law 371; J Hans van Oosterhout and Pursey PMAR Heugens, 'Much Ado About Nothing: A Conceptual Critique of Corporate Social Responsibility' in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 197; Jeremy Moon and David Vogel, 'Corporate Social Responsibility, Government and Civil Society' in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 303; Tim Bartley, 'Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards' (2011) 12(2) Theoretical Inquiries in Law 517; Alwyn Lim and Kiyoteru Tsutsui, 'Globalization and Commitment in Corporate Social Responsibility: Cross-National Analyses of Institutional and Political-Economy Effects' (2012) 77(1) Am Soc Rev 69; Tim Bartley, 'Transnational Governance and the Re-centered State: Sustainability or Legality?' (2014) 8 Regulation & Governance 93.

These scholarships are not constrained by conceiving states as the sole duty bearers with regard to human rights and rigorously address the obligations of private corporate actors. However, the main puzzle that motivates most studies in such fields focuses as well on the soft law/hard law distinction and its implications for effectively regulating and taming corporate complicity in violation of human rights. This focus on the hard law/soft law puzzle implicitly assumes the corporate actor as an *object* of international regulation in contrast to the state's classic public regulatory role.

2.1 New Governance Theories: Private entities as 'law-makers'

In recent years, a new theoretical framework has emerged that suggests a further paradigm shift with respect to the command-and-control versus market regulation dichotomy in the field of global governance. Governance, as defined by John Ruggie, 'refers to the systems of authoritative norms, rules, institutions and practices by means of which any collectivity, from the local to the global, manages its common affairs'.[27] The new governance model challenges the classical view that the regulatory power of administrative agencies is based on their superior knowledge, and focuses on the increased participation of non-state actors in the process of regulation by promoting collaborative public-private standard-setting.[28] Within this paradigm, private entities and institutions are regarded as norm-generating subjects,[29] in contrast to merely the objects of regulation,[30] thus creating a new division of labour between the state and other social actors.[31] In other words, rather than conceptualising non-state actors as passive objects of regulation, whose 'agency is limited to choosing whether to comply with the regulations to which they are subjected',[32] this model endeavours to harness private entities' practices, standard-making, and resources, to ameliorate the effectiveness of regulation.[33]

27 John Gerard Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 Global Governance 5.

28 Lobel, 'New Governance as Regulatory Governance' (n 7) 66–67.

29 ibid.

30 ibid.

31 David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 The Annals of the American Academy of Political and Social Science 12.

32 Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise in Governance in Contemporary Legal Thought' (2004) 89 Minn L Rev 342, 376.

33 Lobel, 'New Governance as Regulatory Governance' (n 7) 69.

The new governance model is often taken to be a response to the process of globalisation, and more specifically, to the failure of international 'old governance'[34] to effectively regulate businesses in the transnational arena. This empirical claim emphasises the way in which the prior, state-centric hierarchical governance model, consisting of treaty-based mandatory regimes had limited capacity in dealing with the challenges of strong economic actors, globalisation, and the attendant societal challenges.[35] Abbott and Snidal characterised these new regulatory initiatives as having two main characteristics. The first is a central role that private actors—namely NGOs and private firms—play in forming and designing these regulatory norms (as opposed to that of the state). The second is the voluntary nature of these norms, although they involve the typical functions of administrative statist regulation, such as rule-making, and implementation and imposition of sanctions.[36]

The state, in this new regulatory model, remains a significant actor, albeit not in its role as a top-down commander, but rather as an orchestrator operating through the promotion of networks of different actors and institutions engaging in regulatory activities.[37] Under the new governance model, the state encourages private actors to draw on their great resources and capacities in order to self-regulate and participate in regulating others through varied forms of private ordering. This decentralisation mechanism works through various networks in which non-state actors are partners in governance and not mere objects of regulation, which, in turn, alleviates the adversarial nature of old governance regulation.[38] In addition, through the active participation of multiple actors in governance processes, different societal actors become engaged in dialogue and deliberation regarding both the normative and practical aspects of standards-setting. This type of discourse encourages different societal actors to take mutual responsibility for human rights violations.[39] Amongst these diverse types of regulatory initiatives, the present article will focus on voluntary practices of corporate social responsibility.

34 Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42(2) Vanderbilt J Transnatl L 501.

35 Ruggie (n 27) 8; See also Abbott and Snidal (n 34).

36 Abbott and Snidal (n 34) 505–07.

37 ibid 521.

38 ibid 525–26.

39 ibid 526–28.

2.2 Corporate Social Responsibility as a form of New Governance

One of the major focuses of corporate social responsibility practices in the last two decades has been the improvement of labour conditions in developing countries characterised by weak institutions of domestic labour governance. After the exposure of the precarious working conditions in factories manufacturing for corporations such as Nike, Gap and Walmart in the 1990s, a large number of retailers and brands in the apparel, electronics and food industries have adopted codes of conduct establishing standards for working conditions in their supply chain, along with enforcement mechanisms.[40] These different initiatives offered a way to advance workers' rights on the ground, independently of the legal regime regulating labour conditions in a particular state, and contributed to the local human rights discourse amongst workers, factory managers, trade unions and governmental agents.

The ability of private entities to take part in global regulation of social fields has been recognised by sociologists,[41] but has not been the focus of the sociology of human rights. The following section offers the conceptual lens of legal transplants to critically explore the regulatory role of corporations and elucidate the ways in which TNCs serve as carriers of human rights norms into post-colonial settings through corporate social responsibility practices and policies.

