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Contact information
Cambridge Journal of International and Comparative Law
Faculty of law, 10 West Road
Cambridge, CB3 9DZ
United Kingdom

E-mail: editors@cjicl.org.uk
Web: http://www.cjicl.org.uk

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**Volume 1 C.J.I.C.L. [2012] Issue 3**

Conference Issue:
Agents of Change: The Individual as a Participant in the Legal Process

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# Foreword

*Professor James Crawford SC*[*]

Student-run journals are by no means the feature on the UK legal scene that they are in the US, and there is room for the view that this is no bad thing. On the other hand the energy, drive and organizational skill of the editors and their committee have been remarkable, as evidenced by the contributions here. They have added something—with elan and vitality—to international law at Cambridge.

As to the theme of the Conference, discussion on the relations between the individual and international law more often than not focuses on whether the individual is a 'subject' or an 'object' of the international legal system. The relationship between the individual and international law is more complex than this (not necessarily helpful) inquiry suggests, however. The individual interacts with international law as judge, as scholar, as participant in adjudicative proceedings, as negotiator of international agreements and in many other capacities. The contributions in this issue of the *Cambridge Journal of International and Comparative Law* provide critical insight into this multifaceted relationship and highlight the potential for the individual to be not merely an object or subject of the international legal system, but an agent of change.

James Crawford
University of Cambridge

[*] Whewell Professor of International Law, University of Cambridge and Honorary Member and Senior Treasurer of the Cambridge Journal of International and Comparative Law.

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# Editors' Introduction

*Andrew Sanger*
*Rumiana Yotova*[*]

On 19th and 20th of May 2012, the *Cambridge Journal of International and Comparative Law* (CJICL) launched its first two issues at its inaugural conference on the theme 'Agents of Change: The Individual as a Participant in the Legal Process'. The conference provided a platform for discussion between both young and senior international, comparative and domestic lawyers on a number of important issues relating to the role of individuals in law. This special conference issue serves as a record of the engaging, stimulating and constructive discussion that took place.

The conference was held at the Faculty of Law and the University Centre at the University of Cambridge. It attracted around 120 participants from across the globe: Europe, the Americas, Asia, Africa and Australia—and at all stages of their academic career: from graduate students and young academics to established professors and practitioners. HE Judge Cançado Trindade of the International Court of Justice and Professor James Crawford SC gave keynote addresses before engaging in a spirited and now legendary debate. Professor Philippe Sands Q.C. gave a special address and Dr Roger O'Keefe delivered a convivial after-dinner speech. The conference also provided the backdrop for a reunion of many Cambridge alumni and academics, including the aforementioned speakers and Professor Sir Elihu Lauterpacht CBE QC LLD, Dr Lorand Bartels, Dr Freya Baetens, Dr John Barker, Dr Matthew Dyson, Dr Douglas Guilfoyle, Dr Jessie Hohmann, Professor Joshua Karton, Dr Alex Mills, Dr Sarah Nouwen, Dr Kate Parlett, Ms Zena Prodromou, Mr Dan Saxon, Dr Kimberley Trapp and Dr Michael Waibel.

The main program consisted of eight panels with four speakers and a chair, each of which examined the role of the individual from various international and comparative law perspectives. The theme allowed speakers to assess the individual participant in the legal process from several distinct vantage points:

[*] Founders and Editors-in-Chief of the *Cambridge Journal of International and Comparative Law* and Doctoral Candidates at the University of Cambridge. They can be contacted at <as662@cam.ac.uk> and <rvy21@cam.ac.uk> respectively.

as a lawyer, a scholar, a judge, a peacemaker, a terrorist or a pirate; as a woman, a child or a corporation: all, ultimately, as 'agents of change'.

This special conference issue contains a selection of articles that expand on the initial conference papers and that further the debate on the place, role and influence of individuals in the legal process. The issue begins with Judge Cançado Trindade's article, which examines the place of the individual in international law. For Judge Cançado Trindade, individuals were central within the early conception of the law of nations, only to be excluded from the international legal order by the subsequent distortions of legal positivism. His argument takes us from this point of departure and explains how the individual was eventually rejected as a subject of international law, and then re-established as an object, and in some cases, a subject of international law. He further discusses the rights and obligations now conferred and incumbent upon and the individual in international law. Finally, he examines the individual in the context of dispute resolution. First by offering an insight into the erosion of the inter-state framework of adjudication as a consequence of the International Court of Justice's efforts and second, by examining the individual's personality, capacity, and access to justice.

Kate Parlett then provides a conceptual analysis of the individual in international law, adopting a contrasting historical position to Judge Cançado Trindade, before discussing the individual as a force for structural change in international law, and offering normative critiques for the perceived conceptual move away from the state. Douglas Guilfoyle gives a historical and contextual perspective on the contemporary pirate as an agent of change in international law-making and in transnational cooperation, concluding that a two-track response to piracy is called for: one targeted at the high seas and the other ashore. Cindy Daase assesses the role of the peacemaker in the negotiation and mediation of peace agreements. She chooses as a case study the Dayton Peace Agreement for Bosnia and Herzegovina and analyses the role of the US Special Envoy Richard Holbrooke as the agent of change, comparing his role with that of the UN Secretary-General Special Envoy in the Kosovo status negotiations. She concludes that mediators have become less like peace facilitators and more like agents of change, setting standards and promoting norms in the making of peace agreements. Michael Peil analyses the role of the scholar as a subsidiary source of international law in judgments of the International Court of Justice. He surveys references to the most highly qualified publicists in over 600 judgments and orders of the ICJ to find only 22 instances of reliance, with the most influential being Shabtai Rosenne, Hersch Lauterpacht and Sir Gerald Fitzmaurice.

The article by Bashir and Janaby focuses on the right of individuals to make claims against international persons for the wrongs they have committed. As their case study, they examine the crimes allegedly committed by NATO during its intervention in Libya, and whether a civil or criminal action can be pursued. Gleider Hernandez also looks at individuals as agents of change in the context of international adjudication. He undertakes a critical assessment of the role the judges on the bench of the ICJ by reference to the notion of impartiality, analysed from the perspective of their legal training and of institutional propriety. Lucas Bastin focuses on the individual as an agent of change capable of enhancing the legitimacy, transparency and accountability in investment treaty arbitration. In particular, he assesses the increasing pressure exerted by NGOs and industry bodies to be allowed to participate as *amicus curiae* in investment proceedings and the corresponding shift of practice resulting in expanded access of individuals, as well as growing pressure to develop guidelines and procedures for this purpose.

Fowkes then examines public interest litigation from a comparative perspective. He asks whether traditional rules continue to be adequate or whether new procedural rules have become necessary. She takes India as a case study and argues that some of the fundamental problems affecting India's model of public interest litigation are problems of procedure, even if they are not necessarily recognised as such. She invites us to question the substantive ends we seek to achieve with procedure and whether more procedure—potentially drawn from 'rich comparative law resources'—might be better for meeting those ends than less procedure. Khan takes Bangladesh as a case study and examines how NGOs, as agents of change, have played a leading role in using the Bangladesh Supreme Court as a political forum. She focuses on two landmark decisions: one shortly after Bangladesh became democratic and the other, during the emergency declared by the government in 2007. Both decisions allow Khan to make interesting observations about the nature of the Court's decision-making process, the effect of surrounding political pressure and the Court's reliance on public international law.

Finally, Aoife O'Donoghue gives a witty overview of the wide array of ideas about the individual discussed during the conference, adding not only her insights on the conference papers, but also on the wider role of the academic conference participants as agents of change in the international academic system and the legal order as a whole. She emphasizes the importance of the open dialogue between the agents of change themselves in the context of academic conferences. The issue finishes with Bart Smit Duijzentkunst's book review of Judge Cançado Trindade's topical study on *The Access of Individuals*

*to International Justice,* which was both launched during, and inspired the theme of, the conference.

The organizers of the conference would like to profoundly thank all the conference participants and contributors, as well as the dedicated Editorial team that brought these papers to print: this issue is a testament to the high quality and engaging level of debate that took place at the CJICL's inaugural conference.

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# Opening Remarks

*Professor Sir Elihu Lauterpacht QC*[*]

**Keywords**
Cambridge Journal of International and Comparative Law, conference, international law, Professor Sir Elihu Lauterpacht QC

I am described on the programme as participating in the 'Welcome', though it is difficult to tell how much welcoming remains to be done after the comprehensive observations of Rumiana Yotova and Andrew Sanger. Nonetheless, at the very least, some words of appreciation are owed to the organisers of this Conference. Familiar as they both will be to many of you, they may not be known to all of you. And so it is appropriate to embrace both Rumiana and Andrew to the confraternity of those who in their careers have had a hand in the advancement of international law by furthering the production of learned journals. And these friendly greetings are the more enthusiastic because of the fact that they are initiating a completely new journal—the Cambridge Journal of International and Comparative Law, to be edited by students of the law. Though some may have had doubts about the need for yet another periodical in the field, the fact remains that there is still room for a periodical supplementary to the books that form the admirable Cambridge Studies of International and Comparative Law. And, from the lists of the contributions to be offered today and tomorrow, it appears that there still remains a rich vein of personnel and material to be quarried.

But in addition to the substantive and original contribution these papers will make to the content of international legal literature, there is the much-to-be-appreciated emergence of new names in the international literary and academic scene. Rumiana and Andrew are greatly to be praised for their skill in the recruitment of authors. We must hope that those who first appear amidst us on this occasion will be names that become more familiar as time passes.

At the other end of the time spectrum of involvement in international law, kind things have been said about me. I appreciate this and am reminded of the story about Eva Peron who was at one time confronted by a hostile mob howling outside her house the word 'Prostitute'. Understandably, she was distressed and

[*] Emeritus Director of the Lauterpacht Centre for International Law and Honourary Professor of International Law, University of Cambridge.

telephoned for advice to an old friend of hers. He replied: 'Madame, do not be upset. I have been retired from the Army for 20 years and they still call me Colonel.'

I should no longer stand between you and the intellectual feast that lies before us. I welcome, and gladly make way for, one of Cambridge's most distinguished international law graduates, Judge Antônio Augusto Cançado Trindade of the International Court of Justice. He honours us by his presence and we are very glad that he has come back to us now.

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# The Historical Recovery of the Human Person as Subject of the Law Of Nations

*Antônio Augusto Cançado Trindade*[*]

## 1 Introduction: the inter-generational dialogue

It is a source of satisfaction to me to return to the University of Cambridge after so many years, upon the initiative of its young scholars *in statu pupillaris*, and to associate myself with this Conference on the occasion of the launching of their *Cambridge Journal of International and Comparative Law*. I have always practiced and greatly value this inter-generational dialogue, and am deeply touched by the decision of my young colleagues of the new generations to open a space in their event for the presentation of the ideas I have laid down in my last book, *The Access of Individuals to International Justice*,[1] within the framework of the general theme of this 2012 Conference, "Agents of Change: The Individual as a Participant in the Legal Process".

May I at first ponder to my young colleagues assembled in this Conference that your condition *in statu pupillaris* is a privileged one, as the search for knowledge and justice never ends, and you have the time, which may seem to you to pass on slowly, in your favour. But beware, as the passing of time will in due course deprive you of this graceful condition of being *in statu pupillaris*. We, academic veterans, who have lost that condition a long time ago, greatly miss it, as we now realize that, in many respects, experience withdraws to a greater

[*] Ph.D. (Cambridge—Yorke Prize) in International Law; Judge of the International Court of Justice; Former President of the Inter-American Court of Human Rights; Emeritus Professor of International Law at the University of Brasília, Brazil; Honorary Professor at the University of Utrecht; Doctor Honoris Causa at distinct Universities in Latin America; Member of the Institut de Droit International, and of the Curatorium of The Hague Academy of International Law.

[1] Oxford University Press, 2011.

extent than it gives. Moreover, the more knowledge we achieve to obtain, we realize that there is considerably more to learn.

Yet, we are bound to live within the shortness of our lifetime, which is never sufficient to learn as much as we wanted. Time seems to pass faster and faster, and we try in vain to slow it down, but the truth is that it is *we* who get slower and slower. To be alive is already a grace, and to be young, *in statu puppilaris*, is a privilege, if not a glory! May I thank very much the distinguished young colleagues of the new generations for the honour of the invitation to come back to Cambridge after a long time, which gives me the occasion of sharing some personal reflections with all present herein, in this colourful spring morning of 19 May 2012.

The topic of this Conference is indeed one of great relevance; it encompasses many aspects, of substantive and procedural law. Years ago I chose it for my research undertaken here in Cambridge,[2] as much as the topic chose me. We indeed identify ourselves with the topic of our research, which accompanies us throughout our academic lifetime. Out of this identification with each other (the subject who searches knowledge, and the object of the knowledge sought), some insights keep on emerging. I shall be pleased to condense, in sequence, some of those insights, and to share them with all present in this Conference.

## 2 The Legacy of the Individual's Subjectivity in the Emerging Law of Nations

May I begin by pointing out that I have never been convinced by the heralds of conventional wisdom in spotting a historical moment, agreed upon, for the "beginning" of international law, "as we know it today": to me, international law, as we know it today, does not go back only to the ninetheenth century, as some authors would try to make one believe, but goes much further back in time, keeping in mind its conceptual framework and the endeavours, along centuries, to fulfil the aspirations of the whole of human kind. To start with, one should not forget, in our times, the considerable importance attributed to the condition of individuals in the law of nations (the *droit des gens*) by the so-called founding fathers of our discipline.

Their thinking had considerable importance and influence in their epoch; it was not exclusively state-centred, and projected itself in time. Its influence was

[2] A A Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge University Press, 1983).

understandable, given the necessity of systematization of the matter.[3] Even in our day it is necessary to keep its legacy in mind. Thus, along the sixteenth century, it may be recalled, the conception of Francisco de Vitoria (author of the renowned *Relecciones Teológicas* , 1538-1539) flourished, whereby the law of nations regulates an international community (*totus orbis*) constituted of human beings organized socially in States and coextensive with humanity itself[4].

Furthermore, in his *De Lege*, Vitoria sustained the necessity of every law to pursue, above all, the common good; and he added that natural law is found not in the "will", but rather in right reason (*recta ratio*).[5] In his understanding, the reparation of breaches of (human) rights reflects an international necessity fulfilled by the law of nations, with the same principles of justice applying both to States and to individuals and peoples who form them.[6] Over more than four and a half centuries later, his message retains a remarkable topicality.

On his turn, Alberico Gentili (author of *De Jure Belli*, 1598) sustained, by the end of the sixteenth century, that Law governs the relationships between the members of the universal *societas gentium*[7]. In his *De Jure Belli Libri Tres* (1612), Gentili held that the law of nations was "established among all human beings", being observed by all mankind.[8] In the seventeenth century, in the outlook advanced by the learned scholar Francisco Suárez (author of the treaty *De Legibus ac Deo Legislatore*, 1612), the law of nations discloses the unity and universality of humankind, and regulates the States in their relations as

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[3] For accounts of the formation of classic doctrine, cf., *inter alia*, L Le Fur, 'La théorie du droit naturel depuis le XVIIe. siècle et la doctrine moderne' (1927) 18 *Recueil des Cours de l'Académie de Droit International de La Haye* [*RCADI*] 259, at 297-399; P Guggenheim, *Traité de droit international public*, (Georg, 1967) vol. I, at 13-32; A Verdross, *Derecho Internacional Público* (Aguilar, 1969), at 47-62; C de Visscher, *Théories et réalités en Droit international public* (Pédone, 1970), at 18-32; A A Cançado Trindade, *Princípios do Direito Internacional Contemporâneo* (University of Brasília, 1981), at 20-1.

[4] Cf. F de Vitoria, 'De Indis—Relectio Prior (1538–1539),' in T Urdanoz (ed), *Obras de Francisco de Vitoria - Relecciones Teológicas* (BAC, 1960), at 675.

[5] F de Vitoria, *La Ley* (*De Lege—Commentarium in Primam Secundae*) (Tecnos, 1995), at 5, 23, 77.

[6] J Brown Scott, *The Spanish Origin of International Law—Francisco de Vitoria and his Law of Nations* (Clarendon Press/H Milford—Carnegie Endowment for International Peace, 1934), at 282-283, 140, 150, 163-165, 172; A A Cançado Trindade, 'Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)' (1987) 202 *RCADI* 9, at 411; A A. Cançado Trindade, 'Totus Orbis: A Visão Universalista e Pluralista do Jus Gentium: Sentido e Atualidade da Obra de Francisco de Vitoria' (2008) 24 *Revista da Academia Brasileira de Letras Jurídicas* 197, at n. 32.

[7] A Gómez Robledo, *infra* n. 10, at 48-55.

[8] A Gentili, *De Jure Belli Libri Tres (1612)* (Clarendon Press/H Milford—Carnegie Endowment for International Peace, 1933), vol. II, at 8.

members of the universal society.[9]

It was, however, the other scholar, of Salamanca, Francisco de Vitoria, who gave a pioneering and decisive contribution to the notion of the prevalence of the *rule of law*: it was he who sustained, with rare lucidity, in his *Relecciones Teológicas* (1538-1539), that the legal order obliges everyone—those who are ruled as well as those who rule—and, in this same line of thinking, the international community (*totus orbis*) has primacy over the free will of each individual State.[10] In our days, it may be pointed out, the topic of the "the rule of law at the national and international levels" appears—since 2006—in the agenda of the UN General Assembly.

Shortly after Vitoria, Gentili and Suárez, the conception elaborated by Hugo Grotius (*De Jure Belli ac Pacis*, 1625), always attentive to the role of civil society, sustained that *societas gentium* comprises the whole of humankind, and the international community cannot pretend to base itself on the *voluntas* of each state individually; to Grotius, the state is not an end in itself, but a means to secure the social order in conformity with human reason, so as to "improve" the common society which encompasses the whole of humankind.[11] Human beings—occupying a central position in international relations—have rights *vis-à-vis* the sovereign state, which cannot demand obedience of their citizens in an absolute way (the imperative of the common good), as the so-called *raison d'État* has its limits, and cannot prescind from law.[12]

In the thinking of H Grotius, every legal norm—of domestic or international law—creates rights and duties to the persons they are addressed; according to his legacy,[13] the international community cannot pretend to be based on the *voluntas* of each State individually. Given the historical necessity to regulate the relations of the emerging States, Grotius sustained that such relations were ruled by legal norms, and not by the *"raison d'État"*, which is incompatible with the existence itself of the international community: this latter cannot prescind from the law.[14]

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[9] Cf. Association Internationale Vitoria-Suarez, *Vitoria et Suarez—Contribution des Théologiens au Droit International Moderne* (Pédone, 1939), at 169-170.

[10] Cf. F de Vitoria, *Relecciones—del Estado, de los Indios, y del Derecho de la Guerra* (Porrúa, 1985), at 1-101; A Gómez Robledo, *Fundadores del Derecho Internacional* (UNAM, 1989), at 30-9.

[11] P P Remec, *The Position of the Individual in International Law according to Grotius and Vattel* (Nijhoff, 1960), at 216 and 203.

[12] *Ibid.*, at 219-20, 217.

[13] *Ibid.*, at 243, 221.

[14] Cf. H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Year Book of International Law* 1.

In the Grotian legacy, human beings and their well-being occupy a central position in the system of international relations; accordingly, the standards of justice apply *vis-à-vis* States as well as individuals.[15] In this line of reasoning, in the eighteenth century, Samuel Pufendorf (author of *De Jure Naturae et Gentium*, 1672) sustained as well the subjection of the legislator to human reason, while Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1749), pondered that, just as individuals ought to—in their association in the State—promote the common good, the state on its turn has the correlative duty to seek its perfection.[16]

## 3 The Exclusion of the Individual from the International Legal Order by the Distortions of Legal Positivism

The subsequent personification of the all-powerful State, inspired mainly in the philosophy of law of Hegel, had a harmful influence in the evolution of international law by the end of the nineteenth century and in the first decades of the twentieth century. Regrettably, the vision and thinking of the so-called "founding fathers" of international law (notably the writings of the Spanish theologians and of Grotius), which conceived it as conforming a truly *universal*[17] system, came to be replaced by the emergence of legal positivism, which personified the State, endowing it with its own "will", reducing the rights of human beings to those which were "conceded" by the state. The consent or will of the States became, according to voluntarist positivism, the predominant criterion in international law, denying *ius standi* to individuals, to the human beings. This rendered difficult the understanding of the international community, weakening international law itself, reducing it

[15] H Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man' (1943) 29 *Transactions of the Grotius Society* 1, at 7, 21-31.

[16] C Wolff beheld nation-states as members of a *civitas maxima*, a concept which E de Vattel (author of *Le Droit des Gens*, 1758), later on, invoking the necessity of realism, intended to replace by a society of nations (a less advanced conception); cf. F S Ruddy, *International Law in the Enlightenment—The Background of Emmerich de Vattel's Le Droit des Gens* (Oceana, 1975), at 95; for a criticism to this step backwards (incapable of providing the foundation of the principle of *obligation* in international law), cf. J L Brierly, *The Law of Nations* (Clarendon Press, 1963), at 38-40.

[17] C W Jenks, *The Common Law of Mankind* (Stevens, 1958), at 66-9; cf. R J Dupuy, *La communauté internationale entre le mythe et l'histoire* (Economica/UNESCO, 1986), at 164-5.

to a strictly inter-State law, no longer *above* but *between* sovereign States,[18] This doctrinal trend resisted as much as it could to the ideal of the emancipation of the human being from the absolute control of the State, and to the recognition of the individual as subject of international law. The disastrous consequences of this distortion are widely known.

Yet, the individual's submission to the "will" of the State was never convincing to all, and it soon became openly challenged by the more lucid doctrine. The idea of absolute state sovereignty, which led to the irresponsibility and the alleged omnipotence of the state, not impeding the successive atrocities committed by it (or in its name) against human beings, appeared with the passing of time entirely unfounded. Against the reactionary dogmas of legal positivism stood, among others, Jean Spiropoulos, in a thoughtful monograph titled *L'individu en Droit international*, published in Paris in 1928:[19] contrary to what ensued from the Hegelian doctrine, he pondered, the state is not a supreme ideal subjected only to its own will, is not an end in itself, but rather a means of the realization of the aspirations and vital necessities of the individuals, it thus being necessary to protect the human person against the harm to her rights by her own State.[20]

Furthermore, in the past, positivists ascribed a far too great importance to the method of *observation* (neglected by other currents of thought), in contrast, however, with their total incapacity to present guidelines of analysis, and above all guiding general *principles.*[21] At the normative level, positivism appeared subservient to the established legal order, and validated the abuses perpetrated in its name. But already in the mid-twentieth century, the more lucid doctrine of the law of nations moved definitively away from the Hegelian and neo-Hegelian formulation of the state as the final repository of the freedom and responsibility of the individuals who composed it, and which in it integrated themselves entirely.[22]

The old and sterile polemics, between monists and dualists, erected upon false premises, not surprisingly failed to contribute to the doctrinal endeavours on behalf of the emancipation of the human being *vis-à-vis* his own state. In effect, what both dualists and monists did, in this particular, was to

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[18] P P Remec, *supra* n. 11, at 36-37.

[19] J Spiropoulos, *L'individu en Droit international* (LGDJ, 1928), at 66, 33, and cf. at 19.

[20] *Ibid.*, at 55; an evolution to this effect, he added, would bring us closer to the ideal of *civitas maxima*.

[21] Cf. L Le Fur, *supra* n. 3, at 263.

[22] W Friedmann, *The Changing Structure of International Law* (Stevens, 1964), at 247; E Weil, *Hegel et l'État* [1950] (J Vrin, 1974), at 11, 24, 44-5, 53-6, 59, 62, 100, 103.

personify the state as subject of international law.[23] Monists discarded all anthropomorphism, asserting the international subjectivity of the state by an analysis of the juridical person;[24] and dualists—like Triepel and Anzilotti—did not restrain themselves in their excesses of characterization of the states as sole subjects of international law.[25] In effect, a whole doctrinal trend, of traditional positivism, formed, besides Triepel and Anzilotti, also by Strupp, Kaufmann, Redslob, among others, came to sustain that only the states were subjects of public international law. The same posture was adopted by the old Soviet doctrine of international law, with emphasis on the so-called inter-state peaceful coexistence.[26]

Against this vision an opposing doctrinal trend emerged, as from the publication, in 1901, of the book by Léon Duguit *L'État, le droit objectif et la loi positive*, formed by G Jèze, H Krabbe, N Politis and G Scelle, among others, sustaining, *a contrario sensu*, that ultimately only the individuals, addressees of all juridical norms, were subjects of international law (cf. *infra*). The idea of absolute state sovereignty, which led to the irresponsibility and the assumed omnipotence of the state, not impeding the successive atrocities perpetrated by this latter against the human beings, proved to be, with the passing of time, entirely groundless. The State—it is nowadays recognized—is responsible for all its acts—both *iure gestionis* and *iure imperii*—as well as for all its omissions. Created by the human beings themselves, composed by them, for them it exists, for the realization of their common good. In case of violation of human rights, the *direct access* of the individual to the international jurisdiction is thus fully justified, in order to vindicate those rights, even against the state itself.[27]

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[23] Cf. C T Eustathiades, 'Les sujets du Droit international et la responsabilité internationale—nouvelles tendances' (1983), 84 *RCADI* 405.

[24] *Ibid.*, at 406.

[25] For a criticism of the incapacity of the dualist thesis to explain the access of individuals to the international jurisdiction, cf. P Reuter, Quelques remarques sur la situation juridique des particuliers en Droit international public, in *La technique et les principes du Droit public—Études en l'honneur de G. Scelle* (LGDJ, 1950), vol. II, at 542-3, 551.

[26] Cf., e.g., Y A Korovin, S B Krylov et al, *International Law* (Academy of Sciences of the USSR/Institute of State and Law, [s/d]), at 93-8, 15-18; G I Tunkin, *Droit international public—problèmes théoriques* (Pédone, 1965), at 19-34.

[27] S Glaser, 'Les droits de l'homme à la lumière du droit international positif,' in *Mélanges offerts à H. Rolin—Problèmes de droit des gens* (Pédone, 1964), at 117-118, and cf. at 105-106, 114-116. Hence the relevance of the compulsory jurisdiction of the organs of international protection of human rights; *Ibid.*, at 118.

# 4 The Legal Personality of the Individual as a Response to a Necessity of the International Community

The individual is indeed subject of both domestic and international law.[28] In fact, he has always remained in contact, directly or indirectly, with the international legal order. In the inter-war period, the experiments of the *minorities*[29] and *mandates*[30] *systems* under the League of Nations, for example, bear witness thereof.[31] They were followed, in that regard, by the *trusteeship system*[32] under the United Nations era, parallel to the development under this latter, along the years, of the multiple mechanisms—conventional and extra-conventional–of international protection of human rights. Those early experiments in the twentieth century were of relevance for subsequent developments in the international safeguard of the rights of the human person.[33]

To that effect of evidencing and reasserting the constant contact of the individual with the international legal order, the considerable evolution in the

[28] On the historical evolution of the legal personality in the law of nations, cf. H Mosler, 'Réflexions sur la personnalité juridique en Droit international public,' in *Mélanges offerts à H. Rolin—Problèmes de droit des gens* (Pédone, 1964), at 228-51; G Arangio-Ruiz, *Diritto Internazionale e Personalità Giuridica* (Coop. Libr. Univ., 1972); G Scelle, 'Some Reflections on Juridical Personality in International Law' in G A Lipsky (ed), *Law and Politics in the World Community* (University of California Press, 1953), at 49-58, 336; J A Barberis, 'Nouvelles questions concernant la personnalité juridique internationale' (1983) 179 *RCADI* 157.

[29] Cf., e.g., P de Azcárate, *League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace, 1945), at 123-130; J Stone, *International Guarantees of Minorities Rights* (Oxford University Press, 1932), at 56; A N Mandelstam, 'La protection des minorités' (1923) 1 *RCADI* 363.

[30] Cf., e.g., G Diena, 'Les mandats internationaux', (1924) 5 *RCADI* 246; N Bentwich, *The Mandates System* (Longmans, 1930), at 114; Q Wright, *Mandates under the League of Nations* (Chicago University Press, 1930), at 69.

[31] C A Norgaard, *The Position of the Individual in International Law* (Munksgaard, 1962), at 109-131; A A Cançado Trindade, 'Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century', (1977) 24 *Netherlands International Law Review/Nederlands Tijdschrift voor international Recht* 373.

[32] Cf., e.g., C E Toussaint, *The Trusteeship System of the United Nations* (Stevens, 1956), at 39, 47, 249-50; J Beauté, Le droit de pétition dans les territoires sous tutelle (LGDJ, 1962), at 48-136; G Vedovato, 'Les accords de tutelle', (1950) 76 *RCADI* 613.

[33] Cf., e.g., C T Eustathiades, 'Une nouvelle expérience en Droit international—Les recours individuels à la Commission des droits de l'homme' in *Grundprobleme des internationalen Rechts—Festschrift für J. Spiropoulos*, (Schimmlebusch, 1957), at 111-37, esp. at 77, 121, n. 30.

last decades not only of the international law of human rights but likewise of international humanitarian law, has contributed decisively. This latter likewise considers the protected persons not only as simple object of regulation that they establish, but rather as true subjects of international law.[34] This is what clearly ensues from the fact that the four Geneva Conventions plainly prohibit the states parties to derogate—by special agreements—from the rules enunciated in them and in particular to restrict the rights of the persons protected set forth in them.[35] In effect, the impact of the norms of the international law of human rights has, in turn, been having already for a long time repercussions in the *corpus iuris* and application of international humanitarian law.

Thus, international humanitarian law gradually freed itself from a purely inter-state obsolete outlook, giving an increasingly greater emphasis—in the light of the principle of humanity—to the protected persons and to the responsibility for the violation of their rights.[36] Thus, in distinct contexts, the legal personality of individuals was reckoned in response to the needs of protection, and, ultimately, as a response to a necessity of the international community itself.

## 5 The Individual's Presence and Participation in the International Legal Order

The attempts of the past to deny to individuals the condition of subjects of international law, such as denying them some of the capacities which states have (such as, e.g., that of treaty-making), are definitively devoid of any meaning. Nor at the domestic law level do all individuals participate, directly or indirectly, in the law-making process, but they do not thereby cease to be subjects of the law. That doctrinal trend, attempting to insist on such a rigid definition

[34] It is what ensues, e.g., from the position of the four Geneva Conventions on International Humanitarian Law of 1949, erected as from the rights of the protected persons (e.g., III Convention, articles 14 and 78; IV Convention, article 27).

[35] I, II and III Geneva Conventions, article 6; and IV Geneva Convention, article 7. In fact, as early as in the passage from the nineteenth to the twentieth century, the first Conventions on international humanitarian law expressed concern for the fate of human beings in armed conflicts, thus recognizing the individual as direct beneficiary of the international conventional obligations.

[36] On the historical roots of this development, cf. E W Petit de Gabriel, *Las Exigencias de Humanidad en el Derecho Internacional Tradicional (1789-1939)* (Tecnos, 2003), at 149, 171, 210.

of international subjectivity, conditioning this latter to the very formation of international norms and compliance with them, simply does not sustain itself, not even at the level of domestic law, in which it is not required—it has never been—from all individuals to participate in the creation and application of the legal norms in order to be subjects (*titulaires*) of rights, and bearers of duties.

This unsustainable conception appears contaminated by an ominous ideological dogmatism, which had as the main consequence to alienate the individual from the international legal order. It is surprising, if not astonishing and regrettable, to see that conception repeated mechanically and *ad nauseam* by a doctrinal trend, apparently trying to make believe that the intermediary of the state, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious. In the brief historical period in which that Statist conception prevailed, in the light—or, more precisely, in the darkness—of legal positivism, successive atrocities were committed against the human being, in a scale without precedents.

There is another point which passes unperceived to the heralds of the statist outlook of international law: in their myopia, proper of the dogmatisms, they seem not to perceive that the individuals have already began to participate effectively in the process of elaboration of norms of international law, which today appears much more complex than some decades ago. This phenomenon ensues from the democratization, which, in our days, also comes to encompass the international level.[37] This is illustrated, as already pointed out, by the growing presence and participation of entities of the civil society (NGOs and others), as verified in the *travaux préparatoires* of recent treaties as well as throughout the prolonged cycle of the great World Conferences of the United Nations during the decade of the nineties and the earlier years of last decade.

Today there is nothing intrinsic to international law that impedes or renders it impossible for non-state actors to enjoy international legal personality. No one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emanate directly from international law, with which they find themselves, therefore, in direct contact. And it is perfectly possible to conceptualize—even with greater precision–as subject of international law any person or entity, *titulaire* of rights and bearer of obligations, which emanate directly from norms of international law. It is the case of the individuals, who thus have strengthened this direct contact—without

[37] Cf., e.g., A A Cançado Trindade, 'Democracia y Derechos Humanos: Desarrollos Recientes, con Atención Especial al Continente Americano' in F Mayor (ed), *Amicorum Liber—Solidarité, Égalité, Liberté—Livre d'Hommage offert au Directeur Général de l'UNESCO à l'occasion de son 60e. Anniversaire* (Bruylant, 1995).

intermediaries—with the international legal order. The international movement in favour of human rights, launched by the Universal Declaration of Human Rights of 1948, came to disauthorize the aforementioned false analogies, and to overcome traditional distinctions (e.g., on the basis of nationality): subjects of law are all human beings as members of the universal society.[38]

Moreover, individuals and non-governmental organizations (NGOs) assume nowadays an increasingly relevant role in the formation of *opinio iuris communis.*[39] NGOs have gained considerable visibility throughout the recent cycle of UN World Conferences (1992-2001), by their presence and lobbying in the Conferences themselves[40] or by their articulation in their own forums parallel to such Conferences.[41] In recent years, they have been entitled to present on a regular basis their *amici curiae* before international tribunals such as the Inter-American and the European Courts of Human Rights, and the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda.

In recent years, individuals and NGOs have effectively participated in the *travaux préparatoires* of certain international treaties, or influenced them,[42] as well as in the monitoring of their implementation. The growing performance,

[38] R Cassin, 'L'homme, sujet de droit international et la protection des droits de l'homme dans la société universelle,' in *La technique et les principes du Droit public—Études en l'honneur de G. Scelle* (LGDJ, 1950), vol. I, at 81-82.

[39] At the global level, article 71 of the UN Charter has served as basis to the advisory *status* of NGOs acting in the ambit of the UN, and resolution 1996/31, of 26 July 1996, of the UN Economic and Social Council (ECOSOC), regulates in detail the relations between the UN and NGOs with advisory status (providing the framework for accreditation of the latter). At the regional level, the Permanent Council of the Organization of American States (OAS) has issued directives (on 15 December 1999) governing the participation of NGOs and other entities of civil society in OAS activities; ever since they have appeared regularly before the Council and other OAS organs. And the European Convention on Recognition of the Legal Personality of International Non-Governmental Organizations (of 24 April 1986), on its turn, provides for the constitutive elements of the NGOs (article 1) and for the *ratio legis* of their legal personality and capacity (article 2).

[40] The Rules of Procedure of the Preparatory Committee to the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001), e.g., contained a provision (rule 66) which regulated the participation of NGOs directly in its own work (as from May 2000).

[41] For my personal recollections of the World NGO Forum parallel to the UN II World Conference on Human Rights (Vienna, 1993), cf. A A Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* (S A Fabris, 2003), vol. I, at 220-31; and cf. also M. Nowak (ed), *World Conference on Human Rights (Vienna, June 1993)—The Contribution of NGOs, Reports and Documents* (Manzsche Verlags- und Universitätsbuchhandlung, 1994), at 1-231.

[42] E.g., the 1984 UN Convention against Torture and its 2002 Optional Protocol; the 1989 UN Convention on the Rights of the Child; the 1991 Madrid Protocol (to the 1959 Antarctica Treaty) on Environmental Protection in the Antarctica; the 1997 Ottawa Convention on the

at the international level, of NGOs and other entities of civil society has had an inevitable impact in the theory of the subjects of international law, contributing to render individuals not only direct beneficiaries (without intermediaries) of the international norms, but true subjects of international law, and to put an end to the purely inter-state anachronistic dimension of this latter; moreover, their activities have contributed to the prevalence of superior common values in the ambit of international law.[43] Individuals, NGOs and other entities of civil society come, thus, to act in the process of formation as well as in the application of international norms.[44]

In sum, the very process of formation and application of the norms of international law has ceased to be a monopoly of the states. In addition, individuals should also have the procedural capacity to vindicate their rights at the international level. It is by means of the consolidation of the full international procedural capacity of individuals that the international protection of human rights has become reality[45]. But even if, by the circumstances of life, certain individuals (e.g., children, the mentally ill, aged persons, among others) cannot fully exercise their capacity (e.g., in civil law), this does not mean that they cease to be *titulaires* of rights, opposable even to the state. Irrespective of the circumstances, the individual is subject *iure suo* of international law, as sustained by the more lucid doctrine, since the writings of the so-called founding fathers of the discipline[46]. Human rights were conceived as *inherent* to every human being, independently of any circumstances.

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Prohibition of Anti-Personnel Mines and on Their Destruction; the 1998 Rome Statute of the International Criminal Court; and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[43] R Ranjeva, 'Les organisations non-gouvernementales et la mise-en-oeuvre du Droit international' (1997) 270 *RCADI* 9, at 22, 50, 67-8, 74, 101-2.

[44] M Bettati and P-M Dupuy, *Les O.N.G. et le Droit international* (Economica, 1986), at 1, 16, 19-20, 252-61, 263-5.

[45] Cf. A A Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humans* (University of Deusto, 2001), at 17-96; A A Cançado Trindade, 'Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne' (2001), 14 *Revue québécoise de Droit international* 207, at n. 2.

[46] P N Drost, *Human Rights as Legal Rights* (Sijthoff, 1965), at 226-7, and cf. at 215, 223.

# 6 The Rescue of the Individual as Subject of International Law

Although the contemporary international scenario is entirely distinct from that of the epoch of the so-called founding fathers of international law (no one would deny it), who propounded a *civitas maxima* ruled by the law of nations, there is a recurrent human aspiration, transmitted from one generation to another, along the last centuries, to the effect of the construction of an international legal order applicable both to states (and international organizations) and to individuals, pursuant to certain universal standards of justice. Hence the importance which, in this new *corpus iuris* of protection, the international legal personality of the individual assumes, as subject of both domestic and international law.

The individual, as subject of international law in his own right, was certainly distinguishable from his own state, and a wrong done to him was a breach of classical *ius gentium*, as universal minimal law.[47] The whole new *corpus iuris* of the international law of human rights has been constructed on the basis of the imperatives of protection and the superior interests of the human being, irrespectively of his link of nationality or of his political statute, or any other situation or circumstance. Hence the importance assumed, in this new law of protection, by the legal personality of the individual, as subject of both domestic and international law. The application and expansion of the international law of human rights, in turn, has repercussions, not surprisingly, and with a sensible impact, in the trends of contemporary public international law.[48]

In fact, already in the first decades of the twentieth century one recognized the manifest inconveniences of the protection of the individuals by the intermediary of their respective states of nationality, that is, by the exercise of discretionary diplomatic protection, which rendered the complaining states at a time judges and parties. One started, as a consequence, to overcome such inconveniences, to nourish the idea of the *direct access* of the individuals to the international jurisdiction, under certain conditions, to vindicate their rights against States, a theme which came to be effectively considered by the *Institut de Droit International* in its sessions of 1927 and 1929.

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[47] C Parry, 'Some Considerations upon the Protection of Individuals in International Law', (1956) 90 *RCADI* 557, 686-8, 697-8.

[48] Cf. A A Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* (S A Fabris, 2003), vol. I, at 33-50, and vol. II, at 23-194; A A Cançado Trindade, *O Direito Internacional em um Mundo em Transformacao* (Renovar, 2002), at 1048-1109; A A Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (Editorial Jurídica de Chile, 2001), at 15-58, 375-427.

In a monograph published in 1931, the Russian jurist André Mandelstam warned as to the necessity of the recognition of a *juridical minimum*—with the primacy of international law and of human rights over the state legal order—below which the international community should not allow the state to fall. In his vision, the horrible experience of our time demonstrated the urgency of the necessary acknowledgement of this *juridical minimum*, to put an end to the unlimited power of the state over the life and the freedom of its citizens, and to the complete impunity of the state in breach of the most sacred rights of the individual.[49]

In his celebrated *Précis du Droit des Gens* (1932-1934), Georges Scelle criticized the fiction of the contraposition of an inter-state society to a (national) society of individuals: one and the other—he pondered—are formed by individuals, subjects of domestic law and of international law, whether they are individuals moved by private interests, or else endowed with public functions (rulers and public officials) in charge of looking after the interests of national and international collectivities.[50] Scelle then identified the movement of extension of the legal personality of individuals, by means of the emergence of the right of individual petition at the international level, which led him to conclude that: "Les individus sont à la fois sujets de droit des collectivités nationales et de la collectivité internationale globale: ils sont *directement* sujets de droit des gens".[51]

Still in the inter-war period, Albert de La Pradelle pondered that the *droit des gens* transcended inter-state relations, in regulating them to protect human beings (and to allow them to be masters of their own destiny), and to secure the compliance by States with their duties *vis-à-vis* the individuals under their respective jurisdictions.[52] The strictly inter-state outlook is a particularly dangerous one; attentions ought to focus on the general principles of law, emanating from the juridical conscience, pursuant to jusnaturalist thinking, conforming a true "*droit de l'humanité*", so as to secure respect for the rights of the human person.[53]

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[49] A N Mandelstam, *Les droits internationaux de l'homme* (Internationales, 1931), at 95-6, 138, and cf. at 103.

[50] G Scelle, *Précis de Droit des Gens—Principes et systématique* (Libr. Rec. Sirey, 1932), at 42-4.

[51] *Ibid*. at 48. Also singling out the importance of the attribution to individuals of remedies for the protection of their rights, cf. Lord McNair, *Selected Papers and Bibliography* (Sijthoff/Oceana, 1974), at 329, 249.

[52] A de La Pradelle, *Droit international public* (cours sténographié) (Institut des Hautes Études Internationales/Centre Européen de la Dotation Carnegie, 1932-1933), at 49, 80-1, 244, 251, 263-6, 356.

[53] *Ibid*., at 33-4, 230, 257, 261, 264, 412-3.

Also in the American continent, in the twentieth century, even before the adoption of the American and Universal Declarations of Human Rights of 1948, doctrinal manifestations flourished in favour of the international juridical personality of the individuals, such as those which are found, for example, in the writings of Alejandro Ãlvarez[54] and Hildebrando Accioly.[55] Likewise, Levi Carneiro wrote, in this respect, that "no doctrinal obstacle subsists to the admission of individual claims to international justice. (...) The individual is increasingly of concern to international law", as "the State, created in the interest of the individual, cannot overcome this latter".[56] And Philip Jessup, in 1948, pondered that the old conception of State sovereignty was not consistent with the higher interests of the international community and the *status* of the individual as subject of international law.[57]

In Europe, Hersch Lauterpacht, in a thoughtful book published in 1950, did not hesitate to assert that the individual is the final subject of all law, there being nothing inherent to international law impeding him to become subject of the law of nations and to become a party in proceedings before international tribunals.[58] On his turn, in another perspicacious essay, published also in 1950, Maurice Bourquin pondered that the growing concern of the international law of the epoch with the problems which affected directly the human being revealed the overcoming of the old exclusively inter-state vision of the international legal order.[59]

In a book written shortly before his death, and published in 1954, Max

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[54] A Ãlvarez, *La Reconstrucción del Derecho de Gentes—El Nuevo Orden y la Renovación Social* (Nascimento, 1944), at 46-7, 457-463 and cf. at 81, 91, 499-500; A Ãlvarez, *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual de los Pueblos* (Jurídica de Chile, 1962), at 49, 57, 77, 155-156, 163, 292, 304, 357.

[55] H Accioly, *Tratado de Direito Internacional Público* (Imprensa Nacional, 1933), vol. I, at 71-75.

[56] L Carneiro, *O Direito Internacional e a Democracia* (A. Coelho Branco Fo., 1945), at 121, 108, and cf. 113, 35, 43, 126, 181, 195.

[57] P C Jessup, *A Modern Law of Nations—An Introduction* (MacMillan Co., 1948), at 41.

[58] H Lauterpacht, *International Law and Human Rights* (Stevens, 1950), at 69, 61 and 51, and cf. at 70. Such recognition of the individual as subject of rights also at the international law level brings about a clear rejection of the old positivist dogmas, discredited and unsustainable, of the dualism of subjects in the domestic and international orders, and of the "will" of states as exclusive "source" of international law; cf. *ibid*., at 8-9. On the "natural right" of petition of individuals, exercised also in the general interest, cf. *ibid*., at 247-251, and cf. at 286-291, 337. And cf. also, in the same sense, H Lauterpacht, 'The Revision of the Statute of the International Court of Justice,' in E Lauterpacht (ed), *International Law, Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press, 2004), vol. V, at 164-6.

[59] M Bourquin, 'L'humanisation du droit des gens', *La technique et les principes du Droit public—Études en l'honneur de Georges Scelle* (LGDJ, 1950), vol. I, at 21-54.

Huber, in attesting the "devaluation" of the human person and the social "degradations" at the interior of the states, from 1914 until then, sustained a *ius gentium*, in the line of jusnaturalist thinking, centred on human beings and not on the states, recalling the ideal of the jusphilosophers of the *civitas maxima gentium*[60] (cf. *supra*). Huber had in mind the correct application of international humanitarian law. A short while ago, at the International Court of Justice, in the case of the *Jurisdictional Immunities of the State* (*Germany v Italy,* with Greece intervening, Judgment of 3 February 2012), in my recent and extensive Dissenting Opinion appended thereto, I had the occasion to rescue this doctrinal thinking (paras. 32-40), forgotten in our days, particularly the writings of de la Pradelle, Huber and Ãlvarez, singling out fundamental human values.

For his part, in his course delivered at the Hague Academy of International Law, three years later, in 1953, Constantin Eustathiades linked the international subjectivity of the individuals to the broad theme of the international responsibility (parallel to that of the states). As a reaction of the universal juridical conscience, the recognition of the rights and duties of the individual at the international level, and his capacity to act in order to defend his rights, are linked to his capacity to commit an international delict; international responsibility thus comprises, in his vision, both the protection of human rights as well as the punishment of war criminals (forming a whole).[61] This development heralded the emancipation of the individual from the tutelage of his own State; thus, one cannot deny the individual's condition of subject of international law.[62]

The same conclusion was reached by Paul Guggenheim, in a course delivered also at the Hague Academy, one year earlier, in 1952: as the individual is subject of duties at the international law level, one cannot deny his international legal personality, recognized also in fact by *customary* international law itself.[63] Still in the mid-twentieth century, in the first years of

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[60] M Huber, *La pensée et laction de la Croix-Rouge* (CICR, 1954), at 26, 247, 270, 286, 291-293, 304.

[61] C T Eustathiades, 'Les sujets du Droit international et la responsabilité internationale—Nouvelles tendances', (1953) 84 *RCADI* 397, at 402, 412-413, 424, 586-589, 601, 612.

[62] *Ibid.*, 426-7, 547, 586-7, 608, 610-1. Although not endorsing the theory of Duguit and Scelle (of the individuals as the sole subjects of international law), regarded as expression of the sociological school of international law in France, Eustathiades recognized in it the great merit of reacting to the traditional doctrine which visualized states as the sole subjects of international law; the recognition of the international subjectivity of individuals, parallel to that of states, came to transform the structure of International Law and to foster the spirit of international solidarity; *Ibid*., at 604-10.

[63] P Guggenheim, 'Les principes de Droit international public' (1952) 80 *RCADI* 116, and cf. at

application of the European Convention on Human Rights, there was support for the view that the individuals had become *titulaires* of legitimate international interests, as, in international law, a process of emancipation of the individuals from the exclusive tutelage of the State agents had already started.[64] In the legal doctrine of that time the recognition of the expansion of the protection of individuals in the international legal order became evident.[65] In the lucid words of Röling, the overcoming of legal positivism was reassuring, as the individual, bearer of international rights and duties, was no longer at the mercy of his State, and: '[h]umanity of today instinctively turns to this natural law, for the function of law is to serve the well-being of man, whereas present positive international law tends to his destruction.'[66]

This view was in keeping with the posture upheld by the Japanese jurist Kotaro Tanaka, in his Opinions in cases before the ICJ at The Hague in that epoch, that is, an international law transcending the limitations of legal positivism,[67] and thus capable of responding effectively to the needs and aspirations of the international community as a whole.[68] In the late 1960s, the pressing need was pointed out of protecting internationally the human person both individually and *in groups*,[69] for unless such international protection was

117-118.

[64] G Sperduti, 'L'individu et le droit international', (1956) 90 *RCADI* 727, at 824, 821, 764. The juridical experience itself of the epoch contradicted categorically the unfounded theory according to which the individuals were simple *objects* of the international legal order, and destructed other prejudices of state positivism; *Ibid.*, at 821-2; and cf. also G Sperduti, *L'Individuo nel Diritto Internazionale* (Giuffrè 1950), at 104-7.

[65] C Parry, 'Some Considerations upon the Protection of Individuals in International Law', (1956) 90 *RCADI* 722; B V A Röling, *International Law in an Expanded World* (Djambatan, 1960), at XXII, 1-2.

[66] B V A Röling, *ibid.,* at 2.

[67] Cf. Y Saito, 'Judge Tanaka, Natural Law and the Principle of Equality,' in G Aldredsson and P Macalister-Smith (eds), *The Living Law of Nations—Essays in Memory of A. Grahl-Madsen* (N P Engel Publ., 1996), at 401-2, 405-8; K Tanaka wanted law to be wholly liberated from both the state (as asserted by Hegel and his followers) and from the nation (*Völk*, as asserted by Savigny and Puchta, and other jurists of the historical school); *Ibid*., at 402.

[68] Cf. V Gowlland-Debbas, 'Judicial Insights into Fundamental Values and Interests of the International Community,' in A S Muller *et al* (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Kluwer, 1997), at 344-6.

[69] As acknowledged, e.g., by the 1994 Framework Convention for the Protection of National Minorities of the Council of Europe (in force as from February 1998). For earlier general studies, cf., e.g., P Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1992), at 38-54; F Ermacora, 'The Protection of Minorities before the United Nations', (1983) 182 *RCADI* 257. Cf. also the 1989 ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention n. 169, in force as from 5 September 1991).

secured to individuals and groups of them, the fate of the individual would be at the mercy of some *Staatsrecht*.[70] In an essay published in 1967, René Cassin, who had participated in the preparatory process of the elaboration of the Universal Declaration of Human Rights of 1948,[71] stressed with eloquence the advance represented by the access of individuals to international instances of protection, secured by many human rights treaties:

> If there still subsist on earth great zones where millions of men and women, resigned to their destiny, do not dare to utter the least complaint nor even to conceive that any remedy whatsoever is made possible, those territories diminish day after day. The awakening of conscience that an emancipation is possible, becomes increasingly more general. (...) The first condition of all justice, namely, the possibility of cornering the powerful so as to subject them to (...) public control, is nowadays fulfilled much more often than in the past. (...) The fact that the resignation without hope, that the wall of silence and that the absence of any remedy are in the process of reduction or disappearance, opens to moving humanity encouraging perspectives (...)[72]

To Paul Reuter, individuals become subjects of international law when two basic conditions are fulfilled, namely, when they are *titulaires* of rights established directly by international law, which they can exercise, and are bearers of obligations sanctioned directly by international law.[73] A similar view was

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Furthermore, endeavours undertaken in both the United Nations and the OAS, throughout the nineties, to reach the recognition of indigenous peoples' rights through their projected and respective Declarations, pursuant to certain basic principles (such as, e.g., that of equality and non-discrimination), have emanated from human conscience. Those endeavours, it has been suggested, recognize the debt that humankind owes to indigenous peoples, due to the historical misdeeds against them, and a corresponding sense of duty to undo the wrongs done to them; A Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia, 2001), at 228, 233.