3 Legal transplants and corporate social responsibility: Conceptualising corporations' role as agents of legal change

Although a vast amount of literature has been written both on theories of legal transplants and on the subject of corporate social responsibility, these two frameworks have yet to be discussed in relation to one another. Following the propositions of new governance theories and their perception of private entities' potential role in formulating and designing legal regimes, the following section will offer an explanatory framework for this role and for TNCs' influence on

40 David Vogel, *A Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2005) 75; See also Tim Bartley, 'Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry' (2005) 14 Research in Political Sociology 211; Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36(3) Mich J Intl L 425.

41 Bartley (n 26).

shaping human rights norms. It will do so by considering TNCs as agents of legal change, and corporate social responsibility practices as the means to implement such change.

3.1 What are legal transplants?

The legal transplant framework typically deals with the movement of law from one jurisdiction to another and the relevant actors in this process of mobilisation of the law. Although originating in Alan Watson's positivist-formalist approach which regards law as mobile and autonomous, bearing no connection to the social circumstances surrounding it,[42] this legal scholarship has since then evolved to socio-legal approaches assuming legal pluralism,[43] and challenging the underlying assumptions of Watson's positivist paradigm.[44]

The law, under the socio-legal paradigm, is understood in broader terms to include within its definition forms other than the positive law of the state.[45] Within the premises of transplanted law, one can find not only state laws and institutions, but also a diffusion of standards, regulations, soft-law, treaties, customs and international agreements.[46] This pluralistic perception of the law moves away from the notion of the sovereign state as the only creator and carrier of the law and enables the inclusion of a wide array of legal phenomena within the field of

42 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, The University of Georgia Press 1993); See also Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.

43 Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law Soc Rev 869.

44 Lawrence Friedman, for example, uses the term 'legal borrowing' to undermine the positivist postulations regarding the autonomy of the law. According to Friedman, legal development occurs alongside, and as a function of, social development. See Lawrence Friedman, 'Some Comments on Cotterrell and Legal Transplants' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001); Amongst these scholars are also ones that do empirical work trying to prove the influence of the law's connections to social structures, on the success of transplants. See, eg, Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 Am J Comp L 163; Inga Markovitz, 'Exporting Law Reform – But Will It Travel?' (2004) 37 Cornell Intl LJ 95; Merris Amos, 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 36 Hum Rts Q 386.

45 William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 J Legal Plur 1; William Twining, 'Social Science and Diffusion of Law' (2005) 32 J Law & Soc 203.

46 David Nelken, 'Towards a Sociology of Legal Adaption' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001) 31–32.

transplantation,[47] and its conceptualisation as a multi-participant model in which many actors, beyond the bilateral importer and exporter, take part. According to this paradigm, the colonial perception of legal transplants as movements of entire legal systems in a 'top-down' fashion is anachronistic and is not coherent with the reality of a globalised world comprised of transnational networks.[48]

The long road that the legal transplant discourse has taken from Watson's starting point is thus significant. The numerous socio-legal scholars engaged with conceptualising the field have highlighted the complexity of this legal phenomenon as well as the impact of various factors on the configuration of diffusion processes. New research avenues have challenged the positivist postulations regarding the autonomous character of the law, its definitions and sources, and have suggested reviewing the various ties between the law and other disciplines from a pluralistic, socio-cultural and economic standpoint, as a precondition to further discussing the evolution and migration of the law.

Nevertheless, despite the substantial challenges posed by these scholars to the positivist framework, a broader, more explicit discussion of the identity of the carrier is still absent from the legal transplant discourse. In particular, despite specific references to global agents of change, such as NGOs and civil society organisations, the transplant dialogue often continues to revert to the colonial context, considering state-agents as the main carriers of the law.[49] Within this context, the potential role of TNCs as carriers of human rights norms through means of corporate social responsibility, and consequently, as important regulatory actors in this field, remains unaccounted for.

Conceptualising TNCs' role as carriers may permit breaking free from the prevalent structuralist rhetoric, attempting to base the ability to promote human rights on the rejection of financial power.[50] According to this rhetoric, economic globalisation supported by neo-liberal ideologies weaken states' ability to regulate

47 ibid.

48 Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administrations in the United Kingdom' (2010) 58 Am J Comp L 583.

49 See, eg, Jean-Louis Halperin, 'The Concept of Law: A Western Transplant?' (2009) 10 Theoretical Inquiries in Law 333; Ron Harris and Michael Crystal, 'Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine' (2009) 10 Theoretical Inquiries in Law 561; Michael D Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* (OUP 2013).

50 See, eg, Neil Stammers, 'Social Movements and the Social Construction of Human Rights' (1999) 21 Hum Rts Q 980.

economic and social affairs within their boundaries and thus necessarily hinder the promotion of human rights regimes. In the following section I shall examine the way in which the diffusion of human rights norms by TNCs as a form of legal transplantation undermines this rhetoric.

4 Applying the theory: The Rana Plaza disaster case study

Rana Plaza, an eight-storey commercial building in Dhaka, Bangladesh, housed five garment factories and over 5,000 employees. These factories produced garments for some of Europe's and the United States' largest clothing companies. On April 24th 2013, the building collapsed. Over 1,100 people were killed and thousands were injured. Most of the injured suffered from permanent injuries.[51]

4.1 Historical perspective

During the 1960s, aiming to maximise profit, Western companies such as Walmart, Gap, Sears, H&M and Ralph Lauren, initiated extensive processes of out-sourcing. By relocating their production sites from the Global North to post-colonial economies (mainly in the Far East), they profited from significantly cheaper labour costs. These economies enabled Western corporations to build on 'fast fashion' production models while enjoying flexible policies and a disciplined workforce who provided the same products for a fraction of the price in a fraction of the time.[52]

51 Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence (2016) <http://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence> accessed 27 September 2016.