[70] J J Lador-Lederer, *International Group Protection* (Sijthoff, 1968), at 19.

[71] As *rapporteur* of the Working Group of the United Nations Commission on Human Rights, entrusted with the preparation of the Draft Declaration (May 1947 to June 1948).

[72] R Cassin, 'Vingt ans après la Déclaration Universelle', (1967) 8 *Revue de la Commission Internationale de Juristes* 9, n. 2, at 9-10, and cf. at 11-7.

[73] Thus, as from the moment when the individual is granted a remedy before an organ of international protection (access to international jurisdiction) and can thus initiate the procedure of protection, he becomes subject of international law; P Reuter, *Droit international public* (PUF, 1993), at 235, 238, and cf. at 106.

upheld by Eduardo Jiménez de Aréchaga, to whom there is nothing inherent to the structure of the international legal order which impedes the recognition to the individuals of rights that emanate directly from international law, as well as international remedies for the protection of those rights.[74] Also in this line of reasoning, Barberis pondered in 1983 that, for individuals to be subjects of law, it is necessary that the legal order at issue attributes to them rights or obligations (as is the case of international law).[75]

In fact, successive studies of instruments of international protection came to emphasize precisely the historical importance of the recognition of the international legal personality of individuals as complaining party before international organs.[76] In my own lectures delivered at the Hague Academy of International Law in 1987, I pondered that the continuous expansion of international law is also reflected in the multiple contemporary mechanisms of international protection of human rights, the operation of which cannot be dissociated from the new values acknowledged by the international community.[77] At last individuals were enabled to exercise rights emanating directly from International Law (*droit des gens*). And I added:

> In this connection, the insight and conception of Vitoria developed in his manuscripts of 1532 (made public in 1538-1539), can be properly recalled in 1987, four-and-a-half centuries later: it was a conception of a universal law of nations, of individuals socially

[74] E Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo* (Tecnos, 1980), at 207-208; and cf. A Cassese, *International Law* (OUP, 2001), at 79-85.

[75] The subjects of law are, thus, heterogeneous, he added, and theoreticians who beheld only States as such to be subjects simply distorted reality, failing to take into account the transformations undergone by the international community, which came to admit that non-state actors also possess international legal personality; J Barberis, 'Nouvelles questions concernant la personnalité juridique internationale', (1983) 179 *RCADI* 145, at 161, 169, 171-172, 178, 181.

[76] Cf., e.g., A A Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, *supra* n. 2; A Z Drzemczewski, *European Human Rights Convention in Domestic Law*, (Clarendon Press, 1983), at 20-34, 341; F Matscher, 'La Posizione Processuale dell'Individuo come Ricorrente dinanzi agli Organi della Convenzione Europea dei Diritti dell'Uomo,' in *Studi in Onore di Giuseppe Sperduti* (Giuffrè, 1984); J A Carrillo Salcedo, *Dignidad frente a Barbarie—La Declaración Universal de Derechos Humanos, Cincuenta Años Después* (Trotta, 1999); E-I A Daes (rapporteur spécial), *La condition de l'individu et le Droit international contemporain*, UN doc. E/CN.4/Sub.2/1988/33, of 18 July 1988; R A Mullerson, 'Human Rights and the Individual as Subject of International Law: A Soviet View', (1990) 1 *European Journal of International Law* 33.

[77] A A Cançado Trindade, 'Co-existence and Co-ordination of Mechanisms of International Protection...', *supra* n. 6, at 32-3.

> organized in States and also composing humanity (...); redress of violations of (human) rights, in fulfilment of an international need, owed its existence to the law of nations, with the same principles of justice applying to both States and individuals or peoples forming them.
>
> (...) There is a growing and generalized acknowledgement that human rights, rather than deriving from the State (or from the will of individuals composing the State), all inhere in the human person, in whom they find their ultimate point of convergence. (...) The non-observance of human rights entails the international responsibility of States for treatment of the human person.[78]

The international subjectivity of the human being (whether a child, an elderly person, a person with disability, a stateless person, or any other) erupted indeed with all vigour in the legal science of the twentieth century, as a reaction of the universal juridical conscience against the successive atrocities committed against the human kind. An eloquent testimony of the erosion of the purely inter-state dimension of the international legal order is found in the historical and pioneering Advisory Opinion n. 16 of the Inter-American Court, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 1 October 1999),[79] which has served as orientation to other international tribunals and has inspired the evolution *in statu nascendi* of the international case-law on the matter.[80] The IACtHR recognized, in the light of the impact of the *corpus iuris* of the international law of human rights on the international legal order itself, the crystallization of a true individual subjective right to information on consular assistance,[81] of which is *titulaire* every human being deprived of his freedom in another country;[82] furthermore, it broke away

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[78] *Ibid.*, 411-412.

[79] IACtHR, Advisory Opinion OC-16/99, Series A, n. 16, at 3-123, paras. 1-141, and resolutory points 1-8.

[80] I have more recently revisited this point, within the ICJ, in my lengthy Separate Opinion (paras. 81, 158-188) in the case *A S Diallo* (*Guinea v D R Congo*, Merits, Judgment of 30 November 2010).

[81] Set forth in article 36 of the 1963 Vienna Convention on Consular Relations and linked to the guarantees of the due process of law under Article 8 of the American Convention on Human Rights.

[82] In that Opinion, the Inter-American Court lucidly pointed out that the rights set forth in article 36(1) of the Vienna Convention on Consular Relations of 1963 have the characteristic that their *titulaire is the individual*. In effect, this provision is unequivocal in stating that the rights to consular information and notification are accorded' to the interested person. In

from the traditional purely inter-state outlook of the matter,[83] bringing support to numerous individuals victimized by poverty, discrimination, and deprived of freedom abroad.

The subsequent Advisory Opinion n. 17 of the Inter-American Court, on the *Juridical Condition and Human Rights of the Child* (of 28 August 2002), fits into the same line of assertion of the juridical emancipation of the human being, in stressing the consolidation of the juridical personality of the child, as a true subject of law and not simple object of protection, and irrespective of the extent of his legal capacity to exercise his rights for himself (capacity of exercise). In this respect, the 1989 UN Convention on the Rights of the Child recognizes subjective rights to the child as a subject of law, and further reckons that, given his vulnerability or existential condition, the child needs special protection and legal representation, while remaining a *titulaire* of rights; this is in accordance with the Kantian conception of every human person being ultimately an end in herself.[84] The juridical category of the international legal personality has not shown itself insensible to the *necessities* of the international community, among which appears with prominence that of providing protection to the human beings who compose it, in particular those who find themselves in a situation of special vulnerability.

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this respect, article 36 is a notable exception to the essentially Statist nature of the rights and obligations set forth elsewhere in the Vienna Convention on Consular Relations; as interpreted by this Court in the present Advisory Opinion, it represents a notable advance in respect of the traditional conceptions of International Law on the matter (para. 82, emphasis added).

[83] This Opinion, pioneering in international case-law, has had a remarkable impact in the countries of the region, which have sought to harmonize their practice with it, aiming at putting an end to abuses on the part of the police and to discrimination against poor and illiterate foreigners (mainly migrants), often victimized by all sorts of discrimination (also *de iure*) and injustice. The Inter-American Court thus gave a considerable contribution to the evolution itself of the law in this respect.

[84] D Youf, *Penser les droits de l'enfant* (PUF, 2002), at 93-6, 100, 118-9; and cf. F Dekeuwer-Défossez, *Les droits de l'enfant* (PUF, 2001), at 4-5, 22, 74.

# 7 The Attribution of Duties to the Individual Directly by International Law

To the legal doctrine of the second half of the twentieth century it did not pass unnoticed that individuals, besides being *titulaires* of rights at the international level, also have duties which are attributed to them by international law itself. And, what is more significant, the grave violation of those duties, reflected in the crimes against humanity, engages the *international* individual penal responsibility, *independently* from what provides the *domestic* law on the matter.[85] Contemporary developments in international criminal law have, in fact, a direct incidence in the crystallization of both of the international individual penal responsibility (the individual subject, both active and passive, of international law, *titulaire* of rights as well as bearer of duties emanated directly from the law of nations (*droit des gens*)), as well as the principle of universal jurisdiction.

The work of contemporary international criminal tribunals has given a new impetus to the struggle of the international community against impunity, as a violation *per se* of human rights,[86] besides reasserting the international criminal responsibility of the individual[87] for such violations, thus seeking to prevent future crimes.[88] The process of *criminalization* of the *grave* violations of human rights and of international humanitarian law[89] has, in effect, accompanied *pari*

[85] M C Bassiouni, *Crimes against Humanity in International Criminal Law* (Kluwer, 1999), at 106, 118.

[86] W A Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', (1997) 7 *Duke Journal of Comparative and International Law* 461.

[87] Cf., in this respect, e.g., D Thiam, 'Responsabilité internationale de l'individu en matière criminelle,' in *International Law on the Eve of the Twenty-First Century—Views from the International Law Commission / Le droit international à l'aube du XXe siècle—Réflexions de codificateurs* (UN, 1997).

[88] For a pioneering study, cf. C T Eustathiades, 'Les sujets du droit international et la responsabilité internationale—Nouvelles tendances' (1953) 84 *RCADI* 401. For historical antecedents of a (permanent) international criminal jurisdiction, cf., *inter alia*, M R Marrus, *The Nuremberg War Crimes Trial 1945-1946—A Documentary History* (Bedford Books, 1997); M C Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', (1997) 10 *Harvard Human Rights Journal* 11.

[89] Cf. G Abi-Saab, 'The Concept of International Crimes' and Its Place in Contemporary International Law,' in J H H Weiler et al (eds), *International Crimes of State—A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (W de Gruyter, 1989), at 141-50; B Graefrath, 'International Crimes—A Specific Regime of International Responsibility of States and Its Legal Consequences,' in *ibid*., at 161-9; P-M Dupuy, 'Implications of the Institutionalization of International Crimes of States,' in *ibid*., at 170-85; M Gounelle, 'Quelques remarques sur la

*passu* the evolution of contemporary international law itself: the establishment of a (permanent) international criminal jurisdiction is regarded in our days as an element which enhances international law itself, bridging a basic gap and overcoming its insufficiencies of the past. Attention is to be drawn to the superior universal *values*, underlying the whole theme of the creation of a permanent international criminal jurisdiction. The crystallization of the international criminal responsibility of individuals (parallel to the responsibility of the state), and the process of criminalization of grave violations of human rights and of international humanitarian law, constitute elements of crucial importance to the struggle against impunity,[90] and to the treatment to be dispensed to past violations, in the protection of human rights.

The consolidation of the international legal personality of individuals, as active as well as passive subjects of international law, enhances accountability in international law for abuses perpetrated against human beings. Thus, individuals are also bearers of duties under international law, and this reflects the consolidation of their international legal personality.[91] Developments in international legal personality and international accountability go hand in hand, and this whole evolution bears witness of the formation of the *opinio iuris communis* to the effect that the *gravity* of certain violation of fundamental rights of the human person affects directly basic values of the international community as a whole.[92]

In an intervention in the debates of 12 March 1986 of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations, I deemed it fit to warn as to the manifest incompatibility with *ius cogens* of the voluntarist conception of international law.[93] To the *objective* international responsibility of the states corresponds nec-

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notion de crime international' et sur l'évolution de la responsabilité internationale de l'État,' in *Mélanges offerts à P. Reuter—Le droit international: unité et diversité* (Pédone, 1981), at 315-26.

[90] In the case of *Paniagua Morales and Others v Guatemala* (also known as the case of the *White Van*), the IACtHR, in clearly warning as to the states' duty to combat impunity, had the occasion, in its judgment on the merits (8 March 1998) on the case, to set forth its own conceptualization of *impunity* (cf. para. 174).

[91] H-H Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute', (2004) 2 *Journal of International Criminal Justice* 43.

[92] Cf., e.g., A Cassese, 'Y a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?,' in A Cassese and M Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (PUF, 2002), at 15-29; and cf., generally J A Carrillo Slacedo (ed), *La Criminalización de la Barbarie: La Corte Penal Internacional* (Consejo General del Poder Judicial, 2000).

[93] Cf. *United Nations Conference on the Law of Treaties between States and International*

essarily the notion of *objective illegality* (one of the elements underlying the concept of *ius cogens*). In our days, no one would dare to deny the objective illegality of systematic practices of torture, of summary and extra-legal executions, and of enforced disappearance of persons, practices which constitute crimes against humanity, condemned by the universal juridical conscience,[94] parallel to the application of treaties.

Furthermore, no one would dare to deny that such grave violations of human rights and international humanitarian law, as well as the persistent denial of the most basic guarantees of the due process of law, constitute an affront to the universal juridical conscience, and clash in effect with the peremptory norms of *ius cogens*. This whole doctrinal evolution points in the direction of the consolidation of *obligations erga omnes* of protection, i.e., obligations pertaining to the protection of human beings owed to the international community as a whole. This development is essential to advances in the struggle against the arbitrary power and in the strengthening of the protection of the human person against contemporary acts of barbarism and current atrocities.[95]

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*Organizations or between International Organizations (Vienna, 1986)—Official Records* (UN, 1995), vol. I, at 187-8 (intervention of A A Cançado Trindade, Deputy Head of the Delegation of Brazil). In effect, the aforementioned voluntarist conception appears incapable of explaining the very formation of rules of general international law and the incidence on the process of formation and evolution of contemporary international law of elements independent from the free will of states.

[94] In a study published in a book commemorative of the fiftieth anniversary of the UN High Commissioner for Refugees (UNHCR), I sought to conceptualize what I deem it fit to name the universal juridical conscience; cf. A A Cançado Trindade, 'Reflexiones sobre el Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal,' in A A Cançado Trindade and J Ruiz de Santiago (eds), *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (UNHCR, 2001), at 19.

[95] Cf., recently, A A Cançado Trindade, '*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law', *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano—2008* (OAS General Secretariat, 2009), at 3.

# 8 Subjective Right, Human Rights and the New Dimension of the International Juridical Titularity of the Human Person

The international juridical titularity of the human person, as the so-called "founding fathers" of international law (the law of nations, the *droit des gens*) foresaw it, is nowadays a reality. Furthermore, the (active) international subjectivity of the individuals responds to a true necessity of their *legitimatio ad causam* (cf. *supra*), to vindicate their rights, emanated directly from international law. In the ambit of the international law of human rights, in the regional (European, inter-American and African) systems of protection—endowed with international tribunals in operation—one recognizes today, parallel to the legal personality, also the international procedural capacity (*locus standi in judicio*) of the individuals.

This is a logical development, as it would not appear reasonable to conceive rights at the international level without the corresponding procedural capacity to vindicate them; the individual applicants are effectively the true complaining party in the international *contentieux* of human rights. Upon the right of individual petition is erected the juridical mechanism of the emancipation of the human person *vis-à-vis* the state itself for the protection of her rights in the ambit of the international law of human rights,[96] an emancipation which constitutes, in our days, a true juridical revolution, which comes at last to give an ethical content to the norms of both public domestic law and international law.

On the basis of this remarkable development lies the principle of *respect for the dignity of the human person*, irrespective of her existential condition. By virtue of this principle, every human being, independently of his situation and of the circumstances in which he finds himself, has the right to dignity.[97] The whole remarkable development of the jusinternationalist doctrine in this respect,

[96] If the aforementioned right of petition had not been originally conceived and consistently understood in this way, very little would the international protection of human rights have advanced in more than six decades of evolution. With the consolidation of the right of individual petition before the international tribunals of human rights, the international protection has attained its majority.

[97] On this principle, cf., e.g., B Maurer, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme* (CERIC, 1999); *Le principe du respect de la dignité de la personne humaine* (Actes du Séminaire de Montpellier de 1998) (Council of Europe, 1999), at 15; E Wiesel, 'Contre l'indifférence,' in F Mayor (ed), *Agir pour les droits de l'homme au XXIe. siècle* (UNESCO, 1998), at 87-90.

along the twentieth century, finds its roots, and it could not be otherwise, in some reflections of the past, in the juridical as well as philosophical thinking,[98] as exemplified, *inter alia* (to refer to one which goes far back in time), by the Kantian conception of the human person as an end in itself. This is ineluctable, as it reflects the process of maturing and refinement of the human spirit itself, which renders possible the advances in the human condition itself.

In effect, one cannot dissociate the recognition of the international legal personality of the individual (*supra*) from the dignity itself of the human person. In a wider dimension, the human person is the being which brings within herself her supreme, and who abides by it throughout the journey of her life, under her own responsibility. In effect, it is the human person, essentially endowed with dignity, who articulates, expresses and introduces the "*Sollen*" of the values in the world of the reality wherein she lives, and it is only her who is capable of doing so, as bearer of such ethical values. The legal personality, for its part, is manifested as a juridical category in the universe of Law, as the unitary expression of the aptitude of the human person to be *titulaire* of rights and bearer of duties at the level of regulated behaviour and human relations.[99]

It may be recalled, in the present context, that the conception of individual *subjective right* has already a wide historical projection, originated in particular in the jusnaturalist thinking in the seventeenth and eighteenth centuries, and systematized in the legal doctrine throughout the nineteenth century. However, in the nineteenth century and the beginning of the twentieth century, that conception remained situated in the ambit of domestic public law, emanated from the public power, and under the influence of legal positivism.[100]

The subjective right was conceived as a prerrogative of the individual as defined by the legal order at issue (the objective law).[101] Despite that, one cannot deny that the crystallization of the concept of individual subjective right, and its systematization, achieved at least an advance towards a better comprehension of the individual as *titulaire* of rights. And they rendered it possible to attain, with the emergence of human rights at the international level, the gradual overcoming of positive law. By the mid-twentieth century, the impossibility became clear of the evolution of law itself without the individual subjective

[98] For an examination of the individual subjectivity in philosophical thinking, cf., e.g., A Renaut, *L'ère de l'individu–Contribution à une histoire de la subjectivité* (Gallimard, 1991).

[99] Cf., in this sense, e.g., L Recaséns Siches, *Introducción al Estudio del Derecho* (Porrúa, 1997), at 150-1, 153, 156, 159.

[100] L Ferrajoli, *Derecho y Razón—Teoría del Garantismo Penal* (Trotta, 2001), at 912-3.

[101] C Eisenmann, 'Une nouvelle conception du droit subjectif: la théorie de M. Jean Dabin', (1954) 60 *Revue du droit public et de la science politique en France et à l'étranger* 753, esp. at 754-5, 771.

right, expression of a true human right.[102]

As I deemed it fit to sustain in my Concurring Opinion in the historical Advisory Opinion n. 16 of the IACtHR on the *Right to Information on Consular Assistance in the Ambit of the Guarantees of the Due Process of Law* (of 1 October 1999), we nowadays witness

> the process of *humanization* of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the individual subjective right to information on consular assistance, of which are *titulaires* all human beings who are in the need to exercise it, has crystallized: such individual right, situated into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law.[103]

The emergence of universal human rights, as from the proclamation of the Universal Declaration of 1948, came to widen considerably the horizon of contemporary legal doctrine, disclosing the insufficiencies of the traditional conceptualization of the subjective right. The pressing needs of protection of the human being much fostered this development. Universal human rights, superior and anterior to the state and to any form of socio-political organization, and inherent to the human being, asserted themselves as opposable to public power itself. Human rights freed the conception of subjective right (*supra*) from the chains of legal positivism. If, on the one hand, the juridical category of the international legal personality of the human being contributed to instrumentalize the vindication of the rights of the human person, emanated from international law—on the other hand the *corpus iuris* of universal human rights ascribed to the legal personality of the individual a far wider dimension, no longer conditioned to the law emanated from the public state power.

[102] J Dabin, *El Derecho Subjetivo* (Rev. de Derecho Privado, 1955), at 64.

[103] Para. 35. On the impact of this Advisory Opinion n. 16 (1999) of the IACtHR on contemporary international case-law and practice, cf. A A Cançado Trindade, 'The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice', (2007) 6 *Chinese Journal of International Law* 1, at n. 1.

# 9 The Erosion of the Inter-State Outlook of Adjudication by the ICJ

I have recently had the occasion, in my Separate Opinion appended to the Advisory Opinion of the ICJ on the *Revision of a Judgment of the ILO Administrative Tribunal upon a Complaint Filed against IFAD* (1 February 2012), to dwell upon the outdated dogmatism of the PCIJ and ICJ Statutes, in so far as the international legal capacity of individuals is concerned. As I have recalled in that Separate Opinion (paras. 70-75), the question of the procedural capacity of the individuals before the ICJ, and its predecessor the Permanent Court of International Justice (PCIJ), was effectively considered on the occasion of the original drafting, by the Advisory Committee of Jurists appointed by the old League of Nations, of the Statute of the PCIJ, in 1920.[104]

Of the ten members of the aforementioned Committee of Jurists, only two–Loder and De La Pradelle—pronounced themselves in favour of enabling the individuals to appear as parties before The Hague Court (*ius standi*) in contentious cases against (foreign) States. The majority of the Committee, however, was firmly opposed to this proposition: four members[105] objected that the individuals were not subjects of international law (and could not, thus, in their view, be parties before the Court) and that only the states were juridical persons in the international order, in what they were followed by the other members.[106]

The position which prevailed in 1920—which has been surprisingly and regrettably maintained in article 34(1) of the Statute of the ICJ (formerly the PCIJ) to date, was promptly and strongly criticized in the more lucid doctrine of the epoch (already in the twenties). Thus, in his thoughtful monograph *Les nouvelles tendances du Droit international* (1927), Nicolas Politis pondered that the States are no more than fictions, composed as they are of individuals, and that all law ultimately aims at the human being, and nothing more than the human being: this is something "so evident", he added, that "il serait inutile d'y insister si les brumes de la souveraineté n'avaient pas obscurci les vérités

[104] A A Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humans*, *supra* n. 47, at 31, and cf. at 32-5.

[105] Ricci-Busatti, Baron Descamps, R Fernandes and Lord Phillimore.

[106] Cf. J Spiropoulos, *Lindividu en Droit international* (LGDJ, 1928), at 50-51; N Politis, *Les nouvelles tendances du Droit international* (Libr. Hachette, 1927), at 84-7; M St Korowicz, 'The Problem of the International Personality of Individuals', (1956) 50 *American Journal of International Law* 543.

les plus élémentaires".[107] And Politis proceeded in the defence of the granting to individuals of the direct appeal to international instances to vindicate their "legitimate interests", as that would to "a true necessity of international life".[108]

Another criticism to the solution adopted in the matter by the Statute of the PCIJ (article 34(1)) was formulated by Spiropoulos, also in the twenties. Already in 1928, he had anticipated that the emancipation of the individual from the state was a "question of time" and that the individual should be able to defend *himself* and his rights at the international level.[109] There was, he added, no impediment for conventional international law to secure to individuals a direct action at the international level (there having even been precedents in this sense in the inter-war period); if this did not occur and one would limit oneself to judicial actions at the domestic law level, not seldom the state would become "judge and party" at the same time, what would be an incongruity.

To Spiropoulos, the international legal order can be addressed itself directly to individuals (as exemplified by the peace treaties of the inter-war period), thereby erecting them into the condition of subjects of international law, to the extent that a direct relationship is established between the individual and the international legal order, which renders him "directly *titulaire* of rights or of obligations"; thus, one cannot fail to admit the international legal personality of the individual.[110] Without the granting to individuals of direct means of action at the international level, his rights will continue "without sufficient protection"; only with such direct action before an international instance, he added, an *effective* protection of human rights will be achieved, in conformity with the "spirit" of the new international order.

The option made by the draftsmen of the Statute of the old PCIJ, stratified with the passing of time in the Statute of the ICJ up to the present time, is even more open to criticism if we consider that, already in the first half of the twentieth century, there were experiments of international law which in effect granted international procedural status to individuals. This is exemplified by the system of the navigation of the river Rhine, by the Project of an International Prize Court (1907), by the Central American Court of Justice (1907-1917), as well as, in the era of the League of Nations, by the systems of minorities (including Upper Silesia) and of the territories under mandate, by the systems of petitions of the Islands Aaland and of the Saar and of Danzig, besides the practice of

[107] N Politis, *ibid.,* 76-8, 69.
[108] *Ibid*., at 82-3, 89-90, and cf. at 92, 61.
[109] J Spiropoulos, *supra* n. 106, at 44, and cf. at 49, 64-5.
[110] *Ibid*., at 50-1, 25, 31-3, 40-1.

mixed arbitral tribunals and of mixed claims commissions, of the same epoch.[111]

This evolution intensified and generalized in the era of the United Nations, with the adoption of the system of individual petitions under some universal human rights treaties of our times, in addition to human rights conventions at the regional level, which established international human rights tribunals (the European and Inter-American Courts of Human Rights,[112] followed, more recently, by the African Court of Human and Peoples Rights). Thereunder the international procedural capacity of individuals came to be exercised, with their direct access to international justice.[113] The significance of the right of individual petition, a definitive conquest of the international law of human rights,[114] can only be properly assessed in historical perspective.

In my aforementioned Separate Opinion in the recent ICJ Advisory Opinion on the *Revision of a Judgment of the ILO Administrative Tribunal upon a Complaint Filed against IFAD* (2012), I then turned my criticisms on what I perceive as the erosion of the strict inter-State outlook of adjudication by the of adjudication by the Hague Court (paras 76-81 and 88-90). I pondered that the fact that the Advisory Committee of Jurists did not find, in 1920, that the time was ripe to grant access to the PCIJ to subjects of rights other than the states, such as the individuals, did not mean a definitive answer to the question at issue. The

[111] For a study, cf., e.g.: A A Cançado Trindade, 'Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century', (1977) 24 *Netherlands International Law Review* 373; C A Norgaard, *The Position of the Individual in International Law* (Munksgaard, 1962), at 109-28; M St Korowicz, *Une expérience de Droit international—La protection des minorités de Haute-Silésie* (Pédone, 1946), at 81-174; among others. And, for a general study, cf. A A Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional* (University of Brasília, 1997).

[112] A A Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, *supra* n. 45, at 34-5.

[113] At the beginning of the exercise of the right to individual petition, such right, even if motivated by the search for individual reparation, also contributed to secure the respect for the objective obligations that were binding upon states parties. Cf., under the original text of article 25 of the European Convention of Human Rights, e.g., H Rolin, 'Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'homme', (1956) 9 *Revue hellénique de droit international* 9; C T Eustathiades, "Les recours individuels à la Commission européenne des droits de l'homme", in *Grundprobleme des internationalen Rechts—Festsschrift für J. Spiropoulos* (Schimmelbusch & Co., 1957), at 121; F Durante, *Ricorsi Individuali ad Organi Internazionali* (Giuffrè, 1958), at 129-30; K Vasak, *La Convention européenne des droits de l'homme* (LGDJ, 1964), at 96-8; F Matscher, 'La Posizione Processuale dell'Individuo come Ricorrente dinanzi agli Organi della Convenzione Europea dei Diritti dell'Uomo', in *Studi in Onore di G. Sperduti* (Giuffrè, 1984), at 601.

[114] A A Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (Editorial Jurídica de Chile, 2001), at 317-70.

fact that the same position was maintained at the time of adoption in 1945 of the Statute of the ICJ did not mean a definitive answer to the question at issue.

The question of access of individuals to international justice, with procedural equality, continued to occupy the attention of legal doctrine ever since, throughout the decades. Individuals and groups of individuals began to have access to other international judicial instances (cf. *supra*), reserving the PCIJ and later the ICJ only for disputes between states. The dogmatic position taken originally in 1920, on the occasion of the preparation and adoption of its Statute, did not hinder the PCIJ to occupy itself promptly of cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own. In considerations developed in the examination of such matters, the PCIJ went well beyond the inter-state dimension, taking into account the position of individuals themselves (as in, e.g., *inter alia*, the Advisory Opinion on *the Jurisdiction of the Courts of Danzig*, 1928).[115] Ever since, the artificiality of such dimension became noticeable and acknowledged, already at an early stage of the case-law of the PCIJ.

The exclusively inter-state character of the *contentieux* before the ICJ has not appeared satisfactory at all either. At least in some cases (from 1955 to 2004), pertaining to the condition of individuals, the presence of these latter (or of their legal representatives), in order to submit, themselves, their positions, would have enriched the proceedings and facilitated the work of the Court.[116]

[115] In that Advisory Opinion (3 March 1928, Series C, No 14-I, p. 8, followed by its *Advisory Opinion on Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 4 December 1935, Series C, No 77, p. 291), the PCIJ held that a treaty (the 1921 Danzig-Polish Agreement) conferred rights directly upon the individuals concerned (railway employees). They could thus lodge personal pecuniary claims (e.g., salaries, and pensions), even though they had passed from the service of the Free City of Danzig into the jurisdiction of Poland. Thus, as early as in 1928, the PCIJ had the courage and vision to determine, in its Advisory Opinion on the Jurisdiction of the Courts of Danzig, that, in the circumstances of the matter brought into its cognizance, individuals can be subjects of rights and bearers of obligations emanating directly from international law, from an international treaty. That finding by the PCIJ was to have repercussions in the following United Nations era. Thus, the new Court, the ICJ, in its Advisory Opinion of 1950 on the *International Status of South West Africa*, ICJ Reports 1950, p. 128, held that the inhabitants of the mandated territories had (even irrespective of a bilateral treaty) a right to petition the [former] UN Trusteeship Council, under article 80 of the UN Charter. From all the aforesaid, it is clear that, by the mid-twentieth century, the individuals international legal standing, and the need to secure a procès équitable (also in the emerging law of international organizations) were already recognized.

[116] One may recall, for example, the classical Nottebohm case concerning double nationality (*Nottebohm Case (second phase)*, ICJ Reports 1955, p. 4); the case concerning the *Application*

In those cases, one cannot fail to reckon that one of their predominant elements was precisely the concrete situation of the individuals directly affected, and not merely abstract issues of exclusive interest of the litigating States in their relations *inter se*. Moreover, one may further recall that, in the case of *Armed Activities in the Territory of Congo* (*D R. Congo v Uganda*, 2000) the ICJ was concerned with grave violations of human rights and of international humanitarian law; in the Land *and Maritime Boundary between Cameroon and Nigeria* (1996), it was likewise concerned with the victims of armed clashes.

More recent examples wherein the Court's concerns have gone beyond the inter-State outlook include, e.g., the case on *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*, 2009) pertaining to the principle of universal jurisdiction under the UN Convention against Torture, the case of *A S Diallo* (*Guinea v D R Congo*, 2010) on detention and expulsion of a foreigner, the case of the *Jurisdictional Immunities of the State* (*Germany v Italy*, counter-claim, 2010; and merits, 2012), the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*, 2011), the case of the *Temple of Preah Vihear* (*Cambodia v Thailand*, provisional measures of protection, 2011).

Further examples can be found in the ICJ two most recent Advisory Opinions, namely, the Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), and the Advisory Opinion of the ICJ on the *Revision of a Judgment of the ILO Administrative Tribunal upon a Complaint Filed against IFAD* (2012). In all these recent cases and Advisory Opinions, one cannot fail to recognize that a key element–at times the predominant one—has precisely been the concrete situation of human beings, and not mere abstract questions of exclusive interest of the contending states in their relations *inter se*. [This is what the *droit détatistes*, fascinated with that they regard as the "art" of litigation, and eager "to win a case" before the World Court, fail to see].

The truth remains that the artificiality of the exclusively inter-state outlook of the procedures before the ICJ is clearly disclosed the very nature of some of

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*of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)*, ICJ Reports 1958, p. 55; the cases of the *Trial of Pakistani Prisoners of War (Pakistan v India)* (1973), of the *United States Diplomatic and Consular Staff in Teheran case*, ICJ Reports 1980, p. 3, of the *East-Timor (Portugal v Australia)*, ICJ Reports 1995, p. 90; the case of the *Application of the Convention against Genocide (Bosnia-Herzegovina v Yugoslavia)*, ICJ Reports 2007, p. 43; and the three successive cases concerning consular assistance—namely, *Vienna Convention on Consular Relations* (Paraguay v United States of America) (1998), *LaGrand (Germany v United States)*, ICJ Reports 2001, p. 466, and *Avena and Others (Mexico v United States)*, ICJ Reports 2004, p. 12.

the cases submitted to it. Such artificiality has been criticised, time and time again, in expert writing, including by a former President of the Court itself. It was recalled that "nowadays a very considerable part of international law" (e.g., lawmaking treaties) "directly affects individuals", and the effect of srticle 34(1) of the ICJ Statute has been "to insulate" the Court "from this great body of modern international law". The ICJ remains

> trapped by Article 34(1) in the notions about international law structure of the 1920s. (…) [I]t is a matter for concern and for further thought, whether it is healthy for the World Court still to be, like the international law of the 1920s, on an entirely different plane from that of municipal courts and other tribunals.[117]

To the same effect, Rosenne expressed the view, already in 1967, that there was "nothing inherent in the character of the International Court itself to justify the complete exclusion of the individual from appearing before the Court in judicial proceedings relating of direct concern to him".[118] The current practice of exclusion of the *locus standi in iudicio* of the individuals concerned from the proceedings before the ICJ, he added, in addition to being artificial, could also produce "incongruous results". It was thus highly desirable that that scheme be reconsidered, in order to grant *locus standi* to individuals in proceedings before the ICJ, as

> it is in the interests of the proper administration of international justice that in appropriate cases the International Court of Justice should take advantage of all the powers which it already possesses, and permit an individual directly concerned to present himself before the Court, (…) and give his own version of the facts and his own construction of the law.[119]

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[117] R Y Jennings, 'The International Court of Justice after Fifty Years', (1995) 89 *American Journal of International Law* 504.

[118] S Rosenne, 'Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice,' in P Sanders (ed), *International Arbitration—Liber Amicorum for M. Domke* (Nijhoff, 1967), at 249, and cf. 242.

[119] *Ibid.*, at 250, and cf. at 243.

# 10 The international juridical capacity of the individual

Parallel to the construction of their international juridical personality, the access of individuals to contemporary international tribunals for the protection of their rights reveals a *renovation* of international law, in the sense of its aforementioned *humanization,*[120] opening a great gap in the traditional doctrine of the reserved domain of states[121] (or *compétence nationale exclusive*), definitively overcome: the individual is erected as subject of international law,[122] endowed with procedural capacity. Before internationals tribunals, the human person encounters herself, to protect herself from the arbitrariness of the State, being protected by the rules of international law.[123]

This renovation of international law, proper of our time, corresponds to the recognition of the necessity that all states, in order to avoid new violations of human rights, are to respond for the way they treat all human beings who are under their jurisdiction. Such renovation would simply not have been possible without the crystallization of the right of individual petition, amidst the recognition of the objective character of the obligations of protection and the acceptance of the collective guarantee of compliance with them: this is the real sense of the *historical rescue* of the individual as subject of the international law of human rights (cf. *supra*).

The counterposition between the complainant individual and the respondent state in cases of alleged violations of protected rights is the essence of the international protection of human rights. The profound transformation of the international legal order, launched by the emergence of the international law of human rights, has not taken place without difficulties, precisely for requiring a new mentality. It has furthermore undergone stages, some of which no longer sufficiently studied in our days, even in respect of the crystallization of the right

[120] Cf. A A Cançado Trindade, 'El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional de los Derechos Humanos', (2001) 30/31 *Revista del Instituto Interamericano de Derechos Humanos* 45; A A Cançado Trindade, 'Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios en el Sistema Interamericano de Protección de los Derechos Humanos', (2003) 37 *Revista del Instituto Interamericano de Derechos Humanos* 13.

[121] F A von der Heydte, *op. cit. infra* n. 129, at 332-3 and 329-30; and cf. A A Cançado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations', (1976) 25 *International and Comparative Law Quarterly* 715.

[122] F.A. von der Heydte, *infra* n. 130, at 345.

[123] *Ibid.*, at 356-7, 301-2.

of individual petition.

Already in the beginnings of the exercise of this right it was stressed that, though motivated by the search for individual reparation, the right of petition contributes also to secure the respect for obligations of an objective character which bind the States Parties.[124] In various cases the exercise of the right of petition has gone further, occasioning changes in the domestic legal order and in the practice of the public organs of the state. The significance of the right of individual petition can only be properly assessed in historical perspective.

Consideration of the right of individual petition as a method of international implementation of human rights has necessarily to take into account the central aspect of the *legitimatio ad causam* of petitioners and the conditions of the exercise and of the admissibility of petitions (set forth in the distinct human rights instruments which foresee them).[125] Under the European Convention of Human Rights, a vast case-law on the right of individual petition has developed, recognizing its *autonomy*, in respect of the substantive rights listed in titled I of the European Convention. In the inter-American system of human rights protection, the right of individual petition has constituted itself in an effective way to face not only individual cases but also cases of massive and systematic violations of human rights. Its importance has been fundamental, and could never be minimized.

The American Convention goes beyond the European Convention: the *legitimatio ad causam*, which extends itself to every and any petitioner, can prescind even from some manifestation on the part of the victim herself. The right of individual petition, thus widely conceived, has as immediate effect that of widening the scope of protection, mainly in cases wherein the victims (e.g., *incommunicado* detainees, enforced disappeared persons, among other situations) find themselves unable to act on their own, and stand in need of the

[124] For example, under the original article 25 of the European Convention on Human Rights; cf. H Rolin, 'Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'homme' (1956), 9 *Revue hellénique de droit international* 3, esp. at 9; C T Eustathiades, 'Les recours individuels à la Commission européenne des droits de l'homme,' in *Grundprobleme des internationalen Rechts—Festschrift für J. Spiropoulos* (Schimmelbusch & Co., 1957), at 121; F Durante, *Ricorsi Individuali ad Organi Internazionali* (Giuffrè, 1958), at 125-52, esp. at 129-30; K Vasak, *La Convention européenne des droits de l'homme* (LGDJ, 1964), at 96-8; M Virally, 'L'accès des particuliers à une instance internationale: la protection des droits de l'homme dans le cadre européen', (1964) 20 *Mémoires Publiés par la Faculté de Droit de Genève* 67; H Mosler, 'The Protection of Human Rights by International Legal Procedure', (1964) 52 *Georgetown Law Journal* 800.

[125] For an examination of the matter, cf. A A Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, *supra* n. 49, at 68-87.

initiative of a third "party" as petitioner on their behalf and defence.[126] With the access of individuals to justice at the international level, by means of the exercise of the right of individual petition, a concrete expression has been given to the recognition that the human rights to be protected are inherent to the human person and do not derive from the state. Accordingly, the action in their protection is not exhausted—cannot be exhausted—in the action of the state.

Each of the procedures which regulate the right of individual petition under international treaties and instruments of human rights, despite their differences in their juridical nature, has contributed, in their own way, to the gradual strengthening of the procedural capacity of the complainant at the international level.[127] In effect, of all the mechanisms of international protection of human rights, the right of individual petition is, effectively, the most dynamic one, in even attributing the initiative of action to the individual himself (the ostensibly weaker party *vis-à-vis* the public power), distinctly from the exercise *ex officio* of other methods (such as those of reports and investigations) on the part of the organs of international supervision. It is the one which best reflects the specificity of the international law of human rights, in comparison with other solutions proper of public international law.

The ineluctable and indispensable complement of the right of international individual petition lies in the intangibility and preservation of the integrity

[126] The denationalization of protection and the requisites of the international action of safeguard of human rights, besides widening sensibly the circle of protected persons, enabled the individual to exercise rights emanated directly from international law (*droit des gens*), implemented in the light of the aforementioned notion of collective guarantee, and no longer simply conceded by the state.

[127] In express recognition of the relevance of the right of individual petition, the Declaration and Programme of Action of Vienna, main (final) document adopted by the II World Conference of Human Rights (1993), urged its adoption, as an additional method of protection, by means of Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women (already adopted) and to the Covenant on Economic, Social and Cultural Rights (recently adopted); cf. Declaration and Programme of Action of Vienna of 1993, part II, paras 40 and 75, respectively. That document recomended, moreover, to states parties to human righs treaties, the acceptance of all available optional procedures of individual petitions or communications (cf. *ibid*., part II, para. 90). For an assessment of the results of the II World Conference of Human Rights (Vienna, 1993), cf. A A Cançado Trindade, 'Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)', (1993-1994) 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* 9; A A Cançado Trindade, 'Balance de los Resultados de la Conferencia Mundial de Derechos Humanos (Viena, 1993),' in *Estudios Básicos de Derechos Humanos* (IIDH, 1995), vol. III, at 17; A A Cançado Trindade, 'A Conferência Mundial de Direitos Humanos: Lições de Viena', (1994) 10 *Revista da Faculdade de Direito da Universidade Federal do Rio Grande do Sul* 232.

of the jurisdiction of international tribunals of human rights.[128] In this respect, both the IACtHR, in its historical judgments in the cases of the *Tribunal Constitucional* and of *Ivcher Bronstein versus Peru* (jurisdiction, 1999), and of *Hilaire, Constantine and Benjamin and Others versus Trinidad and Tobago* (preliminary objection, 2001), as well as ECtHR, in its landmark judgments in the cases of *Belilos v Switzerland* (1988), of *Loizidou v Turkey* (preliminary objections, 1995), and of *Ilascu, Lesco, Ivantoc and T Petrov-Popa v Moldova and the Russian Federation* (2001), have advanced their shared understanding that their respective jurisdictions on contentious matters could not be conditioned by acts distinct from their own; the two Courts duly discarded the voluntarist conception, and thus rightly preserved the integrity of the mechanisms of protection of the American and the European Convention of Human Rights, respectively.[129]

## 11 Personality and Capacity: The Individual's Access to Justice at International Level

Ultimately, all law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality,[130] as well as the capacity to exercise his rights. The state–it is nowadays widely acknowledged—is responsible for all its acts–both *iure gestionis* and *iure imperii*—as well as for all its omissions, in breach of human rights. In case of violation of human rights, the *direct access* of the individual to the international jurisdiction has been reckoned as being fully justified, in order to enable him to vindicate such rights, even against his own state. With the emergence of the international law of human rights (cf. *infra*), the necessity

[128] For a study, cf. A A Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humans*, *supra* n. 45, at 17-96, esp. at 61-76. And, on this particular point, cf. A A Cançado Trindade, *El Ejercicio de la Función Judicial Internacional—Memorias de la Corte Interamericana de Derechos Humanos* (Del Rey, 2011), ch. I, at 5-10.

[129] A A Cançado Trindade, *El Desarrollo del Derecho Internacional de los Derechos Humanos mediante el Funcionamiento y la Jurisprudencia de la Corte Europea y la Corte Interamericana de Derechos Humanos* (IACtHR, 2007), at 17-8, 41-2.

[130] F A von der Heydte, 'L'individu et les tribunaux internationaux', (1962) 107 *RCADI* 301; cf. also, in this respect, e.g., E M Borchard, 'The Access of Individuals to International Courts', (1930) 24 *American Journal of International Law* 359.

of the *legitimatio ad causam* of individuals in international law has found growing support in legal doctrine.[131]

The respect for the individual's personality at the international level is instrumentalized by the international right of individual petition. It is for this reason that, in my Concurring Opinion in the case of *Castillo Petruzzi and Others v Peru* (Preliminary Objections, Judgment of 4 September 1998) before the Inter-American Court of Human Rights (IACtHR), urged by the circumstances of the *cas d'espèce*, I saw it fit to characterize such international right of individual petition as a *fundamental clause* (*cláusula pétrea*) of the human rights treaties which provide for it,[132] adding that:

> The right of individual petition shelters, in fact, the last hope of those who did not find justice at the national level. I would not refrain myself nor hesitate to add—allowing myself the metaphor—that the right of individual petition is undoubtedly the most luminous star in the universe of human rights.[133]

Human rights do assert themselves against all forms or domination or arbitrary power.[134] In the public hearings before the IACtHR (mainly those pertaining to

[131] Cf. A A Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humans*, *supra* n. 45, at 17-96; A A Cançado Trindade, 'The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments,' in K Vasak (ed.), *Amicorum Liber—Les droits de l'homme à l'aube du XXIe siècle* (Bruylant, 1999), at 521; A A Cançado Trindade, 'Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne,' *supra* n. 47, at 207-39; A A Cançado Trindade, 'El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional de los Derechos Humanos', (2001) 30/31 *Revista del Instituto Interamericano de Derechos Humanos* 45.

[132] To which one can add, insofar as the American Convention on Human Rights is concerned, the other *fundamental clause* (*cláusula pétrea*) of the recognition of the competence of the Inter-American Court of Human Rights in contentious matters; for a study, cf. A A Cançado Trindade, 'Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos,' in *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI—Memoria del Seminario* (Nov. 1999) (IACtHR, 2001), at 3.

[133] IACtHR, case *Castillo Petruzzi and Others v Peru* (Preliminary Objections), Judgment of 4 September 1998, Series C, n. 41, Concurring Opinion of Judge A A Cançado Trindade, at 62, para. 35.

[134] A A Cançado Trindade, 'The Future of the International Protection of Human Rights,' in B Boutros-Ghali (ed), *Amicorum Discipulorumque Liber—Paix, Développement, Démocratie*

reparations), a point which has particularly drawn my attention has been the remark, increasingly more frequent, on the part of the victims or their relatives, in the sense that, were it not for their access to the international instance, justice would never have been made in their concrete cases. Without the right of individual petition, and the consequent access to justice at the international level, the rights set forth in human rights treaties would be reduced to a little more than dead letter.

The human being emerges, at last, even in the most adverse conditions, as the ultimate subject of Law, domestic as well as international. The case of the *"Street Children"* (*Villagrán Morales and Others v Guatemala*, 1999-2001), decided by the IACtHR, the first one of the kind in which the cause of the children abandoned in the streets was brought before an international human rights tribunal,[135] and in which some of those marginalized and forgotten by this world succeeded to resort to an international tribunal to vindicate their rights as human beings,[136] is truly paradigmatic, and gives a clear and unequivocal testimony that the international law of human rights has nowadays achieved its maturity. As it can be inferred from this historical case of the *"Street Children"*, the international juridical subjectivity of the individuals is nowadays an irreversible reality, and the violation of their fundamental rights, emanated directly from the international legal order, brings about juridical consequences.

As I have seen it fit to sum up in my Concurring Opinion in the aforementioned Advisory Opinion of the Inter-American Court on the *Juridical Condition and Human Rights of the Child* (2002),

> every human person is endowed with juridical personality, which imposes limits to State power. The juridical capacity varies in virtue of the juridical condition of each one to undertake certain

(Bruylant, 1998), vol. II, at 961. On the need to overcome the current challenges and obstacles to the prevalence of human rights, cf. A A Cançado Trindade, 'L'interdépendance de tous les droits de l'homme et leur mise-en-oeuvre: obstacles et enjeux', (1998) 158 *Revue internationale des sciences sociales* 571.

[135] IACtHR, case *Villagrán Morales and Others v Guatemala*, Judgment (merits) of 19 November 1999, Series C, n. 63, paras 1-253, and Joint Concurring Opinion of Judges A A Cançado Trindade and A. Abreu Burelli, paras. 1-11.

[136] In fact, in that case of the killing of the *Street Children*, the mothers of the murdered children (and the grandmother of one of them), as poor and abandoned as their sons (and grandson), had access to the international jurisdiction, appeared before the Court (public hearings of 28/29 January 1999 and of 12 March 2001), and, due to the judgments of the Inter-American Court (as to the merits, of 19 November 1999, and reparations, of 26 May 2001), which brought them redress, could at least recover their faith in human justice.

> acts. Yet, although such capacity of exercise varies, all individuals are endowed with juridical personality. Human rights reinforce the universal attribute of the human person, given that to all human beings correspond likewise the juridical personality and the protection of the Law, independently of her existential or juridical condition. (par. 34)

In respect of the human rights of individuals belonging to groups or human collectivities, reference is to be made to the historical Advisory Opinion n 18, on the *Juridical Condition and Rights of Undocumented Migrants* (17 September 2003), of the IACtHR. The Court stressed that the migratory status cannot serve as justification for depriving them of the enjoyment and exercise of their human rights, including labour rights. The Court added that States cannot discriminate, or tolerate discriminatory situations, to the detriment of migrants, and ought to guarantee the due process of law to any person, irrespective of her migratory status.

The IACtHR further warned that States cannot subordinate or condition the observance of the fundamental principle of equality before the law and non-discrimination to the aims of their migratory or other policies. In my Concurring Opinion I sustained that this fundamental principle belonged to the domain of *ius cogens*, and stressed the importance of the *erga omnes* obligations (encompassing also inter-individual relations) *vis-à-vis* the rights of undocumented migrants. The Advisory Opinion of the Court thus benefitted a considerable number of persons, those belonging to numerous groups of undocumented migrants, exposed to all sorts of abuses in numerous countries nowadays.

The recognition of the direct access of individuals to international justice reveals, in these first two decades of the twenty-first century, the new primacy of the *raison d'humanité* over the *raison d'État*, to inspire the historical process of *humanization* of international law. Human conscience thus attains in our days a stage of evolution which renders it possible to do justice at the international level in the safeguard of those entirely marginalized or socially excluded (cf. *supra*). The international juridical titularity of the individuals is nowadays an irreversible reality, and the human person emerges, at last, even in the most adverse conditions, as the ultimate subject of both domestic and international law, endowed with full juridico-procedural capacity.

# 12 The Overcoming of State-Centrism: The Human Person in the Expansion of International Legal Personality

Some learned thinkers of past decades, who were prepared to extract lessons left by the history of the twentieth century, coincide in a key point:[137] never as in the last century so much progress in science and technology was verified, tragically accompanied by so much destruction and cruelty.[138] The twilight of the twentieth century disclosed a panorama of unprecedented scientific discovery and suffering.[139] In a luminous essay published more than six decades ago, in the same year of the adoption of the Universal Declaration of Human Rights, the learned historian Arnold Toynbee, questioning the very basis of what was known as *civilization*, that is, the very modest advances at social and moral levels, regretted that the command achieved by man over non-human nature unfortunately did not extend itself to the spiritual level.

That abuses and crimes have been committed in the name of the public state power is unjustifiable, as the state was conceived—it should not be forgotten—as promoter and guarantee of the common good.[140] The international legal order no longer fits itself into the straight-jacket of the strict inter-State outlook, which led to some many abuses, and atrocities, in the recent past; it turns instead its attention, with the revival of jusnaturalism, to the condition of human beings, and the questions which affect the whole of humankind.[141] One recognizes today the need to reinstate the human person to the central position—as *subject of both domestic and international law*—wherefrom she was unduly removed, with the disastrous consequences of sad memory.