52 The 'fast fashion' model was born as a retail strategy designed to reduce the retailer's amount of stock, so that displays would be altered every 4–6 weeks instead of once every 2–4 seasons. After the displays are replaced, prices are cut down and the clothes are moved to be sold in outlet stores. This model enables the retailer to sell his merchandise at a higher preliminary price as well as to provide a more versatile display of garments throughout the year. See Ian M Taplin, 'Who is to Blame? A Re-Examination of Fast Fashion After the 2013 Factory Disaster in Bangladesh' (2014) 10(1/2) Critical Perspectives on International Business 72, 74–75; See

Bangladesh, where the average minimum wage for a worker in the garment industry at the time of the Rana Plaza disaster was less than US$40 a month,[53] is one of the countries in which production costs are the lowest in the world. Benefitting from changes in global regulations of the garment industry and from bilateral agreements with the United States granting it relief on export taxes, it became one of the world's largest garment exporters.[54] Its garment industry comprises 80% of its annual exports, produces US$20 billion, and employs approximately four million workers in over 5000 factories.[55]

Although considered a parliamentary democracy, Bangladesh is still seeing massive violations of human rights in its territory.[56] Labour legislation has been built piece by piece, but has not been adjusted to Bangladesh's joining of the global market arena.[57] In 1992 a special governmental commission began trying to amend Bangladeshi labour legislation with the purpose of creating one coherent comprehensive code. In 2006, the Bangladesh Labour Act was enacted regulating various matters such as the minimum wage, working hours, child labour, workers' safety and more. Nevertheless, the government was concerned that enforcing the Labour Act on corporations would cause them to transfer their production sites elsewhere. These concerns withheld the government from enforcing its

also Jason Burke, 'Rana Plaza: one year on from the Bangladesh factory disaster' *The Guardian* (London, 19 April 2014) <http://www.theguardian.com/world/2014/apr/19/rana-plaza-bangladesh-one-year-on> accessed 27 September 2016.

53 The minimum wage was later raised to US$68 a month. Tamanna Rubya, 'The Ready-Made Garment Industry: An Analysis of Bangladesh's Labor Law Provisions After the Savar Tragedy' (2015) 40(2) Brooklyn J Int'l L 685, 686; Alexandra Rose Caleca, 'The Effects of Globalization on Bangladesh's Ready-Made Garment Industry: The High Cost of Cheap Clothing' (2014) 40(1) Brooklyn J Int'l L 279, 297.

54 The liberalisation of trade prompted a decline in global regulation of the garment and clothing industries. Bangladesh, which was the beneficiary of bilateral trade agreements under Multi-Fibre Arrangements with the United States, enjoyed a steady growth of its garment industry, especially in light of the deceleration of China's production abilities due to lack of work force. See Taplin (n 52) 75–76.

55 Caleca (n 53) 287–88; Rubya (n 53).

56 See, eg, US Department of State Bureau of Democracy, Human Rights and Labor, 'Country Reports on Human Rights Practices for 2014: Bangladesh' (2014) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=25295> accessed 27 September 2016.

57 Caleca (n 53) 299–303.

new standards on corporations, thus enabling factory owners to violate them systematically.[58]

With the expansion of the garment industry, production processes became gradually decentralised, thus weakening the connection between the workers and the corporations for which they manufacture. This enabled TNCs to easily distance themselves from legal liability for violations of labour regulations and minimum wage requirements.[59] Nonetheless, after the Rana Plaza disaster and the media frenzy that ensued, the question of TNCs' legal liability began to arise.

4.2 The Disaster

The investigation conducted by local authorities following the disaster had revealed the building's collapse was a result of the illegal construction of additional floors occupied by several thousand workers.[60] As land values in Bangladesh rocketed following the rapid opening of factories to meet Western production demands, Mohammad Sohel Rana, the building owner, had used his political clout to illegally obtain title for the land on which Rana Plaza was built and the construction permit for the upper floors.[61] On the eve of the collapse, Rana Plaza factories were evacuated on police orders following complaints regarding cracks in their walls. An engineer was summoned to the scene and determined the building to be dangerous and in need of evacuation until a more extensive inquiry could be conducted.[62] However, the following day, workers were sent back into the building

58 ibid.

59 See NYU Stern Center for Business and Human Rights, 'Rana Plaza. Factory Safety and Workers' Rights in the Apparel Supply Chain Two Years Later' (NYU Report) <http://bhr.stern.nyu.edu/bangladesh> accessed 27 September 2016.

60 Jim Yardley, 'Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame' *The New York Times* (22 May 2013) <http://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html> accessed 5 January 2017.

61 Jim Yardley, 'The Most Hated Bangladeshi, Toppled From a Shady Empire', *The New York Times* (30 April 2013) <http://www.nytimes.com/2013/05/01/world/asia/bangladesh-garment-industry-reliant-on-flimsy-oversight.html> accessed 5 January 2017; Broken Dreams: OdhiKar, A Report on the Rana Plaza Collapse, Fact Finding Report, 19 June 2013 <http://1dgy051vgyxh41o8cj16kk7s19f2.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/Fact-finding_RMG_Rana-Plaza_Eng.pdf> accessed 5 January 2017.

62 Jim Yardley and Julfikar Ali Manik, 'Bangladesh Arrests Engineer Who Warned of Dangers' *The New York Times* (New York, 2 May 2013) <http://www.nytimes.com/2013/05/03/world/asia/engineer-arrested-in-bangladeshi-building-collapse.html> accessed 27 September 2016.

by factory owners under the threat of monthly salary deductions for those who refused to resume their work.[63] The factory owners,[64] operating under enormous pressure from western companies to meet their quotas,[65] sought to avoid losing working hours necessary for achieving those quotas.[66] The government's first investigation revealed that vibrations of the giant generators in the factories caused the building (whose rickety infrastructure was built, as aforementioned, against existing regulations) to collapse, in what was termed Bangladesh's worst industrial accident.[67] The collapse killed over 1,100 of Rana Plaza's workers, injured thousands, and left many others severely traumatised.

Approximately two years after the collapse of Rana Plaza, in June 2015, the Bangladeshi authorities served indictments against the perpetrators involved in the collapse.[68] However, beyond the criminal charges brought against those involved directly in the omissions leading to the disaster, the Rana Plaza case led to an additional series of events relevant to this article's context. In June of the same year, two months after the collapse, the American government announced a programme suspending Bangladesh's trade privileges due to concerns regarding the safety and

63 Arun Devnath and Mehul Srivastava, '"Suddenly the floor wasn't there," Factory Survivor Says' *Bloomberg* (New York, 25 April 2013) <http://www.bloomberg.com/news/articles/2013-04-25/-suddenly-the-floor-wasn-t-there-factory-survivor-says> accessed 27 September 2016; Dave Jamieson, 'Rana Plaza Survivor Left with Debilitating Trauma, Mere $519 In Compensation So Far' *The Huffington Post* (19 March 2014) <http://www.huffingtonpost.com/2014/03/19/rana-plaza-compensation_n_4994370.html> accessed 27 September 2016.

64 Amongst the factory owners, there were ministers, former ministers, members of parliament, military generals and university vice chancellors: Caleca (n 53) 296.

65 Amongst others, Primark, JC Penny, Benetton and Joe Fresh. See Clare O'Connor, 'These Retailers Involved in Bangladesh Factory Disaster Have Yet to Compensate The Victims' *Forbes* (New Jersey, 26 April 2014) <http://www.forbes.com/sites/clareoconnor/2014/04/26/these-retailers-involved-in-bangladesh-factory-disaster-have-yet-to-compensate-victims> accessed 27 September 2016.

66 Julfikar Ali Manik, Steven Greenhouse and Jim Yardley, 'Western Firms Feel Pressure as Toll Rises in Bangladesh' *The New York Times* (New York, 25 April 2013) <http://www.nytimes.com/2013/04/26/world/asia/bangladeshi-collapse-kills-many-garment-workers.html> accessed 27 September 2016.

67 'Bangladesh factory collapse toll passes 1,000' *BBC News* (London, 10 May 2013) <http://www.bbc.com/news/world-asia-22476774> accessed 27 September 2016.

68 Abigail Elise, 'Rana Plaza Disaster Update: Owner Sohel Rana Charged with Murder in Building Collapse That Killed 1,129' *International Business Times* (New York, 31 May 2015) <http://www.ibtimes.com/rana-plaza-disaster-update-owner-sohel-rana-charged-murder-building-collapse-killed-1945446> accessed 27 September 2016; 'Bangladesh murder trial over Rana Plaza factory collapse' *BBC News* (London, 1 June 2015) <http://www.bbc.com/news/world-asia-32956705> accessed 27 September 2016.

working conditions of the textile industry and its failure to uphold international labour standards.[69] Bangladesh was one of 125 countries that received tax relief under the Generalised System of Preferences (GSP). The GSP programme was established in an American attempt to safeguard international labour standards, enabling Bangladesh to export 5,000 products to the US—who purchases 25% of its yearly export—tax-free.[70] This decision of the American government was obtained following enormous pressure from international worker organisations and NGOs on the American administration to express its dissatisfaction with Bangladeshi working conditions. Despite differences between government and state department officials regarding the consequences of such actions, and the strong resistance of the Bangladeshi government, the American government decided to execute it.[71]

Although this sanction on behalf of the American government was rather symbolic given that it did not apply to the import of garments and affected less than 1% of the American import from Bangladesh, the American government assumed that revoking Bangladesh's tax benefits would encourage European states to impose appropriate sanctions, thus creating the necessary pressure to change the Bangladeshi norms of protecting human and worker rights.[72]

This move by the American government led the Bangladeshi government to amend the 2006 Labour Law. The amendments included mostly changes in worker safety provisions and the workers' freedom to join trade unions. Among these amendments, requirements regarding better regulation and supervision of factory safety were introduced, as well as training, accident report mechanisms, and the stationing of medical centres in certain factories.[73] However, these amendments, induced by state action, did not sufficiently ameliorate human and worker rights standards. Many of them were technical in essence and those which did include substantive changes lacked satisfactory enforcement mechanisms. Mainly what

69 Steven Greenhouse, 'Obama to Suspend Trade Privileges with Bangladesh' *The New York Times* (New York, 27 June 2013) <http://www.nytimes.com/2013/06/28/business/us-to-suspend-trade-privileges-with-bangladesh-officials-say.html> accessed 27 September 2016.

70 The GSP was an initiative designed to encourage financial globalization through attaching certain benefits such as reduced tariffs and foreign investments with the upholding of labour standards. The programme was initiated by the United Nations Conference on Trade and Development (UNCTAD). See Lisa Clay, 'The Effectiveness of the Worker Rights Provisions of the Generalized System of Preferences: The Bangladesh Case Study' (2001) 11 Transnat'l L & Contemp Probs 175; See also Greenhouse (n 69).