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[137] So well singled out, for example, in some of the last writings of Bertrand Russell, of Karl Popper, of Isaiah Berlin, among others; cf. B Russell, Knowledge and Wisdom, in H Peterson (ed), *Essays in Philosophy* (Pocket Library, 1960), at 498-9, 502; K Popper, *The Lesson of This Century* (Routledge, 1997), at 53 and 59; I Berlin, 'Return of the *Volksgeist*: Nationalism, Good and Bad,' in N P Gardels (ed), *At Century's End* (Alti Publ., 1996), at 94.

[138] And never, as in our times, has one registered so much increase of prosperity accompanied in an equally tragic way of so much increase—statistically proven—of socio-economic disparities and of extreme poverty.

[139] A J Toynbee, *Civilization on Trial* (Oxford University Press, 1948), at 262-4. And another historian, Eric Hobsbawn, in our days portrays the twentieth century as a period of history marked above all by the crimes and madness of man; E Hobsbawm, *Era dos Extremos—O Breve Século XX* (Cia. das Letras, 1996), at 561.

[140] J Maritain, *The Person and the Common Good* (University of Notre Dame Press, 1966).

[141] A Truyol y Serra, *La Sociedad Internacional* (Alianza Editorial, 1998), at 97-8, 167.

The recognition of the centrality of human rights corresponds to a new *ethos* of our times. In this line of evolution also lies the current trend of "criminalization" of grave violations of the rights of the human person. At this early stage of the twenty-first century, we witness the acceleration of the historical process of *humanization* of international law,[142] to which it is a privilege to be able to contribute, which comes to occupy itself more directly with the realization of superior common goals.

We stand before a humanized (or even truly humanist) international *ordre public*, wherein the public interest or the general interest coincides fully with that of the prevalence of human rights.[143] That implies the recognition that *human rights constitute themselves the basic foundation of the legal order*. In the domain of the international law of human rights, moved by considerations of international *ordre public*, we are before common and superior values,[144] underlying it, and which appear truly fundamental and irreducible.[145] We can here visualize a true *droit au Droit*, that is, the right to a legal order which effectively safeguards the rights inherent to the human person.[146] Of their faithful safeguard will depend, to a large extent, the future evolution of international law itself. This is the path to follow, for us and the following generations not to keep on living with the tragic contradictions which marked

[142] Cf. A A Cançado Trindade, *A Humanização do Direito Internacional* (Del Rey, 2006).

[143] On a *ius commune* of human rights at the international level, cf. M de Salvia, 'L'élaboration d'un *jus commune* des droits de l'homme et des libertés fondamentales dans la perspective de l'unité européenne: l'oeuvre accomplie par la Commission et la Cour Européennes des Droits de l'Homme,' in F Matscher and H Petzold (eds), *Protection des droits de l'homme: la dimension européenne—Mélanges en l'honneur de G.J. Wiarda* (C Heymanns Verlag, 1990), 555-63; G Cohen-Jonathan, 'Le rôle des principes généraux dans l'interprétation et l'application de la Convention Européenne des Droits de l'Homme,' *Mélanges en hommage à L.E. Pettiti* (Bruylant, 1998), at 168-9.

[144] These values are perfectly identifiable, along the operative part of international treaties and instruments of human rights, but expressed above all in their preambles. These latter tend to invoke the ideals which inspired the respective treaties and instruments (of importance to the identification of their spirit), or to enunciate their foundations or general principles. Cf., in this respect, e.g., N Bobbio, 'Il Preambolo della Convenzione Europea dei Diritti dell'Uomo', (1974) 57 *Rivista di Diritto Internazionale* 437.

[145] Cf., in this sense, F Sudre, 'Existe t-il un ordre public européen?,' in P Tavernier (ed), *Quelle Europe pour les droits de l'homme?* (Bruylant, 1996), at 41, 50, 54-67. For a classic study of the legal order, which sought to transcend pure normativism, cf. S Romano, *L'ordre juridique* (Dalloz, 2002).

[146] For a case-study in this respect, cf. A A Cançado Trindade et al, 'Gobernabilidad Democrática y Consolidación Institucional: El Control Internacional y Constitucional de los *Interna Corporis*—Informe de la Comisión de Juristas de la OEA para Nicarágua (Febrero de 1994)', (2000-2001) 67 *Boletí n de la Academia de Ciencias Políticas y Sociales*—Caracas 593, at n. 137.

the twentieth century.

# 13 The Historical Significance of the International Subjectivity of the Individual

The international juridical subjectivity of the human being, as foreseen by the so-called "founding fathers" of international law (the *droit des gens*), is nowadays a reality. At this beginning of the twenty-first century, this highly significant conquest can be appreciated within the framework of the historical process of *humanization* of international law, to which it is a privilege to be able to contribute, which, always attentive to fundamental values, comes to occupy itself more directly of the realization of superior common goals. In the ambit of the international law of human rights, in the European and inter-American systems of protection—endowed with international tribunals in operation—parallel to the legal personality, also the international procedural capacity (*locus standi in judicio*) of the individuals is acknowledged today.

This is a logical development, as it does not seem reasonable to conceive rights at the international level without the corresponding procedural capacity to vindicate them; the individuals are effectively the true complainant party in the international *contentieux* of human rights. On the basis of the right of individual petition is erected the juridical mechanism of emancipation of the human being *vis-à-vis* his own state for the protection of his rights in the ambit of the international law of human rights,[147] an emancipation which constitutes, in our days, a true juridical revolution, which comes at last to give an ethical content to the norms of both domestic public law and international law.

The recognition of the direct access of the individuals to international justice reveals, at the beginning of the twenty-first century, the new primacy of the *raison de l'humanité* over the *raison d'État*, inspiring the historical process of *humanization* of international law.[148] The subjects of international law have,

[147] If the aforementioned right of petition had not been originally conceived and consistently understood in this way, the international protection of human rights would have advanced very little in slightly over half a century of evolution. With the consolidation of the right of individual petition before international tribunals—the European and Inter-American Courts—of human rights, it is the international protection that attains its maturity.

[148] A A Cançado Trindade, *A Humanização do Direito Internacional*, *supra* n. 142.

already for a long time, ceased to be reduced to territorial entities.[149] Nowadays it appears quite clear that there is nothing intrinsic to international law that would impede, or render it impossible, for non-state actors to be endowed with international legal personality and capacity. Yet, part of the contemporary legal doctrine keeps on referring to individuals as actors (rather than subjects) in the international legal order. This is not a juridical term, it is rather a term of art, to which no specific juridical contents and consequences are necessarily attached. To call the individuals actors in international law is nothing but a platitude. They are true subjects of international law, bearers of rights and duties which emanate from international law.

No one in sane conscience would deny that individuals effectively possess rights and have duties which derive directly from international law, with which they thus are in direct contact. And it is perfectly possible to conceptualize as subject of international law, precisely, any person or entity, *titulaire* of rights and bearer of obligations, which emanate directly from norms of international law. It is the case of individuals, who have their direct contacts—without intermediaries—with the international legal order thus fostered and strengthened. This evolution is to be appreciated in a wider dimension. The expansion of international legal personality, nowadays encompassing that of individuals as active and passive subjects of international law, goes *pari passu* with the acknowledgment of accountability in international law.

This contributes ultimately to the international rule of law, to the realization of justice also at the international level, thus fulfilling a long-standing aspiration of humankind. In reaction to the successive atrocities which, along the twentieth century, have victimized millions and millions of human beings, in a scale until then unknown in the history of humankind, the universal juridical conscience, as the ultimate *material source* of all Law, has restored to the human being his condition of subject of both domestic and international law, and final addressee of all legal norms, of national as well as international origin. Human beings were to benefit from that, and international law itself was thereby enriched and justified. International law liberated itself from the chains of statism, and again met with the conception of a true, and new, *ius gentium*.

As the attentions of contemporary international legal doctrine on the

[149] More than half a century ago, as acknowledged in the celebrated Advisory Opinion of the International Court of Justice on *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, p. 174 1949, the advent of international organizations had put an end to the States' monopoly of the international legal personality and capacity, with all the juridical consequences which ensued therefrom, cf., for a general study on the matter, A A Cançado Trindade, *Direito das Organizações Internacionais* (Del Rey, 2012).

expansion of the international legal personality turn to the central position occupied today by the victimized individuals, giving unequivocal witness of the new *ius gentium* of our times,[150] as I sought to demonstrate in the General Course of Public International Law which I delivered in 2005 at the Hague Academy of International Law,[151] the mechanical and thoughtless attachment to unfounded dogmas of the past becomes even more unsustainable. But as we do not live in a rational world, we ought to remain attentive to avoid an eventual contamination of nostalgia of immobility, even in our days (at a time when one reads less and less, and reflects less and less). Thus, as we enter the second decade of the twenty-first century, it appears truly surprising to find those who, in admitting the opening of international law to the expansion of the international legal personality (extending itself to individuals), notwithstanding insist, in a rather contradictory way, on the permanence of the traditional State-centric outlook, out of which they seem to feel lost.

Their position is indeed unsustainable: all they do is cling arbitrarily to the doctrinal developments of the nineteenth century, and try to project it—attempting to endow it with "perennial" validity—onto the present, making abstraction of the evolution of international law in more than a century. Yet, the state-centric world imagined by de Vattel ceased to exist a long time ago. The evolution of the law of nations, quite on the contrary, keeps on following its path in the twenty-first century, with the access to international justice nowadays secured also to persons who found themselves in situations of the utmost vulnerability, if not entirely in defencelessness (cf. *supra*).

Those who cling to a surpassed dogmatism, to the point of trying to make one believe that international law, "as we know it today", "began" in the nineteenth century, are simply distorting the truth. International law has much preceded the inter-state order established in the nineteenth with his historical roots going back to the thinking of its "founding fathers", the jusinternationalists of the sixteenth and seventheeth centuries, as recapitulated in the present keynote address.[152] International law has much evolved since the nineteenth century, accompanying the profound transformations of the world,

[150] A A Cançado Trindade, *Évolution du Droit international au droit des gens—L'accès des particuliers à la justice internationale: le regard d'un juge* (Pédone, 2008), at 81-184; R Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010), at 126-8, 243, 271-7, 283.

[151] A A Cançado Trindade, 'International Law for Humankind: Towards a New *Jus Gentium*—General Course on Public International Law—Part I', (2005) 316 *RCADI* 252, at chs. IX-X.

[152] Cf. item II.

and appearing today entirely distinct from what it then was.[153]

In reaction to the succession of acts of barbarism and of the recurring horrors throughout the twenthieth century and the beginning of the twenty-first century, law cared to open itself to the expansion of the international legal personality, and, accordingly, of the corresponding legal capacity, as well as, significantly, of the international responsibility. Contemporary *ius gentium* has been undergoing a historical process of humanization,[154] caring to instrumentalize itself against the manifest insufficiencies and the dangers of the state-centric outlook or of the surpassed strictly inter-state vision. To that effect, the international law of human rights has much contributed, to the point of the phenomenon transcending the parameters of this latter, and permeating in our days the *corpus iuris* of international law as a whole.

Contemporary international case-law contains eloquent illustrations of the access of the human person to international justice in circumstances of considerable adversity, in cases pertaining to, e.g., undocumented migrants, children abandoned in the streets (cf. *supra*), members of peace communities and other civilians in situations of armed conflict, internally displaced persons, individuals (including minors of age) under infra-human conditions of detention, members of dispossessed indigenous communities, among others. In such circumstances, the centrality of the suffering of the victims has become notorious with their access to justice at the international level.[155]

Today, in such situations, effective use has been made of the international individual petition,[156] something which could hardly have been anticipated, in their days, by the draftsmen of international treaties and instruments of human rights. On the other hand, such recent advances are not at all surprising, as the international law of human rights is essentially *victim-oriented*. Such development is due, in my perception, to the awakening of the human conscience to the imperative of protection of the human person in these circumstances of extreme vulnerability. It is in such circumstances that such protection reaches its plenitude.

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[153] A A Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, *supra* n. 48, at 1039-1109.

[154] A A Cançado Trindade, *supra* n. 142, at 107-72.

[155] Cf., on this particular point, A A Cançado Trindade, *El Ejercicio de la Función Judicial Internacional—Memorias de la Corte Interamericana de Derechos Humanos* (Del Rey, 2011), ch. XIX, at 159-65.

[156] Cf. A A Cançado Trindade, 'The Right of Access to Justice in the Inter-American System of Human Rights Protection', (2007) 17 *Italian Yearbook of International Law* 7; A A Cançado Trindade, 'Die Entwicklung des interamerikanischen Systems zum Schutz der Menschenrechte', (2010) 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 629.

In effect, to this remarkable evolution I dedicate my recent book (of 2011), on the matter, published in Oxford.[157] I examine therein some cases adjudicated by the IACtHR in recent years, a cycle of cases of massacres, with aggravating circumstances, wherein grave violations of human rights were planned and perpetrated in pursuance of state policies, forming a *systematic* practice of extermination of human beings. The adjudication of those cases was launched by the historic judgment of the IACtHR (of 14 March 2001) in the case of the massacre of *Barrios Altos* concerning Peru.

To that judgment followed the subsequent judgments of the IACtHR in the cases of the massacres of *Caracazo* concerning Venezuela (reparations, 29 August 2002)], of *Plan de Sánchez* pertaining to Guatemala (29 April 2004), of the *19 Tradesmen v Colombia* (5 July 2004), of *Mapiripán v Colombia* (17 September 2005), of the *Moiwana Community ve Suriname* (15 June 2005), of *Pueblo Bello v Colombia* (31 January 2006), of *Ituango v Colombia* (1 July 2006), of *Montero Aranguren and Others (Detention Centre of Cátia) v Venezuela* (5 July 2006), of *La Cantuta v Peru* (29 November 2006), and of the *Prison of Castro v Peru* (25 November 2006), as well as in the cases of assassinations planned at the highest level of the state power and executed by order of this latter (such as that of *Myrna Mack Chang* (25 November 2003)).

Thus, massacres and crimes of state (perpetrated by state agents as part of a state policy), which tended to fall into oblivion some decades ago, have more recently been brought to the cognizance of international human rights tribunals (such as the Inter-American and European Courts), in order to determine the responsibility of the state (under the respective regional Conventions) for grave violations of the protected human rights.[158] Cases of the kind have also been lodged, to other effects, with other international tribunals, such as the international criminal ones (for the determination of individual international criminal responsibility), and the ICJ, in the framework of the inter-state *contentieux*.

Thus, more recently, within this latter, I have had the occasion to retake the consideration of the matter in my extensive Individual Opinions (two of them Dissenting, and one Separate), in distinct stages of the case pertaining to state immunities, opposing Germany to Italy before the ICJ (2010-2012). Thus, in my Separate Opinion in the case of the *Jurisdictional Immunities of the State*, in

[157] A A Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press, 2011).

[158] For a recent study, cf. A A Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice* (Inaugural Address, 10 November 2011) (Universiteit Utrecht, 2011).

supporting the intervention by Greece (Order of 4 July 2011), I cared to set forth, pedagogically, the distinct positions of states as well as individuals as titulaires of rights, in the framework of the *cas despèce* (paras 9-54).

I thus purported to make even clearer the point I had earlier made, in the same case, in my Dissenting Opinion, in supporting the counter-claim of Italy (Order of 6 July 2010), to the effect that states cannot waive claims as to rights which are not theirs, but of individuals. In my own words, states

> cannot waive claims for reparation of serious breaches of rights that *are not* theirs, rights that are inherent to the human person. Any purported waiver to this effect runs against the international *ordre public*, is in breach of *ius cogens*. This broader outlook, in a higher scale of *values*, is in line with the vision of the so-called "founding fathers" of the law of nations (the *droit des gens*, the *ius gentium*), and with what I regard as the most lucid trend of contemporary international legal thinking.
>
> One cannot build (and try to maintain) an international legal order over the suffering of human beings, over the silence of the innocent destined to oblivion. At the time of mass deportation of civilians, sent to forced labour along the *two* World Wars (in 1916-1918 and in 1943-1945) of the XXth century (and not only the II World War), everyone already knew that that was a *wrongful* act, an atrocity, a serious violation of human rights and of international humanitarian law, which came to be reckoned as amounting also to a war crime and a crime against humanity. Above the will stands conscience, which is, after all, what moves the Law ahead, as its ultimate *material* source, removing manifest injustice. (paras 178-179)

Still in the same case of the *Jurisdictional Immunities of the State*, in my subsequent Dissenting Opinion (merits, judgment of 3 February 2012), I sustained that:

> Individuals subjected to forced labour in the German war industry (1943-1945), or the close relatives of those murdered in Distomo, Greece, or in Civitella, Italy, in 1944, during the II world war, or victimized by other State atrocities, are the *titulaires* (with their *ayants-droits*) of the corresponding right to reparation. Victims are the true bearers of rights, including the right to reparation, as generally recognized nowadays. (para. 246).

I added that there can be no state immunities in face of *delicta imperii*, of international crimes in breach of *ius cogens.* (para. 184) In my perception, the State-centric distorted outlook yields in face of the imperatives of justice. (paras 161-171) The realization of justice is in itself a form of the reparation due to individual victims of grave violations of human rights and of international humanitarian law. (paras 282-287)

The current multiplicity of contemporary international tribunals (a reassuring phenomenon of our times) has by itself considerably increased the number of *justiciables* all over the world, fostering the access to international justice in our days, even in cases of the aforementioned gravity. New developments have in fact occurred lately in international legal procedures,[159] such as the ones pertaining to the determination of the *aggravated* international responsibility of the states concerned, and the identification of the victims in distinct stages of those procedures.

An aggravating circumstance lies in the intentionality of the damage (to reveal the coexistence of the objective responsibility with the responsibility on the basis of fault or *culpa*). Modern history is full of examples in which the intellectual and material authors of massacres sought to characterize their victims—not seldom innocent and defenceless—as "enemies" to be eliminated, and also of "dehumanizing them" by undue uses of language and through distorsions by means of neologisms and euphemisms before murdering them.[160] In reaction to cruelties of the kind, one may attest, in the international adjudication of such cases, the centrality and expansion of the notion of (direct)

[159] Cf., in this respect, A A Cançado Trindade, 'Reflexiones sobre los Tribunales Internacionales Contemporáneos la Búsqueda de la Realización del Ideal de la Justicia Internacional,' in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz / Vitoria-Gasteizko Nazioarteko Zuzenbidearen eta Nazioarteko Harremanen Ikastaroak* (Universidad del Paí s Vasco, 2010), at 17; A A Cançado Trindade, 'Os Tribunais Internacionais Contemporâneos e a Busca da Realização do Ideal da Justiça Internacional', (2010) 57 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* 37.

[160] For dramatic personal accounts, cf. P Levi, *The Drowned and the Saved* (Vintage, 1989); J Améry, *At the Mind's Limits* (Indiana Univ. Press, 1980). And cf. also the studies of B A Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century* (Cornell University Press, 2004), at 17, 49, 55, 57, 71, 235; Y Ternon, *Guerres et génocides au XXe. Siècle* (O Jacob, 2007), at 14-5, 81-3, 138, 191, 279, 376; G Bensoussan, *Europe—Une passion génocidaire*, (Mille et Une Nuits, 2006), at 53, 134, 220, 228-9; J A Berry and C P Berry (eds), *Genocide in Rwanda—A Collective Memory* (Harvard University Press, 1999), at 3-4, 28-9, 87; B Bruneteau, *Le siècle des génocides* (A Colin, 2004), at 41, 43, 222, 229; E Staub, *The Roots of Evil—The Origins of Genocide and Other Group Violence* (Cambridge University Press, 2005), at 29, 103, 121, 142, 227; R J Bernstein, *El Mal Radical—Una Indagación Filosófica* (Lilmod, 2005), at 110-1, 145, 290-1.

victim, and the relevance of their right to reparation for the damages suffered. It is highly significant that, in our days, surviving victims of massacres, and relatives of fatal victims, have had access to international justice.

States themselves today recognize and realize that they can no longer dispose, as they wish, of the human beings who happen to be under their respective jurisdictions.[161] Their power of action is not unlimited, ought to be guided by the faithful observance of certain fundamental values,[162] and of the general principles of law.[163] They are to respond for their eventual damages to human beings under their respective jurisdictions, and to provide the reparations due to them.[164] States cannot even shield themselves behind the international criminal responsibility of the individuals who perpetrated international wrongs; the responsibility of the state always subsists.[165] The responsibilities of ones and the others do not exclude each other, but rather complement each other. The new international legal order of our times has emerged from the human conscience—the universal juridical conscience, as the ultimate *material* source of all Law. The expansion of the international legal personality has taken place to the benefit of all subjects of law, including the individuals as subjects of international law.

## 14 Epilogue, in the Inter-Generational Dialogue

I could not conclude my keynote address in this Conference without turning back to its beginning, as to the importance of the inter-generational dialogue

[161] Cf. my Separate Opinion (paras 1-231) in the Advisory Opinion of the ICJ on the *Declaration of Independence of Kosovo* (22 July 2010).

[162] Cf., e.g., S Glaser, 'La protection internationale des valeurs humaines', (1957) 60 *Revue générale de Droit international public* 211.

[163] Cf. my Dissenting Opinion (paras 1-214) in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russian Federation*), Judgment of the ICJ of 1 April 2011; cf. also my Separate Opinion (paras 1-184) in the recent case of *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), Judgment of the ICJ of 20 July 2012); and cf. my Separate Opinion (paras 1-118) in the Advisory Opinion of the ICJ on the *Revision of a Judgment of the ILO Administrative Tribunal upon a Complaint Filed against IFAD* (1 February 2012).

[164] Cf. my Separate Opinion (paras 1-101) in the case of *A S Diallo* (*Guinea v D R Congo*), reparations, Judgment of the ICJ of 19 June 2012).

[165] Cf. my Dissenting Opinion (paras 1-316) in the case of the *Jurisdictional Immunities of the State* (*Germany v Italy*, with Greece intervening), Judgment of the ICJ of 3 February 2012).

such as the one we undertake here in Cambridge today, on 19 May 2012. I trust it may look clear, to the young scholars *in statu pupillaris* of our discipline, that the law of nations, the *droit des gens*, has much evolved, ultimately moved by the universal juridical conscience, which stands well above the will of the states. Those who serve states tend to think too highly of themselves, and to attribute a key role in this evolution to strategic international litigation.

Hence their adherence to the unsatisfactory and dangerous inter-state framework, and to dogmas of the past, and their insistence on trying to prolong certain moments of legal history, without realizing that theirs is a static outlook of the law of nations. After all, their activity is one of means—to "win a case"—and not of ends. Those encapsulated in dogmatisms of the past tend to undermine advances achieved in the contemporary *ius gentium*, such as those pertaining to the consolidation of the international legal personality and the capacity of individuals, which they label, at best, as "not perfect". They are longing for an international legal order which no longer exists.

Theirs is a static outlook, centred on states, unpersuasive for its arbitrary points of reference. Such outlook attempts in vain to minimize the remarkable evolution of international law itself, as illustrated, e.g., by the historical recovery of the human person as subject of the law of nations. That surpassed inter-state outlook discloses a far too limited view which nostalgically insists on what they regard as the "perfect" international legal personality of states, a "perfectness" taken for granted, without demonstration. The heralds of that outlook tend to forget that states were created by human beings for their common good, and benefited from "personification" on the basis—ironically–of an analogy with that of human beings. It is about time that states do their part, to the benefit of human beings who created them for the common good.

Contemporary international law has been moved, in its advances, by the search for justice and for the prevalence of common superior *values*. It has purported to enable individuals to exercise their rights (by acknowledging their *legitimatio ad causam*) and peoples to live in peace with justice. The fact is that, nowadays, individuals, even in the most adverse circumstances, and in situations of defencelessness (as we have seen), have had access to international justice; this would have been simply unthinkable in the nineteenth century, or even some decades ago. The international legal order nowadays promptly reacts to situations of manifest injustice.

The young colleagues, *in statu pupillaris*, of our discipline, have provided me a memorable day, in taking the spontaneous initiative of opening a space in this Conference, which marks the launching of their *Cambridge Journal of International and Comparative Law*, for the presentation of my reflections

developed in my most recent book, *The Access of Individuals to International Justice*, on a theme which coincides with that of this Conference. May I extend the expressions of my appreciation to my young colleagues for their openness of spirit, and for having, by their gesture, furthermore given me the opportunity, paraphrasing Jorge Luis Borges, of this encounter with myself, surrounded by the lawns of Cambridge.

Looking back in time, I can recognize myself, at an early stage of my path, in the old Squire Law Library, in the endless search for knowledge, undertaken with *free thinking*. This self-recognition brings me relief and satisfaction, and I sense it is today made possible as I have remained always faithful to my ideals of youth throughout the years of my journey. I trust my young colleagues assembled herein value likewise free thinking, and realize that we can hardly seek sensibly for knowledge within straight-jackets, and mechanically attached to dogmas of the past.

It is important, in order to cultivate the freedom of thinking, to stay outside the strict confines of institutionalized "schools of thought"; I feel satisfied not to belong, and never to have belonged, to any such "schools". We have indeed to move beyond them. We can give our modest contribution to the improvement of the human condition essentially as free thinkers, moved by our ideals, and remaining always attentive to fundamental human *values*, standing well above dogmas. Human conscience (the *recta ratio*), the universal juridical conscience, stands well above the will of States.

Cambridge, 19 May 2012.
A.A.C.T.

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# The Individual and Structural Change in the International Legal System

*Kate Parlett*[*]

## 1 Introduction

The international law of today arguably bears little relation to the international law of the 19th century. At that time, international law was generally conceived as a body of rules and forms of conduct applicable to states in their relations with each other.[1] During the 20th century, a more multifaceted and cosmopolitan view of legal relations in international law emerged.

There is now little controversy surrounding the notion that international law is not exclusively concerned with inter–state relations, nor the proposition that individuals have a certain status in international law as the beneficiaries of rights and the bearers of obligations—indeed, that they are 'subjects' of international law as the notion of 'subjects' has been defined. There has thus been a significant shift in attitudes towards the individual and individual rights over the period since Vattel.[2]

Nevertheless, there are two aspects of the debate concerning individuals in the international legal system that remain controversial.

The first is the question of the motivating force for this structural change in international law. Can it be explained on pragmatic grounds, or is it a product

[*] BA/LLB (Hons), University of Queensland; LLM (Hons), PhD (Cantab); Associate, Freshfields Bruckhaus Deringer LLP, Paris, France; <kate.parlett@freshfields.com>. This paper draws upon research published in *The Individual in the International Legal System: Continuity and Change in International Law* (CUP, 2011) and presented at the CJICL's inaugural conference in Cambridge in May 2012.

[1] *Cf* H. Grotius, *The Rights of War and Peace* (1625, R. Tuck (ed)) (Liberty Fund, 2005), Book I, Chapter I, XIV, at 162.

[2] E. de Vattel, *The Law of Nations or, Principles of the Law of Nature Applied to the Conduct and Affairs and Nations and Sovereigns* (1758, B. Kapossy and R. Whatmore (eds)) (Liberty Fund, 2008), Introduction, §3, at 67.

of theoretical discourse championing individualism over the construct of the state?

The second is whether, normatively, the move towards individualism in international law is to be welcomed in all its forms, or whether some of the aspects of the more traditional, 19th century conception of international law, still serve a useful purpose, and should be conserved rather than condemned.

There is a third controversy to which these structural changes have given rise, concerning the way in which engagement in the international legal system is measured. Traditionally, engagement in international law has been measured by international legal personality, or the doctrine of 'subjects'. In the international legal system of the 19th century, this was basically a categorization of states versus all others, since international law was traditionally conceived as bearing only upon inter–state relations. In today's international legal system, it is uncontroversial to suggest that entities other than states (including natural persons) are subjects of international law. But their qualitative status differs, such that it is questionable whether the doctrine of subjects serves a useful purpose any longer.

Bearing in mind these three controversies, the paper is structured in four parts. First, the development of the position of the individual in the international legal system is summarised, using a historical perspective. Second, the forces or motivations which appear to have driven this structural change in the international legal system are examined. Third, the controversy surrounding the doctrine of 'subjects' of international law as the measure of engagement in the international legal system is considered. Fourth and finally, the normative value of the apparent move towards individualism and away from the state, which appears to be occurring at the present time, is discussed.

## 2 Historical development of the position of the individual in the international legal system

The method I have used to assess structural change in the international legal system is to take a historical perspective, *i.e.* to look at developments as and when they occurred and to consider their impact on the structures of international law, bearing in mind the prevailing conceptualisations of international law at that time.

However, taking a historical approach begs the question of when history began. Many refer to Grotius as the father of international law and begin their assessment with his work. I chose rather to begin in the 19th century, when there was emerging consensus on a conception of international law or 'the law of nations' as a law between states. Thus my history begins with the work of Emer de Vattel in the mid-18th century, whose approach came to occupy a dominant position in doctrine from the late 18th until the mid-19th century.[3]

It is true that writers pre-dating Vattel had a broader conception of the *jus gentium*. Hugo Grotius (1583-1645) in *De jure belli ac pacis libri tres* referred to the 'law of nations' or *jus gentium*; he did not envisage a law exclusively concerned with relations between states, but rather a law between the rulers of nations—those exercising public power—and between groups of citizens or private individuals not in a domestic relation to each other.[4] Grotius did not see the state as a separate juridical entity, but as a 'body of free Persons, associated together'[5] under the personal leadership of the ruler.[6] Grotius' law of nations was not an inter–state law, but an inter-individual law, applicable on a universal basis.[7] In this respect his work followed a leading tradition of medieval scholastic thought. Medieval natural law was seen to be all-embracing; it regulated the natural and social life of all, applying between rulers as well as between private individuals.[8] Similarly Vitoria's idea of an international society was based on the concept of a universal community which encompassed all mankind, an organised community of peoples which were

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3 See *e.g.*, A. Nussbaum, *A Concise History of the Law of Nations* (Macmillan, 1964), at ix.

4 P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France, 1983), at 541-3; E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Pedone, 1998), at 263, 361; J. Crawford, *International Law as an Open System* (Cameron May, 2002), at 19. Hugo Grotius is often said to be the founder of modern international law: see L. Oppenheim, *International Law: A Treatise* (Longmans, Green & Co, 1905), at 77; H. Lauterpacht (ed) *International Law: A Treatise, by L. Oppenheim* (Longmans, 1955), at 91; H. Lauterpacht, 'The Grotian Tradition in International Law', (1946) 23 *BYIL* 1, at 51. But more recently this has been subject to criticism and dismissed as an exaggeration: see R. Jennings and A. Watts, *Oppenheim's International Law* (Longmans, 1992), at 4; H. Waldock (ed), *J L Brierly, The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press, 1963), at 28; D. Kennedy, 'Primitive Legal Scholarship', (1986) 27 *Harvard International Law Journal* 1, at 77.

5 Grotius, *supra* note 1, at 162.

6 Haggenmacher, *supra* note 4, at 541-3; E. Jouannet, *supra* note 4, at 261-4.

7 M. Koskenniemi, *From Apology to Utopia* (CUP, 2005), at 98.

8 S. C. Neff, 'A Short History of International Law', in M. Evans (ed), *International Law* (OUP, 2006), 29, at 32.

themselves constituted politically as states.[9] Suárez conceived of a rational basis of the law of nations as the moral and political unity of the human race.[10] The sources of this law of nations were believed to be natural law principles, which were merely supplemented by tacit or express agreements between sovereign princes, which bound them in a personal capacity.[11] The law of nations as conceived by these early writers was all-embracing in character.[12] But this conception was not consistent with what came to be the orthodox view. Rather, drawing upon the work of Vattel, by the end of the 19th century there was general agreement on the scope and subjects of international law, which implied inter-related doctrines of legal personality and designated the individual as an object of international law. It is useful to begin our traverse of history at that time.

## 2.1 The 19th century international legal system

In the 19th and early 20th centuries, the established understanding of the international legal system was that its exclusive concern was relations between states, and that individuals were not subjects of, and could derive no rights or obligations directly from, international law. An examination of doctrine and practice in this period, across different subject-matter areas of international law, broadly supports this orthodox account. In general, international law did not engage individuals as right-holders or duty-bearers; nor did it recognise individual capacity to participate in the international system by bringing international claims. To the extent that the purpose was to protect or benefit individuals, this was achieved through the imposition of obligations on states, rather than by the conferral of international law rights on individuals.

Consistent with the orthodox account of the international legal system, two oft-cited antecedents for the direct engagement of individuals in the international legal system appear on closer inspection better characterised as arrange-

[9] W. G. Grewe, *The Epochs of International Law* (M. Byers (trans)) (Walter de Gruyter, 2000), at 145-6.

[10] F. Suárez, *On Laws and God the Lawgiver* (1612) (G.L. Williams (trans)) (Clarendon Press, 1944), Book II, Chapter 19.9, at 348-9.

[11] F. de Vitoria, *Political Writings* (A. Pagden and L. Jeremy (eds)), (CUP, 1991), Relectio De Indis Question 3 Article 1, para. 4, at 280-1, Relectio De Potestate Civili Question 3 Article 1 paras. 15-17, at 32-6; Grotius, *supra* note 1, at 162. See also R. Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', (2002) 73 *BYIL* 103, at 123-4.

[12] Kennedy, *supra* note 4, at 16-7, 42-5, 62-5 and 81-3; see also Koskenniemi, *supra* note 7, at 98-9; A. Nussbaum, *supra* note 3, at 86-7 and 108-9.

ments regulating the conduct of individuals through the imposition of obligations on states. Piracy *jure gentium* was a special source of national jurisdiction which permitted states to prosecute individuals under their municipal law; international law did not directly impose obligations on individuals in respect of piracy; rather it endorsed the power of states to prosecute individuals.[13] The abolition of slavery also operated exclusively through inter–state obligations, imposed by treaty in which the individual was an object of beneficial regulation.[14]

There were, however, a few exceptions. One was the Central American Court of Justice, which permitted individuals to seise the Court with questions of 'violations of treaties or conventions'.[15] The Court, which was in operation for a decade, examined five cases brought by individuals; the one case held admissible was decided in favour of the respondent state. There was no specific requirement that the relevant treaty or convention ascribe a particular right to an individual to form the basis of a claim; rather individuals were treated as having standing to complain that a state had violated an inter–state obligation. The Court thus treated individuals as having the capacity to bring international claims, but that capacity was not specifically linked to individuals as substantive right-bearers.[16]

A second exception was the treatment of armed opposition groups in civil conflict. Civil conflict caused problems for naval states when either or both of the lawful government and the insurgents claimed belligerent rights at sea. In response to these practical problems, maritime powers began to recognise belligerent rights.[17] Initially recognition of belligerency was linked

[13] 'Harvard Research Draft on Piracy' (1932) 26 *AJIL Supplement* 739, at 759. See also A.P. Rubin, *The Law of Piracy* (Naval War College Press, 1998), at 17, footnote 61; Viscount Sankey LC, *In Re Piracy Jure Gentium*, [1934] AC 586.

[14] 1926 Slavery Convention, 60 *LNTS* 253, No. 1414; 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 UNTS 3. As to the scope of the definition, see H. H. Wilson, 'Some Principal Aspects of British efforts to crush the African Slave Trade, 1807-1929' (1950) 44 *AJIL* 505, at 522-3. See generally J.A.C. Gutteridge, 'Supplementary Slavery Convention, 1956', (1957) 6 *ICLQ* 449.

[15] Article 2, El Salvador- Nicaragua- Costa Rica- Honduras- Guatemala, 20 December 1907 (1908) 2 *AJIL* 231.

[16] See M.O. Hudson, *International Tribunals* (Carnegie, 1944), at 34. One case requesting a declaration of nullity of an election in Costa Rica was dismissed because it was not international in character; another case brought by Díaz (Nicaraguan) against Guatemala for wrongful arrest was dismissed for a failure to exhaust local remedies. See also C. J. Gutiérrez, *La Corte de Justicia CentroAmericana* (Biblioteca del Pensamiento Centroamericano, 1957).

[17] See *e.g.*, Britain's invocation of the law of neutrality in cautioning third states against providing aid to the insurgents during the American independence conflict (1775-83), which

to recognition of at least *de facto* independence, since it was thought that only states could be the subject of belligerent (international law) rights.[18] But beginning in the middle of the 19th century, recognition of belligerency was detached from recognition of independence.[19] Thus belligerent (international law) rights were recognised for groups and individuals who did not necessarily have a valid claim to statehood. This occurred through a process of recognition by states: in this way, states remained gatekeepers of the international legal system; the ability of individuals to acquire international law rights was dependent on a specific intentional act by a state adopted as a matter of policy. At the time, there was a marked uncertainty as to how this practice could be reconciled with the way in which international law was conceived.[20] It appears that governments had an appreciation of the problem but did not fully engage with it. Rather, they responded to a practical problem by recognising that international law rights accrued to non-state entities, without confronting the question of how to reconcile that recognition with the established understanding of the international legal system. The engagement of the individual in the international legal system was not the end to which the recognition of belligerency and insurgency was directed; rather it was a by-product of a limited practice developed in response to a practical problem.

In contrast to these exceptional elements of international law during the 19th century, the vast majority of doctrine and practice supported the established understanding of the framework of the international legal system at that

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had the effect of designating the enemy as a separate state: 17 Geo 3 c. 9.

[18] The fact that recognition of statehood was considered to be the basis of the acquisition of rights of belligerents in this early practice is also seen from an arbitration between the United States and Chile concerning the application of neutrality: see *The Macedonian* report in J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a party* (Government Printing Office, 1898), Volume II, at 1449ff. See discussion in A. McNair, 'The Law Relating to the Civil War in Spain', (1937) 53 *LQR* 471, at 479.

[19] See *e.g.*, the British treatment of the Greek rebellion against Turkey (1821-25), where the British Government claimed that the law of nations required it to recognise the free exercise of belligerent rights to Greek subjects of Turkey, separately from any obligation to recognise Greece as an independent state: Dispatch from Canning to Wellesley at Vienna, 31 December 1824, reproduced in H.A. Smith (ed), *Great Britain and the Law of Nations Volume I—States* (P.S. King & Son Ltd, 1932), at 294-7, esp. 295. See discussion in H. Lauterpacht, *Recognition in International Law* (CUP, 1947), at 178-9, also 188. See also Opinion of Stephen Lushington, Doctors' Commons, 29 May 1823, reproduced in H. A. Smith (ed), *Great Britain and the Law of Nations Volume I - States*, at 291-3; Opinion of Stephen Lushington, Doctors' Commons, 26 June 1823, reproduced in *ibid.*, at 293-4.

[20] This is also reflected in the literature: see W.E. Hall, *A Treatise on International Law*, 3rd edn (Clardendon Press, 1890), at 35.

time. Before 1919 there was no developed conception of individual criminal responsibility under international law; rather individual responsibility was a matter for domestic law and domestic processes.[21] In this period there was no notion of a general international law of human rights and where measures were taken in international law to benefit or protect individuals (such as the abolition of slavery and rules of warfare to alleviate the suffering of victims), they were effected through inter–state obligations in which the individual was an object of regulation, rather than a right-holder.[22]

## 2.2 The inter-war period

In the inter-war period the established understanding of the international legal system was effectively unchanged: the theory held that individuals could not bear rights and duties under international law directly; nor was it possible for individuals to be characterised as subjects of international law. During this period there was significant development in respect of individual rights, but it effected no immediate transformation of the orthodox account of the international legal system. In 1928, the Permanent Court of International Justice (PCIJ) held in the *Danzig* Opinion that the object of a treaty 'may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.'[23] While this is now commonly cited as recognising that individuals could hold international law rights and obligations, at the time this was not generally accepted as an accurate analysis—not least by influential members of the Court itself.[24] International legal doctrine maintained that individuals could not bear rights or obligations

[21] Three categories of practice are often cited as antecedents of individual criminal responsibility under international law: first, individual responsibility for war crimes under national law; second, the 'international crime' of piracy; and third, internationalised courts for the prosecution of individuals. Although these practices may have claims as conceptual antecedents of international crimes, treating them as antecedents of individual responsibility under international law is questionable. See further K. Parlett, *The Individual in the International Legal System* (CUP, 2011), at 230-4.

[22] See *e.g.*, 1885 General Act of Berlin, Chapter II, Articles 4, 6, 9, *Hertslet's Commercial Treaties* (London, 1827-1925), Volume XVII, at 66ff; 1926 Slavery Convention, 60 LNTS 253; and 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 *UNTS* 3.

[23] *Jurisdiction of the Courts of Danzig* (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, Against the Polish Railways Administration), PCIJ Reports Series B No 15, at 3, 17-8.

[24] D. Anzilotti, *Cours de droit international* (Librairie de Recueil Sirey, 1929), at 407-8, 133-4.

directly under international law, and that individuals were objects, not subjects, of international law.[25]

But in practice, the idea of individuals being granted rights under treaties was taken up across several fields. This can be seen in relation to claims, where international claims tribunals and commissions were about evenly split between those processes in which individuals pursued claims directly, claims over which they had exclusive control, and those processes which operated on the basis of diplomatic protection, brought by a state in respect of injury to its national.[26] It is also seen in some of the often-cited antecedents of international human rights law, most clearly in the arrangements for protection of minorities and some of the rules relating to the treatment of refugees.[27] Further, some of the rules of humanitarian law treaties referred to rights for individuals, although it was unclear whether these rights were derived from international rather than national law.[28]

Moreover, where rights were conferred directly on individuals, the record suggests that this occurred as a means to some other particular end, rather than reflecting a conscious attempt to transform the structures of the international legal system. The development of rules concerned with the treatment of individuals within state borders, for example to protect minorities, was driven by concerns arising from the significant reorganisation of boundaries following the First World War, and was not the manifestation of an attempt to extend international law to an area traditionally considered as reserved to domestic jurisdiction. The engagement of individuals as rights-holders was the by-product of particular forces, not an end in itself.

In respect of the protection of individuals during the inter-war period, international law continued largely to express rules that benefited or protected individuals by the imposition of obligations on states, and without conferring direct rights on individuals. For example, the vast majority of the rules governing the conduct of international armed conflict continued to operate in terms of obligations imposed upon states to protect and benefit individuals,

[25] See *e.g.*, A. McNair, *Oppenheim's International Law* (Longmans, 1928), at 520.

[26] See Parlett, *supra* note 21, at 65-84 and Appendix III to Chapter 2.

[27] 1919 Treaty of Versailles, UKTS 4 (Cmd. 153), Article 93. See also 1919 Treaty of St-Germain-en-Laye, UKTS 11 (Cmd. 400), Article 51; 1919 Treaty of Neuilly, UKTS 5 (Cmd. 522), Article 46; 1920 Treaty of Trianon, UKTS 10 (Cmd 896), Article 44. J. Robinson, *Were the Minorities Treaties a Failure?* (Institute of Jewish Affairs, 1943), at 19-20; I. L. Evans, 'The Protection of Minorities', (1923) 4 *BYIL* 95, at 104; United Nations Economic and Social Council, Commission on Human Rights, *Study of the Legal Validity of the Undertakings Concerning Minorities*, E/CN.4/367, 7 April 1950, at 2-3.

[28] See 1929 Geneva Convention on Prisoners of War, 118 LNTS 343, Articles 62 and 64.

and were not expressed in terms of rights.[29] Some of the early arrangements for refugees and the International Labour Organization conventions also imposed obligations upon states without conferring correlative rights on individuals.[30] Individuals were therefore protected in two ways: either as indirect beneficiaries of obligations imposed upon states, or as direct right-bearers under international treaties. There is no obvious pattern between the application of one or other of these frameworks, and in particular there seems to have been no consideration given to the question of which framework was better suited to the type of benefit or protection.

In this period, a principle of individual responsibility under international law was implied by the Treaty of Versailles: for the Kaiser, responsibility was foreshadowed for violations of the 'sanctity of treaties',[31] whereas for all other individuals, responsibility was envisaged for violations of the laws and customs of war. However, these provisions of the Treaty of Versailles were not executed, and in practice individual responsibility was only enforced under domestic law, through (manifestly defective) domestic processes.[32] No conception of individual obligations directly under international law arose in this period in any other context.

In general the developments in the inter-war period reflect a sense of transition and change in the structures of the international legal system. This is particularly evidenced in the reluctance of some commentators to accept the apparent consequences of the Permanent Court's Opinion in *Danzig*. Yet in practice—on the part of states and tribunals—that reluctance was not manifested; *Danzig* was frequently cited in support of individual rights under treaties, enforceable before international tribunals, and a significant proportion of the arrangements for the protection of individuals under the auspices of the League used the structural device of individual rights to achieve that protection.

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[29] See 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 118 LNTS 30, Articles 1, 5, 9 and 12.

[30] See generally A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP, 2001), at 149-51; D. A. Morse, *The Origin and Evolution of the I.L.O. and Its Role in the World Community* (Humphrey Press, 1969); W. C. Jenks, *Human Rights and International Labour Standards* (Stevens, 1960); J. T. Shotwell, *The Origins of the International Labour Organization* (Columbia University Press, 1934).

[31] 1919 Treaty of Versailles, UKTS 4 (Cmd. 153), Article 227.

[32] See generally C. Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (H.G. & G. Witherby, 1921).

## 2.3 The post-1945 international legal system

In the period between 1945 and the present day, it has come to be accepted in orthodox doctrine that individuals may derive rights and obligations directly under international law, which may be enforced in international tribunals. The effect of *Danzig* was only realised in this period; and eventually the International Court of Justice (ICJ) held that treaties may confer rights on individuals by plain language.[33] In doctrine the bearing of rights and obligations has been more closely linked with international legal personality: it has come to be acknowledged that to the extent that individuals possess rights and duties, they are subjects of international law.

In practice individuals have been accorded rights under treaties across a range of areas of international law. This is most clearly the case in international human rights law: universal and regional conventions treat individuals as holding rights which they may enforce in an international tribunal having jurisdiction, or through an international forum with an established complaint mechanism.[34] In internal armed conflict, individuals may possess both rights and obligations under common Article 3 of the Geneva Conventions[35] and Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts,[36] or applicable customary international humanitarian law.[37] In the context of protection of foreign investment, although it depends on the particular bilateral investment treaty (BIT), it has been accepted that the terms of a BIT, interpreted in their context and in light of the treaty's object and purpose, may confer substantive rights on individual investors coterminous with the host state's obligations of treatment.[38] In addition, it is also more common for states to establish treaty mechanisms which confer on individuals the capacity to enforce

[33] *LaGrand (Germany v United Status of America),* Judgment, ICJ Reports 2001, p. 466, at 492-4 para. 77.

[34] See generally P.G. Lauren, *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, 2003), 147ff.

[35] G.I.A.D. Draper, 'The Geneva Conventions of 1949' (1965-I) 114 Hague *Recueil* 60, at 96.

[36] 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 606. Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Protocol Additional to the Geneva Conventions* (ICRC/Martinus Nijhoff, 1987), at 1345, para. 4444.

[37] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Merits, ICJ Reports 1986, p. 14, at 114, para. 218. *Prosecutor v Tadic, Judgment of Appeals Chamber (Jurisdiction),* Case IT-94-1-AR72, 2 October 1995.

[38] See *e.g., The Republic of Ecuador v Occidental Exploration and Production Company* [2005] EWHC 774 (Comm), at para. 61.

their own rights before international tribunals or to seek redress through international complaint mechanisms. It is generally accepted that individuals have at least a procedural right to seek international arbitration claiming in respect of violation of a BIT, provided it contains a relevant dispute resolution clause.[39] Both individual rights and individual capacities to enforce rights are dependent on a specific grant of right or capacity by states which might be given prospectively (as in the case of an offer to arbitrate in a BIT) or retrospectively (as in the case of the Iran-US Claims Tribunal and the UN Compensation Commission): access to the international legal system has remained within the exclusive control of states.

Although it is common to accord direct rights to individuals, rules for the protection of individuals do not operate exclusively through this structural device. A number of rules intended to benefit individuals impose obligations on states without conferring rights on individuals. For example, international humanitarian law applicable in international armed conflict generally establishes standards of treatment as obligations on individuals and does not confer direct rights on individuals.[40] While in the inter-war period it appeared that the choice between one or other of these structural devices was not reasoned, in this period it has been argued that one or other framework may be used because it is better adapted or more effective in relation to the particular rule.[41] It has been suggested that in international armed conflict, a framework of standards is more effective than an individual rights framework in ensuring the protection of individuals. This may explain why international humanitarian law has retained its inter–state framework, rather than operating within an individual rights framework.

While individuals are given rights across a range of fields, the only developed conception of individual obligations has occurred in relation to international crimes. After Nuremberg, the principle of individual responsibility for international crimes was generally accepted but there was some reluctance to accept that this necessarily entailed that individuals were directly subject to international law. This reluctance is reminiscent of the reluctance which sur-

[39] For example, Article 8 of the Sri Lanka Model BIT states that a dispute 'may be submitted upon request of the investor…': Sri Lanka Model BIT, reproduced in C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2007), Appendix 9, 427. Article 1120 of NAFTA provides that 'a disputing investor may submit the claim to arbitration': 1992 North American Free Trade Agreement, 32 ILM 612 (1993). 1994 Energy Charter Treaty, 2080 UNTS 100, Article 26.

[40] See Parlett, *supra* note 21, at 181-96.

[41] R. Provost, *International Human Rights and Humanitarian Law* (CUP, 2002), at 54-6.

rounded individual rights in the inter-war period, the full ramifications of the Permanent Court's opinion in *Danzig* only forming part of the orthodox account some twenty years later. With the work of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court (ICC), there can now be no question that individual responsibility for international crimes is imposed by international law and without the interposition of domestic law.

The development of individual responsibility for international crimes - which is rightly traced to Nuremberg—occurred in response to the practical question of what ought to be done with the major war criminals. While it is common to present the Nuremberg Charter and trial as a kind of inevitability in response to the horrors of the Second World War, the historical record presents a rather different picture. For the British and the Americans, there was a reluctance to commit to a judicial process rather than summary executions and judicial treatment was pursued because Stalin was not amenable to a political disposition. Again, an international military tribunal was a political solution to a practical problem, and individual responsibility under international law was a by-product of that solution. In general, there is a sense that the development of individual responsibility under international law for international crimes was a graft onto the international legal system motivated by practical and political concerns, and that it was not inevitable even in September 1944, less than 12 months before the Nuremberg Charter was signed.[42]

Notable by its absence is any capacity for individuals to formally participate in the process by which they acquire rights and obligations, or more generally in the making of international law. To the extent that individuals acquire rights, obligations and capacities, it is through a passive process, directed primarily, if not exclusively, by states. Individuals cannot agree to the conferral of rights or the imposition of obligations, for example, through participating in international treaties. In general there has been little concern as to whether individuals consent to bearing rights, obligations and capacities. In the context

[42] Initially both the British and the Americans were reluctant to commit to a judicial process for the treatment of the major war criminals. In September 1944 Churchill and Roosevelt agreed to propose to Stalin that a number of the top Nazi leaders be executed, including Hitler and Himmler (see FRUS, *The Conference of Quebec 1944* (1972), at 467). On 22 October Churchill reported that Stalin was not amenable to a political disposition of the Nazi leaders and was firmly insistent on a trial if death sentences were to be imposed. But the British continued to reject the prospect of establishing an international court by treaty, preferring trial before national military courts. It was not until the San Francisco Conference that the British Cabinet instructed its delegation that there was no utility in continuing to oppose a trial if the US and the USSR were committed to it.

of armed opposition groups in internal armed conflict, it has been suggested that these groups and individuals acquire rights and obligations through a process of consent, similar to that required for third party states to acquire rights and obligations under treaties. In other contexts there has been no consideration of whether individuals so consent. This absence might be explained in some circumstances by considerations of beneficence which imply that consent is irrelevant; in other contexts, particularly where obligations are imposed on individuals, the question of consent may be more significant. Moreover this demonstrates the differential treatment of states and individuals: between active subjects and passive recipients of rights and obligations in the international legal system.

In the extent to which individuals exercise rights, individuals have a more active role, but even in this context the exercise of rights is dependent on a pre-existing grant (which like any treaty is revocable in certain circumstances). In international claims practice, whether an individual submits a claim to arbitration (for example, in relation to foreign investment) is a question solely within that individual's control and dependent on its resources. In this sense, the individual is not completely passive, but the extent to which it is capable of acting in the international legal system is still conditioned on a grant of capacity by a state. So while the post-1945 period may be perceived as one which has witnessed the rise of the individual, it must be emphasised that states have remained central and in control of the extent to which individuals may engage in the international legal system: the extent to which individuals are given rights, obligations and capacities is dependent on a specific grant from the primary actors in the international legal system, dominated by states.

## 3 Forces for structural change: solutions above theories

So, taking account of this brief summary of the development of international law vis-à-vis individuals, what can be said about the *raison d'être* of the engagement of the individual in international law? (This reverts to the first controversy identified above, namely the extent to which the structural change in international law to accommodate individuals has been motivated by theoretical discourse.)

The international legal system has experienced structural transition as a result of the need to manage and address practical problems rather than

resulting from any deliberate attempt to effect a structural transformation. The international legal system does not appear to be developing along a smooth trajectory from a state-centric international law to a more inclusive international legal system.[43] The picture which emerges suggests, rather, that states manage practical questions as they arise by adaptation of the international legal system, and as a result of those practical solutions the international legal system may be transformed. That transformation does not seem to inhere in any particular theoretical framework or any preconceived notions of a fixed set of goals for international law.

There are three prominent examples.

The first is the development of individual criminal responsibility. In an orthodox account of international criminal law, the move from the concept of war crimes prosecuted in national courts to international crimes prosecuted in an international court at Nuremberg is presented as if it were a *fait accompli*, a natural progression for an international law concerned with the commission of appalling crimes on a mass scale. But the historical record reveals that it was only at the last gasp that it was agreed to deal with the major war criminals through a judicial process, and an internationalised one at that. The Allies had made no commitment to judicial treatment of the major war criminals: in September 1944, less than a year before the Nuremberg Charter was signed, Churchill and Roosevelt agreed that the top Nazi leaders would be summarily executed. Only when it became apparent that the Soviets were firmly opposed to political disposition was it agreed that these persons should be dealt with by judicial process. Thus the Nuremberg Tribunal—subsequently understood as having a transformative effect on the structures of the international legal system—came into being because it represented a political solution to a practical problem. The transformation of the structures of the international legal system was a side-wind.

The second example is the development of international human rights law. Since 1945, there has been incremental development in that field in response to a range of factors, including the atrocities of the Second World War. But the imposition of binding obligations on states (corresponding to individual rights and enforceable in international fora) through international treaties was in pursuit of generalised goals, including the protection of the individual from ill-treatment by his or her own state. Human rights law is acknowledged as having had a transformative effect on the international legal system, yet it came

[43] See *e.g.* the discussion in C. Grossman and D.D. Bradlow, 'Are We Being Propelled Towards a People-Centred Transnational Legal Order?', (1993-1994) 9 *Am. U. J. Intl L. & Pol'y* 1.

about because of steps taken to address the problem of protection of individuals within domestic jurisdiction (and in the context of the failure of the minorities system), not because of a conscious decision to change the structures of the international legal system.

A final example can be found in the device of diplomatic protection, and the recent developments in the law relating to the protection of foreign investments. An increase in the movement of persons across borders and the need to protect those persons and property resulted in the development of an international standard of minimum treatment of aliens, which essentially gave states of nationality an actionable interest in the treatment of their nationals. In more recent times a desire to more effectively protect foreign investment (and thus to encourage foreign investment) has resulted in treaty regimes for the protection of foreign investments. These developments were a consequence of addressing particular problems, rather than originating from a desire to elevate the individual to a particular status in international law, or to transform the international legal system. The ensuing structural transformation was a by-product, not a cause.

To argue that the structures of the international legal system have been transformed in response to practical problems is not to say that theorising serves no useful purpose, or that the international legal system at any particular point in time cannot be explained by reference to theory. It is rather to suggest that there are (and have been) a range of possible futures for the international legal system, and that the extent to which those futures are realised is highly contingent, and in the end dominated by the interests of states. There is a kind of unpredictability inherent in the development of the international legal system, but that unpredictability reflects a strength in the system's potential to flexibly respond to the needs of the international community.

# 4 International legal personality as the measure of engagement

As noted at the outset, the traditional device used to explain the relationship of entities to the international legal system has been the doctrine of the subjects of international law, which divides entities into binary categories of 'object' and 'subject'. In the 19th century international legal system, it was said that subjects of international law were states 'solely and exclusively'.[44] In the inter-war

[44] Oppenheim, *supra* note 4, at 18-9, §13.

period the possibility of the League of Nations being a subject of international law since it had 'distinctive international rights and duties' was raised but not resolved.[45] In the post-1945 international legal system it has been accepted that to the extent that entities other than states 'directly possess' rights, powers and duties in international law they may be regarded as subjects of international law.[46] The opening of the doctrine of subjects is generally traced to the 1949 *Reparation* Opinion, where the ICJ introduced a variegated approach to the subject categorisation, holding that the extent of a subject's rights, duties and capacities in the international legal system 'depends on the needs of the [international] community.'[47] Thus the subjects of international law are not identical: states possess the full range of rights, duties and attendant capacities, whereas other subjects may have more limited rights, obligations and capacities.

The variegated approach to subjects of international law has the consequence that there are qualitatively different subjects. At one end of the spectrum, a state, which has a complete ability to acquire rights, obligations and capacities and to enter into legal relations is apt to be described as a subject of international law; while at the other end of the spectrum, a non-governmental organisation which is recognised by a single inter-governmental organisation as having standing before it is also apt to be described as a subject of international law. There must be significant qualitative differences between the two ends of the spectrum. Yet in orthodox doctrine there are no criteria for locating subjects according to the measure of their rights, obligations and capacities. Thus the variegated approach to the doctrine of subjects has exposed a fundamental deficiency of the doctrine: that the identifier 'subject' has no objective and meaningful content, since it denotes no particular capacities: hence it fails to provide any revealing description of the relationship of the entity to the international legal system. As Eli Lauterpacht has noted:

> …there is no definition of personality in international law which is sufficiently comprehensive to apply in some constructive or realistic way to all the different types of entities which operate in the international field.[48]

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[45] McNair, *supra* note 25, at 133-4.

[46] Jennings and Watts, *supra* note 4, at 16, §7.

[47] *Reparation for Injuries Suffered in the Services of the United Nations,* Advisory Opinion, ICJ Reports 1949, p. 174, at 178.

[48] E. Lauterpacht, 'The Development of the Law of International Organization by the Decisions of International Tribunals', (1976-IV) 152 Hague *Recueil* 377, at 403.

Several alternatives for locating entities within the international legal system have been proposed. The late Professor D.P. O'Connell suggested that the term 'international legal personality' should be discarded in favour of identifying particular *capacities* of relevant entities.[49] Dame Rosalyn Higgins, who rejects the subject/object dichotomy as having 'no credible reality and… no functional purpose',[50] argues that within the process of international law there are a variety of *participants* who make claims corresponding to their values.[51] Within this framework, what matters is not the designated status of an entity but its actual exercise of functions.[52] Professor McCorquodale[53] also argues in favour of the notion of *participation*, suggesting that it connotes greater flexibility than the binary categories of subjects and objects, and that this flexibility reflects current doctrine, as reflected in the ICJ's treatment of international legal personality.[54] A similar approach is advocated by Christoph Schreuer, who prefers to examine the relationship of entities to the international system by an examination of their *functions*.[55]

These notions of capacities, participation and functions are conceptually useful because they suggest that what is significant is not the formal status of an entity, but its actual ability to engage in the international legal system in a given context. Whether an entity can act in the international legal system in a particular way is dependent not on its formal status, but rather on that entity's capacities and functions. Since the generalised identifier of 'subject' is not revealing of any particular ability to act in the international legal system, an examination of the capacities, participations or functions of an entity must be undertaken to determine whether and to what extent an entity is able to act or engage in the international legal system.

Where the notions of capacities, participation and functions do not assist is in locating entities in the international legal system: in distinguishing between qualitatively different subjects, from those entities bearing a single international

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[49] D.P. O'Connell, *International Law, Volume I* (Stevens and Sons, 1970), at 83.

[50] R. Higgins, *Problems and Process: International Law and How We Use It* (OUP, 1994), at 49.

[51] *Ibid.*, 50.

[52] R. Higgins, 'Conceptual thinking about the individual in international law', (1979) 24 *New York Law School L Rev* 11, at 16.

[53] R. McCorquodale, 'The Individual and the International Legal System', in M. Evans (ed), *supra* note 8, 307, at 311; R. McCorquodale, 'An Inclusive International Legal System', (2004) 17 *LJIL* 477, at 481.

[54] *Reparation for Injuries Suffered in the Services of the United Nations,* Advisory Opinion, ICJ Reports 1949, p. 174, at 178.

[55] C. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law', (1994) 4 *EJIL* 447, at 453.

right or obligation at one of the spectrum, to entities with the full range of rights, responsibilities and capacities at the other.

Dividing the subjects of international law into 'states' and 'others' might seem overly simplistic, but it is nevertheless helpful to identify which capacities distinguish subjects at one of the spectrum from subjects at the other end of the spectrum. In particular, two capacities would appear to distinguish entities which have autonomy and independence in the international legal system (termed, for convenience, 'autonomous subjects') from entities which have only limited and passive capacities in the international legal system ('passive subjects'). The first is the extent to which an entity has control over its own receipt of rights, obligations and capacities: whether it receives capacities only when it consents or whether capacities are imposed upon it without regard for its consent. An entity which has this type of control would have capacity to prevent international law from being imposed upon it by other international law-makers, without its consent. The second capacity is an entity's control over the delegation of functions and capacities to other entities: the extent to which it can control access to the international legal system. Entities which enjoy this capacity may be described as 'gatekeepers'. Entities which have both these capacities have an independent capacity to participate in the international legal system, whereas entities which possess neither may only participate in the international legal system at the instigation of and with the consent of these independent subjects. The latter are passive to the extent that they have no independent capacity to participate or exercise functions in the international legal system.

In the period since 1945 it has become part of the orthodox understanding of the international legal system that (a) individuals can have rights and duties flowing directly from international law, and (b) to the extent that individuals have rights, duties and capacities under international law, individuals are subjects of international law.[56] But qualitatively the capacities of individuals

[56] Jennings and Watts, *supra* note 4, at 16, §7. See also O'Connell, *supra* note 49, at 107-8; Higgins, *supra* note 52, at 16; McCorquodale (2006), *supra* note 53, at 329; McCorquodale (2004), *supra* note 53. In 2002 Judge Cancado Trinidade, in a separate opinion in the Inter-American Court of Human Rights, emphasised that it was now impossible to sustain the opposite view, that individuals were not subjects of international law: 'The doctrinal trend which still insists in denying to individuals the condition of subjects of International Law is based on a definition of these latter, requiring from them not only to possess rights and obligations emanated from International Law, but also to participate in the process of creation of its norms and of the compliance with them. It so occurs that this rigid definition does not sustain itself…': *Advisory Opinion on the Legal Status and Human Rights of the Child,* Inter-American Court of Human Rights, Advisory Opinion OC-17/02, 28 August 2002,

have been limited to receiving rights, obligations and particular capacities through processes in which they have no formal rights of participation. Thus the way in which individuals may participate and exercise functions in the international legal system operates on a kind of dependency: it only occurs at the instigation and with the consent of other subjects of international law which control access to the international legal system. Individual rights, obligations and capacities are imposed on individuals without particular regard for their consent in the process. Individuals have no meaningful or formal capacity to participate in the process by which international law is created. Thus individuals remain subordinated in the international system, suspended between object and independent or autonomous subject.

## 5 The move towards individualism and away from the state: normative critiques

The final controversy to be discussed is the normative question: to what extent is the move away from the state, and the increased prominence of the individual in international law, a cause to be championed?

In my view, enthusiasm for the increased prominence of the individual in international law must be qualified. This is for three reasons.

First, giving individuals direct rights and obligations, and conferring upon them capacities to enforce their rights, is not the only available device for the protection of individuals. They may be benefitted or protected in other ways. The system of diplomatic protection has not been outright replaced by regimes for protection of foreign investment or human rights; rather those newer regimes continue to operate alongside the existing regimes. It seems unlikely that diplomatic protection will be replaced by these regimes or others; it continues to serve a useful purpose in the international system. In this way new developments in the international legal system can be seen to have resulted in a series of grafts on the existing structure of the international legal system, rather than a replacement of the existing structure. Thus the international legal system has developed multiple structural devices which can be used in a particular situation to address particular problems. In any given situation, more than one structural device may offer possible answers to those problems.

Second, and following from the first, individual interests in a particular field may be best protected by a framework which does not necessarily accord them

(2004) 11 *IHRR* 510, Concurring Opinion of Judge Cancado Trinidade, at paras 26-7.

rights of participation. In relation to humanitarian law, it has been suggested that a framework of standards of treatment functions more effectively than a framework of individual rights. Direct participation by individuals is one model which operates to protect individual interests, but the assumption that it is the preferable model for that protection is open to question—and it can certainly not be assumed to be the exclusive model. Individuals might have direct interests in having the standard of minimum treatment of aliens respected, but this is not to say that individuals should have standing to bring claims which traditionally belonged to the realm of diplomatic protection to the ICJ. Individuals might well have direct interests in respect for the rules of warfare, but this does not necessitate that those individuals have substantive rights which would entitle them to reparation in case of violation. In those contexts the state construct still serves some useful purpose. Claims that the international legal system is moving away from a state-centric model and that better protection of individuals is necessarily achieved through a framework of individual rights overlook the possibility that in a particular context, a framework closely associated with a state-centric international legal system may be more effective in achieving benefits for and protection of individuals.

Finally, it should not be forgotten that individuals may also have rights—and effective remedies—through domestic law. The primacy of domestic law and remedies has been emphasized in recent times: it is reflected in the complementarity provisions of the ICC Statute, and it has been mentioned in the context of reforms to the European Court of Human Rights, an institution which is struggling to deal with the number of individual applications pending before it. In the end it may be more beneficial to individuals to focus efforts on improving domestic rights and remedies—and making them more consistent with international law standards—than to seek elevated standing in the international legal system in respect of each and every area in which individuals have interests.

Undoubtedly the international legal system of the 21st century is less state-centric that the international legal system of the 19$^{th}$ century, and the individual has a more prominent role in international law today than in Vattel's conceptualisation. However, even today, states still have a dominant role in the international legal system, as autonomous and independent subjects of international law, while individuals, although also subjects, have much more limited capacity to engage in the international legal system. Furthermore, while individuals have some direct rights in international law in various—and ever expanding - fields, it should not be assumed that direct rights necessarily connote better protection in a particular context, than would be possible under

a state-centred model of international law. The state is not about to 'wither away'.[57] Rather, its dominating position in the international legal system has been reinforced while some limited rights and obligations have been developed for individuals, who remain subordinated in the international legal system.

[57] E. Stein, 'International Law in Internal Law: Towards Internationalization of Central-Eastern European Constitutions?', (1994) 88 *AJIL* 427, at 450.

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# Somali Pirates as Agents of Change in International Law–making and Organisation

*Douglas Guilfoyle*[*]

## 1 Introduction

Somali piracy is a highly adaptive business activity that can only be understood in context. The present article aims to provide an analysis of the phenomenon and in particular its impact on international law-making and organisation. The relevant developments have moved fast enough that there is already a significant history of international co-operation in response to Somali piracy. The contention of this article is that the most important impact of Somali pirates as agents of change has *not* been on the substantive law of piracy but through generating new models of co-operation and soft-law. This has been evident in a range of shifts: the move from a military approach to law enforcement operations; from unilateral enforcement to international authorisation and then to transnational co-ordination; a shift from reliance on formal organisations to informal co-ordinating bodies; and from maritime operations in the Gulf of Aden to various land-based operations, most notably including law and prison reform. The use of soft-law in particular is most evident in the shipping industry's response to piracy.

The present article thus proceeds by first offering an extended account of the history of Somali piracy and its context. This is vital for two reasons: first, one must appreciate that Somali piracy is not a static phenomenon; and second, understanding how Somali piracy is shaped by its context cautions us against concluding that Somali-style piracy may 'spread' to other regions. The article then turns to the rise of international counter-piracy operations and counter-piracy co-operation. Here we see a rapid shift from a largely 'military paradigm' response (unilateral actions and Security Council authorised missions) to a

[*] Reader in Law, Faculty of Laws, University College London. E-mail: <d.guilfoyle@ucl.ac.uk>.

'law enforcement response'. The latter in particular requires transnational co-ordination, which soon moves out of formal international organisations to a range of informal co-ordinating bodies. Finally, we can see how a response that commenced as, in effect, containment of piracy through maritime patrols becoming increasingly engaged in operations ashore, though usually in the form of engagement with criminal justice sector reform rather than military strikes on pirate bases.[1] Some tentative conclusions are then offered about the effectiveness of current efforts.

## 2 Somali piracy: understanding the business model and its evolution

Somali piracy is often presented, typically by pirates themselves, as being a justified response to illegal fishing and toxic waste dumping in Somali waters by foreign vessels.[2] In truth, "there were pirate attacks as early as in 1991, which targeted cargo ships, vessels not related to illegal fishing".[3] From the very onset of Somali governmental collapse in 1991, local piracy had an element of opportunism unrelated to whether the vessels seized were engaged in illegal activity. There may have been an early period of piracy in the mid-1990s to early 2000s which encompassed self-styled volunteer coast guards "targeting fishing vessels accused of fishing illegally in Somali territorial waters" and holding them to ransom[4] (or simply 'fining' them[5]); but in this early and sporadic phase the vessels taken included "an equal representation of fishing vessels, commercial traders or private yachts".[6] There is, therefore, little evidence of a clear-cut transition from 'coast guard' to 'criminal' forms of piracy.

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1 Though these occur: Y. Bayoumy, 'EU helicopters strike Somali pirate base on land', *Reuters*, 15 May 2012, available at <http://www.reuters.com> [last accessed 22 August 2012].

2 UN International Expert Group on Piracy off the Somali Coast, 'Piracy off the Somali Coast: Final Report' (2008), at 27, available at <http://www.asil.org/files/SomaliaPiracy IntlExpertsreportconsolidated1.pdf> [last accessed 21 August 2012]. *Cf.* L. Ploch *et al*., 'Piracy off the Horn of Africa' (Congressional Research Service, 2011), at 9, available at <http://www.fas.org> [last accessed 21 August 2012].

3 S. J. Hansen, 'Piracy in the greater Gulf of Aden: Myths, Misconception and Remedies' (Norwegian Institute for Urban and Regional Research, 2009), at 20, available at <http://dev02.imbera.no/nibr/filer/2009-29-ny.pdf> [last accessed 28 October 2012].

4 UN Expert Report, *supra* note 2, at 19.

5 R. Marchal, 'Somali Piracy: The Local Contexts of an International Obsession', (2011) 2 *Humanity* 31, at 37, 39-40. Compare CRS Report, *supra* note 2, at 5.

6 UN Expert Report, *supra* note 2, at 18.

Further, most pirates are not displaced fishermen but members of "nomadic, land based clans" who "generally have little or no knowledge of the sea".[7] Certainly, illegal fishing has occurred and represents a vast potential economic loss to Somalia.[8] However, fishing has in practice never been a large part of the Somali economy,[9] and the most demonstrable economic damage to local communities dependent on fishing resulted from the destruction caused by the 2004 tsunami.[10] Maritime toxic waste dumping is, as one would expect, a hard crime to prove. It certainly seems documented that various Somali warlords entered into contracts with European companies to allow the latter to bury dangerous waste on land or coastal sites within Somalia.[11] UN missions in 1992, 1997, 1998 and 2005, however, found no evidence of the widely-reported barrels of toxic waste allegedly dumped at sea and subsequently washed up along the Somali shore.[12] Indeed, the 2005 UN mission "visited three key populated coastal locations" where "toxic waste hazards" were allegedly freshly uncovered by the 2004 tsunami; no such waste was found.[13] Evidence of illegal oily waste discharge by passing vessels is, however, firmly established.[14] Ultimately, the truth or falsehood of these claims is irrelevant. "Pirates are seen [by many Somalis] as genuine nationalists who fight the looting of national assets and fine foreign vessels *recurrently* accused of depriving Somalis of their national wealth".[15] This fits a (generally entirely justifiable) local narrative in which Somalis see Somalia as the victim of successive waves of foreign intervention

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7 *Ibid.*, at 17-18.

8 'Report of the Secretary-General on the protection of Somali natural resources and waters', UN Doc. S/2011/661 (2011), para 18.

9 The UN Food and Agriculture Organization estimates that fishing represented, pre-war, no more than 2-3% of GDP: UNFAO, 'Fishery Country Profile: The Somali Republic' (2005), available at <http://www.fao.org/index_en.htm> [last accessed 21 August 2012].

10 G. Tello, 'Fisheries Tsunami Emergency Programme: Somalia, End of Mission Report' (UNFAO, 2005), at 10, available at <www.fao.org/index_en.htm> [last accessed 21 August 2012].

11 D. MacKenzie, 'Toxic waste adds to Somalia's woes', *New Scientist*, 19 September 1992, at 5; T. Kington, 'From cocaine to plutonium: mafia clan accused of trafficking nuclear waste', *The Guardian*, 9 October 2007, available at <http://www.guardian.co.uk> [last accessed 21 August 2012]. Compare Natural Resources Report, *supra* note 8, at paras 46-7 (dumping in Africa generally).

12 Natural Resources Report, *supra* note 8, at paras 51-4.

13 See UN Environment Programme, 'The State of the Environment in Somalia: A Desk Study' (2005), at 33, available at <http://postconflict.unep.ch/publications.php?prog=none> [last accessed 21 August 2012].

14 Natural Resources Report, *supra* note 8, para 52.

15 Marchal, *supra* note 5, at 38 (emphasis added).

and exploitation.[16]

That said, we can discern a number of shifts over time in Somali piracy. First, Somali piracy dating from 1991 through to the early-2000s saw few vessels captured and ransomed each year. These "relatively rare incidences ... were viewed somewhat sensationally" by the media, but were not seen as a major international problem.[17] This conclusion is supported by the fact that Somali piracy was not seriously raised in the International Maritime Organization (IMO) and UN Security Council until 2006-7, and even then the international response only really commenced with the *Le Ponant* episode in April 2008 (discussed below).[18]

The boom in Somali hostage-taking piracy from approximately 2003-4 onwards resulted from a combination of factors: the rise of an efficient business model; a collapse in government and policing in Puntland, the region of Somalia where most piracy is based; and a shift towards the use of mother ships. One must also bear in mind the strategic geographic position of Somalia in relation to some of the world's busiest shipping routes and the significant financial incentives for front-line or foot-soldier pirates. Getting anything done in Somalia usually requires, in the absence of effective centralised authority, the support of clans.[19] Hansen identifies as an important factor in the piracy boom the emergence of a new piracy cartel in the Hobyo-Harardhere area. The Hobyo-Harardhere cartel was established by Mohamed Abdi Hassan 'Afweyne' who was able to assemble an efficient, profit-oriented piracy enterprise and who "managed to transcend [ordinary] clan [allegiances], by actively recruiting the best pirates for his group".[20] The impact of this 'entrepreneurial' approach to piracy is returned to below. Another enabling condition for piracy was provided by the financial collapse of the regional government of Puntland, which stopped paying its police in April 2008.[21] The Puntland government had always only had a relatively weak capacity to repress piracy; now it effectively had none. Finally, the most successful adaptation of Somali piracy has been in

[16] Hansen, *supra* note 3, at 11-2. Hansen also notes frequent clashes between Somalis over rights to use certain local fishing grounds. *Cf.* Marchal, *supra* note 5, at 39-40; House of Commons Foreign Affairs Committee, 'Piracy off the coast of Somalia' (2012), at Ev 30, available at <http://www.parliament.uk> [last accessed 27 February 2012].

[17] UN Expert Report, *supra* note 2, at 18.

[18] See generally A. Panossian, 'L'Affaire du Ponant et le renouveau de la lute internationale contre la piraterie', (2008) 112 *RGDIP* 661, 661-7; D. Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights', (2010) 59 *ICLQ* 141, at 145-6.

[19] Hansen, *supra* note 3, at 26.

[20] *Ibid.*, at 23-4. On clan structure, see *ibid.*, at 25.

[21] *Ibid.*, at 32-3.

the use of mother ships, a practice which has evolved over time. At least as late as May 2007 it was thought any vessel sailing 200 nm or more from Somalia would be safe from attack.[22] Somali pirates, however, were able to considerably extend their range through first using skiffs to hijack local (often Yemeni) fishing dhows and then using these larger dhows to tow the skiffs much further out to sea in order to attack merchant shipping. Mother ships, often indistinguishable from genuine fishing vessels and often with hostages still aboard, were in use in this basic manner no later than 2007.[23]

At the time of writing, in August 2012, Somali piracy has increased its range still further. The basic tactic remains the same: hijack fishing vessels, and redeploy these as "mother ships, in order to capture larger merchant vessels".[24] However, now these larger merchant vessels may, in turn, not only be held for ransom but also used as mother ships themselves. This provides pirates with not only the ability to attack multiple further merchant vessels but also new supplies, increased range and endurance (especially in terms of staying at sea in poor weather). This new ability to ride out bad weather and await days with a calmer sea state means that pirates can now operate in the monsoon season, a time of year which had previously seen a decline in attacks.[25] This shift in tactics also means that pirates can now "almost always deploy[] with hostages on board", making military intervention difficult.[26] Pirates have thus progressively refined and developed the use of mother ships to significantly expand their capabilities. Pirate attacks now range as far as 1800 nm out from the Somali coast.[27] This so-called 'balloon effect' is in large part of consequence of naval success in securing the Internationally Recommended Transit Corridor, discussed below.

The range of pirates is yet further increased by the psychology of the front-line pirates themselves. For example, if one had a vessel capable of holding supplies for 30 days then:

> A prudent mariner would steam for nine days and have 10 days loiter time, at which point [as a pirate] he would hope to get lucky and catch a ship; he would give himself one day's fudge factor and

[22] See 'Call to arms to tackle Somalia piracy threat; International shipping community must act to end violent attacks', *Lloyd's List*, 16 January 2008, at 15.

[23] UN Expert Report, *supra* note 2, at 19.

[24] M. Hijmans, 'Threats of the Sea', (2011) 67(11) *The World Today* 22, at 22.

[25] *Ibid.*, at 22.

[26] *Ibid.*, at 23.

[27] *Ibid.*, at 22.

> 10 days to get back. Somalis do not do that: they steam for 30 days until they run out of everything, at which point, in desperation ... they will go for anything.[28]

An enabling condition for these tactics is the culture of physical bravery among young Somali men. Having grown up in a strife-torn country the calculus of risks involved to them must look very different than it might to those of us sitting in the west. The share of the profits made by front-line pirates is not large,[29] but it represents enormous wealth compared to other available opportunities. Somali pirates may thus be understood as 'irrational rational actors'. They are willing to take extraordinary risks, but once that willingness is taken into account, their tactics represent an entirely sensible business strategy.

At the same time, the violence of pirate attacks on merchant vessels and their violence in the treatment of hostages has increased noticeably over 2011.[30] The former may be partially attributable to ship-board defences: even the adoption of passive or non-lethal defences by merchant shipping may prompt pirates to use greater violence in an effort to force a vessel to stop and allow boarding. Theories as to the cause of increased violence (there are even allegations of torture[31]) against captured hostages vary. Some consider it an effort to increase pressure in ransom negotiations; others suggest that the 'outsourcing' by pirates of the physical care and custody of hostages to other gangs may result in their immediate captors having less concern for their welfare and more for keeping costs down.[32] Still others suggest that a greater percentage of pirates are coming from having spent time fighting in Somalia and so are more accustomed to using violence.[33]

Despite its success to date, a new difficulty for the pirate business model may be emerging. It may be that piracy has become geared around expectations

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[28] House of Commons Report, *supra* note 16, at Ev 16-7.

[29] Gettleman suggests that in one case involving a record US $10 million ransom payment, the front-line Somali 'gunmen' involved received a $150,000 share but after advances and expenses were deducted by pirate bosses earned only $20,000: J. Gettleman, 'Money in Piracy Attracts More Somalis', *The New York Times*, 9 November 2010, available at <http://www.nytimes.com> [last accessed 21 August 2012].

[30] *E.g.* W. Ross, 'US deaths show growing pirate violence in hijackings', *BBC News*, 23 February 2011, available at <http://www.bbc.co.uk/news> [last accessed 21 August 2012].

[31] The term must be understood colloquially. Other than in the context of a war crime or crime against humanity, torture as a legal term requires the involvement or acquiescence of a government agent.

[32] On outsourcing, see Hansen, *supra* note 3, at 36.

[33] Ross, *supra* note 30.

of a level of return the insurance market will no longer bear in practice. For example, if pirates assume on capturing a merchant vessel they face a ransom negotiation period of no more than 60-120 days, and a ransom payment of at least USD 3 to 4 million, they will make arrangements accordingly.[34] This will inform how much is promised to investors, how many guards they are willing to hire to watch over hostages, and how much credit they are willing to take from local businesses (who effectively under-write the costs of feeding hostages and guards). During the ransom negotiation the pirate business effectively runs on credit. If, however, the pirates are forced to settle for less than anticipated, they may actually run into trouble meeting their commitments to investors or creditors. Indeed, pirates may themselves default on creditors in order to maintain a profit.[35] Why have pirates in some cases been forced to settle for radically lower sums? Arguably, as more vessels transiting the Gulf of Aden adopt recommended safety measures (see the discussion of Best Management Practices, below) and/or armed guards, the result is that those vessels taking least precaution for their own safety are more likely to be taken by pirates. In turn, these 'low-cost' shipping operators who could not or would not bear the costs of implementing better security are also those least likely to have extensive insurance. Increasingly, perhaps, the vessels that make easiest prey for pirates are those least likely to be profitable. This, however, remains speculation. To date, piracy has proved sufficiently lucrative to sustain a variety of business models.

There is no single universal structure or even single type of organisation behind the present Somali piracy industry. Notably, "[t]he 2008 boom led to the fragmentation of piracy, and groups became smaller and more varied", although they seem typically recruited based on pre-existing "family or village ties".[36] Hansen outlines three basic models:

- "the first one involves a responsible group structure within which an investor functions as leader, carrying all costs, but also taking most of the ransom";
- "[t]he second ... has a shareholder structure in which the pirates themselves invest to meet the current running expenses of the group"; and

[34] R. Young Pelton, 'Pirates Fight Over MV Blida Ransom', *Somalia Report*, 7 November 2011, available at <http://www.somaliareport.com> [last accessed 21 August 2012].

[35] *Ibid*.

[36] Hansen, *supra* note 3, at 34.

- the third "has a shareholder structure in which a leader gathers shares from local investors and hires a crew (often on commission)", commission in this context meaning "no prey, no pay".[37]

The latter model most notoriously resulted in the 'pirate stock exchange' of Haradheere.[38] Under this model, ordinary Somalis could make modest contributions of money or weapons to a particular pirate mission and would take a share in the ransom paid in the event of a successful hijacking. Despite this evident decentralisation, there are still suggestions that a significant part of Somali piracy is ultimately controlled by a "relatively small number" of bosses and financiers, whose, "identities ..., locations [often within Somalia] and political connections are widely known".[39] Thus:

> Naval forces estimate that there are about 50 main pirate leaders, around 300 leaders of pirate attack groups, and around 2,500 'foot soldiers'. It is believed that financing is provided by around 10 to 20 individuals. In addition, there is a large number of armed individuals guarding captured ships, and numerous [English-speaking] ransom negotiators.[40]

On any approach, the basic Somali piracy business model has a number of enabling factors and constraints which are indigenous to Somalia. The role of an ample supply of potential recruits and a culture of physical bravery has already been noted. Most importantly, the Somali business model requires a kind of highly-ordered lawlessness: the absence of effective central government repression is needed to undertake piracy, but a degree of relative stability is needed for it to be profitable.[41] That is, functioning markets are required to finance missions and supply hostages/pirates, and an effective informal banking sector is needed to deal with the large quantities of physical cash generated by ransoms. In this sense, the combination of clan networks and weak government in Puntland appear to provide the requisite degree of stability in the absence of

[37] *Ibid.*, at 35-6.

[38] M. Ahmed, 'Somali sea gangs lure investors at pirate lair', *Reuters*, 1 December 2009, available at <http://www.reuters.com> [last accessed 21 August 2012].

[39] 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts', UN Doc. S/2011/360 (2011), para 64.

[40] *Ibid.*, Annex I, at para 3. Estimates vary as to the number of translators/negotiators.

[41] See in particular S. Percy & A. Shortland, 'The Business of Piracy in Somalia' (Deutsches Institut für Wirtschaftsforschung, 2011), especially at 13-4, available at <http://www.diw.de/en> [last accessed 8 August 2012].

effective policing.[42] In this context, the start-up costs to forming a 'pirate action group' are relatively low, though not negligible:

> a 15-foot pirate skiff costs between USD 1000 and 2000 and supplies have to be bought. Skiffs are seldom rented, many attacks involve more than two boats and the investor has to provide food and supplies for the expedition, perhaps some USD 100 a day for a sizable group.[43]

The risks, however, are higher than many realise. Physically, it seems likely that more pirates are lost at sea than killed in naval encounters.[44] Financially, returns are generally either nil or very high. If a pirate action group comes back empty-handed, or not at all, the investment is lost. A further enabling condition in Somalia is obviously the extraordinary length of its coastline; 3,300 kilometres,[45] facing onto a vital and busy route for world shipping. However, the collapse of the central government and general economy places a constraint on Somali piracy. Somali pirates can only ransom crews and cannot evolve to the early 2000s South-East Asian model of piracy where crews might be set adrift so the vessel and its cargo could be sold,[46] due to the lack of functional ports in Somalia.

Overall, one major theme is discernible in the evolution of Somali piracy. A key driver of change has been improvements in security.[47] Indeed, the expansion of the area of pirate operations and the escalation in pirate violence off Somalia may be seen as perverse consequences of efforts to suppress or mitigate piracy. These efforts are discussed further below, but in essence improved security in the Gulf of Aden provided by naval forces has displaced piracy elsewhere in the Indian Ocean, while improved ship-board security

[42] On the risk of local economies becoming piracy-dependent see J. Lang, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN Doc. S/2011/30 (2011), at para 16.

[43] Hansen, *supra* note 3, at 14.

[44] On some estimates up to 30% of Somali pirates are lost at sea: J. Goldstein, 'F.B.I.'s Man on the Pirate Beat, Seeking Confessions', *The New York Times*, 21 August 2011, available at <http://www.nytimes.com> [last accessed 21 August 2012].

[45] Lang Report, *supra* note 42, para 40.

[46] D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), at 52-3; P. Mukundan, 'Piracy and Armed Attacks against Vessels Today', (2004) 10 *Journal of International Maritime Law* 308, at 308-15.

[47] N. Hopkins & C. Chonghaile, 'Somali pirates take more risks and rethink tactics', *The Guardian*, 21 February 2012, available at <http://www.guardian.co.uk> [last accessed 21 August 2012].

(brought about largely by industry self-regulation) may have contributed to an escalation in pirate violence. The important point to capture is that Somali piracy is not a static model, but a moving target.

The threat to the shipping community remains, however, low in terms of absolute risk. Only about 1.5 ships in every thousand transits are hijacked;[48] further, while the absolute number of Somali pirate attacks on vessels increased through most of 2011, (other than a sharp drop at year's end), the success rate of such attacks has been falling. In the first nine months of 2011 attempted hijackings were successful in 12% of cases, down from 28% the previous year.[49] This may, of course, simply encourage pirate gangs to make more attacks in an effort to secure a profitable vessel, but the operating costs of such a strategy (food, fuel, etc) may drive smaller pirate operations out of business.[50]

# 3 International counter-piracy in the Gulf of Aden: the shift from military operations to transnational corporation

## 3.1 Introduction

Until late 2007, Somali piracy drew relatively little international concern. In 2007-8, however, the *Le Ponant* episode prompted both a French military intervention in Somalia and soon after a—in some ways quite traditional—Security Council Resolution authorising the use of force. A wide range of naval deployments off Somalia followed.

A striking feature of subsequent developments has been the rapidity of change. Very quickly the limitations of a military strategy to contain or deter piracy became apparent and a shift from a 'military' to 'law enforcement' paradigm followed. Even more noteworthy is the range of co-operative mechanisms that followed, almost all of which have been informal, decentralised and located outside the major international institutions such as the IMO and UN. The change has not occurred exclusively in the public realm; the shipping industry has also been a notable contributor to the growth of relevant soft law.

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[48] Hijmans, *supra* note 24, at 24.

[49] 'As world piracy hits a new high, more ships are escaping Somali pirates, says IMB report', *ICC Commercial Crime Services*, 18 October 2011, available at <http://www.icc-ccs.org/news> [last accessed 21 August 2012].

[50] Young Pelton, *supra* note 34.

## 3.2 Early Concerns: Institutional and Unilateral Responses

IMO statistics show a steep rise in attempted and successful high seas pirate attacks off East Africa after 2004. Taking the figures for attempted and successful attacks together shows that: in 2004, the East African region accounted for nine out of 97 reported incidents worldwide of violence, robbery or hijack against ships on the high seas; in 2005, the figure was 26 out of 65 incidents; in 2006, 18 out of 60 incidents; and in 2007, East Africa accounted for 33 out of 88 incidents.[51] The real figures may well be higher, given the historic under-reporting of attempted piracy.[52] In November 2007, the IMO requested that Somalia's Transitional Federal Government (TFG) and the Security Council take urgent action regarding piracy.[53] The TFG gave consent to such measures on 27 February 2008. The only action taken to that date by the Security Council had been in protection of World Food Programme convoys.[54] The spur to wider action came when in April 2008 crew and passengers aboard the French yacht *Le Ponant*, including 22 French nationals, were taken hostage by pirates in international waters off Somalia.[55] The hostages were released within a week, following payment of a ransom; however, French commandoes (with TFG permission) captured the pirates on their return to shore and the pirates were taken to Paris for trial.[56] The same month, France co-sponsored what became Security Council Resolution 1816.[57]

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[51] Guilfoyle, *supra* note 46, at 49-50. See also the IMO Annual Reports on Acts of Piracy and Armed Robbery against Ships, available at <http://www.imo.org/OurWork/Security/SecDocs/Pages/Maritime-Security.aspx> [last accessed 27 October 2012].

[52] Guilfoyle, *supra* note 46, at 46 and 51.

[53] IMO Res A.1002(25), 29 November 2007, para 6.

[54] See SC Res 1772, 20 August 2007, para 18; and later SC Res 1801, 20 February 2008, para 12. *Cf.* SC Res 1814, 15 May 2008, para 11.

[55] Panossian, *supra* note 18.

[56] *Ibid*.

[57] 'UN urged to tackle Somali pirates', *BBC News*, 28 April 2008, available at <http://www.bbc.co.uk/news> [last accessed 21 August 2012]; SC Res 1816, 2 June 2008.

## 3.3 The First 'Use of Force' UN Security Council Resolutions and 'Deter and Disrupt Patrols': June 2008

Resolution 1816, the first of the major counter-piracy resolutions, was a classic UN authorisation of the use of force: it authorised entry into Somalia's territorial waters (by states co-operating with the TFG) and the use there of all "necessary means to repress acts of piracy and armed robbery" (paragraph 7); while on the high seas it urged states "to be vigilant to acts of piracy" and to "render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law" (paragraphs 2 and 3). While certainly contemplating state co-operation in "the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia" (in paragraph 11), it is fair to say that Resolution 1816 was more a general mandate to conduct 'deter and disrupt' patrols[58] than a clarion call for pirate prosecutions. Though it clearly did not invoke the laws of war, Resolution 1816 was more phrased in terms of UN-authorised military intervention within a state's territorial jurisdiction (here, the territorial sea) rather than law-enforcement co-operation. It was also presented on its face as being a measure which was exceptional, temporary and (to some states) worrying. This is most clearly expressed in paragraph 9, the rather dramatic savings clause in which the Security Council:

> *Affirms* that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under [UN Convention on the Law of the Sea (UNCLOS)], with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of ... the consent of the TFG.

The point was thus clearly made that piracy was not itself a threat to international peace and security warranting Security Council action; rather, Somali

[58] On 'deter and disrupt' or 'catch and release' as a counter-piracy tactic see Guilfoyle, *supra* note 18, at 141.

piracy was an extension of the situation in Somalia itself.[59] States like Indonesia (which has long suffered piracy problems of its own) clearly had a number of concerns about the potential impact of the Resolution including: its potential to serve as a precedent justifying similar action in other regions in the future; its potential to destabilise the balance of rights and interests underlying the UNCLOS regime; and (somewhat bizarrely) its potential to create customary international law.[60] Perhaps in response to such concerns the measures adopted in Resolution 1816 involved both TFG consent and were initially authorised only for a period of six months (paragraph 7). Nothing, of course, is as permanent as a temporary solution, and this temporary measure has been renewed for a series of twelve-month spans without being allowed to lapse ever since.[61]

Nonetheless, the Resolution was clearly part of the spur to a variety of counter-piracy missions, in particular the Combined Task Force 151 (CTF-151), NATO and EU Naval Force (EU NAVFOR) operations. CTF-151 is an offshoot of military operations in Afghanistan, as part of which "U.S. Naval Forces Central Command (NAVCENT) commands ... [a group of] Combined Maritime Forces ... operating in the ... [region]".[62] In January 2009, the CMF command "established Combined Task Force 151 (CTF-151), with the sole mission of conducting anti-piracy operations in the Gulf of Aden and the waters off the Somali coast in the Indian Ocean. ... The list of countries participating in CTF-151 [at any time] is fluid and consists of personnel and approximately two dozen ships from 25 countries".[63] This had been preceded in the period August 2008 to January 2009 by a different CMF taskforce (CTF-150) which had had a maritime operations mandate including, but not limited to, counter-piracy. NATO has also conducted a series of counter-piracy missions in the region, giving it a more-or-less continuous presence in the Gulf of Aden since October 2008.[64] The present and longest-running operation, Operation Ocean Shield, commenced in August 2009 and involved five vessels as at April 2011.[65] The

[59] UN Department of Public Information, 'Security Council Condemns Acts of Piracy, Armed Robbery Off Somalia's Coast' (2008), comments of South Africa, available at <http://www.un.org/News/Press> [last accessed 21 August 2012].

[60] *Ibid.*, comments of Indonesia. See further T. Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', (2009) 20 *EJIL* 399.

[61] See SC Res 1846, 2 December 2008, para 10; SC Res 1897, 30 November 2009, para 7; SC Res 2020, 22 November 2011, para 9.

[62] CRS Report, *supra* note 2, at 25.

[63] *Ibid.*

[64] *Ibid.*, at 26 on Operations Allied Provider (October-December 2008) and Allied Protector (March-June 2009).

[65] *Ibid.*, at 26-7.

EU NAVFOR mission, Operation Atalanta, was established in December 2008. One should note that the EU NAVFOR is not a permanent body and has no wider mission than Operation Atalanta.[66] While "[m]ore than twenty vessels and aircraft take part in Atalanta"[67] the actual number of assets deployed at any one time may be closer to ten to sixteen.[68] Numerous individual states, most notably Russia, India, China and South Korea, have also deployed independent naval missions to conduct counter-piracy missions off the coast of Somalia.

## 3.4 Co-operative Mechanisms: Early Evolution

This proliferation of missions required some efforts at co-ordination. As I have noted elsewhere:

> [I]n August 2008 ... [the US-led CMF] established 'a maritime security patrol area ['MPSA'] in international waters off the Somali coast'. The MPSA is a defined area within the Gulf of Aden, providing a common system of reference which allows naval forces in the Gulf to 'de-conflict' their activities. Running through the MPSA is an internationally [recommended] transit corridor (the 'IRTC'), [also] established in August 2008 by the United Kingdom Maritime Trade Organization. As of 1 February 2009, information for mariners using the IRTC is available through a secure website administered by the Maritime Security Centre (Horn of Africa), itself part of the EU counter-piracy mission Operation Atalanta.[69]

Deconfliction is the military term for a process aiming at creating mutual awareness among the various missions of each other's activities, with the aim of avoiding duplication of effort; it is a term deliberately used to avoid any suggestion that there is some unitary command or central authoritative co-ordinator. It has since been given a more substantive dimension in the Shared Awareness and Deconfliction meetings discussed below. These early efforts have been highly successful. Ships that register with the Maritime

[66] F. Naert, *International Law Aspects of the EU's Security and Defence Policy: With a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia, 2010), at 179-92.

[67] House of Lords European Union Committee, 'Combating Somali Piracy: the EU's Naval Operation Atalanta' (2010), at 8, available at <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/103/103.pdf> [last accessed 21 August 2012].

[68] House of Commons Report, *supra* note 16, at Ev 13.

[69] Guilfoyle, *supra* note 18, at 151.

Security Centre (Horn of Africa) (MSC-HOA)[70] and which use the IRTC are made much easier to protect. This is in part because the IRTC is 'picketed' with vessels such that any vessel attacked should be capable of being reached within half an hour.[71] Perhaps more effective is the potential to direct vessels registered with MSC-HOA to adjust speed and heading such that they may transit in groups. The group transit system is based on the observation that pirate attacks at night are rare and have a zero success rate.[72] Vessels are thus grouped to transit the most vulnerable areas at night and to depart at dusk from and arrive at dawn in areas with a military presence. The net result is that there have been no merchant vessels captured in the IRTC since September 2010.[73]

Overall, the flavour of early efforts in counter-piracy off Somalia to late 2008 was that of a military response. While there was no suggestion that pirates were combatants,[74] little thought or priority was given to the idea that navies would actively seek to arrest pirates for trial. Indeed, in some cases, even thinking about the possibility at the level of national governments seemed to have prompted a sense that the issues involved were too complicated, or cut across too many national agencies, or would raise awkward questions about the applicable legal regime aboard warships (for example, the extent of extra-territorial human rights obligations and how to implement them).[75] Events, however, soon proved that the problem could not be contained within an exclusively military mandate.

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[70] Similar registration/information services are provided by the UK Maritime Trade Organisation and the US Navy's Maritime Liaison Office, irrespective of a vessel's nationality.

[71] House of Commons Report, *supra* note 16, at Ev 14-5.

[72] See, *e.g.*, EU NAVFOR, 'Gulf of Aden Internationally Recommended Transit Corridor & Group Transit Explanation' (2009), available at <http://www.intertanko.com/upload/IRTC%20%20GT%20Explanation%20-%20March%202009%20(2).pdf> [last accessed 21 August 2012].

[73] House of Commons Report, *supra* note 16, at Ev 14-5, n 2.

[74] On whether pirates could be combatants under international humanitarian law see E. Kontorovich, ' "A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists', (2010) 98 *California Law Review* 243; D. Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?', (2010) 11 *Melbourne Journal of International Law* 141.

[75] See, *e.g.*, 'World Scrambles to Deal with Pirate Threat', *Spiegel Online*, 24 November 2008, available at <http://www.spiegel.de> [last accessed 21 August 2012]. *Cf.* K. Westcott, 'Pirates in the Dock', *BBC News*, 21 May 2009, available at <http://www.bbc.co.uk/news> [last accessed 21 August 2012].

## 3.5 The Shift Towards Law Enforcement

One well-reported example of the limits of conducting counter-piracy as a military operation occurred on 11 November 2008, when boarding craft from the *HMS Cumberland* subdued a suspected pirate vessel. Onboard, royal marines discovered Yemeni fisherman being held by Somali pirates: the mother ship they had boarded was a hijacked vessel with its crew held hostage. If the fishermen were set free with their craft, then something would have to be done with the pirates. The answer initially hit upon was their transfer to regional states for trial, Kenya in particular. This was not without precedent. In 2006 a group of ten pirates intercepted by the *USS Churchill* had been transferred to Kenya for trial.[76]

By the end of 2008 a shift towards a law-enforcement paradigm was underway. The shift was most decisively apparent in UN Security Council Resolution 1851 of 16 December 2008, in which the emphasis on investigation and prosecution and the strengthening of criminal justice mechanisms is readily apparent. The Resolution:

- called on all states with the capacity to do so to co-operate in combating Somali piracy through "deploying naval vessels and military aircraft";
- granted a power of summary "seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use";
- invited "all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ('shipriders') from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution";
- encouraged "all states and regional organizations fighting piracy ... off the coast of Somalia ... to [act to] increase regional capacity ... to effectively investigate and prosecute piracy and armed robbery at sea offences" with the assistance of the UN Office on Drugs and Crime (UNODC); and

[76] J. Kraska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Praeger, 2011), at 179.

- encouraged "all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating [Somali] piracy".[77]

Each of these points is worth further consideration. As to the first point, as noted above, a significant expansion in navy deployments was already underway by this time. The grant of a power of summary disposal of suspected pirate equipment plugged a possible gap in the UNCLOS regime (which refers only to the power of *courts* to dispose of property in piracy cases).[78] The use of ship-riders is a potentially useful idea, but one which has not been implemented to date.[79] (The principal difficulties being whether the regional partner states are willing, have legislation allowing their police to operate outside their territory, and have personnel to spare.) Regional capacity building has occurred in a number of ways. In a relatively early development a number of regional coastal states, in an IMO-sponsored process, began negotiating a memorandum of understanding (MOU) on counter-piracy, resulting in a draft MOU in April 2008.[80] This was then adopted as the so-called Djibouti Code of Conduct in January 2009.[81] The Djibouti Code aims at promoting co-operation, information sharing and capacity development to better allow regional states to combat piracy themselves. Its achievements to date have included support for reform of national piracy laws.[82] Djibouti Code information sharing centres in Tanzania, Kenya and Yemen, became active in 2011[83] and an agreement on their use was concluded in November

[77] SC Res 1851, 16 December 2008, at paras 2-5.