71 Greenhouse (n 69).

72 ibid.

73 Rubya (n 53) 693–99.

was missing was increased sanctions against factory owners and individuals who violated the law, which remained especially lenient.[74]

Alongside the aforementioned statist regulatory intervention, another important sphere in which measures were taken after the Rana Plaza disaster was the corporate one. As a direct response to the collapse, a group of American corporations established the Alliance for Bangladesh Worker Safety ('the Alliance').[75] The purpose of this initiative was to promote the safety level in Bangladeshi garment factories in order to prevent the recurrence of disasters like Rana Plaza in the future. The Alliance's members pledged to provide a total of US $100 million in financing to factories in their supply chain in order to ameliorate working conditions in Bangladesh, and over 50 million dollars in finance to local banks in order to increase lending to garment factories undertaking remediation of the deficiencies and shortcomings in the existing factories.[76] Moreover, the Alliance publishes annual reports of the progress of its goals. In September 2015, the Alliance reported that it had conducted safety inspections in 661 factories, 22 of which remain under inspection and may close due to their safety conditions; 414 factories had introduced hotlines in order to respond to employee complaints; 597 factories had conducted worker safety training; and the Alliance had given US$100 million to factories in their supply chain.[77]

Another initiative established following Rana Plaza was the Accord on Fire and Building Safety in Bangladesh ('the Accord').[78] The Accord was signed as a binding agreement between TNCs, professional unions and NGOs with the purpose of improving safety conditions in the garment industry in Bangladesh. The Accord obligated its members to act in favour of factory safety, conduct inspection plans, transparency and reporting regarding their findings, and promotion of employees through the proper training of the management of hotlines. In addition, the Accord has an enforcement mechanism similar to that of international treaties

74 ibid; See also NYU Report (n 59).

75 The Alliance for Bangladesh Worker Safety <http://www.bangladeshworkersafety.org> accessed 27 September 2016.

76 Alliance for Bangladesh Worker Safety, 'Remediation' (2017) <http://www.bangladeshworkersafety.org/en/what-we-do/remediation> accessed 16 January 2017.

77 Alliance for Bangladesh Worker Safety, 'Protecting and Empowering Bangladesh's Garment Workers. Second Annual Report' (September 2015) <http://www.bangladeshworkersafety.org/files/Alliance Second Annual Report, Sept, 2015.pdf> accessed 27 September 2016.

78 ACCORD, 'Welcome to the Accord' (2017) <http://bangladeshaccord.org/> accessed 1 January 2017.

between states, including a dispute-settlement and violations arbitration system between the members of the Accord.[79]

Alongside these two initiatives, some of the corporations for which the Rana Plaza garment factories manufactured contributed funds through the Rana Plaza Donors Trust Fund.[80] The fund, established by the International Labour Organization (ILO) together with authorities in the Bangladeshi government, authorities in the textile industry, TNCs and NGOs, promotes donations to the Rana Plaza victims and their families. The damages calculations are done according to ILO standards.[81] Among the donor corporations, international brand names such as Walmart, United Colors of Benetton, Gap, Primark and more can be found.[82]

4.3 Corporate social responsibility policies post Rana Plaza — a legal transplant?

The literature on Rana Plaza tends to concentrate, in its analysis of the corporate initiatives following the disaster, on the challenges TNCs pose to human and labour rights regimes, and on questions regarding the effectiveness of soft-law measures as opposed to states' obligations in the prevention of the recurrence of such tragedies.[83] This article, however, wishes to question whether it is possible to conceptualise the Accord, the Alliance and the Donors Trust Fund as backpacks in which TNCs have managed to carry human rights norms to Bangladesh as legal transplants. The article suggests that, by embracing a pluralistic, socio-legal view of the legal transplants field, one may perceive the norms and practices that the corporate initiatives detailed above attempted to implement as legal transplants in the field of human rights that are embedded in the wider regulatory frameworks of human and labour rights in Bangladesh.

79 Rubya (n 53) 709–14.

80 The Rana Plaza Donors Trust Fund, <http://www.ranaplaza-arrangement.org/fund> accessed 27 September 2016.

81 For further information on the Fund's operations, see 'Terms and Conditions of the Rana Plaza Donors Trust Fund' (2014) <http://ranaplaza-arrangement.org/fund/termsandconditions> accessed 27 September 2016.

82 'Rana Plaza Arrangement: Donors' <http://www.ranaplaza-arrangement.org/fund/donors> accessed 27 September 2016; Steven Greenhouse, '3 Retailers Give Aid to Bangladesh Workers' *The New York Times* (28 March 2014) <http://www.nytimes.com/2014/03/29/business/international/3-retailers-give-to-aid-bangladesh-workers.html?hpw&rref=business&_r=1> accessed 27 September 2016.

83 Taplin (n 52); Caleca (n 53).

One of the most significant contributions of the Accord and the Alliance was the amelioration of working safety conditions in accordance with Article 7 of the International Covenant on Economic Social and Cultural Rights which recognises a person's right to enjoy minimal working conditions, such as safety at work.[84] The reports published by the Accord indicate that, as of February 2016, safety inspections were conducted in 1,326 factories.[85] After conducting these safety inspections, including fire, electricity and structure safety, their findings are shared with factory owners, the signatory companies and worker representatives. The companies, together with the factory owners, later devised the Corrective Action Plans, detailing the remedial actions to be taken, a timeline for the proposed amendments and a financial plan to support them. The plans are then brought to engineers on behalf of the Accord for final approval. By November 2015, 1,195 Corrective Action Plans had been updated after follow-up inspections and approximately 20,000 amendments were made accordingly.[86] Moreover, the Accord delineates an equal participation of workers' mechanism concerning factory safety management by placing factory employees in health and safety commissions and involving them in the factories' inspection reports.[87]

The Alliance lacks the obligatory and enforcement mechanisms of the Accord and is criticised as such.[88] Such criticism is in line with international human rights scholars' statist perception and their clear distinction between hard law and soft law mechanisms, as well as their perception of the relevant regulatory actors who should participate in human rights regulation. However, the Alliance reported, like the Accord, actual progress with regard to workers' right to take part in shaping their employment conditions according to the ILO's fundamental principles.[89] Over 400 employees were trained in using the hotline, enabling them to anonymously report any deficiency in working conditions such as minimum wage and working

84 ICESCR (n 14) Art 7.

85 Accord on Fire and Building Safety in Bangladesh, 'Quarterly Aggregate Report' (25 February 2016) <http://bangladeshaccord.org/wp-content/uploads/Quarterly-Aggregate-Report-25-February-2016.pdf> accessed 27 September 2016.

86 ibid.

87 Mark Anner, Jennifer Bair and Jeremy Blasi, 'Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' (2013–2014) 35 Comp Lab L & Pol'y J 1, 29.

88 Caleca (n 53) 306–07.

89 The ILO, 'Declaration on Fundamental Principles and Rights at Work' (18 June 1998, annex revised 15 June 2010) <http://www.ilo.org/declaration/lang--en/index.htm> accessed 27 September 2016.

hours. In addition, the Alliance initiated a pilot programme in twelve factories, establishing a democratically elected workers' representational committee in charge of safety and health at work issues.[90]

Many of the safety provisions promoted by the Accord and the Alliance were anchored in the Bangladeshi Labour Law 2006, and as aforementioned, most of them were amended in the 2013 amendment of the Law to provide better protection following the Rana Plaza disaster and the international pressure that ensued. Nonetheless, for many reasons, the law revealed itself as extremely limited when it came to enforcing its provisions.[91]

Due to this limitation, the Accord's and Alliance's ability to regulate issues of workers' safety and safeguard human rights norms as a new form of corporate social responsibility should be noticed. These initiatives could be regarded as de facto contributing to the infusion of globally recognised, treaty-based, human and worker rights norms, bottom-up, where state legislation failed to solely implement them top-down. As such, TNCs can be perceived as actively contributing to the institutionalisation of human rights in Bangladesh, although doing so through non-formal, non-binding, voluntary impositions of human rights norms.

This conclusion resonates with claims made by new governance theorists regarding the effectiveness of public-private, multi-actor collaborative regulation. According to transnational new governance theories, the new voluntary regulatory initiatives, such as the Accord and the Alliance, which are governed by firms and industry groups together with governments and NGOs (as opposed to traditional inter-state treaties or trans-governmental networks of state officials), are more conducive to information-sharing and learning than the state-centred, centralised old governance regulatory mechanisms. They allow policies to be tailored to the specific needs of the local population and local conditions rather than the enforcement (or lack of) uniform rules,[92] which, as previously stated, have failed in Bangladesh to make a substantial difference on the ground.

90 Alliance for Bangladesh Worker Safety (n 77).

91 One of the main reasons for the failure to implement and uphold the labour legislation's provisions is government corruption. A substantial part of factory owners and other authorities in The Bangladesh Garment Manufacturers and Exporters Association are politicians belonging to two of the biggest parties in Bangladesh. William Gomes, 'Reason and responsibility: The Rana Plaza collapse' *openSecurity* (9 May 2013) <http://www.opendemocracy.net/opensecurity/william-gomes/reason-and-responsibility-rana-plaza-collapse> accessed 27 September 2016.

92 Abbott and Snidal (n 34) 526.

The collaboration between TNCs on the one hand, together with NGOs on the other, allows these two types of actors to each pursue their complementary goals. Initiatives such as the Accord and the Alliance permit the NGOs involved to encourage and sponsor higher labour standards in Bangladesh while also enabling the TNCs in such partnerships to enjoy self-regulation, rather than an imposed one. In turn, this results in the creation of joint standards that have the potential, not only to be more effectively implemented than if they were advocated by NGOs alone, but also more legitimate than codes formulated solely by corporations since they are backed by the normative legitimacy of the NGOs.[93] Moreover, TNCs' willingness to contribute funds to advance the Accord and the Alliance's purposes, and to compensate the Rana Plaza victims, signals a clear recognition of their liability with regard to violations of human and worker rights. Subject to more empirical research, this recognition has the potential to promote local human rights discourse by empowering local populations, and educating them regarding their identity as right-holders.[94]

This suggests that, for all practical purposes, the initiatives described above should be regarded as a type of legal transplant. The model proposed by this article of the current transplant, in the spirit of the broader models offered by socio-legal scholars, recognises the migration of a variety of legal phenomena (standards, ideologies, and practices), from multiple sources (international treaties and principles) which pass through multiple levels (from the transnational/international to the state and the sub-state) in formal and informal ways, through TNCs and with the help of international organisations, in an ongoing collaborative fashion.[95] The legal transplant in this case reaches the receiving state through corporate social responsibility practices adopted by the member corporations of the Accord and the Alliance, and are accepted with the help of the local citizenry through means of transparency and cooperation.

93 ibid.