[78] 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 396, Art 105.

[79] D. Guilfoyle, 'Combating Piracy: Executive Measures on High Seas', (2010) 53 *Japanese Yearbook of International Law* 149, at 171-2. On ship-riders more generally, see Guilfoyle, *supra* note 46, at 72-3, 89-94, 119-20, 196-7, 209-11.

[80] D. Guilfoyle, 'Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts', (2008) 57 *ICLQ* 690, at 697-9.

[81] 2009 Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, available at <http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting> [last accessed 21 August 2012].

[82] J. A. Roach, 'Countering Piracy off Somalia: International Law and International Institutions', (2010) 104 *AJIL* 397, at 410-1; CRS Report, *supra* note 2, at 23-4.

[83] IMO, 'Status of the Implementation of the Djibouti Code of Conduct' (2011), at 2, available at <http://www.imo.org/OurWork/Pages/Home.aspx> [last accessed 27 February 2012].

2011.[84] This is a potentially significant step towards institutional arrangements along the lines of the 2005 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (a pioneer of the information sharing centre model).[85] More significantly, perhaps, the UNODC has proven highly effective in criminal justice capacity-building in the region. It has provided translators, judicial and prosecutorial training, refurbished prisons and court-houses, assisted with legislative reform and drafted prisoner transfer and evidence collection guidance, as well as undertaken various projects within Somalia itself.[86] The final point highlighted above is the call to establish an 'international co-operation mechanism'. This took the form of the Contact Group on Piracy off the Coast of Somalia (CGPCS), discussed below.

## 3.6 Co-operative Mechanisms: a Second Phase

Two co-operative mechanisms in particular are worth brief discussion here: the CGPCS set up in response to UN Security Council Resolution 1851 and the Shared Awareness and Deconfliction (SHADE) process established around the various Gulf of Aden counter-piracy missions. It is convenient to begin with SHADE. At its simplest, SHADE is a series of meetings held in Bahrain since December 2008:[87]

> It is a staff-level group of officers who meet regularly (approximately once every six weeks) to ensure that the naval forces conducting counterpiracy operations are effectively coordinating their efforts. ... At these meetings tactical and operational coordination is discussed and agreements are made for a certain period

[84] IMO, 'Piracy centres expand information network' (2011), available at <http://www.imo.org/MediaCentre/PressBriefings/Pages/Home.aspx> [last accessed 27 February 2012].

[85] (2005) 44 ILM 829. See further Guilfoyle, *supra* note 46, at 57-61; M. Hayashi, 'Introductory Note', (2005) 44 ILM 826.

[86] A. Cole, 'Prosecuting Piracy: Challenges for the Police and the Courts', in *Conference on Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracy* (Dubai School of Government, 2011), 107, at 108-10, available at <http://counterpiracy.ae/briefing_papers/Forging%20a%20Common%20Approach%20to%20Maritime%20Piracy.pdf> [last accessed 21 August 2012]. More information is available at <http://www.unodc.org/piracy> [last accessed 21 August 2012].

[87] R. Geiß & A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011), at 27-8.

> of time with regard to the division of tasks, optimizing the use of available assets and coordination of the geographic presence.[88]

It is not an organisation *per se* and has no formal decision-making authority; nonetheless it has been highly effective. The plethora of multinational and national missions involved in counter-piracy may appear inefficient absent some unified command structure. Nonetheless, the SHADE process has allowed "the forces engaged in the counter-piracy effort ... [to] work and co-operate very closely" on a pragmatic, "tactical, day-by-day level".[89] Industry representatives also attend SHADE meetings and it has been credited with improving communications between industry and the military.[90]

The CGPCS was established on 14 January 2009. The need for some new forum to co-ordinate counter-piracy outside the UN or IMO auspices may not be readily apparent. However, all existing organisations had, in effect, over or under-inclusive mandates or expertise in only pieces of the problem. The IMO, for example, has a great deal of relevant expertise as regards the commercial shipping industry but no experience of military deployments. Thus the CGPCS is:

> not a UN or an IMO body. It is voluntary cooperation among states and organizations engaged in or with an interest in countering piracy off the coast of Somalia. The participants thus share a clear common goal and the work of the CGPCS has therefore been characterized with much specific and practical progress in a very short period of time. At its first meeting the CGPCS established four working groups on[:] operational matters and capacity building (WG1—chaired by the United Kingdom), legal issues (WG2—chaired by Denmark), cooperation with industry (WG3—chaired by the USA) and communication (WG4—chaired by Egypt).[91]

A fifth working group has since been established to examine financial flows. The working groups meet several times a year and consist of participants representing governments, international organisations and industry groups.

[88] K. Homan & S. Kamerling, 'Operational Challenges to Counterpiracy Operations off the Coast of Somalia', in B. van Ginkel & F. van der Putten (eds), *The International Response to Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, 2010), 65, at 85.

[89] House of Commons Report, *supra* note 16, at Ev 13.

[90] Geiß & Petrig, *supra* note 87, at 28; Homan & Kamerling, *supra* note 88, at 85.

[91] T. Winkler, 'Foreword', in van Ginkel & van der Putten, *supra* note 88, vii, at viii (Ambassador Winkler is the Chairman of WG2).

Like SHADE, they serve principally as a forum for sharing information and experience and, to a certain extent, for co-ordinating efforts. That said, like SHADE, they also lack formal decision-making authority. Their secretariat is provided by the government chairing the group and the make-up of the meetings can change significantly over time. SHADE and the CGPCS working groups are more a co-operative forum than a standard-setting body. Again, this might not seem a recipe for efficiency or effectiveness.

Nonetheless both are clearly 'institutions' in the broader sense of looking beyond formal organisations to other " 'rules, norms, and decision-making procedures' that shape expectations, interests, and behavior".[92] Both mechanisms clearly fall within Scott and Trubek's concept of 'new governance' institutions which: "accept[] the possibility of coordinated diversity" among legal systems; use "machinery that brings actors from various levels of government … together" and industry to generate "open-ended standards, flexible and revisable guidelines, and other forms of 'soft law' "; all of which may be "designed more to support and coordinate" policy rather "than to create uniformity".[93] Essentially, new governance eschews top down 'command and control' regulation and favours instead experimentation and sharing of best practice, the informal alignment of expectations, and loose horizontal co-operation. Such transnational governance networks have certain advantages. They can act and adapt quickly and can be a valuable way of sharing experience and promoting open-ended deliberation regarding a common problem.[94] They may allow a range of possible solutions to be explored at the national level before identifying and disseminating best practice. They may even bring national authorities or capabilities together in a manner that delivers unexpected efficiencies. Such measures have certainly helped focus available political will, explore the possible options and assisted different states and agencies to co-ordinate their efforts.[95] This has led to successes in terms of facilitating co-operation in piracy prosecutions. In particular, prosecutions of pirates captured by foreign navies are now being conducted by Kenya, Mauritius, Seychelles and Tanzania with inter-

[92] M. Finnemore & S. J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', in B. A. Simmons & R. H. Steinberg (eds), *International Law and International Relations* (Cambridge University Press, 2007), 188, at 191.

[93] J. Scott & D. M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', (2002) 8 *European Law Journal* 1, at 6.

[94] *Ibid*.

[95] See for example references to work by the CGPCS working groups on sharing and coordinating law-enforcement intelligence through INTERPOL: 'Piracy and Armed Robbery Against Ships: Contact Group on Piracy off the Coast of Somalia, Report of Working Group 3', IMO Doc. MSC 90/INF.4 (2012), Annex, at para 3.2.

national assistance.[96] Trust funds have also been established under the CGPCS and the Djibouti Code to support counter-piracy projects (including some UNODC projects mentioned above) and have had some impact in terms of assisting judicial and prosecutorial capacity-building in the region (discussed further below).[97] One of the most effective examples, however, of such co-operative action through a loose network of international actors is provided by the shipping industry and IMO collaboration on 'Best Management Practices' for securing individual vessels from pirate attack.

## 3.7 The Industry Response to Somali Piracy: a Move to Self-Protection

The initial position of much of the shipping industry to Somali piracy was that this was a governmental problem requiring 'robust' military measures to suppress it. Further, while trust funds have been established under the CGPCS and the Djibouti Code to support counter-piracy projects, industry has been slow to contribute to them. The usual explanation is that one does not ordinarily expect victims of crime to bear the costs of policing when they are already taxpayers. There was even reluctance in some quarters initially to using the IRTC. While responsible elements of the industry now do use the IRTC, anything up to 25% of vessel transits through the Gulf of Aden still do not.[98]

The shipping industry as a whole, however, appears to have rapidly accepted that the most effective way to secure vessels from pirate attack is to secure the vessels themselves. In collaboration with the IMO, a series of Best Management Practice (BMP) documents have been issued.[99] These specify the range of (largely passive or non-lethal) measures vessels should take to protect themselves from pirate attack if they are transiting the 'high risk area' off Somalia, and compliance demonstrably improves an attacked vessel's chances of eluding capture.[100] Further, being BMP-compliant attracts lower insurance premiums,[101] effectively making it a kind of industry-policed soft-law. Nonetheless, there are still reports of a significant fraction of vessels

[96] 'Report of the Secretary-General on Somalia', UN Doc. S/2012/283 (2012), at para 51.
[97] *Ibid*.
[98] House of Lords Report, *supra* note 67, Annex of Minutes of Evidence, at 45.
[99] At time of writing, the current version was BMP4, available at <http://www.gard.no/webdocs/BMP4.pdf> [last accessed 21 August 2012].
[100] House of Commons Report, *supra* note 16, at 19-20, 22.
[101] *Ibid.*, at Ev 3-4.

not complying with BMP—and unsurprisingly, such vessels appear more likely to be taken by pirates (as discussed above).[102]

In this context, there has been significant discussion about whether individual vessels should have *armed* protection. The two basic possible models are, obviously, private or state-sponsored provision. The former is now commonly referred to as Privately Contracted Armed Security Personnel (PCASP)[103] and the latter as Vessel Protection Detachments (VPDs). In 2009, some shipping industry figures described the attitude of their sector as "resolutely oppose[d]"[104] to the use of PCASPs due to the risk of violence escalating and legal liability. As the IMO has put it:

> It should also be borne in mind that shooting at suspected pirates may impose a legal risk for the master, shipowner or company, such as collateral damages. In some jurisdictions, killing a national may have unforeseen consequences even for a person who believes he or she has acted in self defence. Also the differing customs or security requirements for the carriage and importation of firearms should be considered, as taking a small handgun into the territory of some countries may be considered an offence.[105]

The clear preference of industry was for VPDs, typically paid for by the flag state.[106] Other than questions of cost, VPDs also benefit from sovereign immunity. Sovereign immunity, it is presumed, would greatly simplify the

[102] *Ibid*., at Ev 15, Ev 63.

[103] See 'Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', IMO Doc. MSC.1/Circ.1405 (2011) and 'Interim Recommendations for Flag States Regarding the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', IMO Doc. MSC.1/Circ.1406 (2011).

[104] See, *e.g.*, 'Statement on International Piracy by Giles Noakes Chief Maritime Security Officer of BIMCO before the United States House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation' (2009), available at <http://www.marad.dot.gov> [last accessed 21 August 2012].

[105] 'Piracy and Armed Robbery Against Ships: Guidance to Shipowers and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships', IMO Doc. MSC.1/Circ.1334 (2009), para 61; see now 'Report of the Maritime Safety Committee on its Ninetieth Session', IMO Doc. MSC 90/28 (2012), para 20.11.5.

[106] House of Commons Report, *supra* note 16, at 20 (noting France, Spain, Israel and Italy already provide VPDs and other States are contemplating it). See also Recommendation 3 ('the Government should engage with the shipping industry to explore options for the industry to pay for vessel protection detachments of British naval or military personnel on board commercial shipping'): *ibid*., at 5.

potential legal situation arising in the event of fatal shootings of foreign nationals.[107] However, only a handful of governments have been willing to bear these costs.[108] There thus appears to have been a cautious shift in government, industry, military and IMO opinion in favour of ships being allowed to take greater "responsibility for their own protection by hiring" PCASP.[109] In particular, those in industry who once opposed PCASP have now taken a lead in drafting contracts for their use.[110] Irrespective of whether PCASP are considered desirable, they are clearly here to stay and national 'hard law' frameworks are increasingly changing to accommodate their existence.[111]

# 4 Assessment

## 4.1 The Challenges of Asymmetric Organised Crime

Any assessment of the effectiveness of the international response to Somali piracy has to take into account a number of constraints and challenges. First, Somali piracy has proven itself to be highly agile and adaptive. As it is highly decentralised, physically dangerous and highly profitable, it is a criminal activity with excellent incentives to experiment, adapt and learn. Its low start-up costs, multiple business structures and large potential labour pool also make it more flexible than state agencies and ordinary commercial organisations. Promisingly, the international response, as discussed in this article, has become more flexible, decentralised and horizontal. This may suggest that counter-piracy increasingly has some measure of the adaptability of

[107] Whether this is clearly the case is open to doubt. See Guilfoyle, *supra* note 46, at 299-323 and the debate over India's denial of immunity to Italian VPD members who shot Indian fishermen: D. Guilfoyle, 'Shooting fishermen mistaken for pirates: jurisdiction, immunity and State responsibility', *EJIL:Talk!*, 2 March 2012, available at <http://www.ejiltalk.org> [last accessed 22 August 2012].

[108] Though the number may be increasing: House of Commons Report, *supra* note 16, at 20.

[109] *Ibid*., at 22.

[110] *E.g.* 'Denmark: BIMCO Creates Standard Contract for Armed Guards', *Naval Today*, 22 November 2011, available at <http://www.navaltoday.com> [last accessed 21 August 2012] (quoting G. Noakes, *supra* note 104).

[111] On recent developments at the IMO see 'Report of the Maritime Safety Committee on its Ninetieth Session', IMO Doc. MSC 90/28 (2012), at paras 20.1-20.34; and 'Guidance for private maritime security companies and passenger ship recommendations agreed by IMO's Maritime Safety Committee', IMO Doc. MSC 90/WP.6 (2012); for UK guidance see Department of Transport, 'Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances' (2011), available at <http://www.dft.gov.uk/publications> [last accessed 21 August 2012].

piracy itself. Nonetheless, state action to counter Somali piracy remains limited by factors including: limited resources to support regional prosecution efforts or economic development in Somalia;[112] finite military resources; necessary adherence to the rule of law; and the lack of any 'kinetic solution' to Somali piracy, it not being a problem that can be solved with firepower.[113] In this context the key issues to consider are: the rate of prosecution for Somali pirates, and the factors that may inhibit prosecution;[114] the role and effectiveness of international organisations and networks involved (and whether they lack strategic vision);[115] and the use the international community is making of the finite resources available to tackle the problem. Given a growing literature addressing the other the issues, only the latter point will be addressed briefly here.

## 4.2 The Reality of Scarce Resources

The international community has finite resources with which to combat Somali piracy, despite its high cost to the international economy as a whole.[116] Co-ordination is clearly required to best use available resources. This truism extends beyond military patrolling. Sometimes, however, modest resources can be used or leveraged to create a disproportionate impact. For example, one early concern in prosecuting piracy cases in Kenya was severe prison overcrowding. This created human rights concerns for states transferring suspects to Kenya and problems for Kenya in terms of its capacity to receive suspects. An expensive solution would have been to embark on a prison-building scheme. Instead, the UNODC looked at series of measures targeted at one prison (Shimo La Tewa). For example, a UNODC–supported review of those being held on remand identified 517 prisoners for immediate release who had already served

[112] House of Commons Report, *supra* note 16, at 65 and the figures at 65-6.

[113] 'Navy head cool on Somalia strikes', *BBC News*, 13 December 2008, available at <http://www.bbc.co.uk/news> [last accessed 21 August 2012].

[114] Compare E. Kontorovich & S. Art, 'An Empirical Examination of Universal Jurisdiction for Piracy', (2010) 104 *AJIL* 436; D. Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options', (2012) 10 *Journal of International Criminal Justice* 767.

[115] Somewhat sceptically, see A. Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia', in C. R. Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, 2011), 139, at 144-5.

[116] 'The Economic Cost of Maritime Piracy' (One Earth Future, 2010), available at <http://oceansbeyondpiracy.org> [last accessed 21 August 2012].

time equivalent to the maximum sentence they might receive at trial.[117] This process obviously required resources, but less than a new building. Similarly, the IMO Djibouti Code implementation unit is trying less to create complete new infrastructure systems to support maritime situational awareness (e.g. chains of radar and radio stations) than to plug gaps in existing networks and, where they exist, to integrate parallel infrastructure controlled by different state agencies.[118] Finally, there is also the capacity for win-win solutions. Funding regional prosecutions of piracy trials may also *de facto* be a form of rule of law development assistance. Court and prison facilities improved to deal with piracy cases have lasting benefits beyond piracy trials, and local prosecutors may receive training and mentoring from internationally seconded staff funded by donor states. These are all causes for optimism. Co-ordination, leverage and looking for win-wins, of course, will only take us so far.

Obviously, the best solution to Somali piracy is a functional Somali state, justice system and economy. The resources the international community stands prepared to put into Somali reconstruction are, however, "extremely limited".[119] However, the reality of counter-piracy operations has been that states have had to deal—given the TFG's limited effective authority—with the relatively stable territorial entities of Somaliland and Puntland. There is significant interest in seeing prisons constructed in these territories under UN oversight so pirates convicted elsewhere in the region could be transferred home to serve their sentences.[120] (Thus relieving a burden on other prison systems which may translate to a greater willingness to prosecute.[121]). Such grass-roots engagement with Somaliland, Puntland and especially clan networks is likely the only way of gaining any traction in Somalia. Realistically, the clans are the (competing) seat(s) of effective power in Somali and engagement with them is the thing most likely to pay dividends. The UNODC is beginning to attempt such community outreach,[122] but these are all experiments in untested waters.

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[117] UN Office on Drugs and Crime, 'Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects: Issue 5' (2011), at 5, available at <http://www.unodc.org> [last accessed 21 August 2012].

[118] IMO, *supra* note 83.

[119] House of Commons Report, *supra* note 16, at 65.

[120] Modalities Report, *supra* note 39, paras 28-31. The Seychelles has entered a series of such agreements with the TFG and the regional governments of Somalia. See Report of the Secretary-General, *supra* note 96, para 50.

[121] Modalities Report, *supra* note 39, para 28.

[122] See, *e.g.*, W. Miller, 'Counter-Piracy Programme: Somalia Beyond Piracy' (UNODC, 2011), available at <http://piracy-europe.com/uploads/files/1169/Wayne_Miller.pdf> [last accessed 21 August 2012]; compare Report of Working Group 3, *supra* note 95, at para 3.2

# 5 Conclusion

Everyone acknowledges that Somali piracy is a maritime problem with its roots ashore and that the international response must address both aspects. The real risk, of course, is that while talking about the need for a 'two track' response, all the available resources and political will is diverted into dealing with the immediate high-seas problem. If this occurs, we can only hope to reach a kind of equilibrium: using available resources to cobble together a series of measures that reduces piracy to an 'acceptable' level (in the eyes of markets and politicians, if not seafarers). What we have to hope is that the present series of greater and smaller experiments can identify the components of a successful wider counter-piracy strategy with both short and long-term goals that can be meaningfully co-ordinated. This may, however, require a wider strategic vision than is presently evident.[123]

(similar efforts of the CGPCS).

[123] Murdoch, *supra* note 115.

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# The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Lawmaking

*Cindy Daase*[*]

**Keywords**
Mediators, Diplomacy, Peace Negotiations

## 1 Introduction

In 1966 a new comic superhero had his debut: *The Peacemaker*, alias Christopher Smith, US diplomat and Special Envoy to the Geneva Arms Conference, a convinced pacifist who, as the subtitle announced, "Loves peace so much that he is ready to fight for it!"[1] He took up arms for peace in his *Peacemaker* identity whenever diplomacy ceased to work. In the 4th issue he fought against a villain from the Balkans and his guerrilla troops.[2] *The Peacemaker*, of course, successfully stopped this disturbance of world peace, by using one of his portable atomic bombs.[3]

The conceptualisation of *The Peacemaker* superhero character in this 1960s comic is a telling example of the myth that has been constructed around some

[*] M.A. (Research Associate). Leipzig Centre for the History and Culture of East Central Europe (GWZO). The author wants to thank John Barker, Mehrdad Payandeh, Christian Schliemann-Radbruch, the participants of the Roundtable with Anne Orford organised by the Wissenschaftskolleg zu Berlin, the participants of the SIASSI 2012 Workshop "Regulating the World Society: Law, Governance and the Quest for Global Justice" convened by Alfred C. Aman and Peer Zumbansen and, of course, the organisers and participants of the the Cambridge Journal of International and Comparative Law conference "Agents of Change: The Individual as a Participant in the Legal Process" for their comments on earlier drafts of this article. The author feels especially indebted to Patricia Hania and Anne Prahtel for their invaluable comments and support. Any mistakes or misconceptions are the author's own.

1 Referring to the cover of *The Peacemaker*, No. 1, 1967. The Peacemaker had his debut in *The Fightin' 5*, No. 40, 1966.

2 *The Peacemaker,* No. 4, 1967.

3 *The Peacemaker* comic book turned out to be rather unsuccessful and several attempts to revitalise this superhero in different series were crowned by very modest success.

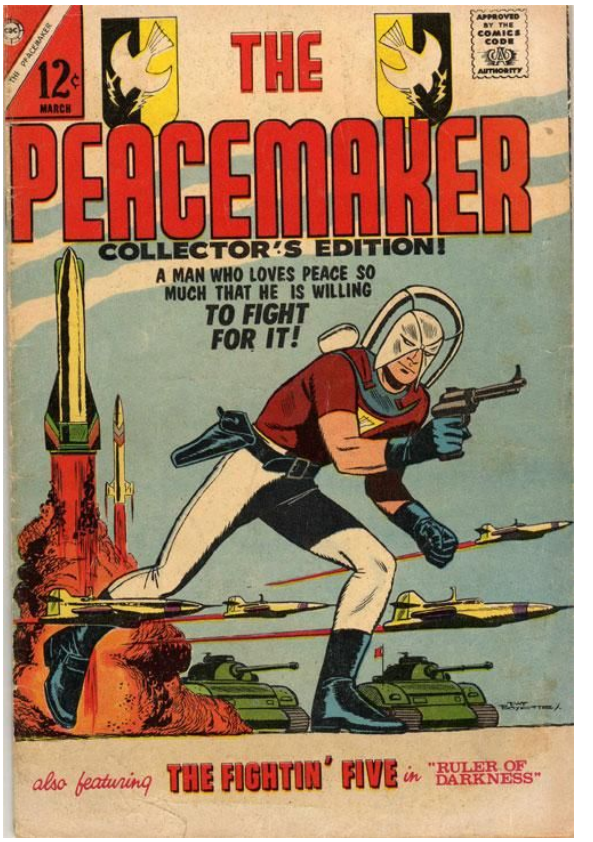


Figure 1: The Peacemaker No. 1, March 1967, Cover, by Pat Bovette Boyette. ©DC Comics.

men (as they are mostly men)[4] and their roles in mediation and peacemaking processes. The role of (charismatic) individual mediators in peace negotiations remains an object of mystification in public but also in academic discourses.[5] This especially holds true for US President's Special Envoy Richard Holbrooke and his role in the process leading to the Dayton Peace Agreement for Bosnia

[4] Even Antonia Potter, a woman, dedicates only half a page to the lack of women in leading roles in the UN System and to the role some women have played in mediation processes including their special involvement in so-called *track two* mediations, in a book edited by a woman presenting six male mediators. A. Potter, 'In Search of the Textbook Mediator', in H. Martin (ed), *Kings of Peace, Pawns of War: The untold story of peace-making* (2006), 159, at 166.

[5] See H. Martin (ed), *Kings of Peace, Pawns of War: The untold story of peace-making* (Continuum, 2006). See also *infra* Part II.

and Herzegovina that will serve as a case study in this article.[6]

From a general perspective, peace processes can be considered as laboratories of lawmaking shaped by different (legal) actors. The role of mediation is usually analysed as one variation of an institutionalised form of third party involvement. The role of the individual mediator, however, is rarely the focus of analysis, while the traditional image of mediation, specifically the one promoted by the media, principally focuses on the enigmatic role of the charismatic individual expert—the peacemaker—shuttling from one place to another, trying to mediate between the parties and to negotiate an agreement to settle the conflict.[7]

This article addresses the following questions: are mediators mere facilitators of a dialogue and negotiation process in a politically and legally set framework or are they—in their attempt not only to terminate a conflict but actively to create a sustainable peace process—in fact often dominating the process by procedurally and substantively imposing a peace agreement and predetermining the rules for the transition process? Which role is assigned to lawyers, law and lawmaking in mediation and peacemaking processes? For instance, does law set a framework or does it become an instrument or technique for the mediator/peacemaker to code the deal between the conflicting parties?

By taking Richard Holbrooke as a key example, the article seeks to describe and analyse the role of individual mediators in the negotiation and making of peace and peace agreements and their potential role in lawmaking in the grey zone between conflict and peace, as well as between the national and international sphere. At the same time, the author must remain aware of the danger of falling into the trap of mystifying Holbrooke's role as one of a superhero *Peacemaker*: the challenge is thus to describe and analyse the role of the individual mediator in peace and lawmaking processes by becoming immersed in, but not submerged by the "mystique" or "art-talk" around him.

Based on this outline, the article initially presents an overview of forms of mediation and functions of mediators in negotiation processes. As a leading example it then points to the mediation and negotiation processes in the conflicts following the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), most prominently the peace negotiation process for Bosnia and Herzegovina led by US Special Envoy Richard Holbrooke. Next, Holbrooke's role will be compared to the practice of the UN Secretary-General (SG) in conflict mediation based on his *good offices,* with a particular focus on the

[6] See *infra* Part II, A.

[7] For examples, see Martin, *supra* note 5 and *infra* Part II, III.

role of Martti Ahtisaari as his Special Envoy in the Kosovo status negotiations from 2005 until 2007. Additionally, the article will also draw out processes of differentiation and professionalisation of peace mediation into so-called *track one* and *track two* processes. Against this background, the final question it addresses is whether a (professional) code of conduct is necessary or is in the process of being developed for peace mediators, especially when it comes to the growing number of private diplomacy and transnational mediation institutions.

## 2 The Role of Mediators in Peace Negotiations

Are there approaches and analytical frameworks that are designed to analyse, and in effect to "demystify", the role of mediators in peace and lawmaking processes? For a start, it is has to be acknowledged that negotiation and mediation often elude analysis due to their confidential character. Attempts to pursue for instance comprehensive discourse analysis are doomed to stagnate or fail due to the secrecy of talks and the lack of material to reconstruct them. A reason for this strict secrecy and exclusiveness, as well as avoidance of transparency and public participation, could be—next to dominantly political reasons—that negotiation outcomes, especially in form of peace agreements, could potentially be subject to some sort of judicial review.[8] Furthermore, it has been argued that it is not possible to develop patterns to analyse these processes and the role of actors involved on the basis that the observed differences in formats and functions would derive directly from the particular nature of the conflict situation and have their source in the respective characters of the intermediaries. The difficulties in generalising mediation processes and their participants is also closely related to the perception of mediation as a personal art of the mediator.[9]

However, what does the existing body of social science literature say about mediation processes and the role of mediators in the making of peace and law?

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[8] A. D. Grimshaw, 'Research on the Discourse of International Negotiations: A Path to Understanding International Conflict Processes', (1992) 7 *Sociological Forum, Special Issue: Needed Sociological Research on Issues of War and Peace* 87, at 101 *et seq*.; and A. Wanis-St. John and D. Kew, 'Civil Society and Peace Negotiations: Confronting Exclusion', (2008) 13 *International Negotiation* 11, at 11, 13.

[9] See for instance L. Kirchhoff, 'Linking Mediation and Transitional Justice', Paper presented at the International Conference 'Building a Future on Peace and Justice', Nuremberg, 25-7 June 2007, at 5-6

Traditionally, mediation is understood as a political process in which parties to a violent conflict agree to the appointment of a third party to support them, impartially and without making binding decisions, in creating a negotiation process and reaching an agreement to end their conflict. *Mediation*, together with *negotiation*[10] and *good office*,[11] is considered part of a set of political and diplomatic methods of dispute settlement that are conducted on invitation and without resorting to physical force or invoking the authority of the law.[12] This is also reflected in Article 33, Chapter VI on the Pacific Settlement of Disputes of the UN Charter.[13]

Furthermore, social science literature mostly categorises mediation processes as facilitative or interest-based mediation,[14] formulative mediation,[15] or

[10] Negotiations can be defined as a process of joint decision-making in *good faith* conducted between the direct parties to a conflict. Negotiations do not necessarily need the involvement of a mediator. It has to be added that most negotiations in the course of intra-state conflicts are characterised by the asymmetry of the parties. See F. Vendrell, 'The Role of Third Parties in the Negotiation and Implementation of Intrastate Agreements—An Experience-Based Approach to UN-Involvement in Intrastate Conflicts', in M. Boltjes (ed), *Implementing Negotiated Agreements—The Real Challenge to Intrastate Peace* (T.M.C. Asser Press, 2007), 193, at 199 *et seq*.; and Mediation Support Project (MSP), CSS, and Swisspeace, 'Unpacking the Mystery of Mediation in African Peace Processes', (2008), at 10, available at: <http://www.css.ethz.ch> [last accessed 5 February 2013].

[11] See *infra* Part II, B.

[12] Miller holds, "[t]he difference between mediation and negotiation is generally understood whether there are two parties or three. It is not always clear just how 'third' a third party is, even though many wish to paint an ideal portrait of the mediator as impartial, or as equally obliged to both sides, or as serving community interests judged to be moral, as well as in partial terms, less twisted by self-interest and passion than if the matters were left to unaided principle parties. Then too, the mediator's force is claimed to be mostly a moral force, aided by his rhetorical skills, or by his personal ability to cajole, flatter or threaten; for by definition he is without formal authority to impose a settlement. He is not a judge or an arbitrator…" See W. I. Miller, 'The Messenger', in G. Althoff (ed), *Frieden Stiften, Vermittlung und Konfliktlösung vom Mittelalter bis heute* (Wissenschaftliche Buchgesellschaft, 2010), 19, at 19. See also K. Beardsley, 'Agreement without Peace? International Mediation and Time Inconsistency', (2008) 52 *American Journal of Political Science* 723, at 724; Mediation Support Project (MSP), CSS, and Swisspeace, *supra* note 10, at 17; and F. Orrego Vicuña, 'Mediation' (2010) in *MPEPIL* (online edition), paras 1 *et seq*.

[13] 1945 Charter of the United Nations, 892 UNTS 119.

[14] The facilitative mediator declines to make substantive contributions to the solution, but ensures a constructive dialogue between the disputants. Kleffner calls this "chairmanship". J. K. Kleffner, 'Peace Treaties' (2011) in *MPEPIL* (online edition), para 12.

[15] Formulative mediation entails drafting agreements that are then presented and adapted by the parties. Thus, the mediator is required to enter the substance of the conflict and to make substantive contributions to the resolution process, including the development and proposal

manipulative or directive mediation.[16] The manipulative mediator has all the powers of the formulative mediator and, in addition, uses the position and leverage to manipulate the parties into an agreement. In effect, the manipulative mediator becomes a party to the negotiation process, making use of the capacity to add or subtract benefits to or from a certain solution.[17] While facilitative and formulative mediation are still in line with the traditional characteristics of mediation, manipulative mediation influences the agreements decisively through setting incentives and disincentives. This includes setting the negotiation agenda, invoking the authority of law, even imposing solutions, and using the threat of sanctions and of the use of force in case of non-cooperation and non-compliance by the parties.[18] The category of manipulative mediation, as will be shown in the example of Richard Holbrooke, is highly relevant to describing and analysing the potential role of contemporary mediators.

However, while mediation processes are mostly analysed according to their form and function, the role of the individual mediator is to some extent still an object of mystification and attributed with a set of characteristics, which are not directly connected with or covered by the above introduced categorisations. The mediator is seen as a charismatic figure or artist who performs his art—conducting a mediation and peacemaking process—thereby using his personal charisma as well as the skills and tools at hand. To grasp this enigmatic role of the mediator, the involvement of US Special Envoy Richard Holbrooke in the complex setting of the dissolution of the SFRY will be taken as a leading example; it will then be compared to the role of the UN SG's *good offices* and of his Special Envoys in mediation processes, particularly the role of Martti Ahtisaari in the Kosovo status negotiations.

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of new resolution options. At the same time the mediator is not in a position to push the conflict actors to endorse any particular outcome, or even to advocate a favoured outcome. Kleffner calls this "pro-active mediation". Kleffner, *supra* note 14, para. 12.

16 Directive mediation is strongly controlling the process and the framework in which it takes place. See S. S. Gartner and J. Bercovitch, 'Overcoming Obstacles to Peace: The Contribution of Mediation to Short-Lived Conflict Settlements', (2006) 50 *International Studies Quarterly* 819, at 823.

17 Kirchhoff, *supra* note 9, at 6.

18 Mediation Support Project (MSP), CSS, and Swisspeace, *supra* note 10, 10; and A. Herrberg, 'Perceptions of International Peace Mediation in the EU—A Needs Analysis', Initiative for Peacebuilding (2008), at 9.

## 2.1 The Architect of Dayton: Richard Holbrooke

"We are inventing peace as we go", Richard Holbrooke said during his shuttle diplomacy between Belgrade, Sarajevo and Zagreb in 1995.[19] It can also be argued that Holbrooke and his team conducted a process that led to the invention or making of law as they went: The General Framework Agreement for Bosnia and Herzegovina and its Annexes, commonly known as the Dayton Agreement.[20]

Richard Holbrooke, the "Architect of Dayton",[21] had been involved in various peace negotiations throughout his long diplomatic career; his most famous appointment was to broker the peace agreement for Bosnia and Herzegovina as a Special Envoy of US President Bill Clinton.[22] In his obituary President Barack Obama described Holbrooke, who died in 2010 at the age of 69, as "a true giant of American foreign policy,"[23] and concluded: "[T]he world is more secure because of the half century of patriotic service of Ambassador

[19] Quoted in R. Cohen, 'After the Vultures: Holbrooke's Bosnia Peace Came Too Late, To End a War: From Sarajevo to Dayton—and Beyond by Richard Holbrooke (Review)', (1998) 77 *Foreign Affairs* 106, at 108. Holbrooke describing his shuttle diplomacy: R. Holbrooke, *To End a War* (The Modern Library, 1999), at 77 *et seq*.

[20] 1995 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, with an introduction by P. C. Szasz, (1996) 35 ILM 75 *et seq*.

[21] Cohen, *supra* note 19, at 109; D. L. Phillips, 'Comprehensive Peace in the Balkans: The Kosovo Question', (1996) 18 *HRQ* 821, at 828; 'Zum Tod von Richard Holbrooke—Voller Tatendrang und Ehrgeiz', *Frankfurter Allgemeine Zeitung,* 14 December 2010, <http://www.faz.net/aktuell/politik/ausland/zum-tod-von-richard-holbrooke-voller-tatendrang-und-ehrgeiz-11079239.html> [last accessed 4 August 2012]; and 'Richard Holbrooke, US Diplomat And Architect Of Dayton Peace Accords, Dies At 69', *Radio Free Europe / Radio Liberty*, 14 December 2010, <http://www.rferl.org/content/richard_holbrooke_dies_/2247460.html> [last accessed 4 August 2012].

[22] During his long career in public service Holbrooke served *inter alia* as Foreign Service Officer in Vietnam, as Assistant Secretary of State for East Asian and Pacific Affairs during the Carter Administration. He was furthermore involved in the Cambodia negotiations and the failed attempts to settle the Kosovo conflict in 1998/1999. His last engagement as a Special Envoy for Afghanistan and Pakistan during the Obama Administration was highly disputed. See R. Jackson, 'International Engagement in War-Torn Countries', (2004) 10 *Global Governance* 21, at 32 and T. W. Crawford, 'Pivotal Deterrence and the Kosovo War: Why the Holbrooke Agreement Failed', (2001-2002) 116 *Political Science Quarterly* 499, at 511 *et seq*. On the special role of Special Envoys of US Presidents, see H. M. Wriston, 'The Special Envoy', (1960) 38 *Foreign Affairs* 219; and M. Fullilove, 'All the Presidents' Men—The Role of Special Envoys in US Foreign Policy', (2005) 84 *Foreign Affairs* 13, at 15.

[23] Quoted in E. Pilkington and A. Gabdatt, 'Richard Holbrooke, "giant of US foreign policy", dies aged 69', *The Guardian*, 14 December 2010, <http://www.guardian.co.uk/world/2010/dec/14/richard-holbrooke-giant-of-diplomacy> [last accessed 13 August 2012]; M. Kelly, 'The Negotiator, Richard Holbrooke knows how

Richard Holbrooke."[24] *Foreign Policy*, the journal Holbrooke once co-edited, proclaimed: "Holbrooke the Dove", while his widow, the writer Kati Marton, told a gathering of mourners that the best way to honour her late husband was "to press on with peace."[25]

During and after the negotiation of the Dayton Agreement, Holbrooke's personality and controversial negotiation style—a sizeable ego and a tenacity and willingness to push hard for diplomatic results—won him both admiration and animosity and contributed to a certain mystification of his mediation skills.[26] His negotiation style earned him nicknames like the "Bulldozer" or the "Raging Bull", and the label of being "Washington's favourite last-ditch diplomat".[27] Holbrooke himself decisively contributed to this complex image with numerous interviews and speeches but most prominently with "To End a War", his memoir of the Bosnian peace process.[28] With this book he fed the arguments of both his critics as well as his admirers and nourished the prejudice that diplomacy and peacemaking in the Balkans was a special art form.[29] Based on his diaries, cables, interviews with companions and media reports, Holbrooke retraced the process from the five-nation Contact Group's efforts to reach a settlement from 1994, via a number of pre-negotiation agreements and a decisive ceasefire,[30] to the Dayton negotiations, and finally to the first

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to bully and beguile—an excellent job qualification for brokering peace in the Balkans', *The New Yorker*, 6 November 1995, 81, at 84; and R. D. McFadden, 'Strong American Voice in Diplomacy and Crisis', *The New York Times*, 14 December 2010, <http://www.nytimes.com/2010/12/14/world/14holbrooke.html> [last accessed 13 August 2012].

[24] President Barak Obama's tribute from 14 December 2010 is available at <http://content.usatoday.com/communities/theoval/post/2010/12/obama-holbrooke-a-true-giant-of-foreign-policy/1#.T4nb41oufgG> [last accessed 13 August 2012]. See also the memorial page of the US State Department: <http://www.state.gov/s/special_rep_afghanistan_pakistan/c40884.htm> [last accessed 13 August 2012] and of The American Academy in Berlin, which was founded by Richard Holbrooke: <http://www.americanacademy.de/home/about-us/holbrooke-memorial> [last accessed 13 August 2012].

[25] R. Ratnesar, 'Holbrooke's Legacy: The Power of Limited War', *Time Magazine*, 3 January 2011, <http://www.time.com/time/world/article/0,8599,2040486,00.html> [last accessed 13 August 2012].

[26] See Kelly, *supra* note 24, at 82, 84.

[27] Pilkington and Gabdatt, *supra* note 23.

[28] Kelly, *supra* note 23, 82; and R. Holbrooke, 'Why are we in Bosnia?—Annals of Diplomacy', *The New Yorker*, 18 May 1998, <http://www.newyorker.com/archive/1998/05/18/1998_05_18_039_TNY_LIBRY_000015558> [last accessed 13 August 2012].

[29] Holbrooke states in his book: "An aspect of the Balkan character was revealed anew: once enraged, these leaders needed outside supervision to stop themselves from self-destruction." Holbrooke, *supra* note 19, at 165; and Cohen, *supra* note 19, at 107.

[30] "The terms of the deal were dictated and drafted largely by the Americans. 'We wrote the

shaky steps of implementing the Agreement in 1996/1997. His accounts leave absolutely no doubt that he had created and wanted the job of *negotiator* and that he saw himself in that role, which should not necessarily be seen as synonymous with that of an impartial *mediator*.[31]

In the eyes of some reviewers, "To End a War" tells the story of a passionate US public servant driven by American values struggling for peace in Bosnia;[32] in the eyes of others it is an irritating egocentric account of the search for peace in the Balkans that, nevertheless, no student of the region and conflict mediation could afford to ignore.[33] In any case, Holbrooke's personal memories and the later released report and collection of documents on the Dayton negotiations of the State Department give an invaluable account of the negotiation process.[34] They illustrate the US's approach to use the threat of the use of force and the actual use of force by NATO to move the negotiation process along, most evident in Holbrooke's instigation: "Give us bombs for peace".[35] It was also the use of force that attracted the most criticism.[36] In

document', Holbrooke said flatly. But Holbrooke was careful to package the agreement in a tissue of niceties which would preserve the myth that the document had been a Serbian proposal with the Americans acting merely as its conveyor, and which would give Holbrooke, and his colleagues a very short arm's-length distance from the distasteful reality of having negotiated with criminals." Kelly, *supra* note 23, at 86. Holbrooke himself considered negotiations as improvisations within the framework of the general goal. His plan was to create a series of agreements, in a high frequency of meetings to narrow the space to manoeuvre for the parties, to create a momentum for peace, and to bring the three Presidents together. This meant step-by-step negotiations, then writing the results down and making them public, thereby locking the parties and then returning to the negotiation table to address other still-open issues. Holbrooke pointed out that the disagreements on substance were less often the crucial point than those on procedures and protocol. At the same time he was aware that all the parties, including himself, were sitting at two tables: the peace negotiation table and a second one at home. See Holbrooke, *supra* note 19, at 111, 117, 131, 175.

[31] "I would be interested in becoming the American negotiator for that problem, a position that did not exist in the Bush Administration." Holbrooke, *supra* note 19, at 43.

[32] Cohen, *supra* note 19, at 107.

[33] J. M. Sharp, 'To End a War by Richard Holbrooke', (1998) 74 *International Affairs* 919, at 920-1; and Cohen, *supra* note 19, at 107.

[34] 'The Road to Dayton, US Diplomacy and the Bosnia Peace Process, May—December 1995', US Department of State, Dayton History Project, May 1997 (declassified, available since 2003), The National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB171/index.htm#study> [last accessed 13 August 2012].

[35] Holbrooke, *supra* note 2, at 32.

[36] For example: "American negotiators had been obliged to waltz around the morally troubling issues of negotiating with war criminals and of linking diplomatic aims to the bombing of people with whom the United States was not at war." Kelly, *supra* note 23, at 86.

his memoir, Holbrooke highlighted his conviction in the importance of the successful Croatian offensive as well as the NATO airstrikes, and the connection between them and the success of his negotiations.[37] It is not surprising that an observer like Michael Kelly found: "To a considerable degree, what has been accomplished reflects the will and the nature of one man".[38] Kelly admits that the surrounding conditions played into Holbrooke's and his team's hands;[39] nevertheless, for him "the single force most responsible for driving the negotiations onward has been the ego of Richard Holbrooke".[40] He continues: "For Holbrooke…. the Balkan mission is the Kissingerian role of a lifetime that has been spent in the pursuit of power and attention. He has played this role—the superdiplomat—in the central crisis of the age—in a manner that anyone who has ever known him would instantly recognize as classical Holbrookean."[41]

But what makes the process that led to the Dayton Agreement and the Agreement itself a "classical Holbrookean"? For Kelly, it is Holbrooke yelling and cursing at Presidents and Foreign Ministers, negotiating agreements at all costs and being the last man standing at two o'clock in the morning.[42] Also, members of Holbrooke's mediation team[43] contributed to the fixation on, and mystification of, the supermediator: James Pardew, then Director of the Balkan Task Force at the Department of Defence, stated in front of the media that it was Holbrooke's "conniving, playacting, seizing opportunity by instinct" that contributed decisively to the success of the negotiations.[44] Brigadier General Donald L. Kerrick, then Director of the National Military Intelligence Collection Center, described with a certain admiration how Holbrooke even manipulated his team and placed them on the stage of what he considered the

[37] See Holbrooke, *supra* note 19, at 86, 119, 199 *et seq*.

[38] Kelly, *supra* note 23, at 81.

[39] Namely, *inter alia* NATO's willingness to support US diplomacy by using force against the Serbs, the election of a new French government and the success of Croatian troops on the battlefield.

[40] Kelly, *supra* note 23, at 81.

[41] *Ibid*.

[42] *Ibid*.

[43] Holbrooke's team consisted of General Wesley Clark; General Don Kerrick; the international lawyer Robert Owen; Chris Hill, Director of the Office of South-Central European Affairs, US Department of State (1994-1996); James Pardew, Director of the Balkan Task Force, Department of Defence (1995-1997); and Rosemarie Pauli, Department of State and Executive Assistant to Richard Holbrooke (1993-1996). Holbrooke also described the necessary character of negotiators and team members. See Holbrooke, *supra* note 19, at 10, 30 *et seq*., 44, 83, 377 *et seq*.

[44] Quoted in Kelly, *supra* note 23, at 88.

theatre of negotiations.[45] Later, the renowned historian Fritz Stern even went so far as to say: "If Only Holbrooke Had Been in the Balkans in 1914", outlining how Holbrooke would have potentially prevented the outbreak of the First World War in summer 1914.[46]

When it came to the members of his negotiation team, Holbrooke pointed to the critical importance of having a skilled legal expert on board,[47] describing the appointment of Robert Owen as follows:

> Christopher (Warren Christopher Secretary of State 1993-1997) noted that we lacked the legal expertise that would be essential if the negotiations got serious. He suggested adding to the team Robert Owen, a distinguished Washington lawyer. Bob Owen… had served, as the Legal Advisor to the State Department during the Carter Administration, was calm, witty, and always cheerfully ready for the most demanding tasks … Christopher's inspired idea gave our team something it was to need continually: an experienced and wise international lawyer.[48]

When Richard Holbrooke and his team started their work in August 1995, Holbrooke adopted previously drawn-up plans for a territorial division of Bosnia between a Bosnian-Croat Federation and an autonomous Serb entity. Instead of directly negotiating with the Bosnian Serb leadership, Holbrooke treated Slobodan Milosevic, then President of Serbia, as their proxy.[49] Hence, Milosevic was placed at the negotiation table and became, at the initiative of

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[45] *Ibid*.

[46] F. Stern, 'If Only Holbrooke Had Been in the Balkans in 1914', Spring 2011 No. 20, *The Berlin Journal, A Magazine of the American Academy in Berlin*, at 14.

[47] Holbrooke, *supra* note 19, at 80.

[48] Holbrooke later also described the mutual admiration between the lawyers Owen and Milosevic. See Holbrooke, *supra* note 19, at 134. Robert Owen was *inter alia* involved in drafting the Constitution of Bosnia and Herzegovina. *Ibid*., at 80, 240 *et seq*.

[49] Many earlier negotiation efforts of both the USA and European States had dealt with the Bosnian Serbs as a separate entity. See Holbrooke, *supra* note 19, at 5. The agreement that made Milosevic a negotiator for the Bosnian Serbs was the so-called Patriarch Agreement. Holbrooke commenting on the agreement and the new perspective for negotiations created by it said: "[T]he Patriarch Agreement and the bombing had greatly strengthened our hand… I asked Owen to start drafting the outlines of an interim, or partial, agreement. We did not consult or inform Washington." *Ibid*., at 111. In relation to the role of the entities Republika Srpska and the Federation of Bosnia and Herzegovina, see P. Gaeta, 'Symposium: The Dayton Agreements: A Breakthrough for Peace and Justice?, The Dayton Agreements and International Law', (1996) 7 *EJIL* 147, at 148 *et seq*.

Holbrooke, a direct and key negotiator for peace in Bosnia and Herzegovina.[50] Thus, officially, the Republic of Croatia,[51] the Federal Republic of Yugoslavia (FRY)/Republic of Serbia[52] and the Republic of Bosnia-Herzegovina (BiH)[53] negotiated the Dayton Peace Agreement. Observers, however, underline that, although in theory the US negotiation team did not recognise Mladic and Karadzic as legitimate representatives of the Bosnian Serbs, it had to interact with them on several occasions before the final negotiations at Dayton began.[54] The Dayton proximity talks, from 1 to 21 November 1995,[55] were conducted nominally under the auspices of the Contact Group, but actually under strict US management, namely that of Richard Holbrooke, his close negotiation team and a broader circle of members of the public service and the government.[56] Behind the scenes "State Department teams worked in harried haste to build both a conference and a nation. The magnitude of the job was indicated by the teams' encompassing titles: Framework Agreement, Separation of Forces, Constitution, Elections, Implementation Force, Economic Reconstruction, Refugees and Human Assistance, Congressional Consultations, Police, Press, United Nations Actions."[57] The teams continued their work in Dayton, and the working groups' focus issues were mirrored in what later became the Annexes

[50] While Milosevic sometimes demonstrated his direct and effective control over the Bosnian Serb leaders, he pointed on other occasions to the fact that every decision reached had to be approved and implemented by the Bosnian Serb leadership. See Anonymous, 'Human Rights in Peace Negotiations', (1996) 18 *HRQ* 249, at 253. John Kornblum makes this into a story of the struggle between two men: Holbrooke and Milosevic. See J. C. Kornblum, 'The Gift of Conviction, A former US ambassador to Germany on the enormous achievements of his successor', Spring 2011 No. 20, *The Berlin Journal, A Magazine of the American Academy in Berlin*, at 5.

[51] In the case of Bosnian Croats, the close party links with the Republic of Croatia ensured that Croatian acceptance would translate into Bosnian Croat acceptance. The leader of the negotiation team was Croatian President Franjo Tuman.

[52] The Bosnian Serb leadership had successfully undermined previous peace agreements, most notably the Vance-Owen Plan. The Bosnian Serb leadership had only conceded that Milosevic could negotiate on their behalf after considerable pressure was exerted. See F. Bieber, 'Power-sharing and International Intervention: Overcoming the Post-conflict Legacy in Bosnia and Herzegovina', in M. Weller and B. Metzger (eds), *Settling Self-determination Disputes: Complex Power-sharing in Theory and Practice* (Brill, 2008), 194, at 220; and Gaeta, *supra* note 49, at 148 *et seq*.

[53] The leader of the Bosnian negotiation team was President Alija Izetbegovic.

[54] Kelly, *supra* note 23, at 90.

[55] "Proximity talks" as a technique: Holbrooke, *supra* note 19, at 205.

[56] Holbrooke also made clear that he and his team were not acting on a UN-mandate. Holbrooke, *supra* note 19, at 153.