94 The recognition of the victims' right to receive remuneration for injuries incurred upon them in the course of their work is compatible with the ILO's Employment Injury Benefits Convention: see Convention (No 121) concerning benefits in the case of employment injury (adopted 8 July 1964, entered into force 28 July 1967) 602 UNTS 260; See also Francesca Rheannon, 'The Lessons of Rana Plaza for CSR: Worker Empowerment the Key to Safety?' *CSRwire* (20 May 2013) <http://www.csrwire.com/blog/posts/854-the-lesson-of-rana-plaza-for-csr-worker-empowerment-the-key-to-safety> accessed 27 September 2016.

95 Twining, 'Social Science and Diffusion of Law' (n 45) 205–07.

It should be emphasised that the recognition of TNCs' role as potential carriers of human rights norms does not assume that corporations are the sole and first carriers to import such norms to countries lacking them. Obviously, a legislative framework recognising some of these rights and principles imported by TNCs following Rana Plaza existed beforehand, and as aforementioned, governmental responses to the disaster were also quick to ensue. However, and counterintuitively perhaps, the involvement of TNCs proved pivotal in shaping the local legal framework by means of transplantation of specific human rights practices in the working routine of these factories.

In line with new governance theorists, this conclusion regarding corporate legal transplantation draws our attention to the probabilities of success of such 'corporate transplants' as compared to those that originate from the state. Socio-legal scholars of legal transplants frequently discuss the important connection between the transplanted law and other social structures in predicting successful acceptance of the transplant.[96] Within this framework, the larger the gap between the transplanted legal norm and the recipient society's social structures, the more difficult for the transplanted norm to be successfully implemented. This view has led scholars to doubt the viability of legal transplants altogether.[97]

This socio-legal logic may indeed explain the difficulties in human rights reception in Bangladesh by statist channels. Meaning, the gap between the social structures of a developing state such as Bangladesh and the rationales standing at the base of human rights norms creates a true hardship for the proper reception and implementation of human rights by means of signing and ratifying international treaties. Indeed, Bangladeshi attempts to make changes in labour legislation following Rana Plaza, in a manner that will ensure worker safety and rights, has failed to produce any change. The gap between the rationales at the base of these constitutional and legal changes and the economic structures in Bangladesh which dictate workers' reality and conditions, were far too great to successfully accept such changes.

96 Gunther Teuber and Otto Kahn-Freund discuss the importance of the ties between the law and other social structures in the receiving state such as politics, economy, science and culture, to the success of the transplant. Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 MLR 11; See also Kahn-Freund (n 42).

97 See, eg, Pierre LeGrand, 'What Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001).

Socio-legal scholars focus primarily on the state level and mark the agents of change—carriers of legal transplants—as the state's agents alone. In the corporate context, nonetheless, the legal transplant process occurs within the premises of the 'corporate greenhouse'. The promotion of human rights is not done at the state level, trickling down through the state's institutions to civil society, but rather bottom-up, through the corporate venue. In other words, it is the corporate entity rather than the state that instigates the legal transplantation of human rights norms by voluntarily adhering to internationally accepted standards and providing its employees with their corresponding rights. In this state of affairs, the society with which the legal norm has to be connected in order to guarantee the transplant's success is the 'corporate society' or the corporate arena. This arena has a priori more liberal characteristics, so as to potentially reduce the gap between the 'social structures' of the corporation and the western-liberal-originated human rights norms that are assimilated through them. One may thus suppose that the same 'corporate liberal arena' may serve as a more fertile environment for the reception of liberal human rights norms by its employees than the state arena in which these norms are often disconnected from their social and cultural structures.

This assumption might spur new thoughts with regard to the field of the sociology of human rights. The proposed discussion of Rana Plaza and the influence of corporations on the local promotion of human rights after the disaster does not focus solely on normative questions of what is appropriate or just, but aims to describe an additional link in the development of human rights regimes in Bangladesh. The acceptance of the proposition according to which TNCs may contribute, through corporate social responsibility practices, to the infusion of human rights norms enriches our understanding of the variety of ways through which human rights are defined and the web of actors that take part in their design and institutionalisation. In other words, the conceptualisation of corporate social responsibility as a legal transplant leads to understanding that human rights regimes are not only formed through state-reception of international treaties, and the influence of transnational networks of NGOs, but through the commercial activity of TNCs as well.

This conclusion undermines the archetypical perception of TNCs and their operation as necessarily posing a threat to human rights regimes. On this view, the threat to human rights regimes is inherent to economic power and global capitalism.[98] However, the Rana Plaza case challenges the pessimist assumptions

98 Stammers (n 50) 994.

associated with this paradigm, and demonstrates how TNCs, holding great economic power, have the potential to serve as regulatory agents influencing the diffusion and design of human rights standards.

TNCs' actions following Rana Plaza in the form of the Accord, the Alliance and the Donors Fund, not only contribute, within a wider regulatory framework, to the promotion of safety standards and employee status, but also have the potential to affect human rights discourses in Bangladesh and to create new understandings amongst the local population regarding the universal rights to which they are entitled. Socio-legal empirical research in the field of human rights should thus focus on the possible ways in which the implementation of corporate social responsibility practices may flush out the gap between the governmental and legal rhetoric and the true situation on the ground. The recognition of the existence of a universal system of rights which are owned by the workers as such can serve as a platform for social mobilisation by re-designing workers' ability to fight locally for their rights and demand the state for a practical implementation of the law in the books.[99] The case of Rana Plaza, therefore, suggests that, contrary to the typical structuralist stand, economic power does not necessarily only violate human rights, but may, under certain conditions, improve them.[100]

Alongside the TNCs which strove, after the disaster, to take part in initiatives to ameliorate conditions and standards in garment factories, there were also corporations such as the Walt Disney Company who decided, as part of their corporate social responsibility policy, to relocate their productions sites to states with higher safety standard norms.[101] Walt Disney publicly stated in May 2013, following the disaster, that, in order to maintain the international labour standards it has set for itself and its employees, it must cease the production of Disney products in states where the risk for violating these standards is too high, Bangladesh included.[102]

However, surprisingly, this decision of the Walt Disney Company encountered sharp public criticism. The criticism was that millions of people are dependent

99 Simmons (n 5); See also Dina M. Siddqi, 'Starving for Justice: Bangladeshi Garment Workers in a "Post-Rana Plaza World"' (2015) 87 Int Labor Work-Class 165.