[57] Kelly, *supra* note 23, at 90.

of the Framework Agreement.[58] Thus, these teams essentially drafted the Agreement and its Annexes. Their influence can also been seen when Bosnian Foreign Minister Muhamed Sacirbey admitted to Holbrooke that the Bosnian team had no qualified international lawyers at hand to serve as legal experts during the negotiations. Although Robert Owen had provided them with a list of potential legal advisors beforehand, the Bosnians arrived in Dayton with only one "overworked and under-consulted international lawyer, Paul Williams".[59] This became a problem during the negotiations, for instance, when it came to Annex 1-A, Agreement on the Military Aspects of the Peace Settlement. On Holbrooke's initiative, the lawyer Robert Perle was invited to support the Bosnian negotiation team. Holbrooke recalled: "Perle took the first available plane to Dayton and … started analyzing the military annex, whose bureaucratic language the Bosnians had been unable to decode… he closeted himself with the Bosnians, showing them the real, often hidden meaning of the jargon in Annex 1-A".[60] Perle's efforts resulted in a long list of changes and suggestions from the Bosnian side to the anger of some drafters of the US mediation team. Holbrooke commented on this situation in his memoir:

> Most senior officials in Washington were still unhappy that Perle was in Dayton. Donilon warned me that the Washington consensus was to tell the Bosnians they had to accept Annex 1-A as originally written and reject all of their proposed changes. 'Tell Perle to shove his goddamn changes up his ass', one angry Pentagon official said when I warned him what to expect … I replied 'We can't reject them all, and some of them make sense.' (…) Clark, Kerrick, Pardew, and I began a careful review of each suggestion, trying to

[58] Holbrooke, *supra* note 19, at 240. For example: Annex 3—Elections, Annex 4—Constitution, Annex 10—Civilian Implementation of Peace Settlement, Annex 11—International Police Task Force, see 1995 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, *supra* note 20.

[59] Holbrooke, *supra* note 19, at 224. Paul R. Williams is an international lawyer and the co-founder as well as President of the Public International Law & Policy Group (PILPG). Since 1995 this institution has provided *pro bono* legal assistance to states and governments involved in peace negotiations, drafting post-conflict constitutions, and prosecuting war criminal. For more information see <http://publicinternationallawandpolicygroup.org/about/board/paul-r-williams/> [last accessed 8 August 2012]. For a reflection on *pro bono* work by international law firms, see M. Steinitz, 'Internationalized Pro Bono and a New Global Role for Lawyers in the 21st Century: Lessons from Nation-Building in Southern Sudan', (2009) 12 *Yale Human Rights & Development Law Journal* 205.

[60] Holbrooke, *supra* note 19, at 253.

> decide how to deal with both the substance and the politics of his proposals.[61]

The final Dayton Agreement, which consists of a Framework Agreement and 12 Annexes, provided for the mutual recognition of the FRY and the Republic BiH (Article X). Furthermore, all the international forces and organs foreseen by the Agreements were not created by the parties or by any other instruments agreed upon in Dayton, but rather by later decisions of various international organisations, in particular the UN and NATO.[62] Remarkable is also Annex 4, the Constitution. The Constitution is not the result of a classical process of constitution making and it is also no coincidence that its original language is English, as the main actors who led the drafting process were Richard Holbrooke, Carl Bildt and Robert Owen.[63] Annex 4 was approved in separate declarations by the BiH Republic, the Federation and the Republika Srpska, and entered into force upon signature of the General Framework Agreement, thereby amending and superseding the BiH Republic's existing Constitution.[64] The Constitution not only commits BiH to a comprehensive list of international human rights agreements; it is, beyond this, open to the direct application of international law, and it is even considered as being 'supervised' by international law.[65] Moreover, in 2000 the Constitutional Court of BiH, found:

> Contrary to the constitutions of many other countries, the Constitution of BiH in Annex 4 to the Dayton Agreement is an integral part of an international agreement. Therefore, Article 31 of the Vienna Convention of the Law on Treaties—providing for a general principle of international law which is, according to Article III.3 (b) of the Constitution of BiH, an 'integral part of the legal system of

[61] Holbrooke, *supra* note 19, at 258. See also Gaeta, *supra* note 49 and E. M. Cousens, 'Making Peace in Bosnia Work', (1997) 30 *Cornell Int. Law J.* 789, at 789 *et seq*., 797 *et seq*.

[62] For example, the Implementation Forces (IFOR), the International Police Task Force (IPTF) and the High Representative. The Agreements only technically constitute the consent of the parties to have such forces and organs carry out specified functions, see 1995 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, *supra* note 20, 78; Gaeta, *supra* note 49; and Cousens, *supra* note 61,

[63] See Holbrooke, *supra* note 19, at 240; and Gaeta, *supra* note 49, at 160 *et seq*.

[64] Art. XII, Annex 4, Dayton Agreement, see 1995 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, *supra* note 20.

[65] See *inter alia* Art. II, Annex 4 and Annex I to Annex 4 of the Dayton Agreement, 1995 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, *supra* note 20, 79; Bieber, *supra* note 52, 230; Gaeta, *supra* note 49, at 161; and C. Bell, *Peace Agreements and Human Rights* (Oxford University Press, 2000), 68 *et seq*.

> Bosnia and Herzegovina and its Entities'—must be applied in the interpretation of all its provisions, including the Constitution of BiH.[66]

An initiative to amend the Constitution in accordance with Article X, Annex 4 of the Dayton Agreement did not pass the Parliament in 2006.[67]

In a nutshell, the Dayton Agreement was an attempt to broaden traditional conceptions of peace agreements and ceasefires and to provide a blueprint using internationalised standards for the post-war reconstruction.[68] The peace agreement has been paradigmatic for an internationalised mediation and peace process in terms of the powers it vests in international institutions and personnel.[69] The role of the lawyers involved in this process seems to be one of gatekeepers and of technicians who create the code to transcribe and seal the deal.

In the end, the Dayton Agreement has been widely credited with ending a war, while both the negotiation process led by Richard Holbrooke and the resulting agreement have been severely criticised for failing to reduce substantially interethnic tensions as well as to guarantee an effective and responsible ownership by the people of BiH.[70] In sum, Richard Holbrooke acted in the enigmatic and interpretative *office* of a Special Envoy of the US President, a position usually given to a person to negotiate with full authority of the President when it would be too sensitive for the US President or Secretary of State to act in person.[71] In 1998, Bill Clinton sent Holbrooke, who was then

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[66] Partial Decision III, Issue of the "Constituent Peoples", Constitutional Court of Bosnia and Herzegovina, Case U 5/98, 30 June and 1 July 2000, Official Gazette of Bosnia and Herzegovina No. 23/00, para. 19.

[67] Concerning the amendments, see European Commission for Democracy through Law (Venice Commission), Preliminary Opinion on the draft amendments to the Constitution of Bosnia and Herzegovina, Opinion 375/2006, CDL(2006)027, 7 April 2006; and D. Hays and J. Crosby, 'From Dayton to Brussels: Constitutional Preparations for Bosnia's EU Accession', United States Institute of Peace, Special Report 175, October 2006.

[68] Bieber, *supra* note 52, at 219.

[69] Bieber, *supra* note 52, at 214.

[70] Kelly was convinced that Holbrooke "also led the United States into a tangle of accords and commitments whose ramifications, both practical and moral, no one—including the man who made them—fully understands." See Kelly, *supra* note 23, at 82. Holbrooke himself said: "ON PAPER, DAYTON WAS A GOOD AGREEMENT... But countless peace agreements survived only in history books as case studies in failed expectations. The results of the international effort to implement Dayton would determine its true place in history. And the start was rocky." Holbrooke, *supra* note 19, at 335. Holbrook also enumerated the flaws of the agreement. See *ibid*., at 363.

[71] Wriston, *supra* note 22; and Fullilove, *supra* note 22.

US Ambassador to the UN, on another troubleshooting mission: the Kosovo crisis.[72] His attempts to negotiate an arrangement with Milosevic failed at this point in time, and observers attested Holbrooke a very flat learning curve in dealing with the charismatic Serbian President.[73]

Seven years later another diplomat was sent out, this time as a Special Envoy of the SG, to negotiate the future status of Kosovo: Martti Ahtisaari. Arnault once held that the conflict between the creation of a negotiated settlement and current international legal standards is never as acute as when the UN serves as a mediator. This leads to the question which kind of institutionalised framework the UN and the SG offer for mediation and negotiation processes.[74]

## 2.2 The Secretary-General's Good Offices and Mediation

Since the end of the Cold War, the SG and the UN have grappled with concepts to address so-called new and asymmetric conflicts. This has led to intensified discussions about already existing approaches, forms and standards of UN involvement, especially in intra-state conflicts and peace processes. Mediation is one of the means at the disposal of the SG to initiate and accompany peace

[72] R. McFadden, 'Strong American Voice in Diplomacy and Crisis', *The New York Times*, 13 December 2010, <http://www.nytimes.com/2010/12/14/world/14holbrooke.html?pagewanted=all> [last accessed 13 August 2012].

[73] In 1998, on a flight to Belgrade, Holbrooke told Michael Ignatieff that diplomacy was not like chess, but more like jazz, a constant improvisation on a theme, and referring to the image of him acting as a free agent Holbrooke told Ignatieff: "People say I have no instructions… Actually, I have twelve pages of them here." Quoted in J. Jon Michaud, 'Richard Holbrooke in the New Yorker', *The New Yorker*, 14 December 2010, <http://www.newyorker.com/online/blogs/backissues/2010/12/richard-holbrooke-in-the-new-yorker.html> [last accessed 13 August 2012].

[74] J. Arnault, 'Good Agreement? Bad Agreement? An Implementation Perspective', Center of International Studies Princeton University (undated), at 21, <http://www.stanford.edu/class/psych165/Arnault.doc> [last accessed 13 August 2012]; Arnault's statement was echoed by The UN Peacemaker database: "When the United Nations is called upon to mediate a resolution to a conflict, it means that the parties have accepted the United Nations Peacemaker to help and provide solutions to resolve the conflict. A United Nations mediation mandate grants authority to the Secretary-General or his Envoys to listen to the parties and to propose ideas and solutions. While the final outcome has to be agreed to by the parties, being a United Nations Mediator entails a much greater responsibility and involvement in the outcome of the conflict. A United Nations mediation mandate gives the parties the opportunity to avail themselves of the experience and best practices that the Organisation has gained in the field of conflict resolution." The UN Peacemaker, <http://peacemaker.unlb.org/index1.php> [last accessed 13 August 2012].

processes.[75] In 2005, the UN World Summit agreed to strengthen both the SG's capacity to mediate disputes and the SG's *good office*.[76] *Good office* is commonly understood as the deployment of diplomatic means for the settlement of disputes through a modest form of third party involvement in which the third party encourages or supports the disputing parties to resume negotiations but does not actively take part in them.[77] This conceptual difference is in practice blurred, and it is often difficult to determine whether the third party has only brought the disputing parties together or whether it also actively assisted them in reaching a compromise—which would be the role of the mediator.[78] The SG's role in the mediation of inter- and intra-state conflicts can be inferred from the position of the SG envisioned by the UN Charter as one of the principle organs of the UN.[79] The SG, as a mediator, is equipped with the authority of his *office*.[80] During the last two decades, the SG was not able to exercise this function in person for every conflict. To address various conflict situations and issues at the same time, the SG began appointing more and more Special Envoys and Special Representatives.[81] There is no generally agreed definition of who, equipped with which mandate, is considered as a Special Envoy or Special

[75] See *inter alia* 'Politically Speaking', (Winter 2007-2008) *Bulletin of the United Nations Department of Political Affairs*, 4 *et seq*.; and A more secure world: Our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004. See also C. Bell, *On the Law of Peace —Peace Agreements and the Lex Pacificatoria* (Oxford University Press, 2008), at 66 *et seq*.

[76] United Nations, 2005 World Summit Outcome, UN Doc. GA/RES/60/1, 24 October 2005, para. 76; and T. Whitfield, 'Good offices and "groups of friends"', in S. Chesterman (ed), *Secretary or General?, The UN Secretary-General in World Politics* (Cambridge University Press, 2007), at 86.

[77] For characteristics of *good office* and the role of mediators see also Arts. 3 and 4 of the Convention (I) For the Pacific Settlement of International Disputes (Hague I), 29 July 1899. See furthermore R. Lapidoth, 'Good Office' (2005) in *MPEPIL* (online edition), paras 1 *et seq*.

[78] Interestingly enough the UN Charter mentions *mediation* but does not mention *good office* in its list of means for the pacific settlement of disputes in Art. 33. See also: Lapidoth, *ibid.*, paras 2, 4, 6 *et seq*. (with examples).

[79] I. Johnston, 'The Secretary-General as norm entrepreneur', in S. Chesterman (ed), S*ecretary or General?, The UN-Secretary General in World Politics* (Cambridge University Press, 2007), 123, at 131.

[80] See K. Göcke and H. von Mohr, 'United Nations, Secretary General' (2011) in *MPEPIL* (online edition), paras 25-6. For details of codes of conduct, see Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field, UN Doc. GA/RES/43/51, 5 December 1988.

[81] Since the 1990s, the number of Special Representatives has increased significantly. See H. Keller, 'Special Representative' (2008) in *MPEPIL* (online edition), para. 10; and Göcke and von Mohr, *supra* note 80, paras 47 *et seq*. On Special Envoys, see M. Payandeh, 'Special

Representative—the terms are often used synonymously. However, there is the tendency to call someone a Special Representative if he/she is appointed on behalf of a collective body, for instance the Security Council (SC), and to speak of a Special Envoy when a person is chosen and appointed on the initiative of the SG.[82] The competence of the SG to appoint Special Envoys could be read into Articles 97-101 of the UN Charter.[83] It is even argued that the authority of the SG to choose and appoint Special Envoys has developed into a rule of customary international law. This would have to derive from the practice and *opinio iuris* of the member states of the UN and should not be confused with practice of an *office* shaped by the individual SG.[84] More convincing is the finding that the appointment of Special Envoys seems to be a practice-adapted and well-tried mechanism of conflict mediation and settlement by the SG's *office*.[85]

The most obvious advantage of the SG's involvement as a mediator, or the

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Envoy' (2009) in *MPEPIL* (online edition), paras 1 *et seq*. For an interesting perspective on how SG Hammarskjöld shaped the SG's office, see A. Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011), at 3 *et seq*., 49 *et seq*.

[82] A distinction between different mandates of Special Envoys and Special Representatives can be found in a series of reports given by SG Boutros Boutros-Ghali to the General Assembly (GA) in which he distinguished: (1) Special Representatives in peacekeeping or observer missions based on a mandate by the SC, (2) Special Envoys who are supposed to assist the SG in the exercise of his *good office* and related functions, and (3) other high level positions in the UN system. According to this classification, a Special Representative is appointed by the SG on the request of the SC or the GA, whereas the appointment of a Special Envoy is based the SG's own initiative or on informal consultation between the SG and the GA and/or the SC. See Special Representatives, Envoys and Related Positions, Report of the Secretary-General, UN Doc. A/C.5/48/26, 15 November 1993, para. 12; Special Representatives, Envoys and Related Positions, Report of the Secretary-General, UN Doc. A/C.5/49/50, 8 December 1994, paras 5, 8 *et seq*.; and Special Representatives, Envoys and Related Positions, Report of the Secretary-General, UN Doc. A/C.5/50/72, 20 September 1996, paras 4-5. On the complicated relationship between the SG and the SC, see J. Cockayne and D. M. Malone, 'Relations with the Security Council', in S. Chesterman (ed), *Secretarr of General?, The UN Secretary General in World Politics* (Cambridge University Press, 2007), at 69-85, 70, 74. See also Orford, *supra* note 81, at 10 *et seq*.

[83] See *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at 182; Orford, *supra* note 81, at 10 *et seq*.; and Johnston, *supra* note 79, 131. In a number of cases, the SG takes initiative without any mandate as foreseen in Art. 98 and outside the scope of Art. 99 UN Charter. This is mostly the case in the context of quiet and preventive diplomacy. These initiatives are based on a case to case (*sui generis*) approach and there is no clear legal basis to be found in the UN Charter. See Göcke and von Mohr, *supra* note 80, paras 11 *et seq*., 18 *et seq*., 21 *et seq*; Payandeh, *supra* note 81, para. 8 *et seq*.; and Keller, *supra* note 81, para. 11.

[84] Keller, *supra* note 81, para. 12.

[85] Keller, *supra* note 81, para. 13.

appointment of a Special Envoy like Martti Ahtisaari, is that the individual is purportedly acting under a personal mandate of the world's only global organisation with an assumed unparalleled legitimacy which provides a set of standards and a normative framework for mediation and negotiation processes.[86] In sum, the SG and the SG's Special Envoys face the challenge of acting as mediators on this basis, promoting global norms whilst retaining the freedom and leverage to shape and adapt their *office* to a particular situation, and sometimes contradicting local needs, as can also be demonstrated by the example of Noble Prize Laureate Martti Ahtisaari.[87]

In 2005, the SG appointed former Finnish President Martti Ahtisaari as his Special Envoy to lead a process that was supposed to determine the status of Kosovo.[88] The beginning of the final status talks was conditional on meeting a set of internationally established benchmarks and standards.[89] This mediation is mostly perceived as a form of *mandatory mediation* due to a lack of other means for the parties to settle their dispute over Kosovo's political and legal status. Representatives from the Serbian government (including representatives of Kosovo Serbs), the Kosovo delegation (including opposition representatives) and the Contact Group[90] began regular meetings in Vienna to reach a settlement. The parties met every few weeks to discuss draft agreements that had been prepared by Ahtisaari's mediation team. The task of UN Special

[86] Madeleine Albright, former US Ambassador to the UN and Secretary of State once said that the SG wears three hats: as super-negotiator, diplomat, and manager of the UN System. Concerning the SG's role in filling 'normative vacuums', see Q. Trinh, 'The bully pulpit', in S. Chesterman (ed), *Secretary or General?, The UN Secretary General in World Politics* (Cambridge University Press, 2007), at 102-20, 107 *et seq*., 116. See also: Johnston, *supra* note 79, at 138.

[87] See the Norwegian Nobel Committee, <http://www.nobelprize.org/nobel_prizes/peace/laureates/2008/press.html> [last accessed 13 August 2012].

[88] 'Kosovo: Annan to name veteran trouble-shooter Ahtisaari to lead status talks', *UN News Centre*, 1 November 2005, <http://www.un.org/apps/news/story.asp?NewsID=16433&Cr=kosovo&Cr1> [last accessed 13 August 2012].

[89] See Independent Commission on Kosovo, *The Kosovo Report* (Oxford University Press, 2000); also available as 'The Kosovo Report', Independent Commission on Kosovo, Executive Summery, 1 October 2000, <http://reliefweb.int/node/21913> [last accessed 13 August 2012]. See also R. Goldstone et al., 'International Law, Politics and the Future of Kosovo', (2008) 102 *Proceedings of the Annual Meeting of the American Society of International Law* 129, at 129.

[90] Consisting of France, Germany, Italy, the Russian Federation, the UK, and the USA. During the final status negotiations, the Contact Group set an overall framework for the future status in January 2006: it contained three "no's", i.e. "no" return to the status Kosovo had until 1999, "no" union with any other country, and "no" partition, see 'Understanding conflicts and mediation: Case of Kosovo', University of Bologna, Working Papers, 31 July 2009, <http://foreignpolicy.it/adon.pl?act=doc&doc=4777> [last accessed 13 August 2012].

Figure 2: Debut of the Peacemaker in The Fightin' 5, No. 40, 1966. ©DC Comics.

Envoy Ahtisaari was undeniably very difficult in terms of its political and legal dimensions. Additionally, the task of the Office of the Special Envoy of the Secretary-General of the United Nations for the future status process for Kosovo (UNOSEK)[91] was not only to organise the schedule of negotiations but also to provide Special Envoy Ahtisaari with legal and political advice, *inter alia* to ensure that a proposed agreement would be in line with international law. Despite all efforts, the negotiation process stagnated in summer/autumn 2006.[92] The Serbian side held that Ahtisaari was in fact mediating in favour of

[91] Office of the Special Envoy of the Secretary-General of the United Nations for the future status process for Kosovo, <http://www.unosek.org/> [last accessed 13 August 2012].

[92] The question of whether both parties negotiated in *good faith* was intensively discussed in written and oral statements during the Advisory Proceedings of the ICJ. See *inter alia*: *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional*

the representatives of Kosovo, whose goal was independence, a suspicion that was also strongly reflected in the media.[93] In the end, the question was whether Ahtisaari would be able to lead the status negotiations to an effective agreement between the parties or whether he had to redefine his *office* as a Special Envoy and mediator to find and provide a solution to the conflict. This made the mediator in effect the status maker.

In 2007, Martti Ahtisaari made recommendations regarding Kosovo to the Security Council in which he came up with a model solution: a supervised independence for Kosovo.[94] The so-called Ahtisaari Plan was endorsed by the SG but not taken up by the SC in a Chapter VII Resolution.[95] The Ahtisaari Plan was later included in Kosovo's Declaration of Independence and can be considered as the foundation of Kosovo's supervised sovereignty; it also informed the constitution-making process and made its way *inter alia* into Article 143 of Kosovo's Constitution.[96]

In contrast to the *mandatory mediation* and solution finding performed during the Kosovo status negotiations, Ahtisaari, for whom "[p]eace is a question of will",[97] underlined in his Nobel speech: "The task of the mediator is to help the parties to open difficult issues and nudge them forward in the peace process. The mediator's role combines those of a ship's pilot, consulting

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*Institutions of Self-Government of Kosovo*, Order of 17 October 2008, ICJ Reports 2008, p. 409; Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, UN Doc. A/63/L.2, 23 September 2008; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, General List No. 141.

[93] 'Serbian press mistrusts Kosovo plan', *BBC News*, 3 February 2007, <http://news.bbc.co.uk/2/hi/europe/6326947.stm> [last accessed 13 August 2012]; N. Wood, 'Serbs Criticize U.N. Mediator, Further Bogging Down Kosovo Talks', *The New York Times*, 2 September 2006, <http://www.nytimes.com/2006/09/02/world/europe/02kosovo.html> [last accessed 13 August 2012]; and A. Ivanji, 'Martti Ahtisaari's Compromise Proposal for the Kosovo', *Eurotopics*, March 2007, <http://www.eurotopics.net/en/home/presseschau/archiv/magazin/politik-verteilerseite/kosovo-2008-03/debatte_kosovo_2007_03/> [last accessed 13 August 2012].

[94] Taking up suggestions which were already made by the Independent Commission on Kosovo. See *supra* note 89; Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168, 26 March 2007; and Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168 Add.1, 26 March 2007.

[95] Goldstone et al., *supra* note 89, at 129. UN Doc. SC Res 1244, 10 June 1999 is still in force.

[96] Kosovo Declaration of Independence, 17 February 2008, Art. 12; Constitution of the Republic of Kosovo, 15 June 2008, Art. 143, Chapter XIII.

[97] M. Ahtisaari, 'Nobel Lecture', Oslo 10 December 2008, <http://www.nobelprize.org/nobel_prizes/peace/laureates/2008/ahtisaari-lecture_en.html> [last accessed 13 August 2012].

medical doctor, midwife and teacher".[98] Ahtisaari admitted that there tends to be a strong focus on the person of the mediator and criticised this by stating: "With that we are disempowering the parties to the conflict and creating the wrong impression that peace comes from the outside. The only people that can make peace are the parties to the conflict, and just as they are responsible for the conflict and its consequences, so should they be given responsibility and recognition for the peace".[99] In the end, Ahtisaari found that "[e]ven though all eyes are often on the peace mediators, it is important to emphasise the role of the mediation teams and the other important actors outside the direct negotiation process itself."[100] Ahtisaari, founder of the Crisis Management Initiative (CMI), an independent non-profit private diplomacy and mediation organisation, also critically reflected that mediation processes often exclusively focus on negotiations between elites, so called *track one* negotiations.[101] In his conclusion, the Nobel Prize laureate pointed to the necessity of cooperation of all parties to a conflict and all actors who are involved in the peace process and to the need for expertise in conflict mediation and negotiation.[102] Moreover, Ahtisaari also pointed to the role of the UN as an institutionalised third party in peace processes while admitting, based on his own experiences, the constraints of UN peace mediations, especially due to the *de facto* divergences between the demanding assignments of UN mediation and the provision of adequate resources and political support.[103] This critique was recently underlined by former SG Kofi Annan, when he announced his resignation from his office as a Joint Special Envoy of the UN (Department for Political Affairs) and League of Arab States for the Syrian crisis.[104] Rumour has it that Lakhdar Brahimi, another experienced high-profile mediator, will be the next appointee to this extremely complicated position.[105]

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[98] *Ibid*.
[99] *Ibid*.
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid*.
[103] *Ibid*.
[104] Kofi Annan Appointed Joint Special Envoy of United Nations, League of Arab States on Syrian Crisis, Secretary-General, UN Doc. SG/SM/14124, 23 February 2012; and 'Kofi Annan resigns as UN-Arab League Joint Special Envoy for Syrian crisis', *UN News Centre*, 2 August 2012, <http://www.un.org/apps/news/story.asp?NewsID=42609> [last accessed 4 August 2012].
[105] About Lakhdar Brahimi as a mediator, see for instance Martin, *supra* note 5, at 1-28.

## 2.3 Mediators: Architects or Artists of Peace Making?

In his famous speech at the Reichstag in 1878, Otto von Bismarck offered himself as an *honest broker* for the Berlin Congress, as someone who would act less like an arbitrator and more as a facilitator of a deal between the parties. This offer determined the modern picture of the impartial third party, represented by a charismatic individual mediator with (allegedly) no stakes in the conflict and the results of the negotiation process.[106] "War was the belligerents' concern it would end when it ended … If there was peacemaking, it depended on the consent of the belligerents and the peacemaker. Even then, the peacemaker waited patiently for 'l'instant proprice' ", explains Michael Reisman with regard to the contrast between 19th and early 20th century versus contemporary third party involvement in peace processes.[107] The *traditional* role of a mediator was understood to be part of a political process in which parties to a violent conflict agree to the appointment of a third party to support them, impartially and without making binding decisions, to create a negotiation process and to reach an agreement to end the violent conflict. The conflict parties set the constraints and goals in this process.

As shown above, *contemporary mediation* does not necessarily wait anymore for the clear victory or capitulation of one party or a declared stalemate between the belligerents.[108] The negotiation of the formal termination of inter- and intra-state conflicts and the following peace process are no longer left to the parties alone but often become guided, authoritative, international transactions.[109] Third states like the USA and intergovernmental bureaucracies,

[106] The term *honest broker* originates in a speech of Otto von Bismarck at the Reichstag on 19 February 1878, in which he outlined Germany's position concerning the Oriental Question and his respective role during the Berlin Congress. Bismarck specified that it was not upon the German Reich (and him) to play the role of an arbitrator but rather one of an intermediary or mediator, of an *honest broker* in a transaction; see Various authors, 'Ehrlicher Makler', in *Meyers Konversations-Lexikon* (1885-1892), Vol V, at 349. Legend has it that Bismarck had been looking for three days for the right explanation and expression of his role. The Reichstag's protocols took note of "Heiterkeit"—"amusement"—in the auditorium as a response. Quoted in 'Ich fahre Europa vierelang', *DIE ZEIT*, 9 June 1978, <http://www.zeit.de/1978/24/ich-fahre-europa-vierelang> [last accessed 13 August 2012]. For a broad historical perspective on the development of mediation, see G. Althoff (ed), *Frieden Stiften, Vermittlung und Konfliktlösung vom Mittelalter bis heute* (Wissenschaftliche Buchgesellschaft, 2011).

[107] M. W. Reisman, 'Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics', (1998) 6 *Tulane Journal of International and Comparative Law* 5, at 6; Kleffner, *supra* note 14, para. 12.

[108] E. N. Luttwak, 'Give War a Chance', (1999) 78 *Foreign Affairs* 36.

[109] Whether they criticise this practice of external involvement or welcome it, authors will

most prominently the UN, whose declared purpose is to stop war and achieve peace, manifest this development.[110] To pursue their goals they actively address violent inter- and intra-state conflicts and work towards their termination and the establishment of sustainable peace processes.[111] Thus, third party mediation is increasingly brought to the parties of a conflict and does not necessarily wait for their invitation. Hence, mediation becomes pro-active often before some or all of the parties are in fact ready to sit down at the negotiation table.[112] This essentially changes the character of mediation processes, as they obtain an interventionist character and take the form of externally led standard-stetting and norm-promotion processes.[113] This in turn has a decisive effect on the role of mediators and their teams: they become active parties in negotiation processes as representatives of institutions and normative frameworks. The *new mediators* or peacemakers are not only able to set incentives but also to threaten the parties with sanctions or the use of force in the processes. They draft peace agreements and even constitutions and set incentives for the parties to enter them, and they even frame and make decisions in the event the parties are unable to do so. Furthermore, the performance of the mediator is dependent on a mandate that is often not granted by the parties to the conflict but mostly defined by a third party, a state or international organisation.

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mostly agree that this development is rooted in a heightened interest in inter- and intra-state conflicts that often goes hand in hand with public pressure to end them through third party involvement. This is tied to a changing perception of conflict and peace (war and peace) in which what is perceived as an international community is concerned by war and its atrocities, be it an inter- or an intra-state war. It becomes impermissible not to take a position towards an ongoing conflict or to ignore it. See *inter alia*: Luttwak, *ibid*. On peacemaking as an " authoritative multilateral international transaction", see Reisman, *supra* note 107, 6 *et seq*. See also Kleffner, *supra* note 14, para. 7.

[110] International organisations have significantly contributed to the development of the practice of mediation. See amongst others Orrego Vicuña, *supra* note 12, para. 31 *et seq*.; Reisman, *supra* note 107, at 9; and Kleffner, *supra* note 14, para. 5.

[111] Reisman, *supra* note 107, at 9.

[112] Reisman, *supra* note 107, at 6; and Kleffner, *supra* note 14, para. 12.

[113] It seems questionable, however, whether mediation ever had an entirely neutral character and that mediators performed their office without having recourse to power or force to coerce parties to peace. See Althoff, *supra* note 106, at 11-2 (Introduction by the editor).

# 3 A Professional Code of Conduct For Mediation and Peacemaking?

Could mediation and peacemaking follow certain professional guidelines or ethical codes of conduct?

Classical mediation (mostly between private parties) is a defined profession, most visibly in North America, but increasingly in other parts of the world as well. The codes of conduct of these mediators are created domestically and usually include a set of ethical guidelines and specific training requirements.[114] However, no group of peace mediators has emerged to create a global coalition that agrees on either a code of conduct or a common set of guidelines for the diverse actors involved in mediation processes in inter- and intra-state conflicts.[115] Mediators in peace processes usually claim interpretative freedom for their activities and also to be able to act in the often-necessary secrecy.[116] Additionally, the mediator often combines social, legal and political approaches to lead the parties to the settlement of a dispute. In this process mediators will sometimes override rules and standards of these sub-systems.[117]

There is, however, a growing number of handbooks and manuals for the peacemaker, some of them even taking the character of guidebooks on "how to make peace". In October 2006 for instance, the UN Peacemaker database was launched, a project of the United Nations Department for Political Affairs. The database is an Internet-based platform that is designed to support all kinds of peacemaking "professionals" to perform in a professional manner. It is supposed to function as a tool for the exchange of information and knowledge concerning peace processes and offers, for example, a glossary, a collection of peace agreements, case and best-practice studies as well as comments on peace agreements and on the management of peace processes.[118]

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[114] Althoff, *supra* note 106, at 9.

[115] Herrberg, *supra* note 18, at 21.

[116] Miller speaks about "The dark side of mediation". Referring to social theory he concludes: "Mediators, in short, need not to be all that honest, in fact probably cannot be all that honest and be successful; they might in some of their avatars be talebearers and spies. The historical record is so dense with examples of the dark side of mediation that one need not look long to find examples. It is hardly shocking to discover that mediators had their own interest to advance, they could benefit by gaining honor as a peacemaker, as well as by arranging a settlement that weakened the disputants who were often also the mediators' competitors." Miller, *supra* note 12, at 19.

[117] See Althoff, *supra* note 106, at 9-10 (Introduction).

[118] The UN Peacemaker, *supra* note 74 (access with registration only; currently more than 6000 persons registered).

The UN Peacemaker database also defines who is a peacemaker[119] and what is understood as mediation,[120] it gives advice on how to build a negotiation team (including legal experts),[121] and it promotes that peacemaking is bound by international law, which is also reflected in drafting examples and handbooks.[122]

Around the same time, Humanitarian Dialogue (HD) commenced a report initiative to identify standards and operational principles for peace mediation.[123] The report offers practical guidance for the development of professional good conduct in mediation and peace processes. It does not seek to give precise guidance for specific situations but offers a frame of reference to support professional decision-making. It holds that a mediator has to be acceptable to all parties and not imposed upon any of them and that this impartial mediator must act in the best interests of the peace process.[124] Moreover, the mediator must assume ultimate accountability for his or her choices, actions and decisions throughout a peace process and may even decide to withdraw from a peace process when negotiations are obviously pursued in bad faith or are leading to a solution that is unworkable, illegal or profoundly at odds with the mediator's core values.[125] These guidelines seem to be addressed to a particular kind of mediator, i.e. members of NGOs or so-called private diplomacy institutions that are playing an increasingly important role. Hence, this could be considered as a first attempt at self-regulation of these institutions.[126]

[119] *Definition:* "A skilful Peacemaker can help open the path to dialogue, facilitate discussions, suggest solutions and help promote implementation. In choosing the Peacemaker, the following consideration may be required: His or her capacity to bring either a particular form of leverage to a situation or a specific skill to the process... If the Peacemaker is recognised as an individual with high moral or professional standing and as someone who can maintain his or her objectivity and impartiality, then from the onset, he or she will have the gravitas to be respected by the parties." The UN Peacemaker, *Ibid*.

[120] *Ibid*.

[121] *Ibid*.

[122] The UN Peacemaker's Legal Library provides access to the fundamental legal instruments that guide international peacemaking efforts, The UN Peacemaker, *Ibid*.

[123] 'A Guide to Mediation, Enabling Peace Processes in Violent Conflicts', Centre for Humanitarian Dialogue (2007), i, available at <http://www.hdcentre.org/files/singapore_med_guide_LO.pdf> [last accessed 5 February 2013].

[124] *Ibid*., ii, at 18.

[125] *Ibid*.

[126] Smaller countries that have specialised in mediation, such as the Scandinavian countries and Switzerland, have become more risk-averse about engaging with armed groups, and certain types of diplomacy are thus becoming privatised. See also 'Privatising peace, Governments are increasingly handing over the early stages of conflict resolution to independent organisations', *The Economist*, 30 June 2011, <http://www.economist.com/node/18895458> [last accessed 13 August 2012].

Private diplomacy and mediation institutions represent private organisations and people, including former heads of states or governments and leading civil society representatives. Private diplomacy and mediation has become a crowded field, and the biggest players are, amongst others, the Crisis Management Initiative (CMI) founded by Martti Ahtisaari,[127] the Carter Centre's Conflict Resolution Programme, of former President Jimmy Carter,[128] and HD, which was established by Martin Griffiths,[129] a British diplomat and former UN Assistant Secretary-General. Thus, experienced mediators are starting to build their own offices, organisations and networks. These institutions and people complement traditional diplomacy, usually considered to be the domain of states as well as international organisations. They vary in their capacity, professionalism and size. Most of them can be characterised as international, non-profit organisations and a majority functions as associations or as registered foundations and some even as companies. Only a few are state-initiated institutions or religious organisations.[130] Based on this development, the literature offers a distinction between *track two* and *track one* mediation efforts. In short, while *track one* is considered as the mediation process between the conflict parties with the support of states and international organisations, *track two* negotiations and mediation processes include civil society movements and other groups and are mostly led by non-governmental private diplomacy and mediation institutions. Considering the activities of Ahtisaari and Carter, for instance, this distinction seems convenient but rather artificial, as they are active as mediators, or initiate mediation, on both tracks at the same or different time(s).[131] In general, there is the tendency to engage different forms of mediation and types of mediators depending on the point in time of the transition from conflict to peace.[132]

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[127] See <http://www.cmi.fi/> [last accessed 13 August 2012]. See also Bell, *supra* note 75, at 74 *et seq*.

[128] See <http://www.cartercenter.org/peace/conflict_resolution/index.html> [last accessed 13 August 2012].

[129] See <http://www.hdcentre.org/> [last accessed 13 August 2012].

[130] A. Herrberg and H. Kumpulainen (eds), 'The Private Diplomacy Survey 2008, Mapping 14 Private Diplomacy Actors in Europe and America', Crisis Management Initiative, November 2008, at 4 *et seq*, available at <http://www.initiativeforpeacebuilding.eu/pdf/IfP_mediation_mapping_the_private_diplomacy_survey.pdf> [last accessed 5 February 2013.

[131] See Bell, *supra* note 75, at 74 *et seq*.

[132] See E. M. Cousens, 'It ain't over 'til it's over: what role for mediation in post-agreement contexts?' Centre for Humanitarian Dialogue, OSLO forum 2008—The OSLO forum Network of Mediators, available at <http://www.hdcentre.org> [last accessed 5 February 2013].

In conclusion, it is possible to discern the development of a differentiated and professional peace service landscape, which goes hand in hand with the outsourcing of some aspects of mediation by states and international organisations and the growth of a competing private diplomacy and mediation "industry". The impact of this on the future development of the role of individual mediators and institutionalised mediation processes remains to be seen.

# 4 Conclusion and Outlook

By taking US Special Envoy Richard Holbrooke and the negotiation of the Dayton Peace Agreement as a key example, this article has described and analysed the role of a mysterious superhero peacemaker in a mediation and lawmaking process. This served as a basis for comparison with the role of the UN SG in mediation processes, in particular that of his Special Envoy Martti Ahtisaari in the Kosovo status negotiations. It revealed that mediators are more than mere facilitators of a negotiation process.

The role of the mediator in contemporary peace processes often goes beyond facilitating a dialogue—on invitation—between belligerent parties. Mediation is rather more often pro-active, with the mediator actively shaping the procedural and substantive aspects of negotiations by designing, offering or even dictating frameworks and solutions to the parties. Based on their mandate, professional expertise and a developing code of conduct, mediators become active part(ies) in negotiation processes and often take up the role of standard setters and norm promoters. Mediators can decisively influence the parties' decision-making by setting goals and using incentives or the threat of sanctions, or even the threat of the use of force, to push the parties to a solution. In this context, (international) law sets the limits and the framework for mediation and negotiation processes. The individual mediator becomes the bridge between these constraints and the necessity of addressing a particular conflict and mediating particular party-interests. Then law serves as a tool or technique for mediators/peacemakers to code the deal between the parties to the conflict.

Thus, the *office* of the mediator may be constrained by a mandate, external standards and structures, but it is then translated into practice by the individual mediator's skills in balancing and melding these with the *status quo ante* on the ground. In this setting, the individual mediator creates, and can even actively take part in, peace and lawmaking processes and thus, the development of (international) law. Admittedly, it remains difficult to decode and de-mystify

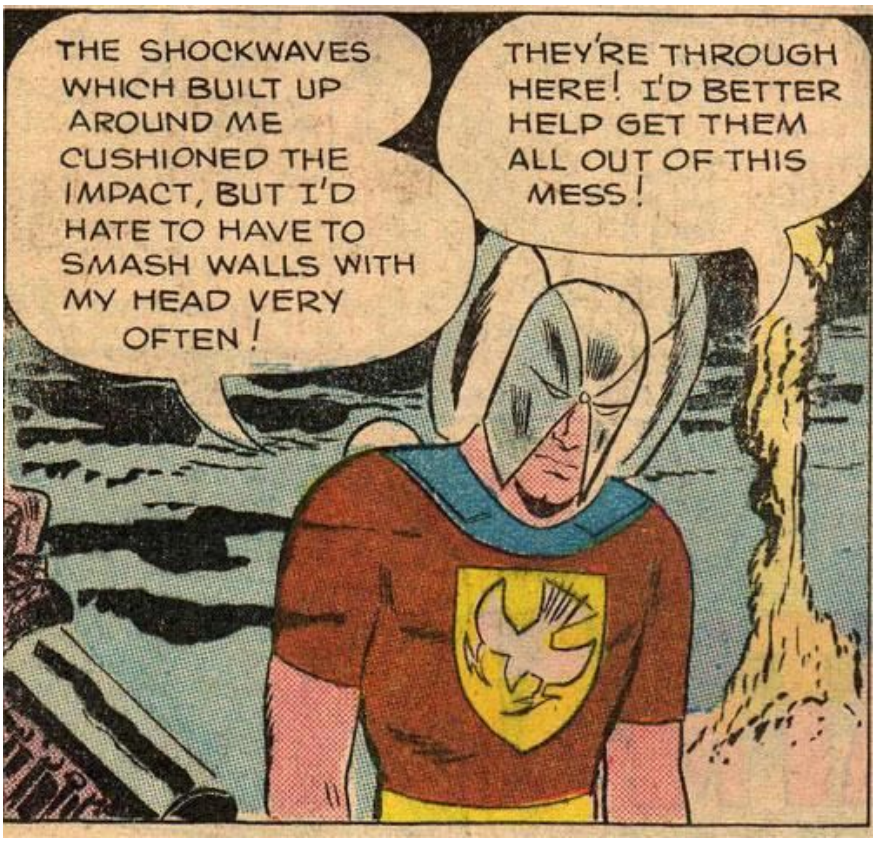


Figure 3: The Peacemaker, No. 4, Sept. 1967. ©DC Comics.

the role of the (charismatic) individual mediator and to grasp clear causal relations between, and legal effects of, mediation and the actual role of the mediator in peace and lawmaking processes. In the end, however, the analysis of the role of mediators is an illustrative example of the undeniable but complicated role of the individual in the making of peace and (international) law.

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# Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice

*Michael Peil*[*]

**Abstract**
Article 38(1)(d) of the Statute of the International Court of Justice instructs the Court to apply, as a subsidiary means for the determination of rules of law, "the teachings of the most highly qualified publicists," namely, scholarly writings. Based upon a survey of more than 600 Judgments, Advisory Opinions and Orders, this paper describes the International Court of Justice's use of these sources and analyzes the individual scholars and writings which have been most useful to the Court. It also explores the meaning of a 'subsidiary source' and the contexts in which judges are most willing to utilize such sources.

**Keywords**
Sources of international law, Doctrine, Scholarly writings, International Court of Justice, Separate and dissenting opinions

## 1 Introduction

When deciding disputes between States, in addition to the three principal sources of international law, the International Court of Justice ('ICJ') is to draw upon "the teachings of the most highly-qualified publicists of the various

[*] Associate Dean for International Programs and Lecturer in Law, Washington University School of Law. The author thanks Gleider Hernandez, Neil M. Richards, Melissa A. Waters, Russell Dalferes, and the participants in the 2012 *Cambridge Journal of International and Comparative Law* annual conference for their helpful comments on earlier drafts. He also thanks Shannon P. Dobson, J.D. '2011, LL.M. '2012, for her excellent translation work on decisions and other materials available only in French. The author accepts exclusive responsibility for the content herein.

nations". However, the Statute is silent on the meaning of "most highly qualified", and the *travaux préparatoires* offer little guidance on this point.

Unlike the other three sources of law, the Court may use the teachings of publicists only "as subsidiary means for the determination of rules of law". The drafters of the Statute disagreed as to the proper role for these teachings, referred to as 'doctrine', and the meaning of "subsidiary" in this context is unclear.

The Court has only rarely invoked doctrine in its Judgments, Advisory Opinions, and Orders. This has not stopped counsel from routinely calling the teachings of publicists to the Court's attention in written and oral arguments, and individual judges freely cite *la doctrine* in their individual opinions. This latter practice led Sir Humphrey Waldock, later a Judge of the ICJ, to observe, "[t]he way in which individual judges quite often make use of them in their separate opinions indicates that they have played a part in the internal deliberations of the Court and in shaping opinion."[1]

In Section 2, the paper analyzes the language of the Statute and its negotiating history for guidance as to the meaning of both concepts. In Section 3, I describe some of the 'conventional wisdom' derived from prior scholarly analysis of the Court's use of highly-qualified publicists. In Section 4, I set out the methodology of my survey of the Court's writings, including a discussion of how I determined when the Court is "apply[ing] … the teachings of the most highly qualified publicists". In Section 5, I summarize the findings of my survey. I conclude by setting out plans for further study.

## 2 The language of the Statute

According to Article 38(1) of its Statute, in rendering its judgments, the International Court of Justice relies upon three principal sources of law:[2]

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

[1] H. Waldock, (1962/II) 106 Hague *Recueil* 1, at 96. More recently, Alain Pellet adds that "the quite abundant references to the opinions of writers in the opinions of the individual judges … suggests that these views have probably been discussed during the deliberation." A. Pellet, 'Article 38', in A. Zimmerman, *et al.*, *The Statute of the International Court of Justice: A Commentary* (Oxford, 2006), at 791-2.

[2] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (Stevens and Sons Ltd., 1957), Vol. 1, at 36.

> (b) international custom, as evidence of a general practice accepted as law; [and]
>
> (c) the general principles of law recognized by civilized nations;[3]

In addition, Article 38(1)(d) provides in very particular language for reliance upon a fourth source of law:

> subject to the provisions of Article 59, judicial decisions and the teachings of the most highly-qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[4]

Given the lack of clarity in these terms, reference to the *travaux préparatoires* of Article 38, as well as subsequent interpretation by experts in the procedure and practice of the Court, is in order.

## 2.1 The *travaux préparatoires* of Article 38(1)

The sources of law enumerated in Article 38(1) are drawn materially *verbatim* from the Statute of the Permanent Court of International Justice ('PCIJ'). It is therefore appropriate to review briefly the discussions of the Advisory Committee of Jurists, the multi-national committee of experts tasked by the League of Nations to draft the PCIJ Statute.

Doctrine was not included in the original draft of the rules of law to be applied by Court. The President of the Committee, Baron Descamps,[5] prepared a draft which enumerated only conventions, custom, the "legal conscience of civilised nations", and international jurisprudence. In his remarks the following day, however, Descamps indicated a desire to add "objective justice" to the sources of law, reasoning that "it is absolutely impossible and supremely odious to say to the judge that, although in a given case a perfectly just solution is possible: 'You must take a course amounting to a refusal of justice' merely because no definite convention or custom appeared."[6] He suggested that, in determining the rules of objective justice, the Court be permitted to use, *inter alia*, "the concurrent teaching of the authors whose opinions have authority".[7]

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[3] 1945 Statute of the International Court of Justice, 33 UNTS 993, Art. 38(1).

[4] *Ibid.*, Art. 38(1)(d).

[5] *Procés-Verbaux* of the Advisory Committee of Jurists (1920), at 306.

[6] *Ibid.*, at 323.

[7] *Ibid.* Descamps invoked Chancellor Kent: "when the greater part of jurisconsults agree upon a certain rule—the presumption in favor of that rule becomes so strong, that only a person who makes a mock of justice would gainsay it." *Ibid.*

It was clear at this time that Baron Descamps intended for doctrine to be a 'tie-breaker', to avoid a *non liquet* in the event that principal rules of law were non-existent or inconclusive. He explained:

> If neither [treaty] law nor custom existed, could the judge pronounce a *non liquet*? The President was convinced that he could not; the judge must then apply general principles of law. But he must be saved from the temptation of applying these principles as he pleased. For that reason he urged that the judge render decisions in keeping with the dictates of the legal conscience of civilised peoples and for this same purpose make use of the doctrines of publicists carrying authority.[8]

Mr. Root and Lord Phillimore responded by submitting an alternative draft, which introduced the four-element structure reflected in present-day Article 38(1), albeit with an explicit hierarchy of sources. The Root-Phillimore proposal ranked doctrine fourth in this hierarchy, and described it as "the opinions of writers as a means for the application and development of law".[9]

Baron Descamps responded to the Root-Phillimore draft by emphasizing that "the judge must use the … coinciding doctrines of jurists, as auxiliary and supplementary means, only".[10] Mr. Ricci–Busatti expressed skepticism that "it would be possible to find coinciding doctrine concerning points in relation to which no generally recognised rules existed".[11] More fundamentally, he "denied most emphatically that the opinions of authors could be considered as a *source of law* to be applied by the Court".[12] Lord Phillimore, the author of the draft, replied that doctrine was "universally recognised as a source of international law", but that "only the opinions of widely recognised authors" would be considered.[13]

Mr. Ricci-Busatti "doubted whether States would really accept rules which would be the result of the doctrine rather than of their own will, or of their usages",[14] and asked *in fine* whether Lord Phillimore's own government would accept a judgment based solely upon the doctrine of legal writers; Lord

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8 *Ibid.*, at 318-9.

9 *Ibid.*, at 344.

10 *Ibid.*, at 332.

11 *Ibid.*, at 332. Mr. de Lapradelle concurred, noting, "the publicists are hardly ever agreed upon a point of law." *Ibid.*, at 336.

12 *Ibid.*

13 *Ibid.*, at 333.

14 *Ibid.*, at 333-4.

Phillimore "thought that this was possible".[15] Mr. Ricci-Busatti had in fact submitted a competing draft, which removed doctrine as a source of law, but instructed the Court to "take into consideration … the opinions of the best qualified writers of the various countries, as means for the application and development of law".[16]

Mr. de Lapradelle opposed including doctrine in the draft, but insisted that if it were included, it be "limited to coinciding doctrines of qualified authors *in the countries concerned in the case*".[17] He also proposed that the sources of doctrine be "arranged according to their importance" with, for example, the *Institut de droit international* at the top of the list.[18] None of his proposals were taken up by the Committee.

In the end, the issue was not resolved—with Baron Descamps and Mr. Ricci-Busatti repeatedly emphasizing "the auxiliary character of [doctrine] as elements of interpretation",[19] and later emphasizing "doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist",[20] and Lord Phillimore insisting that "custom is formed by the usage followed in various public and formal documents, and from the works of writers who agree upon a certain point".[21]

The Committee agreed upon compromise language for the second reading, "the doctrines of the best qualified writers of the various nations as a means for the application and development of law".[22] The drafting committee modified this to "rules of law derived from … the teachings of the most highly qualified publicists of the various nations".[23] In the second reading, Baron Descamps proposed adding "as subsidiary means for the determination of rules of law", and this amendment was adopted along with the Article as a whole without recorded discussion.[24]

In conclusion, the Committee settled on intentionally ambiguous language ("as subsidiary means" and "the teachings of the most highly qualified publicists") without resolving the underlying disagreements between Root and Phillimore, on the one hand, and Descamps and Ricci-Busatti, on the other.

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15 *Ibid.*, at 333.
16 *Ibid.*, at 351.
17 *Ibid.*, at 336 (emphasis added).
18 *Ibid.*
19 *Ibid.*, at 334.
20 *Ibid.*, at 336.
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*, at 567.
24 *Ibid.*, at 584.

## 2.2 Subsequent treatment by scholars

Writing in his private capacity while serving as a judge at the PCIJ, Manley O. Hudson described the ambiguity surrounding "subsidiary means" aptly:

> What is meant by *subsidiary* is not clear. It may be thought to mean that these sources are to be subordinated to others mentioned in the article, *i.e.* to be regarded only when sufficient guidance cannot be found in international conventions, international custom and general principles of law; the French term *auxiliaire* seems, however, to indicate that confirmation of rules found to exist may be sought by referring to jurisprudence and doctrine.[25]

Hudson concluded, however, "[j]udicial decisions and the teachings of publicists are not rules to be applied, but sources to be resorted to for finding applicable rules."[26]

Subsequent scholarly treatment has followed Hudson's reasoning. Scholars themselves have treated Article 38(1)(d) as not only subsidiary, but also qualitatively different than the primary sources of subheads (a), (b) and (c).