100 Stammers (n 50).

101 Puck Lo, 'H&M Responds Slowly to Bangladesh Factory Collapse Killing 1,000' *CorpWatch* (San Francisco, 19 May 2013) <http://corpwatch.org/article.php?id=15840> accessed 27 September 2016.

102 The Walt Disney Company, 'Permitted Sourcing Country Policy – March 2013' (2013) <https://ditm-twdc-us.storage.googleapis.com/Permitted-Sourcing-Countries-Document.pdf> accessed 27 September 2016.

on western corporations in the garment sector for their income, especially rural populations which do not have alternative employment opportunities.[103] Disney's choice to relocate production sites thus does not lead to better living conditions, and might even harm the local population's social mobility. Disney's claims that the risk to human lives justifies the potential economic damage to developing states was thus not sympathetically accepted.[104] The prevalent stance was that TNCs should maintain their supply chains as is, in order to support developing economies, but nevertheless take an active role in ameliorating working conditions while upholding international standards.[105] This stance perceives TNCs as substantial actors in the design and formulation of local human rights regimes and attributes them with irrevocable social responsibilities once they have chosen to utilise the commercial benefits that come along with relocating production sites to post-colonial settings.

The conceptualisation of TNCs' regulatory role as carriers of legal transplants in the field of human rights, and so as agents of change, clarifies the additional contribution of the legal transplants paradigm. The discussion of corporate social responsibility within the soft-law paradigm, as well as under the old governance assumptions, primarily focuses on the ways in which it contributes to restraining TNCs' destructive power with regard to human rights. The basic assumption underlying this discussion is that the TNC is unequivocally an obstacle to the promotion of human rights norms.

Conversely, the discussion of corporate social responsibility within the legal transplant paradigm offers a different perspective, which focuses on the possible contribution of TNCs as significant agents of change to the diffusion of human rights within the statist boundaries. Under this paradigm, therefore, one can move from the normative discussion of legal liability to empirical questions, such as the effectiveness of legal transplants and the necessary means to an efficient diffusion of norms and thus to come one step closer to the effective institutionalisation of human rights regimes where they are lacking.

103 Taplin (n 52) 76–77.

104 The Walt Disney Company (n 102); Michael H Posner, 'Disney and Other Big Brand Need to Address the Real Challenges of Outsourcing' *The New York Times* (New York, 2 May 2013) <http://www.nytimes.com/roomfordebate/2013/05/02/when-does-corporate-responsibility-mean-abandoning-ship/disney-and-other-big-brands-need-to-address-the-real-challenges-to-outsourcing> accessed 27 September 2016.

105 Kimberly Ann Elliott, 'Cutting Off Trade with Bangladesh Would Hurt Workers' *The New York Times* (New York, 2 May 2013) <http://www.nytimes.com/roomfordebate/2013/05/02/when-does-corporate-responsibility-mean-abandoning-ship/cutting-off-trade-with-bangladesh-would-hurt-workers> accessed 27 September 2016.

5 Conclusion

The case study of Rana Plaza and the collaborative initiatives formulated by TNCs and NGOs that ensued reflect some necessary changes in perception within the international human rights scholarship. As new governance scholars have begun to suggest in certain contexts, non-state actors can no longer be regarded as objects of international regulation alone, but should be treated as equal partners in international governance.

The novel angle that the present article offers is to consider the corporate actor as a regulator and an agent of change in the field of international human rights law, and to characterise its regulatory role as a form of legal transplantation. The theoretical merit of this approach is that it regards TNCs as active participants in the design and formulation of human rights regimes, rather than precarious objects that need to be regulated.

Legal transplants theories, which primarily discuss the way that systems of law are created and evolve, have often underestimated this role of private actors, much less of private corporations, in institutionalising legal norms and their contribution to their design. Although recognising a more diverse set of actors involved in the diffusion of law, legal transplants theories have, in many respects, remained state-centric. In the same manner, sociologists of human rights discussing the mobilisation processes of human rights have also been focusing primarily on state mechanisms influencing the diffusion of human rights amongst states and within them.

Thus, by conceptualising TNCs as carriers of legal transplants and concretising such a conception through the case study of Rana Plaza, this article joins new governance claims with regard to the perception of private actors' role in the operation of governance and regulation. Once TNCs' role as carriers of legal transplants, and hence as agent of change in the field of human rights, is seriously considered, new avenues of research can be paved to support policy decisions on the global level with regard to the promotion of human rights regimes, as well as to help develop critical thinking as to the pitfalls of such private transnational regulation. Furthermore, recognising TNCs' regulatory role in the field of human rights raises normative questions with regard to our understanding of human rights theories and doctrines, and the way in which human rights regimes are formed in an era of dominant transnational corporate power.