In his Hague Academy lectures upon stepping down from the Court, Judge Manfred Lachs summed up the spirit of the scholars when describing the status of even the best-known publicists as sources of law: "[n]evertheless, of none, not even of my heroes, could I say: 'this man made law.' For teachers are not legislators, nor lawmakers in international relations. The 'teachings' of the most highly qualified publicists of various nations are only 'subsidiary means for the determination of rules of law.'"[27]

Shabtai Rosenne reasoned from a voluntarist notion of public international law, observing that "[d]octrine is not positive international law as previously described, nor does it stand on the same basis as international judicial decisions since it is not the product of direct or indirect action of States. For that reason alone, the role of doctrine is truly 'subsidiary.'"[28] He concluded that doctrine was "an entirely different aspect, namely means for the determination of rules of law, that is rules falling into any one of heads (a), (b) and (c)". He described

[25] M. Hudson, *The Permanent Court of International Justice 1920-1942* (MacMillan, 1943), at 612.
[26] *Ibid.*
[27] M. Lachs, (1976/III) 151 Hague *Recueil* 161, at 169.
[28] S. Rosenne, *Practice and Methods of International Law* (Oceana, 1984), at 119.

Article 38(1)(d) sources as merely "the storehouse from which the rules … can be extracted".[29]

This followed the earlier conclusion of Schwarzenberger—who described subhead (d) as simply enumerating "some of the means for the determination of alleged rules of international law"[30]—and Waldock—who observed in 1962 that it was "universally agreed" that jurisprudence and doctrine were merely "evidentiary sources which may assist in satisfying the Court as to the existence of a conventional or customary rule or of a general principle of law".[31]

While the scholars are in universal agreement as to the meaning of "subsidiary", they offer little guidance as to the meaning of "most highly qualified". In addition to the quote from Schwarzenberger in the introduction, Rosenne observes, "[t]here is, of course, no way of establishing who is a 'most highly qualified publicist' of any nation. This is a matter for the skill, knowledge and appreciation of the individual legal advisor."[32]

# 3 Prior scholarly analysis of the Court's use of doctrine

Having established its proper place in the sources hierarchy, scholarly discussion concerning doctrine has focused on two issues: the kinds of writings that constitute "teachings" and the paucity of doctrine cited by the Court in its Judgments, Advisory Opinions and Orders. In my review of the practice of the judges—principally in individual and joint opinions—I seek to examine the conventional wisdom concerning doctrine laid out in this section.

## 3.1 What constitutes a "teaching"?

The question of who is a "publicist" is closely related to that of what constitutes a "teaching". After all, "[w]hile one cannot possibly dissociate the 'teachings' expressed in writings or *viva voce* from 'the teacher', there are those other activities in which the teacher has participated throughout the centuries."[33] The

[29] S. Rosenne, *The Law and Practice of the International Court*, 1920-2005 (Brill, 2006), Vol. III, at 1551.

[30] Schwarzenberger, *supra* note 2, at 26.

[31] Waldock, *supra* note 1, at 88.

[32] Rosenne, *supra* note 28, at 119.

[33] Lachs, *supra* note 27, at 218.

modern scholar wears at least two hats: that of faithful chronicler of the state of the law, and that of passionate advocate for development of the law.[34]

Judge Lachs quoted with approval Justice Gray's remarks in *The Paquete Habana*,[35] to the effect that "[s]uch works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really was."[36]

The distinction is important, as the Court's "function is to decide in accordance with international law",[37] that is, consistent with *lex lata*. The distinction has not always been respected: Lauterpacht noted "the prolific and occasionally indiscriminate citation of authors in the written and oral pleadings of the parties"[38]; while Schwarzenberger castigated the scholars themselves, noting, "[n]othing has brought the doctrine of international law into greater disrepute than proneness of individual representatives to present desiderata *de lege ferenda* in the guise of propositions *de lege lata*."[39]

In light of this concern, Schwarzenberger demanded scholars "try [their] hardest not to blur the border lines between *lex lata* and *lex ferenda*".[40] One purpose of this study is to determine whether publicists have succeeded and whether ICJ decisions reflect a corresponding care for those border lines.

## 3.2 Why has the Court not cited doctrine?

The Court has cited publicists in only 22 of its 139 Judgments and Advisory Opinions.[41] Writing in 1958, Sir Hersch Lauterpacht noted that this practice was at odds with the plain language of the Court's Statute:

> Article 38 is explicit on that subject; it is mandatory in its reference to the "teachings of publicists" as a subsidiary source of the law

[34] This is nothing new. Brownlie notes that "Gidel has had some formative influence on the law of the sea." I. Brownlie, *Principles of Public International Law* (Oxford University Press, 2003), at 23. Clive Parry notes the singular contributions that Borchard's work made to the development of diplomatic protection. C. Parry, *The Sources and Evidences of International Law* (Oceana, 1965), at 107.

[35] *The Paquete Habana*, 1899, 175 U.S. 677.

[36] Lachs, *supra* note 27, at 212 (citation omitted).

[37] ICJ Statute, *supra* note 3, Art. 38(1).

[38] H. Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, 1958), at 25.

[39] G. Schwarzenberger, 'The Province of the Doctrine of International Law', (1956) 9 *Current Legal Problems* 235, at 244.

[40] *Ibid.*, at 259.

[41] For my methodology in determining these numbers, see *infra* Section 4.

> to be applied by the Court. A study of the deliberations of the Committee of Jurists who drafted the Statute of the Court does not bear out any suggestion that the authority thus conferred upon the Court ought to remain nominal.[42]

The contrast between the Statutory mandate and practice was—and remains—striking. At the time of Lauterpacht's observation, the Court had delivered 28 Judgments and Advisory Opinions, and had cited publicists on only two occasions: in the *Anglo-Norwegian Fisheries* case[43] and in *Nottebohm*.[44]

Writers have commonly posited five causes for the reticence of the Court to refer explicitly to doctrine.

The first theory derives from the voluntarist perspective. In this spirit, Waldock noted sympathetically, "the Court prefers, if possible, to base itself on evidence more obviously emanating from States or from tribunals invested by States with law-determining authority."[45] This reason is unsatisfying, as it reduces the act of citation to a mere formality. After all, the parties' oral and written pleadings are publicly available, and "perusal of the pleadings … will quickly show the authorities brought to the attention of the court or tribunal and enable the discerning reader to see for himself what teachings of what publicists were adopted by the Court".[46]

The second cause presented suggests that jurisprudence is displacing doctrine as the preferred subsidiary source. Namely, "with the growth of international judicial activity … it is natural that reliance on the authority of writers as evidence of international law should tend to diminish".[47] This suggestion fails for two reasons. First, while it may be (in the authors' minds) 'natural' to privilege jurisprudence over doctrine, such a preference is nowhere authorized or implied in the Statute, which makes no distinction between the two in subhead (d). Second and more importantly, it presupposes that at some

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[42] Lauterpacht, *supra* note 38, at 24-5.

[43] *Fisheries (United Kingdom v Norway)*, Merits, Judgment, ICJ Reports 1951, p. 116, at 129 (referring to "the experts of the Second Sub-Committee of the Second Committee" of the 1930 Hague Codification Conference).

[44] *Nottebohm (Liechtenstein v Guatemala)*, Second Phase, Judgment, ICJ Reports 1955, p. 4, at 22 (noting generally that "[t]he same tendency prevails in the writings of publicists and in practice").

[45] Waldock, *supra* note 1, at 96.

[46] Rosenne, *supra* note 28, at 119.

[47] R. Jennings and A. Watts (eds), *Oppenheim's International Law* (Longman, 1992), at 42. See also Parry, *supra* note 34, at 104 ("[I]t is also no doubt true that, as the body of judicial decisions increases, the authority of the commentator is diminished").

early point in the Court's history, it did in fact rely upon doctrine; as noted above, this is simply not the case.

The third cause may be termed 'technological'. If the role of the publicist is simply to summarise State practice or evidences of general principles, that function is progressively supplanted as publishers (first print, then electronic) make access to primary sources more readily available. Writing well before the advent of the Internet, Lauterpacht observed, "[t]here is no doubt that the availability of official records of the practice of states and of collections of treaties has substantially reduced the necessity for recourse to writings of publicists as evidence of custom."[48] This justification ignores, however, the true value of the learned publicist, namely, "to make a synthesis from the decisions, sometimes to detect a thread of principle running through them, and often to indicate the true line of development and the danger of getting onto the wrong track".[49]

The fourth concerns the process of the Court's deliberations. As demonstrated by the wide divergence of opinion in Separate Opinions, individual judges frequently agree as to the result but disagree fundamentally as to the legal basis for that result. For this reason, "the practice of including citations of individual publicists does not sit well with the concept of a collective pronouncement of what the law is".[50] Taken at face value, however, this rationale suggests that any disagreement among the majority judges as to the source of a rule—for example, in the situation where an obligation might derive from conventional or customary law, or from one of two conventions—results in the source being excised from the decision. This ignores the role that Separate Opinions play in the development of the law. As Rosenne observed,

> It has for some time been commonly felt among competent observers of the Court that individual opinions which, so to speak, underpin the anonymous decisions of the Court, thanks to their greater freedom of expression and emphasis on underlying principles which the anonymous author of the majority view cannot always articulate fully, or which, in another direction, by

[48] Lauterpacht, *supra* note 38, at 24.

[49] A. McNair, *The Development of International Justice* (NYU Press, 1954), at 17. See also Jennings & Watts, *supra* note 47, at 42 (noting "inasmuch as a source of law is conceived as a factor influencing the judge in rendering his decision, the work of writers may continue to play a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinise critically the practice of states by reference to legal principle." (citations omitted).)

[50] Rosenne, *supra* note 28, at 120.

> indicating other legal principles which can govern the particular circumstances, may correct any misleading impression which the majority opinion might convey, or which, by flatly contradicting it, are seen by enlightened legal opinion to be expressive of better law, have a value of their own not so much for the development of the law as for the proper functioning of the Court.[51]

Finally, authors have noted that the reticence may simply be a matter of etiquette. Rosenne delicately refers to the "the inherent and embarrassing difficulty of saying who is a 'most highly qualified publicist'"[52] and, by negative implication, who—among the countless others writing on the same topic—is less qualified. Pellet notes, less tactfully, "[i]nternational law is a 'small world' not exempt from jealousy and envy and the Court is certainly well-advised not to distribute good or bad marks."[53]

However, the frequency with which individual and joint opinions name individual authors suggests that judges do not feel particularly embarrassed, though the point is taken that those judges, collectively, might wish to avoid giving the imprimatur of the Court to an individual scholar, paving the way for the creation of a new Digest.[54]

Furthermore, the decisions of the Court have frequently made use of both the deliberations and work-product of the UN International Law Commission. For the former, Alain Pellet cites the example of the 1969 *North Sea Continental Shelf* Judgment, "where the Court concluded from the work of the Commission that the equidistance rule was not envisaged by it as a customary rule",[55] and for the latter, he notes the 1997 *Gabčíkovo-Nagymaros* judgment, "where the Court quoted not less than seven times from the Articles on State Responsibility

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[51] S. Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', (1961) 55 *AJIL* 825, at 861, *cited in* M. Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996), at 195.

[52] Rosenne, *supra* note 28, at 119.

[53] Pellet, *supra* note 1, at 792.

[54] See W. Buckland and A. McNair, *Roman Law and Common Law: A Comparison in Outline* (Cambridge University Press, 1936), at 13: "It is true that the principal source of law in Justinian's time, the Digest, is made up of juristic writings and these writings are declared to be selected from the writings of jurists who had had some sort of authority. But the authority of the texts in the Digest is not due to their having been written by the jurist, but to their having been incorporated in the Digest and made law by enactment."

[55] *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*, Merits, Judgment, ICJ Reports 1969, p. 3, at 33, para. 49, cited in A. Pellet, *supra* note 1, at 757-8, para. 49.

adopted after first reading by the Commission".[56]

Rosenne convincingly justifies the "special place" reserved for the ILC, noting that "it is not composed of the representatives of States but of experts sitting in their individual capacity" and that it was "created by States in the General Assembly to enable the General Assembly to carry out its obligation under Article 13(1)(a) of the Charter, that is for the very purpose of the progressive development and codification of international law".[57] This mandate in particular distinguishes the ILC from other, freelance publicists.

# 4 Methodology of this survey

The process of culling *bona fide* teachings from over 14,000 pages of opinions required several stages of review. The following process is not intended to be scientific, but was rather intended as a first pass, to enable me to make preliminary observations and prepare a methodology for a later, more empirically rigorous study.

## 4.1 Documentary scope

For this survey, I read the English-language[58] versions of 112 Judgments, 27 Advisory Opinions and 489 Orders of the ICJ issued as of 1 May 2012, as well as the approximately more than 1300 Declarations, Separate Opinions, and Dissenting Opinions appended thereto. I excluded from my survey most of the unanimous or Presidential one-page Orders concerning, *inter alia*, fixing or extension of time-limits or composition of the Court, unless they were contentious—as indicated by the presence of Declarations, Separate Opinions, or Dissenting Opinions.

I used the PDF-formatted documents available from the ICJ's official website[59] and read them cover-to-cover, manually noting any reference to a

[56] *Gabčíkovo-Nagymaros (Hungary v Slovakia)*, Merits, Judgment, ICJ Reports 1997, p. 7, at 38-42 (paras. 47, 50-4), 46 (para. 58), cited in A. Pellet, *supra* note 1, at 757-8 (para. 50).

[57] Rosenne, *supra* note 29, at 1560.

[58] Owing to my linguistic deficiency, my research assistant, Ms. Shannon Dobson (JD '11, LLM '12) read the documents which were, at the time of this study, unavailable in English. Those documents are included in my numbers.

[59] Official Website of the International Court of Justice, <http://www.icj-cij.org/> [last accessed 2 April 2012]. A consolidated, chronological list of all Judgments, Advisory Opinions, and Orders of the Court is available online at <http://www.icj-cij.org/docket/index.php?p1=3&p2=5> [last accessed 3 February 2013]. I checked this list against the lists

scholar, writing, or other potential 'teaching' for later analysis according to my methods described below in subsection 4.2. At this stage, my standards for a 'teaching' were deliberately over-inclusive, in order to gauge the breadth of the Court's use of publicist-like authorities, including authors (legal or otherwise) and expert commissions.

For each putative teaching, I created an 'entry' which included the PDF file number, the case, the authoring judge(s), the page number on which the citation occurred, the identity of the source, and the cited material in the context of the opinion. This process led to approximately 1,400 pages of material.

## 4.2 Culling the entries

In the second stage, I worked through the entries and began removing those which did not constitute a legal 'teaching'. An example of a characteristic application of a publicist's teaching can be found in Judge Dillard's Separate Opinion in the 1974 *Fisheries Jurisdiction* judgment, where he cited McDougal and Burke's *The Public Order of the Oceans*,[60] stating:

> After a characteristically thorough survey, McDougal and Burke conclude that "Practically all international agreements since the beginning of…conservation effort in 1911…witness the general understanding that the participation of all States substantially concerned with a fishery is necessary for effective action".[61]

In this case, we have authors and a reference to a specific teaching. The authors' methodology (if not their qualifications) are established in the citation, and the Court states the purpose for which it is relying upon their teachings. Most references do not meet these exacting criteria and, indeed, there are considerable grounds for disagreement as to the 'teaching' nature of many references. It is important, therefore, that I set out *my own* criteria for including or excluding a source. These criteria will be reevaluated in the next phase of this study, but chief among them are, *inter alia*, as follows:

Agreeing with Brownlie's conclusion in this respect, I included "[s]ources analogous to the writings of publicists, and at least as authoritative, are the draft

of Orders, Judgments and Opinions delivered in each case or proceeding—a list of the cases and proceedings is available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> [last accessed 3 February 2013].

[60] M. McDougal and W. Burke, *The Public Order of the Oceans* (New Haven Press, 1962).

[61] *Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 3, at 68, note 12 (Judge Dillard, Separate Opinion).

articles produced by the International Law Commission, reports and secretariat memoranda prepared for the Commission, Harvard Research drafts, the bases of discussion of the Hague Codification Conference of 1930, and the reports and resolutions of the Institute of International Law and other expert bodies".[62]

I exclude references to prior Judgments of the Court. This is for two reasons. First, these judgments could textually be placed in the *other* category of Article 38(1)(d), namely, "judicial decisions". Second, much has already been written on the use of judicial precedents by the ICJ,[63] and it is not the purpose of this paper to contribute to that discussion.

More controversially, I exclude references to prior *individual opinions* of the Court itself. Although these sources are rightly considered the teachings of publicists,[64] the number of citations is enormous compared to those to other publicists, and this matter is properly the subject of a separate study.

I excluded references to counsel's oral or written arguments, on the grounds that these references were intended to illustrate a party's position, not to establish authority.

I excluded entries in which scholars merely report a single case or arbitral decision, for example, those included at pp. 44-6 of Judge Alfaro's Separate Opinion at the Merits stage of the *Temple of Preah Vihear* case.[65]

I excluded references to the writings of leading scholars *to establish facts*, as Article 38(1) concerns sources of law. Therefore, for example, when Judge De Castro in *Western Sahara* extensively cites several historians and legal scholars to establish the factual ties between the Western Sahara region and the Kingdom of Morocco, I exclude all of these sources.[66] Such citations are frequent, especially

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[62] I. Brownlie, *supra* note 34, at 24.

[63] See, *e.g.* Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators', (2011) 2 *J. of Int'l Dispute Settlement* 5, at 7-12.

[64] See M. Shahabuddeen, *supra* note 51, at 199-200 (noting the opinions of Korowicz and Judge Ammoun that individual opinions are the writings of "particularly well-qualified jurists … under the head of 'the teaching of publicists'" (citations omitted)). See also *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports 1990, p. 3, at 45 (Judge Shahabuddeen, Dissenting Opinion), in which Judge Shahabuddeen notes that the importance of judicial independence "has been rightly stressed in the *literature*" (emphasis added), citing only to separate opinions of Judges Zoricic and Winiarski.

[65] *Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment, ICJ Reports 1962, p. 6, at 44-6 (Judge Alfaro, Separate Opinion). For example, Judge Alfaro cites to an article by Bowett for nothing more than a one–paragraph *précis* of the *Serbian Loans* case. *Ibid.*, at 44.

[66] *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12, at 147-164 (Judge De Castro, Separate Opinion).

in the Court's numerous demarcation opinions, in which establishing historical fact is of the essence.

I excluded references to the *travaux préparatoires* of conventions negotiated by representatives of States. The *travaux* are, of course, useful to the judges for the purpose of establishing the negotiating history of a treaty in force between the States parties.[67] However, even when the speaker is a well-regarded legal scholar, such statements are the political and negotiating position of a State, not an authoritative statement of what the law is.[68]

I excluded references to *extra-legal authorities* for purposes of, for example, principles of logic.[69]

I excluded references in the form of appeals to policy, even where the citation is to an otherwise law-related source.[70]

I exclude citations to dictionaries—even legal dictionaries—that merely recite a definition.[71] In contrast, citations to self-described 'dictionaries' – for

[67] Article 32 of the Vienna Convention on the Law of Treaties permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" in order to confirm the *prima facie* interpretation of the meaning of a treaty provision, or where such *prima facie* interpretation "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable." 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 32.

[68] See, *e.g.*, *Nuclear Tests (Australia v France)*, Merits, Judgment, ICJ Reports 1974, p. 253, at 329, para. 36 (Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, Dissenting Opinion), which refers to the "records of the League of Nations Assembly", and particularly the comments of the Belgian delegate, concerning the relationship between the League and the General Act.

[69] See, *e.g.*, *Corfu Channel (United Kingdom v Albania)*, Merits, Judgment, ICJ Reports 1949, p. 4, at 81, para. 5 (Judge Azevedo, Dissenting Opinion). "We have thus eliminated all other possibilities than the explanation that a minefield was laid after the end of enemy action: we thus succeed, by a process of elimination, in isolating a single antecedent, which is thus transformed into a veritable cause, according to the classical rules of John Stuart Mill." See also *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*, Merits, Judgment, ICJ Reports 1972, p. 46, at 96, note 1 (Judge Dillard, Dissenting Opinion) (explaining away apparently conflicting arguments by India counsel by reference to the *Principia Mathematica* and two other basic logic textbooks).

[70] *Corfu Channel* case, *supra* note 69, at 118 (Judge Ecer, Dissenting Opinion) (citing D. Sandifer, *Evidence before International Tribunals* (Foundation Press, 1939), at 3, stating "[t]he vital interests of States, directly concerning the welfare of thousands of people, may be adversely affected by a decision based upon a misconception of facts.").

[71] See, *e.g.*, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Merits, Judgment, ICJ Reports 1993, p. 38, at 227, paras. 54 and 55 (Judge Weeramantry, Separate Opinion), in which Judge Weeramantry references *Black's Law Dictionary*—as well as, for historical perspective, Berger's *Encyclopaedic Dictionary of Roman Law* and Justinian's *Digest*—all for a definition of "equity".

example, Basdevant's *Dictionnaire de la terminologie du droit international*,[72] which contain legal support or argumentation for their entries, were included.

By the end of this process, I reduced the number of entries to 3,857 and these are the basis for my observations, *infra*. This remaining dataset is likely still over-inclusive, as many of the facially law-oriented references may not have been intended by the judge to demonstrate a rule of law.

# 5 Observations

As a result of the survey, I was able to make several preliminary observations. The following observations are largely quantitative, and are intended as a reference for further study.

## 5.1 The Court is, in fact, quite reticent to cite publicists

As mentioned above, the Court has explicitly cited publicists in only 22 of its 139 Judgments and Advisory Opinions.[73]

[72] J. Basdevant (ed), *Dictionnaire de la terminologie du droit international* (Sirey, 1960), cited, *e.g.*, in *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase, Judgment, ICJ Reports 1966, p. 6, at 54 (Judge Spender, Declaration) for the definition of an individual concurring opinion.

[73] In addition to the references in the *Fisheries* case and in *Nottebohm* mentioned above, these include: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at 48, para. 100 (reference to Smuts's 'The League of Nations: A Practical Suggestion'); *North Sea Continental Shelf* case, *supra* note 55, at 33, 34 and 51, paras. 48, 50 and 95 (three citations to the ILC); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgment, ICJ Reports 1986, p. 14, at 100 and 124-5, para. 190 and 242 (one cite apiece to the ILC and the ICRC); *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)*, Merits, Judgment, ICJ Reports 1992, p. 351, at 567, 592 and 593, paras. 350, 392 and 394 (references to Sir Cecil Hurst, Gidel, *Oppenheim's International Law*, and Vallejo); *Gabčíkovo-Nagymaros* case, *supra note* 56, at 38-42 and 46, paras. 47, 50-4 and 58; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275, at 294, para. 31 (two references to the ILC); *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p. 62, at 87, para. 62 (ILC); *Kasikili/Sedudu Island (Botswana v Namibia)*, Merits, Judgment, ICJ Reports 1999, p. 1045, at 1062, 1075-6, paras. 25 and 49 (two references to the ILC and one to the *Institut de droit international*); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, ICJ Reports 2001, p. 40, at 76-7,

## 5.2 The ILC continues to enjoy a privileged position

The International Law Commission is far and away the most common source relied upon by the judges. Of the 3,857 references in the survey, 384 (approximately ten percent) are to the ILC. The ILC is cited in 134 different opinions. Furthermore, of the 59 citations to publicists contained in the Judgments and Advisory Opinions of the Court, 45 are to the ILC.

The Court—and individual judges—have made use of the drafts and finished product of the Commission, as well as of the discussions reflected in the *ILC Yearbook*, and to conclusions reported by its Rapporteurs.

This is as large as the next four sources combined. It also compares favourably to the other learned societies: the *Institut de droit international* was referenced 85 times in 44 different opinions; and the International Law Association and the ICRC were referenced 18 times apiece; and the American Law Institute was referenced 16 times.

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para. 113 (reference to the ILC and its Special Rapporteur, Georges Scelle); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)*, Merits, Judgment, ICJ Reports 2002, p. 303, at 430, para. 265 (ILC); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, at 175, 176 and 195, paras. 95, 97 and 140 (two references to the ICRC and one to the ILC); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits, Judgment, ICJ Reports 2005, p. 168, at 226, para. 160 (ILC); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, ICJ Reports 2007, p. 43, at 116, 121, 126, 186, 202, 207-8, 217 and 222, paras. 173, 186, 199, 344, 385, 398, 420, 431 (ten references to the ILC); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Merits, Judgment, ICJ Reports 2007, p. 659, at 774, para. 280 (two references to the ILC); *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 582, at 599, 603, 606, 613, 615 and 616, paras. 39, 54, 64, 84, 91 and 93 (several references to the ILC); *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Merits, Judgment, ICJ Reports 2009, p. 61, at 106-7, para. 134 (ILC); *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Merits, Judgment (not yet published), at 77, para. 273 (ILC); *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*, Merits, Judgment (not yet published), at 24, para. 66 (UN Human Rights Committee, general comment); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development*, Advisory Opinion (not yet published), at 16, para. 39 (two references to the UN Human Rights Committee, general comments); *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Merits, Judgment (not yet published), at 24, 29, 36-7 and 50, paras. 56, 69, 89 and 137 (four references to the ILC).

## 5.3 Use of publicists can helpfully be segregated into several category.

My review of the dataset indicates that use of publicists by the Court falls into one of several categories. This list will require refinement: there are, of course, many citations that do not fall neatly into only one or, in some cases, any categories.

*Demonstrating widespread State practice.* Where a publicist has conducted a thorough review of State practice and concluded that the threshold for a rule of customary international law has (or has not) been met, judges frequently rely upon those teachings, rather than directly citing primary evidence of State practice.[74] This practice is perfectly consistent with the scholars' characterization of doctrine as providing evidence of the existence of primary rules of law.

*Interpreting a treaty provision.* Judges also rely upon the authorized[75] and unofficial[76] commentaries of publicists on treaties, especially where such treaties were subject to extensive negotiation or have been the subject of considerable subsequent State practice or scholarly commentary. This practice is likewise consistent with the scholars' characterization of doctrine as providing evidence of the existence of primary rules of law.

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[74] In addition to Judge Dillard's reference to McDougal and Burke discussed *supra* note 60, see, *e.g. Bosnian Genocide* case, *supra* note 73, at 330, note 12 (Judge Tomka, Separate Opinion), in which Judge Tomka relies upon doctrine to show State practice concerning succession in the event of complete dismemberment of a State, citing A. Zimmermann, *Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation* (Springer, 2000), at 860.

[75] For example, both the separate opinion of Judge *ad hoc* Bula-Bula and the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case refer to the authorized commentary of Jean Pictet on the first Geneva Convention. *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Merits, Judgment, ICJ Reports 2002, p. 3, at 71, paras. 31 (Judges Higgins, Kooijmans and Buergenthal, Separate Opinion), 122 and 123 (Judge Bula-Bula, Separate Opinion).

[76] For example, Zimmermann, *supra* note 1, has been cited in individual opinions by Judge *ad hoc* Dugard (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Provisional Measures, Order, (not yet published), at 2, para. 2 (Judge Dugard, Separate Opinion)), Judges Al-Khasawneh and Simma (*Pulp Mills* case, *supra* note 73, at 5, para. 14 (Judges Al-Khasawneh and Simma, Dissenting Opinion)), and Judge Bennouna (*Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Provisional Measures, Order, ICJ Reports 2006, p. 113, at 146, para. 13 (Judge Bennouna, Separate Opinion) and *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832, at 932 (Judge Bennouna, Dissenting Opinion)).

*Demonstrating a general principle of law.* Individual opinions frequently cite the studies of one or more authors concerning State practice in *foro domestico* to establish a general principle of law under Article 38(1)(c) of the Statute.[77] Likewise, judges cite publicists in support of a purported maxim of law.[78] Both practices are consistent with the consensus understanding of doctrine as an evidentiary source.[79]

*Explaining the practice of the Court itself.* One of the most common uses of publicists is to describe the procedure of the ICJ. Shabtai Rosenne is the second most cited publicist (behind only the ILC), with 140 references in 75 different opinions, spanning 47 different phases or cases. Rosenne's research into such procedural matters as third-party intervention, the nature of a justiciable dispute, and provisional measures, has been cited in individual opinions for three decades.

Likewise, Sir Gerald Fitzmaurice, most commonly cited for issues concerning admissibility, the jurisdiction of the Court, and the scope and nature of party consent, ranks fifth among publicists, with 61 references in 46 different opinions. Fitzmaurice is frequently cited to describe the procedures and procedural limitations of the Court.

The invocation of doctrine in this realm is not surprising, as external primary sources, apart from its own broadly-worded Statute and Rules of Court, are not to be expected. However, this is one realm in which jurisprudence is capable of displacing doctrine; namely, once a Judgment is delivered concerning

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[77] See, *e.g.*, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment, ICJ Reports 1970, p. 3, at 70, para. 11 (Judge Fitzmaurice, Separate Opinion), where Judge Fitzmaurice cites surveys by W. E. Beckett and J. Mervyn Jones of American, Austrian, Belgian, Dutch, English, French, German, Italian, Norwegian, Swedish and Swiss law concerning the power of shareholders to bring a suit to protect their interests in the company.

[78] See, *e.g.*, *Corfu Channel* case, *supra* note 69, at 106, para. 34 (Judge Azevedo, Dissenting Opinion), in which Judge Azevedo cites Stelios Seferiades, (1930/IV) 34 Hague *Recueil* 177, at 439, for the maxim, "[t]he greater the use of the [coastal] passage … the more extensive become the infringements of the rights of the coastal States." Such use is consistent with the intent of Lord Phillimore, the co-author of Article 38(1)(c).

[79] See *Procés-Verbaux*, *supra* note 5, at 335 ("Lord Phillimore explained that by 'general principles' he had intended to mean 'maxims of law'"). Schwarzenberger criticized over-reliance on maxims as one of the failings of the deductive method of legal inquiry. See Schwarzenberger, *supra* note 39, at 242-3 ("As has been so frequently the fate of natural law, so maxims, meant originally to be helpful devices for purposes of teaching and memorising, may be degraded into legal disguises of intrinsically political postulates. It is against this type of unholy mixture of law and politics that the doctrine of international law requires to be immunised").

intervention, future opinions can rely upon that Judgment, rather than underlying doctrine, for the legal standard.[80]

*Providing general context for a specific point or case.* ICJ judges frequently cite a publicist, without explanation, for the avowed purpose of providing context or discussion of a citation of a primary source. Examples are numerous, but one example will serve to illustrate the practice. In a 1999 Separate Opinion, Judge Weeramantry observed:

> Bearing in mind that the object of a request for clarification, as stated in *Factory at Chorzow* is "to enable the Court to make quite clear the points which had been settled with binding force in a judgment", it seems to me that this object is fully satisfied by Nigeria's request.[81]

While a simple citation to the *Chorzow Factory* judgment would have sufficed, Judge Weeramantry's footnote read:

> Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 11. *See also* Manley O. Hudson, The Permanent Court of International Justice, 1972. Louis B. Sohn (ed.), p. 59.[82]

The doctrinal source adds nothing to the authority of the referenced rule, and in this sense can be viewed as intended merely to aid the persuasiveness of the citation by providing relevant context. In this sense, one might well wonder whether it is, in fact, an application of doctrine.

*Directly demonstrate the existence of a rule of law.* In his Individual Opinion in the *Anglo-Norwegian Fisheries* case,[83] Judge Alvarez concurred in the result of the Judgment, but presented distinct legal bases for the outcome. In particular, he

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[80] See, *e.g., Territorial and Maritime Dispute (Nicaragua v Colombia)*, Application by Costa Rica for Permission to Intervene, Judgment (not yet published), at 12-14, paras. 27-34 (citing the intervention judgments in the *Land, Island and Maritime Dispute* (1990) case and the *Sovereignty over Pulau* (2001) case for the legal standards surrounding permission to intervene.

[81] *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Preliminary Objections (*Nigeria v Cameroon*), Merits, Judgment, ICJ Reports 1999, p. 31, at 44 (Judge Weeramantry, Separate Opinion).

[82] *Ibid.* at 44, note 2.

[83] *Fisheries* case, *supra* note 43, at 145 et seq. (Judge Alvarez, Individual Opinion).

conceded that acquisitive prescription of territory did not exist in international law, but argued that it "is recognized, in particular, in the case of the acquisition and the exercise of certain rights".[84] In support of this recognition, he cited two sources: the "Declaration of the Great Principles of Modern International Law", which was, according to Alvarez "approved by three great associations devoted to the study of international law"[85] (but not, significantly, authored by or adopted by States); and the 1928 Draft Rules for the Territorial Sea in Peacetime of the *Institut de droit international*. No evidence of custom or convention was presented. At best, Alvarez argued that the principles of modern international law generally "have their origin in the legal conscience of peoples",[86] an oblique reference to general principles; however, no such argument was proferred in support of the Draft Rules.

Such usage finds support in the remarks of Lord Phillimore, who it will be recalled believed that doctrine was "universally recognised as a source of international law",[87] but has largely been rejected by scholars.[88]

*Advocating for a change in the law.* This is the most problematic of the categories, from the perspective of the Statute and from the perspective of the survey. Several judges—including Judge Alvarez in the early years of the Court and Judge Cançado Trindade in the present day—utilize their individual opinions to unabashedly urge a rethinking of public international law. Because their positions are by definition progressive, primary sources of law are lacking. They rely heavily, therefore, upon publicists. Indeed, Judge Cançado Trindade's entire Separate Opinion in the *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear,*[89] which cites 28 different publicist sources in 32 substantive pages, can be seen as a comprehensive manifesto for the progressive development of international law to incorporate the temporal dimension of law[90] and the human and cultural, rather than territorial, element of statehood.[91]

Such a use of publicists is not consistent with the concept of teachings as a source of law, as it focuses on *lex ferenda* rather than *lex lata*. However, such use

[84] *Ibid.*, at 151.
[85] *Ibid.*, at 149.
[86] *Ibid.*, at 148.
[87] See *infra* note 13 and accompanying text.
[88] See *infra* Section 3.1.
[89] *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Provisional Measures, Order (not yet published) (Judge Cançado Trindade, Separate Opinion).
[90] *Ibid.*, sections II-VIII.
[91] *Ibid.*, sections IX-XI.

of doctrine *de lege ferenda* in support of an opinion which argues for progressive development is consistent with Shahabuddeen's view that one function of an individual opinion is to "clarify or restate the law in a way which proves to be helpful to its *development*".[92] Such a view, however, must be tempered by Judge Spender's declaration in *South West Africa*, in which he set out four conclusions concerning the proper scope of individual opinions, and concluded that "there must exist a close link between individual opinions and the judgment of the Court".[93]

## 5.4 Generalists outpace specialists

One clear observation from the data is that publicists who write across a broad range of topics—and, for that matter, abridgments—are cited much more often than specialists. Even setting aside his work as editor of *Oppenheim's International Law*, Sir Hersch Lauterpacht places third among publicists, with 98 references in 61 different opinions. He is cited for such varied topics as principles of treaty interpretation[94] and immunities.[95] *Oppenheim's* itself places sixth among sources, with 54 mentions in 40 opinions.

By contrast, the highest-ranking 'specialists' are Joe Verhoeven (nearly exclusively cited for criminal procedure matters, including head-of-state immunity and genocide) with 24 references in just six opinions, and William A. Schabas, 19 of whose 20 citations occur in opinions in the *Bosnian Genocide* case.

This is not particularly surprising: neither the Court nor the publicists themselves control the docket of the Court. The Court simply has more opportunities to cite publicists who have written in a number of different areas; by contrast, a genocide scholar is likely only to be cited in cases concerning genocide.

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[92] Shahabuddeen, *supra* note 51, at 193.

[93] *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase, Judgment, ICJ Reports 1966, p. 6, at 54-5, para. 22 (Judge Spender, Declaration).

[94] See, *e.g.*, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1995, p. 6, at 27 (Judge Schwebel, Dissenting Opinion); see also *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319, at 227 (Judge Wellington Koo, Dissenting Opinion).

[95] See, *e.g.*, *Arrest Warrant* case, *supra* note 75, at 160-1, para. 35 (Judge *ad hoc* Van Den Wyngaert, Dissenting Opinion); see also *Jurisdictional Immunities* case, *supra* note 73, at 6, para. 17 (Judge Keith, Separate Opinion).

## 5.5 It is possible to identify the "most-favored publicists"

Based upon a raw compilation of the number of citations, it is possible to make some preliminary observations about the most commonly cited publicists in the opinions of the Court. It is important, however, to also take into account the number of different opinions which cite a given publicist.[96] Because of the imprecision of my methodology thus far, I will refrain from attaching specific numbers to any author (other than those mentioned elsewhere), but the following tiers appear to describe the preferences of the Court:

*Ubiquitous publicists.* The following publicists are cited more than 80 times in more than 40 opinions.

1. The International Law Commission. See the discussion *supra* Section 5.2.

2. Shabtai Rosenne. In particular, the various editions of his *The Law and Practice of the International Court of Justice*.[97]

3. Sir Hersch Lauterpacht. This excludes citations to *Oppenheim's International Law* under his editorship, which is treated separately.

4. *L'Institut de droit international*.

   *Commonly cited publicists.* The following publicists are cited between 50 and 60 times, in over 30 opinions.

5. Sir Gerald Fitzmaurice.

6. *Oppenheim's International Law*,[98] in all of its editions.

7. Manley O. Hudson. Most popular among his works is the various editions of his book, *The Permanent Court of International Justice*.[99]

8. Charles de Visscher. His most frequently cited work is *Theory and Reality in Public International Law*.[100]

[96] For example, the scholarly writings of Judge Cançado Trindade are cited 62 times. All but one, however, were citations from the opinions of Judge Cançado Trindade himself.
[97] *Supra* note 29.
[98] *Supra* note 47.
[99] *Supra* note 25.
[100] C. de Visscher, *Theory and Reality in Public International Law* (P. E. Corbett trans., 1968).

*Frequently cited publicists.* The following writers are cited between 20 and 40 times, in 20 or more opinions.

6. Sir Ian Brownlie. Brownlie's textbook, *Principles of Public International Law*,[101] is his most frequently cited work.

7. Sir Humphrey Waldock. His work as Special Rapporteur at the International Law Commission and his time as editor of *Brierly's The Law of Nations*[102] are the most productive of citations.

8. Sir Robert Y. Jennings. Like Lauterpacht, this number excludes citations to *Oppenheim's International Law* on his watch.

9. Emerich de Vattel. Vattel places first in the rankings among members of the 'founding generation' of international law. His *Le droit des gens*[103] is most popular with the Court.

*Other cited publicists.* The following writers are cited between 20 and 30 times, in between 10 and 20 opinions.

10. Julius Stone. In particular, his *Legal System and Lawyers' Reasoning*.[104]

11. James L. Brierly. In particular, his textbook, *The Law of Nations*.[105]

12. Georg Schwarzenberger. In particular, the volumes of his *International Law as Applied by International Courts and Tribunals*.[106]

13. C. Wilfred Jenks. Roughly evenly divided between his *The Common Law of Mankind*[107] and *The Prospects of International Adjudication*.[108]

14. Sir Arnold McNair. Again setting aside his contributions to *Oppenheim's*, his *The Law of Treaties*[109] accounts for nearly all of his citations.

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[101] *Supra* note 34.
[102] H. Waldock (ed), *The Law of Nations* (Oxford University Press, 1963).
[103] E. Vattel, *Les droit des gens* (1758), available in *The Classics of International Law*, J. B. Scott (ed) (Carnegie, 1916).
[104] J. Stone, *Legal System and Lawyers' Reasoning* (Maitland, 1964).
[105] *Supra* note 102.
[106] *Supra* note 2.
[107] C. Jenks, *The Common Law of Mankind* (Stevens, 1958).
[108] C. Jenks, *The Prospects of International Adjudication* (Stevens, 1964).
[109] A. McNair, *The Law of Treaties* (Clarendon Press, 1961).

15. Eduardo Jiménez de Aréchaga.
16. Georges Scelle.
17. Philip C. Jessup.
18. Dionisio Anzilotti.
19. Roberto Ago.
20. Oscar Schachter.

Other publicists receiving a number of citations across several cases and/or authors are Joe Verhoeven, Nagendra Singh, William Schabas, Edvard Hambro, Grotius, the ICRC, the International Law Association, Hans Kelsen, Paul Reuter, D. P. O'Connell, Quincy Wright, Malcolm Shaw, Bin Cheng, Dame Rosalyn Higgins, and Mohammed Bedjaoui. At this stage, the distinctions between tiers become quite close, so a cutoff at this point is quite arbitrary.

### 5.6 It remains difficult to identify 'most favored specialists'

Although very tentative conclusions may be drawn from the raw number of citations to a given specialist, the numbers are so small that individual judge's preferences skew the data. For example, 13 of the 20 cites to Professor Schabas come from Judge *ad hoc* Kreca in two phases of the *Bosnian Genocide* case—five of the others come from Judge *ad hoc* Mahiou in the same case. Likewise, Judge Weeramantry contributed all but two of the references to the works of Burns Weston. While it is of course possible to statistically correct for such occurrences, the size of the dataset may preclude drawing meaningful conclusions from the corrected data.

## 6 Conclusion: proposals for future research

This discussion is preliminary. In a future paper, I intend to improve the methodologies to enable more principled conclusions concerning the Court's use of Article 38(1)(d) sources. In particular, I propose the following next steps in this study:

*Second pass at the original documents.* In order to minimize human error, the project will require a second, independent review of the source material.

*Critical evaluation of 'application' of a source.* As noted above, the survey dataset at present is over-inclusive: there are numerous examples of law-related sources that are not, in fact, used as sources or evidences of a rule of law. (For example, sources in the final two categories described in Section 5.3 *supra* (general context and *lex ferenda*) are not, strictly speaking, intended by the authors as evidence of the law.

*Defining the quantum of a 'citation'.* Different authorities adopt different practices concerning citation. As a result, a single paragraph of an opinion may contain several pinpoint cites to the same source. Further complicating matters, an opinion may rely upon the same source for multiple propositions of law. For this survey, I have made an *ad hoc* determination on a case-by-case basis as to whether any two citations are unique. In the next iteration, I will need to adopt and apply a regular standard.

A later stage of this research will involve analysis of the use of publicists by counsel for parties before the Court, in oral and written submissions, to identify similarities and differences in the attitudes of bench and bar, and to determine what effect, if any, these differences have on the practice of the Court.

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# The Right of Individuals to Take Judicial Action Against International Persons: The Case of NATO's Intervention in Libya

*Mohamad Ghazi Janaby*[*]
*Khaled Ramadan Bashir*[†]

**Keywords**
Libya, NATO intervention, responsibility of international organisations, individual criminal responsibility, universal jurisdiction, diplomatic protection, state responsibility, international criminal court, complementarity, war crimes, crimes against humanity, human rights law

## 1 Introduction

Traditionally, individuals could bring their claims to international court(s) against international persons through their states representing them before courts by way of 'diplomatic protection'. What then are the legal solutions if the state is unable or unwilling to pursue the case on behalf of the individual? Where can an individual seek justice if an international person caused the damage?

This article focuses on the right of individuals to make claims against international persons. Crimes allegedly committed by NATO and other states forces' during the war in Libya will be taken as a practical example for this study. The article will analyse the right of Libyan victims harmed by these actors' bombardment to take legal action within or outside Libya; whether such action be civil, criminal or both.

[*] PhD Candidate, School of Law, University of Aberdeen, LLM in Public International Law from University of Babylon, Iraq, tutor at College of Law, University of Babylon, Iraq).
[†] PhD in Law from University of Aberdeen, Libyan Public Prosecutor, currently Teaching Fellow of Arabic at University of Aberdeen. LLM in International Law and World Order from the University of Reading (2006).

## 2 The Libyan Case

NATO and other state forces operating under its command[1] during the 2011 war in Libya have been accused of the killing of civilians and the destruction of civilian property, schools, hospitals and places of worship. According to several reports received by the UN Commission of Inquiry, in the first four months alone NATO's strikes against civilian targets have:

> resulted in the death of 500 civilians and 2,000 injured. The same reports stated that NATO had targeted schools, universities, mosques, and others civilian locations. According to the same sources, 56 schools and three universities were directly hit by these strikes. Furthermore, it is claimed that NATO airstrikes have resulted in the closure of 3204 schools, leaving 437, 787 students without access to education.[2]

For example, in the village of Majer, NATO's bombardment killed 85 civilians including 32 women and 33 children.[3] Also, in a single day in September it was claimed that "NATO air strikes … killed a total of 354 people in the loyalist stronghold of Sirte".[4] NATO did not investigate these claims but made some general statements that everything was done with the intent to avoid civilian casualties. This prompted a Senior Crisis Adviser at Amnesty International, Donatella Rovera to state that "they cannot now brush aside the deaths of scores of civilians with some vague statement of regret without properly investigating these deadly incidents".[5]

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1 By 31 May these states were: Belgium, Bulgaria, Canada, Denmark, France, Greece, Italy, Jordan, Netherlands, Norway, Qatar, Romania, Spain, Sweden, Turkey, UAE, UK and USA. See Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, UN Doc. A/HRC/17/44 (2011), at 29.

2 *Ibid*., at 77.

3 M. Ryan, 'Tripoli Says NATO Strike Kills Dozens of Civilians', *Reuters*, 09 August 2011, <http://www.reuters.com/article/2011/08/09/us-libya-idUSTRE76Q76620110809> [last accessed 26 March 2012].

4 K. Sengupta, 'NATO Strikes "Kill 354", Says Gaddafi's Spokesman', *The Independent*, 18 September 2011, <http://www.independent.co.uk/news/world/africa/nato-strikes-kill-354-says-gaddafis-spokesman-2356574.html> [last accessed 26 March 2012].

5 M. Holden, 'NATO Failed to Probe Libya Civilian Deaths—Amnesty', *Reuters*, 19 March 2012, <http://uk.reuters.com/article/2012/03/19/uk-libya-amnesty-nato-idUKBRE82I04X20120319> [last accessed 29 July 2012].

Acts allegedly amounting to war crimes and crimes against humanity committed during this war by government forces on the one hand and rebel forces, NATO and its allies on the other, arguably may have exceeded collateral damage or simple acceptable miscalculations.[6] Assuming such atrocities have taken place, victims of alleged atrocities ought to have access to justice to seek punishment of criminals and compensation for losses and damage suffered.

## 3 International Responsibility of International Organisations

The International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations (DARIO) states that responsibility can be held jointly and singly between the organisation and member states.[7] Article 7 stipulates that "the conduct of an organ of a State … that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".[8]

The main condition for this responsibility is that the receiving organisation has effective control over the seconded organ. If the contributing states retain disciplinary powers and criminal jurisdiction over their national troops, the state would still be responsible.[9]

In *Al-Jedda v United Kingdom* the European Court of Human Rights (ECtHR) concluded that "the United Nations Security Council [(SC)] had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations",[10] but the internment of the applicant was attributable to the United Kingdom as it was British troops that had committed the wrongful act in Iraq.[11]

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[6] See Amnesty International, 'Libya: The Forgotten Victims of NATO Strikes,' 19 March 2012, MDE 19/003/201, <http://www.unhcr.org/refworld/docid/4f68451e2.html> [last accessed 26 September 2012].

[7] ILC DARIO, 2011/2 (II) ILC *Ybk*, at 54. See also K. E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organisations', (Spring 2011) 37 *YJIL Online* 1, at 2.

[8] ILC DARIO, Art. 7, *supra* note 7, at 55.

[9] *Ibid*., at 87.

[10] *Al-Jedda v The United Kingdom*, Judgement of 7 July 2011, [2011] ECtHR (Ser 1092), para. 84.

[11] *Ibid*., para. 86.

Attribution of an internationally wrongful act to both the member states and NATO amounts to 'joint and single' responsibility.[12] This dual attribution is because authority and control over the military forces is shared between a state and the organisation. Moreover, in the case of the *Legality of the Use of Force* before the International Court of Justice (ICJ), Brownlie advanced the view that "the North Council directs the war against Yugoslavia as a joint enterprise"[13] which suggests that NATO is a military alliance acting through its member states.[14]

In this regard, NATO itself admitted this view in its comments sent to the ILC. It believes that each member state "retains full responsibility for its decision" as all NATO's decisions are taken by consensus after a full discussion and consultation among representatives of member states and these decisions reflect "the collective will of the sovereign member states".[15]

Accordingly, NATO, its member-states and other states operating under its command are responsible jointly and singly for any wrongful acts they allegedly committed in Libya during Operation Unified Protector. Although this operation was carried out pursuant to SC Resolution 1973, the SC is not responsible for those acts, as it did not have effective control and command over the armed forces.[16]

In relation to the responsibility of international organisations towards individuals, Article 33 (2) of the DARIO states that the right of individuals to reparation should not be affected by establishing the international responsibility of international organizations.[17] This leads to the conclusion that individuals harmed by the wrongful acts of NATO, its member-states and states operating under its command have the right to make claims against NATO, any of its member states and states operating under its command 'jointly and singly'.

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[12] Boon, supra note 7, at 2.

[13] *Legality of the Use of Force (Serbia and Montenegro v Netherlands)*, Public Sitting, Verbatim Record, CR99/25, 1999, at 16 <http://www.icj-cij.org/docket/files/109/4597.pdf> [last accessed 11 November 2012].

[14] B. Boutin, 'What Responsibility for States Participating to a Lesser Extent to The NATO Operation in Libya' <http://www.sharesproject.nl/what-responsibility-for-states-participating-to-a-lesser-extent-to-the-nato-operation-in-libya/> [last accessed 02 April 2012].

[15] ILC, Responsibility of International Organizations Comments and Observations Received from International Organizations, 2011/36, U.N. Doc. A/CN.4/637 (2011), at 12.

[16] Boon, *supra* note 7, at 2.

[17] Art. 33 (2) of DARIO stipulates: "This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization", *supra* note 7, at 61.

# 4 The Responsibility of States Towards Individuals

International Humanitarian Law (IHL) provides for the right of individuals to be compensated by states in respect of armed conflict based on Article (3) of the Hague Convention on Land Warfare 1907[18] and Article 91 of the Additional Protocol I 1977 (API) to the Geneva Conventions 1949.[19] In essence, the parties to a conflict, regardless of whether they are victor or vanquished are bound to compensate individuals damaged by a wrongful act committed by the members of their armed forces in violation of IHL.

The ICJ accepted that states could compensate individuals directly when it highlighted Israel's obligation to provide restitution or compensation to individual Palestinians directly for damages resulting from constructing the Wall in the occupied territories.[20] This advisory opinion asserted that damages to individuals caused by unlawful acts of states must be compensated through the direct relationship between states and individuals, especially as those damages occurred due to violations of IHL and international human rights law.

Article 33 (2) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted in 2001 stipulates that "this Part is without prejudice to any right, arising from the international responsibility of a state, which may accrue directly to any person or entity other than a state".[21] This represents a clear declaration of the right of individuals or entities to invoke the responsibility of states that violate primary norms of international law on their own account.[22]

The right of individuals to reparation is also asserted by the commissions of compensation sometimes instituted after the end of armed conflicts. In this vein, there were two important commissions providing compensation to people who suffered from breaches of IHL. The first one was the United Nations Compensation Commission (UNCC), established by the SC in 1991 to compensate victims of the Iraqi invasion of Kuwait.[23] The Commission dealt with claims of individuals, corporations and governments, and it received more

[18] 1907 Hague Convention (IV) on the Laws and Customs of War on Land. Art. 3.

[19] 1977 Additional Protocol I to the Geneva Conventions, 1125 UNTS 3, Art. 91.

[20] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, at 198, para. 153.

[21] ILC Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001/2(II) *ILC Ybk*, at 94.

[22] *Ibid*., at 95.

[23] SC Res 687, 3 April 1991.

than 2.6 million claims asking for compensation with around $352 billion.[24] In essence, the SC has adopted the principle that the liability could be from states to individuals and not just interstate;[25] the majority of these 2.6 million claims were submitted by individuals.[26]

The second commission is the Eritrea-Ethiopia Claims Commission (EECC) established in 2000 according to the Eritrea-Ethiopia Peace Agreement. The main function of this commission was to compensate entities, including individuals, for damages resulting "from violations of international humanitarian law, including the 1949 Geneva Conventions or other violations of international law".[27]

The conclusion from the foregoing is that states have direct international responsibility towards the individual, regardless of the method of implementing this responsibility.

On the other hand, it has been proposed that criminal responsibility can be extended to include states.[28] However, there has been a heated debate on this issue and it seems that the concept of criminal responsibility applied in domestic law cannot be applied to states at the international level.[29] For this reason, some refuse to adopt the criminal responsibility of the state in international law on the grounds that the state is merely a fictional entity and only individuals can commit crimes.[30] Therefore, there is a lack of rules that support the criminal responsibility of the state itself and this responsibility should be directed to the representatives of states. The clearest example of this is the Nuremberg and Tokyo trials that were carried out against the German and Japanese commanders rather that against Germany and Japan. This article concludes that international law today does not provide impunity for officials of international organisations while allowing prosecution of state officials.

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[24] 'The Claims' <http://www.uncc.ch/theclaims.htm> [last accessed 09 March 2012].

[25] L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', (2003) 85 *IRRC* 497, at 521.

[26] 'The Claims', *supra* note 24.

[27] 2000 Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, 2138 UNTS 94, Art. 5

[28] See C. Gilbert, 'The Criminal Responsibility of States', (1990) 39 *ICLQ* 345, at 366.

[29] Judge Krylov accepted the use of terms, normally used in domestic law, in international law by stating that "the terms of Roman law and of contemporary civil and criminal law may be used in international law, but with certain flexibility and without making too subtle distinctions. There is no need to transfer the distinctions which we sometimes meet in certain systems of municipal law into the system of international law." *Corfu Channel Case (United Kingdom v Albania)*, Merits, Judgement, ICJ Reports 1949. p. 4, at 71 (Judge Krylov Dissenting Opinion).

[30] See C. Gilbert, *supra* note 28, at 366.

With this in mind, the next section will discuss the possible avenues for individuals to take judicial action against international persons with special reference to the Libyan case.

# 5 International Instruments Providing Individuals with the Right to Complain Against International Persons

In the twenty-first century, the ability of individuals to bring cases directly before international courts and tribunals should not be an imaginary notion. In fact, individual victims were able to make claims against Germany before the Mixed Arbitral Tribunal according to the 1919 Treaty of Versailles.[31] Furthermore, individuals were enabled by the Treaty of 1907, between five Central American states, to bring cases directly before the Central American Court of Justice.[32] Under the Hague Convention of 1907 individuals were also provided with the right to directly appeal to the International Prize Court.[33] Similarly the tribunal created under the Upper Silesia Convention in 1922 decided that it was competent to hear cases by the nationals of a state against that state.[34] What then are the current options for individuals to make claims against international persons?

## 5.1 Diplomatic protection (indirect instruments)

The first avenue individuals would traditionally pursue in order to seek justice against an international person is through their own state. In this case, the state would initiate a legal action against an international person on behalf of its citizen(s). Relatedly, when NATO faced allegations of war crimes and crimes against humanity in November 2011, it claimed that it was the Libyan interim authorities who should be responsible for initiating any inquiry into these allegations. However, the Libyan authorities, whose ascent to power was

[31] 1919 the Peace Treaty of Versailles, signed on 28 June 1919, Art. 304 (b).

[32] M.M. Whiteman, *Digest of International Law* (United States Government Printing Office, 1963-73), Vol I, at 39.

[33] 1907 Hague Convention (XII) relative to the Creation of an International Prize Court, Art. 4(3) (never entered into force), available at <http://www.icrc.org/ihl.nsf/FULL/235?OpenDocument> [last accessed 14 Nov 2012]

[34] See *Steiner and Gross v Polish State* (1928) 4 ILR 291

made possible by the help of NATO's airstrikes, are reluctant to take any action in this respect.[35]

As the aim of this article is to discuss the avenues available for individual victims to directly raise their claims before international fora, discussing diplomatic protection is only relevant as far as to assert that a state's lack of interest or inability to initiate diplomatic protection does not hinder individuals from directly taking action.

In *Barcelona Traction*, the ICJ held that a state had discretion as to whether or not to take action on behalf of its injured citizen and to determine to what extent reparation should be paid.[36] Nevertheless, this 1970s ICJ decision has been challenged by many recent developments affecting the course of international law. Today, individuals have the right to seek justice in alternative avenues.[37] Furthermore, Gaja commenting on the ILC Articles on Diplomatic Protection[38] concluded that "it is not to be assumed that the ability of an individual to exercise his/her rights is affected by the fact that international law provides a state with a remedy with regard to the individual's injury."[39] He referred to Article 16 which stressed that the right of "natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles."[40]

Therefore, in the likely event where the Libyan State is unwilling (or unable) to provide diplomatic protection to bring cases of redress against NATO and its allies, the right of individuals to resort to remedies other than diplomatic protection will not be affected.

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[35] C. J. Chivers and E. Schmitt, 'In Strikes on Libya by NATO, an Unspoken Civilian Toll', *New York Times*, 17 Nov 2011, <http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?_r=1> [last accessed 29 July 2012]

[36] *The Barcelona Traction, Light and Power Company, Limited, (Belgium v Spain)*, Second Phase, Judgment of 5 February 1970, ICJ Reports (1970), p. 3, at 45, para 78-9.

[37] R. McCorquodale, 'The Individual and the International Legal System' in M. D. Evans (ed), *International Law* (Oxford University Press, 2010), 293-4.

[38] Articles on Diplomatic Protection, ILC Report of the Fifty-Eighth Session, UN Doc. A/61/10 (2006), at 16.

[39] G. Gaja, 'The Position of Individuals in International Law: An ILC Perspective', (2010) 21(1) *EJIL* 11, at 13.

[40] Articles on Diplomatic Protection, *supra* note 38, at 86.

## 5.2 The right to complain under international human rights law

Under international human rights law there are two main avenues according to which individuals have the right to directly bring cases against international persons accused of committing wrongful acts. Traditionally this was done through commissions or quasi-judicial bodies. Nowadays, however, proper and effective courts are taking the lead in allowing individuals direct access to justice against international persons.

### 5.2.1 Quasi-judicial bodies

Human rights treaty bodies may consider individual complaints or communications from individuals. The competence of these committees to consider complaints from individuals is based on the acceptance by states parties of their jurisdiction to receive petitions from individuals. This is subject to the condition of prior exhaustion of all domestic remedial measures.[41]

Moreover, regionally, human rights conventions have been quite regular with the practice of endowing individuals with the right to similar remedies against states. For example, in 1969 Articles 44 and 45 of the American Convention of Human Rights gave the Inter-American Commission "compulsory jurisdiction for individual complaints and optional jurisdiction for inter-state complaints". This is the opposite of the case of the European Commission on Human Rights, which was given optional jurisdiction over individual petitions and compulsory jurisdiction with regard to inter-state complaints.[42]

Although these committees are not judicial entities, they are described as quasi-judicial mechanisms as they have the ability to assess whether a concerned state is in breach of its treaty obligations. Accordingly, they have a variety of competences to remedy issues raised before them such as compensating the victims,[43] abolishing the violating legislation and releasing

[41] 'Human Rights Treaty Bodies - Individual Communications' <http://www2.ohchr.org/english/bodies/petitions/individual.htm> [last access 05 February 2012]'

[42] See K. Parlett, *The Individual in the International Legal System Continuity and Change in International Law* (Cambridge University Press, 2011), 329.

[43] For example, in the cases *Sattorov, 1200/2003 and Idiev, 1276/2004 v Tajikistan* the Human Rights Committee recommended an effective remedy, including initiation and pursuit of criminal proceedings to establish responsibility for the ill-treatment of the author's son and a payment of adequate compensation. General Assembly, Report of the Human Rights Committee, UN Doc. A/65/40 Vol. I (2010), at 156.

prisoners.[44]

### 5.2.2 Human rights courts

In the field of human rights, the practice of endowing direct rights on individuals and enabling them to have direct accesses to justice before international courts and tribunals is all too common. For example, the African Court on Human and People's Rights has optional jurisdiction over complaints directly submitted by individuals.[45] In addition, the ECtHR "has competence to receive applications directly from individuals".[46] Furthermore, the jurisdiction of the ECOWAS[47] Community Court of Justice (ECCJ) was modified in 2005 and has admitted "the legal possibility for individuals to access the ECCJ to seek relief for violations of their human rights."[48]

Individuals whose rights, particularly one of their fundamental human rights such as the right to life, have been affected by an internationally wrongful act should be able to make direct claims before these bodies. This, however, must be done in accordance with the jurisdictional and procedural requirements. Thus, for example, all local remedies must be exhausted and the act must fall under the jurisdiction of the human rights court approached. This is because these courts might not have universal jurisdiction, as many would think. For example, in *Banković and Others* v *Belgium*, the ECtHR held the case inadmissible as it did not fall within the territorial jurisdiction of the respondent states.[49]

Thus, in the case of Libya, the African Court on Human and People's Rights should be the normal place of resort. The right of individuals to have direct access to this court is based on their states' acceptance of its jurisdiction.[50]

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[44] A. Kjærum, 'The Treaty Body Complaint System, A survey of recent decisions by treaty bodies on individual complaints', (2010) 3 *Human Rights Monitor Quarterly* <http://www.ishr.ch/quarterly> [last accessed 14 November 2012]. See also A. F. Bayefsky, *The UN Human Rights Treaty System University at the Crossroads* (Kluwer Law International, 2001), at 32.

[45] Parlett, *supra* note 42, 331.

[46] *Ibid*., 331-33.

[47] Economic Community of West African States.

[48] S. T. Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice', (2010) 54 (1) *Journal of African Law* 1, at 1-2.

[49] *Banković and Others v Belgium and 16 Other Contracting States*, Admissibility Decision of 12 December 2001, [2001] ECtHR 435, para 80.

[50] 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the Organization of African Unity (OAU) in Burkina Faso, Arts. 5 (3); 34 (6). Libya ratified this protocol on

Although the court has jurisdiction over Libya, as of April 2012 Libya still has not made the required declaration, which would allow individuals to directly access the court.[51] Thus, Libyan individuals cannot access this court directly until Libya declares its acceptance of such jurisdiction. But even if Libya made this declaration, Libyan victims would only be able to bring claims against the Libyan government.

## 5.3 Domestic courts

### 5.3.1 Domestic courts with territorial jurisdiction

The domestic courts in the territory where the crime or the damage occurred are normally where justice should be sought. This jurisdiction can cover both criminal and civil cases. "Indeed, legislation encompassing exterritorial conduct is the exception, rather than the norm to the prosecutorial practice and preference of States."[52] In its Preamble, the International Criminal Court (ICC) Statute emphasises that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". The ICC Statute requires exhaustion of all local remedies before any case can be admitted by the court. Thus, the primary avenue for trials of crimes (including international crimes) should be domestic courts. Domestic courts would normally be able to offer justice with regard to all types of crimes and order damages.

Article 17 of the Rome Statute mentions two cases where the domestic jurisdiction is considered unable or unwilling to offer justice to victims and try criminals. In those cases, the availability of domestic courts would not be an obstacle for victims to take their plea for justice elsewhere. Therefore, if the state is unable or unwilling to investigate the crimes, the rule of complementarity will allow the ICC to take action when possible, subject to the principle of double jeopardy.[53]

An injured Libyan should naturally look at Libyan courts as his/her first option. However, the Libyan case shows that the state is not taking any action towards investigating alleged wrongdoings of NATO and other states

19 November 2003. See <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf> [last accessed 31 October 2012].

[51] African Court on Human and Peoples' Rights, 'African Court in Brief' <http://www.african-court.org/en/index.php/about-the-court/brief-history> [last accessed 1 October 2012]

[52] I. Bantekas, *International Criminal Law* (Hart Publishing, 2010), 332.

[53] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Arts. 17 and 20.

in Libya.[54] In fact, the Libyan government has not supported any claims that either NATO or its allies committed wrongful acts in Libya.[55]

There is no clear-cut objective basis to evaluate the willingness of a state.[56] "A state is '*unable*' when chiefly on account of total or partial collapse of its judicial system, it is not in a position: (i) to detain the accused or to have him surrendered by the authorities or bodies that hold him in custody; or (ii) to collect the necessary evidence; or to carry out criminal proceedings."[57] In Libya today there is no effective army, nor effective policing or an effective government. The judiciary has been inoperative for more than a year with no sign of improvement.[58] The Libyan state is therefore unable to investigate these crimes now or in the near future. Thus, as McCarthy puts it "despite the attractions of coherent national remedial responses to patterns of mass victimization, often national processes are non-existent, dysfunctional or in ruin, as is presently the case in Libya."[59] Moreover, paragraph 6 of Security Council (SC) resolution 1970 confers immunity upon non-Libyans acting according to the SC's authorised or commissioned operations against prosecution in all jurisdictions but that of the national state of the alleged perpetrator of the wrongdoing. This immunity, however, does not apply to nationals of ICC member states, as they were not included within the ambit of this exclusion clause in SC resolution 1970. Therefore, this immunity is inapplicable against non-Libyans whose states are party to the ICC statute, who

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[54] See Amnesty International, *supra* note 6.

[55] See for example the case reported by ABC News where the head of the Libyan rebels' government was more keen on dismissing claims against NATO than NATO itself: M. Marquez, L. Martinez and D. Schabner, 'Libyan Rebels Doubt Government Claims Gadhafi Son Was Killed', ABCNews, 1 March 2011, <http://abcnews.go.com/International/libyan-rebels-dismiss-government-claims-moammar-gadhafi-son/story?id=13503526> [last accessed 14 March 2012].

[56] S. Hassanein, *The Principle of Complementarity Between International and National Criminal Courts*, (Unpublished PhD Thesis: University of Aberdeen, 2010), 156-67. See also M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) in *MPEPIL* (online edition) Vol 7, at 605.

[57] A. Cassese, *International Criminal Law* (Oxford University Press, 2008), 343-4.

[58] In an interview with Libya Al-Hurra TV, on 29th March 2012, a member of the Libyan National Transitional Council (NTC) (Mr Albaajah) has confirmed there is no possibility of fair trials taking place in Libya. He has confirmed that there is no effective government, no effective police and no effective army. He has also confirmed that the justice system is inoperative. Alminbar, Libya Al-Hurra TV, 10am 29th March 2012.

[59] C. McCarthy, 'What Happens to the Frozen Fortune? The Libya Situation and Claims for Reparation', (2011) 3 EHRLR 318, at 322.

are accused of wrongdoing.

### 5.3.2 Domestic courts with personal (nationality) jurisdiction

Some states apply the principle of personal or nationality-based jurisdiction under which their nationals could be tried for crimes even if they were committed elsewhere and have no other connection to the state of nationality. Even in states where the territoriality principle is dominant, some practices of the personal jurisdiction principle can still exist in relation to some crimes. For example, although in the UK the territoriality principle is prevalent, some crimes can still be prosecuted under the nationality jurisdiction principle.[60]

Nationality-based jurisdiction, in some cases, is extremely useful to counter impunity. This is especially true when the state with the territorial jurisdiction over the crime is unable to detain or prosecute the criminal. For example, if a state has received another's army to operate on its territory under the condition that none of the sending state's personnel is to be tried for crimes committed while on duty.[61] In such a case, the state on whose territory the crime is committed is handicapped. The sending state must apply the personal jurisdiction principle to prosecute its personnel to avoid impunity. UN peacekeeping missions have applied this principle when any UN personnel commit a crime while on duty.[62]

If a state exercising personal jurisdiction tries the alleged criminal (its national), this will prevent the ICC from prosecuting him/her according to Article 18(1).[63]

However, the SC has reinforced this jurisdiction with regard to nationals of states not parties to the Rome Statue. In its referral of the Libyan case to the ICC, the SC asserted that:

> nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab

[60] See Bantekas, *supra* note 52, at 338-9.

[61] *Ibid.*, at 350-2.

[62] "As a matter of internal organisation, with respect to UN and other multinational forces, jurisdiction over offences committed in the context of such operations remains with the State of the nationality of the accused." *Ibid*., at 351.

[63] A. Cassese, *supra* note 57, at 344.

> Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.[64]

With regards to non-parties to the Rome Statute (such as the USA), that participated in the Libyan war, their citizens can only be prosecuted for wrongful acts committed during these operations in their own domestic courts, according to the principles of nationality jurisdiction and according to the SC referral.

Personal jurisdiction does not only apply to criminal cases but it also applies to civil matters. In this context, there are a number of cases raised by Libyan victims before the Belgian civil courts against NATO based on this jurisdiction, as the latter's headquarters is in Brussels. The French international lawyer Marcel Ceccaldi, acting on behalf of some Libyan victims, explained "that although international organizations such as NATO enjoy diplomatic immunity in criminal cases, they fall under the jurisdiction of Belgian justice in civil suits."[65] In fact, according to media reports, a Belgian court is currently looking into a case brought by some Libyan victims against NATO.[66] Thus, the court has set a precedent that not only states can be sued by individuals for damages but also international organisations.

### 5.3.3 Domestic courts with universal jurisdiction

The Report of the Technical *Ad hoc* Expert Group on the Principle of Universal Jurisdiction defines universal jurisdiction as "the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction."[67]

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[64] SC Res 1973, 26 February 2011, para 6.

[65] S. Lekic, 'Libya Lawsuit: NATO Sued Over Bombing Campaign', *Huffington Post*, 28 July 2011, <http://www.huffingtonpost.com/2011/07/28/libya-lawsuit-nato_n_912033.html> [last accessed 29 July 2012]

[66] International Coalition to Ensure NATO Accountability, 'Libyan national and a Moroccan national, lift diplomatic immunity from NATO' (2012) <http://icena.org/news.html> [last accessed 29 July 2012]. See also K. Skalli 'Le procès intenté par Abdellatif Chlih contre l'Otan, pour l'assassinat de sa fille Aïcha, débute le 23 août prochain devant le tribunal de première instance de Bruxelles' (2012) <http://www.ghislainduboisavocat.be/medias-bruxelles-protege-l-otan.php> [last accessed 2 December 2012]

[67] AU-EU Expert Report on the Principle of Universal Jurisdiction, <http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf> [last accessed 3 August 2012], at 7.

This principle has been accepted and exercised by many states largely over international crimes. Moreover, different treaties require states parties to authorise their criminal justice systems to exercise universal jurisdiction over certain crimes, such as the Convention for the Protection of All Persons from Enforced Disappearance[68] and the Convention against Torture (CAT).[69] In this regard, in the question relating to the *Obligation to Prosecute or Extradite (Belgium* v *Senegal*), the ICJ emphasised the obligations established by international conventions (specifically the CAT and the 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft) for states to exercise their universal jurisdiction in order to prosecute the crimes stipulated in these conventions, even if these crimes are committed in another state.[70]

States apply universal jurisdiction in different ways. Some regard international law as a part of their domestic rules automatically without needing to enact a specific law. Accordingly, when international law criminalises any act, these states could prosecute those committing international crimes even if these crimes were committed in other states and against other people.[71]

In relation to crimes that fall under universal jurisdiction, the Institute of International Law stated in the Resolution of its 17th Commission in 2005 that universal jurisdiction can be exercised over any "international crime identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict".[72]

The resort to universal jurisdiction requires "the presence of the alleged offender in the territory of the prosecuting state or on board a vessel flying its

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[68] 2006 Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/Res/61/177, Annex, Art. 9 (2).

[69] 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 112, Art. 5.

[70] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Judgement, ICJ reports 2012, p. 1, at 31, para 91.

[71] Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World', (2011) <http://www.amnesty.org/en/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf> at 9 [last accessed 2 December 2012]

[72] Resolution of the Institute of International Law, Krakow Session, 17th Commission, 'Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crime against Humanity and War Crimes' (2005), Art 3(a) <http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf> [last accessed 16 March 2012]

flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender."[73]

The principle of universal jurisdiction allows individuals to bring a case against those who injured them. There are many examples of cases brought by individuals before the domestic courts of European countries that apply universal jurisdiction. In this context, since universal jurisdiction is exercised in criminal cases only, injured individuals should invoke criminal rather than civil jurisdiction; however, the court may compensate the victims with damages for violations of international law. Even foreign individuals can seek remedies against those committing international crimes. The Spanish judicial law for instance, allows victims of any nationality to file criminal proceedings against persons of any nationality committing serious crimes such as genocide, terrorism and other crimes under international treaties ratified by Spain.[74] This is still possible despite the recent amendments in the Spanish law in 2009 requiring a link between Spain and the case or the presence of the accused on Spanish territory.[75] The UK position has also recently changed when Parliament passed the Police Reform and Social Responsibility Act 2011. The act requires the judge to obtain the consent of the Director of Public Prosecutions before hearing criminal complaints filed by private parties.[76] While this does not restrict the individual's right to initiate proceedings, it restricts the exercise of universal jurisdiction by British courts.

As regards the exercise of universal jurisdiction against states, criminal responsibility cannot be ascribed to states as they are just fictional entities that enjoy immunity; but the representatives of states can be held criminally responsible. It has been argued that immunity applies to heads of states and senior public officials.[77] In this regard, the responsibility of official

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[73] *Ibid*., Art 3(b).

[74] N. Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction', (2001) 35(2) *New England Law Review* 311.

[75] M. Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', (2011) 105 *AJIL* 1, at 40.

[76] Police Reform and Social Responsibility Act 2011 <http://www.legislation.gov.uk/ukpga/2011/13/section/1/enacted> [last accessed 19 March 2012]. The main reason behind this amendment was the complaint about the arrest warrant against the Israeli leaders accused of alleged war crimes. These criminal measures forced former Israeli Foreign Minister, Tzipi Livni, to cancel her trip to London in 2009 after an arrest warrant was issued against her. See British Israeli Communications and Research Center (1 April 2011) <http://www.bicom.org.uk/news-article/universal-jurisdiction-amendments-pass-commons-stages/> [last accessed 19 March 2012]

[77] K. Roth, 'The Case For Universal Jurisdiction', (2001) <http://www.foreignaffairs.com/artic

representatives of states may be blocked by immunity. However, the practice of some states proves that immunity cannot always be an obstacle in the way of exercising universal jurisdiction. For example, the House of Lords did not accept the plea of immunity by General Augusto Pinochet—military ruler of Chile from 1973 to 1990—when he was arrested in London in 1998 according to an arrest warrant issued against him in Spain.[78] The House of Lords also decided that there is no immunity in relation to international crimes such as torture and immunity is just for the normal function of the officials of states. Furthermore, according to this decision, "since Chile, Spain and the United Kingdom had all ratified the Convention [Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984] by 8 December 1988 the applicant could have no immunity for crimes of torture or conspiracy to torture after that date".[79]

This decision raises a question relating to immunity of current officials of states who are accused of committing international crimes. It is proposed that there should be no distinction in this regard since the international treaties that the House of Lords relied on in its decision do not draw such a distinction. Furthermore, Pre-Trial Chamber I of the ICC issued two arrest warrants in 2009 and 2010 against Omar Al Bashir, the president of the Republic of Sudan, while he was still in power for allegedly committing crimes against humanity, war crimes and genocide.[80] Article 27 (1) of Rome Statute states that:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

However, the ICJ in the *Congo* v *Belgium* case stated that although international courts such as the ICC and the International Criminal Tribunal for the former

les/57245/kenneth-roth/the-case-for-universal-jurisdiction> [last accessed 3 August 2012] See also G. Robertson, 'Ending Impunity: How International Criminal Law can Put Tyrants on Trial' (2005) 38 Cornell Int'l L. J. 649.

78 Roht-Arriaza, *supra* note 74, at 312.

79 *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (no. 3),* House of Lords, [2000] 1 A.C. 147, at 148.

80 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, International Criminal Court, ICC-02/05 -01/09 <http://www.icc-cpi.int> [last accessed 21 March 2012].

Yugoslavia (ICTY) can issue arrest warrants against serving state officials, national courts cannot, even if they have the requisite jurisdiction to do so in other circumstances. The court concluded that the provisions found in the charters and statutes of the permanent and temporary international courts (such as the ICC, Nuremberg and Tokyo Tribunals and the ICTY) allowing the prosecution of serving state officials, do not amount to a departure from the customary international rule which provides them with immunity from foreign criminal jurisdiction.[81]

It is perplexing for the ICJ to allow international courts to prosecute serving officials who enjoy immunity, while continuing to hold that customary international law does not allow national courts of other states with the requisite jurisdiction to do the same. The court also held that while current state officials may enjoy immunity against the jurisdiction of other states' domestic courts they may be tried:

1. before the national courts of their own states;
2. before other domestic courts if their national state waves their immunity;
3. before international courts or
4. by any domestic court with a jurisdiction over such acts after the official leaves their official post, as immunity will then cease to operate.[82]

### 5.3.4 The International Criminal Court

According to Article 13 of the ICC Statute, the parties who have the right to file a case relating to alleged crimes under the jurisdiction of the court are a state party, the SC and the Prosecutor.

It is clear that there is no explicit indication of the right of individual victims to file a case before the court. However, this jurisdiction may be invoked through direct communication with the ICC Prosecutor. Article 13(c) gives the Prosecutor the authority to initiate an investigation *proprio motu* relating to crimes under the jurisdiction of the court. For this purpose the Prosecutor may gain information relating to these crimes from "states, organs of the United Nations, intergovernmental organisations, or reliable sources

[81] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, ICJ Reports 2002, p. 3, at 24, para 58.

[82] *Ibid*., at 25-6, para 61.

that he or she deems appropriate".[83] It is estimated that the Office of the Prosecutor has received over 8733 communications since 2002 from more than 140 countries. The responsibility of the Prosecutor in these cases is to analyse a communication and determine whether there are reasonable grounds to proceed. Where the Prosecutor decides to initiate an investigation, the sender will be informed.[84] If the Prosecutor decides to initiate a criminal case, the victim could become a witness.[85]

The foregoing can be applied to referrals to the ICC by states and the SC, which should be supported by information gathered from victims.[86]

Additionally, the Rome Statute recognises the right of victims to reparation. It is submitted that this right of the individual as a victim to access the ICC can be invoked in civil litigation to request compensation directly. Article 75 (1) stipulates that the court has the mandate to:

> establish principles relating to, or in respect of, victims, including restitution, compensation and rehabilitation. On the basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

This means that although the jurisdiction of the ICC is specialised in criminal cases, the Statute still gives it the authority upon request to determine the scope and extent of any damage.[87] The reparation could be requested by victims and this should be interpreted as a way of allowing individuals access to the ICC even in civil matters.

The court may direct that reparation be paid by the convicted person or from the Trust Fund for Victims instituted by the Assembly of States Parties in 2002.[88] To help victims in their participation before the ICC, the court

[83] Rome Statute, *supra* note 53, Art.15.

[84] ICC, 'Communications and Referrals', available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referals+and+communications/> [last accessed 22 March 2012]

[85] D. L. Shelton and T. Ingadottir, 'The International Criminal Court Reparations to Victims of Crimes (Art. 75 of the Rome Statute) and the Trust Fund (Art. 79)', Centre on International Cooperation, New York University <http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF> [last accessed 23 March 2012]

[86] E. Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008) 90 *IRRC* 409, at 426.

[87] See Shelton and Ingadottir, *supra* note 85.

[88] Rome Statute, *supra* note 53, Art. 79.

established the Office of Public Counsel for Victims in 2005 to support and assist them and their representatives to gain suitable reparation.[89]

The right of victims to apply for reparation is based on criminal proceedings. It is important to issue a decision from the ICC convicting the accused for committing the alleged crimes causing damage to the victims.[90]

Nevertheless, despite the lack of explicit indication in the Statute that individuals can take their criminal claims to the ICC directly, they can still refer their cases by direct communication to the Prosecutor.[91] In this vein, Professor Schabas argues that "[i]ndividuals can make a complaint pursuant to article 15. The rights of victims under article 75 arise only as a consequence of the Prosecutor determining that he or she will proceed with an investigation".[92]

War crimes and crimes against humanity allegedly committed in Libya fall under the jurisdiction of the ICC pursuant to SC resolution 1970. Consequently, the ICC Chief Prosecutor has already committed the court to investigate all crimes (under its jurisdiction) in the Libyan war and issued some warrants of arrest. Thus all war crimes and crimes against humanity allegedly committed by Libyan forces loyal to Ghadafi fall under the jurisdiction of the court. It is, however, submitted that the crimes committed by NATO and other states' forces during the Libyan war also fall under the jurisdiction of the ICC, since the SC sought referral to investigate all crimes and was not restricted to those committed by forces loyal to the previous government. Thus, while discussing the progress in investigating alleged crimes in Libya, the ICC Prosecutor stated before the Security Council that:

> There had also been allegations of crimes committed by the North Atlantic Treaty Organization (NATO) and the National Transitional Council-related forces, including the alleged detention of civilians suspected to be mercenaries and the alleged killing of detained combatants. Those allegations would be examined impartially and independently by the Office. Carrying out the investigations of all allegations would depend on the available budget.[93]

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[89] Report of the International Criminal Court to the General Assembly of the United Nations, 2006, UN Doc, A/61/217. See also, C. Evans, 'Reparations for Victims in International Criminal Law' in *On-line Festschrift in honour of Katarina Tomasevski* <http://rwi.lu.se/wp-content/uploads/2012/04/Reparations-for-Victims-Evans.pdf> [last accessed 15 November 2012].

[90] Evans, *ibid*.

[91] Rome Statute, *supra* note 53, Art. 15.

[92] Email from William Schabas to authors (04 April 2012)

[93] 'International Criminal Court Prosecutor Briefs Security Council on "Libya Case"', SC

Although the ICC can render a case inadmissible as mentioned in Article 17 of the ICC Statute, the exceptions therein are applicable to the Libyan scenario. It is also important to appreciate that Libyans and nationals of states parties to the ICC statute have not been excluded from the jurisdiction of the ICC according to paragraph 6 of the 1970 SC resolution.

# 6 Conclusion

As the possibility of using diplomatic protection by the current regime to seek justice for injured Libyans is remote, the injured are entitled to seek other options. Thus, an individual could refer a case through communication to the ICC, which has exercised jurisdiction over Libya since 15 February 2011 according to SC resolution 1970. However, the SC has granted immunity from jurisdiction (with the exception of national jurisdiction) to all alleged wrongdoers from states that are non-parties to the ICC Statute. In this case, individual victims can resort to the domestic courts of the state of nationality of the alleged wrongdoers. Where those states do not apply this principle, this category can still be tried in national courts according to paragraph 6 of SC resolution 1970. As for all other alleged criminals in Libya, since Libyan courts are inoperative for the time being,[94] the ICC has jurisdiction over them. Libyan victims can initiate criminal cases by communicating with the ICC Prosecutor's office directly. Alternatively, Libyan victims can bring civil cases against NATO in Belgium as its headquarters is based there. They can also bring civil cases against a wrongdoing state (which participated in the war in Libya) in that state's own national courts. As for the criminal cases, if the official of NATO or a state who is accused of a crime is present in a territory of a state that applies the principle of universal jurisdiction, then the victims can bring a criminal claim before the domestic courts of that state. In some cases where the crime is of a nature (such as torture) which involves an international treaty that requires all states parties to prosecute or extradite the perpetrators present on their territory, a case can be brought before the courts in the state in which the alleged criminal is residing.

6647th Meeting (PM), SC/10433, 2 November 2011.

[94] See note 58 and accompanying text, *supra*.

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# Impartiality and Bias at the International Court of Justice

*Gleider I. Hernández*[*]

**Keywords**
Impartiality, bias, judicial function, judges, independence, ICJ

## 1 Constraints on the judicial role

*"On the consciences of the judges depends the justice of the Court's decisions."*[1]

In an effort to explain impartiality and bias within the Court, studies using a variety of different approaches from virtually every area of the social sciences—psychology, sociology, and political theory amongst them—have attempted to discern the extent of the judges' bias.[2] All of these studies rest

[*] DPhil (Wadham College, Oxford), LL.M (Leiden), LL.B & BCL (McGill). Lecturer in Law, University of Durham. This piece is a redacted version of a chapter from the author's monograph, *The International Court of Justice and the Judicial Function*, (forthcoming, Oxford University Press, 2013). Disclaimer: from 2007 to 2010, the author served as Associate Legal Officer at the International Court of Justice, from 2007 to 2008 in the Legal Department of the Registry of the Court, and from 2008 to 2010, as law clerk in the chambers of Judges Bruno Simma and Peter Tomka. It goes without saying that the views presented in this article are wholly personal, and in no way whatsoever make use of any information learnt during the author's clerkship.

[1] Speech made by President Guerrero at the Inaugural Sitting of the International Court of Justice (18 April 1946), (1946-47) *ICJ Yearbook*, at 38.

[2] See for example T.O. Elias, 'Report: Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements which Follow from its Functions as the Central Judicial Body of the International Community?', in H. Mosler and R. Bernhardt (eds), *Judicial Settlement of International Disputes* (Springer, 1974), at 19; E. Posner and M. de Figureido, 'Is the International Court of Justice Biased?', (2005) 34 *JLS* 599; E.B. Weiss, 'Judicial Independence and Impartiality: A Preliminary Inquiry', in L.F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational, 1987), at 123 [hereinafter 'Brown Weiss']; A. Rovine, 'The National Interest and the World Court', in L. Gross (ed), *The Future of the International Court of Justice* (Oceana, 1976), at 313 (although he was suggesting how the United States could leverage bias within the Court to further its national interest); G. Terry, 'Factional Behaviour on the International Court of Justice: An Analysis of the First and Second Courts

on a basic premise, that bias and partiality are two characteristics anathema to the judicial robe. So goes this argument, the essence of the adjudicator's role, in addition to fulfilling the role of an impartial third party resolving disputes, is to avoid writing personal predilections, biases and prejudices into the law that they are entrusted to administer and safeguard or surrendering to considerations of personal or political expediency.[3] This line of reasoning is surely sound: if the judicial role, whether domestic or international, involves in some measure to alleviate, mediate, resolve or otherwise decide disputes between parties, surely it is appropriate to demand some basic impartiality from judges in relation to the law, in that a judge can be entrusted to adjudicate conscientiously and in adherence with the nature of judicial work within a given legal order.[4]

Scholarly treatment of the question of impartiality has raised another issue: that, because nationality or geography inevitably constitute overriding influences on international judges, bias is inevitable.[5] That claim remains prob-

(1945-1951) and the Sixth and Seventh Courts (1961-1967)', (1975) 10 *Melbourne University Law Review* 59; I. Ro Suh, 'Voting Behaviour of National Judges in International Courts', (1969) 63 *AJIL* 224 [hereinafter 'Suh']; T. Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', (2005) 45 *Va. J. Int'l L.* 631 [hereinafter: 'Ginsburg']; J. Katz Cogan, 'Competition and Control in International Adjudication', (2008) 48 *Va. J. Int'l L.* 411; T. Hensley, 'National Bias and the International Court of Justice', (1966) 12 *MJPS* 568; W. Samore, 'National Origins v. Impartial Decisions: A Study of World Court Holdings', (1956) 34 *Chicago-Kent LR* 193 [hereinafter 'Samore']. *Cf.* A.M. Smith, 'Judicial Nationalism', (2005) 40 *Tex. Int'l L.J* 197 [hereinafter 'Smith'], who uses the same methodology and refutes any idea of national bias; and S. Schwebel, 'National Judges and Judges *ad hoc* of the International Court of Justice', (1999) 48 *ICLQ* 889 [hereinafter 'Schwebel'], at 893-4.

[3] See W.O. Douglas, 'The Dissent: A Safeguard of Democracy', (1948) 32 *Journal of the American Judicial Society* 106; and R.A. Cass, 'Judging: Norms and Incentives of Retrospective Decision-Making', (1995) 75 *Boston University Law Review* 941, at 995 concluding that the principal incentive for judges is to adhere to professional norms "in order to maintain respect within the profession, to deflect criticism, and to conform to the judge's own expectations."

[4] F. Mégret, 'International Judges and Experts? Impartiality and the Problem of Past Declarations', (2011) 10 *LPICT* 31, at 42-3. The *Burgh House Principles on the Independence of the International Judiciary* (published in 2004 by the *Project on International Courts and Tribunals* at University College London, and available at <http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf> [last accessed 30 August 2012]) attempt to entrench a notion of impartiality and independence for international judges more generally.

[5] E.A. Posner and J.C. Yoo, 'Judicial Independence in International Tribunals', (2005) 93 *Cal. L. Rev* 1, at 8, suggest that decision-making in international courts would be more effective once the vested interests of the judges are acknowledged and accepted. But cf. M. Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors', (1992) 33 *William and Mary Law Review* 1201, at 1207-8 who argues forcefully for the need to distinguish one's identity and perspectives, based on race, ethnicity, class or gender, from one's ability to judge impartially: "if being implicated means bias, then

lematic, as it advocates a subjectivist analysis of judicial behaviour that is incomplete. By restricting partiality to the circular claim that "since [judicial decisions are] made by men who, in their attitudes, proclivities, and intellectual tendencies, are to a significant degree products of the environments that relate them to local and national systems of social values, there can be no men impartial in disputes between States",[6] more important constraints are overlooked. Although factors such as national loyalty, the selection process, the manner in which judges align themselves into voting blocs on the bench and questions of procedural fairness[7] could surely prove important considerations if empirically cognisable, there is no evidence that the Court's judges systematically 'vote their preferences' or are instructed by their governments.[8]

Divining the reasons for judicial behaviour is a Sisyphean task riddled with methodological concerns. First, it is virtually impossible to ascertain the truth merely from interviews and constructed biographies without at least a degree of speculation, as judges are bound by the veil of secrecy that protects their deliberations; this might explain why a accurate scholarly treatment of judicial behaviour is probably unattainable.[9] Moreover, theories of judicial behaviour based wholly on national bias remain incomplete, dismissing as they do other important influences which are objectively discernible: training in a particular legal tradition; professional training in diplomacy, government, or practice; institutional loyalty; and even an individual's judge's conception of the judicial

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everyone is biased, and perhaps then no one can judge."

6 T. Franck, 'Some Psychological Factors in International Third Party Decision-Making', (1967) 19 *Stan. L.R.* 1217 [hereinafter 'Franck']. See also Terris *et al*, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (OUP, 2007), at 209 who concluded that "not even the strictest insistence on judicial impartiality can separate a judge entirely from his personal circumstances."

7 Brown Weiss, *supra* note 2, at 124.

8 See response to Posner in R. Higgins, 'Alternative Perspectives on the Independence of International Courts: remarks', 99 *ASIL Proc.* 135; R. Higgins, 'Reflections from the International Court' in M. Evans (ed), *International Law* (OUP, 2006) 3, at 3: "[c]ertainly the international judge is not 'responsible to' the particular States appearing before him/her. It is totally inappropriate for a State to assume, still less to say, that a particular Judge's vote in a case was due to his or her nationality (or race, or religion). Only those present in the Deliberation Chamber can know what views were held, by whom, and on what grounds. In fact, the dynamics of the legal exchanges between the Judges of the International Court in no way reflect tired stereotypes. Assumptions based on such ideas would be surprisingly wide of the mark." See also A. Chayes, 'Nicaragua, The United States and the World Court', (1985) 85 *Colum. L.Rev* 1445, at 1447-8.

9 L.V. Prott, 'The role of the judge of the International Court of Justice' (1974) 10 *RBDI* 473 [hereinafter 'Prott'], at 473.

function within the international legal order.[10]

In this respect, criticism of judges often rests on the appraiser's value-system and his or her subjective understanding of the judicial function without appreciating the complex manner in which a judge's particular judicial methodology and discipline also operate in shaping judicial decisions.[11] This article aims therefore to move beyond such subjective analyses, and will eschew matters of corruptibility and of national or political bias. It will also ignore the nationality of the judges, the political interests of states, and questions relating to the representation of different regions or legal traditions on the bench, leaving these considerations to other authors.[12] As an analysis of constraints incumbent on international judges depends on far more than their personal history or psychological profile, and is in fact the fruit of the unique constraints inherent in the judicial role,[13] this piece will focus on distilling those "ordinarily unchallengeable factors"[14] which do operate upon the Court through the "deliberately

[10] O. Spiermann, *International Legal Argument in the Permanent Court of International Justice* (CUP, 2005) [hereinafter 'Spiermann'], at 27. These factors might be considered as part of the definition of a judge's 'legal culture'. See L. Friedman, 'The Concept of Legal Culture: A Reply' in D. Nelken (ed.), *Comparing Legal Cultures* (Aldershot, 1997) 33, at 34: "ideals, values, expectations and attitudes towards law and legal institutions, which some public or some parts of the public hold."

[11] See R. Dworkin, 'The Judge's New Role: Should Personal Conviction Count?', (2003) 1 *JICJ* 4 [hereinafter 'Dworkin']. For a comparative view of how this occurs within municipal legal orders see Prott, *supra* note 9, at 474 arguing that judges internalise the expectations laid out by external agents as their own personal standards of behaviour; and Franck, *supra* note 6, at 1217 claiming that there exist subconscious and concealed impulses which predetermine the result of the decision-making process of the international judge.

[12] H. Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, 1933) [hereinafter Lauterpacht, *Function of Law*], at 211-5 is similarly dismissive of these considerations, although see H. Lauterpacht, 'Observations concerning the Report of Judge Huber on Amendment of the Statute of the International Court of Justice', in H. Lauterpacht, *International Law: being the Collected Papers of Hersch Lauterpacht, Vol 5: Disputes, War and Neutrality, Parts IX–XIV* (CUP, 2004) 99 [hereinafter 'Lauterpacht, Amendments'], at 100-105. See also in the same volume H. Lauterpacht, 'Contents for the Revision of the Statute of the International Court of Justice', 114 [hereinafter 'Lauterpacht, Revision'], where he suggests various modifications to the selection process. For an interesting, albeit teleological approach to these phenomena, see M. Manouvel, *Les opinions séparées à la Cour internationale: un instrument de contrôle du droit international prétorien par les États* (l'Harmattan, 2005) [hereinafter 'Manouvel'], at 170-215. See also R. Mackenzie and P. Sands, 'International Courts and Tribunals and the Independence of the International Judge', (2002) 44 *Harv. Int'l L.J* 271, at 280-2 for suggestions on safeguarding the impartiality and independence of international judges.

[13] R. Dworkin, *Law's Empire* (Belknap Press, 1986), at 17-8, 401.

[14] K. Malleson, 'Safeguarding Judicial Impartiality', (2002) 22 *Legal Studies* 53, at 61 who lists,

deliberative and reflective process"[15] of judicial decision. Those factors include the direct restrictions due to its institutional structure, concern for its prestige and authority, which may also include concerns of individual members for their legacy and reputation,[16] whether what Lauterpacht calls a "judicial idealism intent upon extending the domain of law"[17] exists, and concerns about the appearance and form of impartiality. These influences are inherent in the adjudicative discipline,[18] and the reason for focussing on these particular constraints is that, unlike subjectivist concerns that cannot be empirically identified, there is sufficient evidence in the Court's institutional structure and procedure, as well as occasionally in its own judgments, where such constraints manifest themselves. As such, the preoccupation over impartiality within the Court remains live; and elucidating how the Court understands impartiality remains an important consideration in discerning how the Court understands its own judicial function.

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*inter alia*, social and educational background, service or employment background or history, political associations, and membership in certain bodies as such "unchallengeable" factors.

15 E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP, 2005) [hereinafter 'Thomas'], at 242.

16 A.-M. Slaughter and L. Helfer, 'Why States Create International Tribunals: A Response to Professors Posner and Woo', (2005) 93 *California Law Review* 3 [hereinafter 'Slaughter and Helfer'], at 6. Slaughter and Helfer have articulated a theory of "dependent adjudication" which posits that several factors, inherent in the international legal order, require a system in which independent tribunals are "unlikely to overstep their bounds and are far more likely to advance states" long-term interests, and therefore are institutions with "constrained independence", going so far as to call judges "fiduciaries' of States' interests". Ginsburg, *supra* note 2, calls this "bounded discretion." A not-dissimilar idea is advanced by K. Alter, 'Agents or Trustees? International Courts in their Political Context', (2008) 14 *EJIR* 33, at 39-41 and 44-7 who argues that judges are "trustees" rather than agents, distinguished from the latter by the relative independence and individual qualifications, but nevertheless acting "on behalf of" States appointing them. *Cf.* Posner and Yoo, *supra* note 5, at 27 who transcend arguments of partiality or bias *simpliciter* to claim that not only do international judges act as conscious agents of their national State's interests, but that their actual *function* of ICJ judges is to circumscribe and control the authority of the Court's judgments. Methodological difficulties permeate these claims of State dependence: "it is the essence of being a judge to be impartial and independent, and he or she publicly will not relinquish that role. To argue otherwise without concrete evidence is to theorise on the basis of speculation." Unusually, Cogan, *supra* note 2, at 415 argues that in fact, *because* States are unable to control judicial decision-making, "we need to think anew about how to maintain control over [international courts]."

17 Lauterpacht, *Function of Law, supra* note 12, at 205. Lauterpacht explains that this tendency "ceases to be legitimate when, in the pursuit of a progressive and ethical solution, judges are driven to disregard a clear rule grounded in the practice of States and in the imperative requirements of the stability of the law", at 209.

18 *Ibid.*, at 243.

## 2 Defining impartiality

Despite the frequency with which judges are exhorted to be impartial, little scholarship seems to have conceptualised the notion of impartiality, even at the domestic level.[19] It is true that impartiality is a difficult concept to articulate from a legal standpoint, raising as it does the basic question: impartiality in relation to *what*? Proximity to the question at hand has two facets: it may either contaminate one's ability to be impartial, or in fact reinforce one's ability to reason from expertise.[20] More importantly, one's theory of justice, on the conception of the 'common good', and on the nature of law all inevitably colour one's conception of impartiality. The classic jurisprudential debates between Herbert Hart and Lon Fuller also led to diverging views on the judicial function and the role impartiality could play within it. Hart's argument, in the main, was that that judicial impartiality could be realised by courts weighing and balancing the competing interests of claimants,[21] but *only* in the light of valid legal rules—rules accepted as valid because they pass Hart's rules of recognition—would form the reason for his/her judgment.[22] Fuller, by contrast, situated judicial impartiality differently: whilst certainly a judge was to remain neutral among the moral positions embedded in the substantive law or rule he/she meant to apply, the judicial function required fidelity to the law's internal morality in assessing the validity of such rules;[23] impartiality thus took a substantive dimension. As such, whilst their substantive directives to judges to be impartial are much the same, the content of the term 'impartiality' is rather different.

The difficulties in defining the term with any certainty suggest that an

[19] W. Lucy, 'The Possibility of Impartiality', (2005) 25(1) *Oxford Journal of Legal Studies* 3, at 4 suggests that the notion of impartiality figures very sparingly in Anglo-American jurisprudential work on adjudication, singling out especially Dworkin, *supra* note 13, at 234 and N. MacCormick, *Legal Reasoning and Legal Theory* (OUP, 1978), who does not consider the concept at any length.

[20] M. Minow, 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors', (1992) 33 *William and Mary Law Review* 1201, at 1204-5 points out that the impartiality of being unfamiliar with issues of major importance may guard against prejudice, but may lack the knowledge to distinguish between fact and the interpretation given by parties' counsel.

[21] H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1994), at 205.

[22] *Ibid.*, 104. Hart's claim on the judiciary's reasons to be an internal statement on the validity of law.

[23] L.L. Fuller, *The Morality of Law* (Yale University Press, 1969), at 130-1. By internal morality, one would be advised to recall Fuller's eight desiderata for the effective existence of a legal system, rather than any substantive or primary rules of law.

understanding of impartiality cannot be discerned through any overarching normative proposition, but is instead dependent on the context in which it is invoked.[24] For the Court, impartiality seems generally to be demanded in the sense of judicial *independence*;[25] this translates into acting "independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute."[26] Defined as such, it is essentially relational, and encompasses primarily procedural impartiality, in that both parties are treated equally, and the outcome is wholly dependent on the direct dispute.[27] If one focuses specifically on the International Court's practice, its relatively formalistic standards suggest a concern for adherence primarily, if not exclusively, using this definition.[28]

A caveat: judicial decision-making at the Court cannot be fully understood purely by reference to formal attributes of the institution; although these may be crucial to understanding its judicial function, regard must be had for the functions attributed to the individual judges themselves. In this respect, a Member of the International Court exercises a function somewhat distinct from that of the Court itself. From an adjudicatory perspective, the judge is expected to uphold the function of the Court and the international legal norms that body is bound to apply. However, rooted in the consensual and arbitration-based history of international dispute settlement, there also exists discernible pressure on judges to fulfil a certain representational role.[29] Despite

[24] Lucy, *supra* note 19, at 5.

[25] See for example T. Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals', (2005) 99(2) *AJIL* 359, at 359-60.

[26] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Res. 276*, Advisory Opinion, ICJ Reports 1970, p. 16, at 23, para. 29. See also M.J. Aznar Gómez, 'Article 2', in Zimmermann *et al* (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, 2006), 205, at 209 who emphasises that independence is to protect judges from any external pressures, so that they rely only on the facts and the law.

[27] To ensure 'outcome impartiality' extrinsic factors, such as the needs and status of the parties in dispute, past and present deeds unrelated to the immediate dispute, and the impact of the outcome are to be ignored. See Lucy, *supra* note 19, at 8 and 17-21.

[28] See for example Article 17(2) Statute of the International Court of Justice, as annexed to the Charter of the United Nations (26 June 1945) 1 UNTS xvi; UKTS 67 (1946), Cmd 7015 [hereinafter 'ICJ Statute'], where judges are called upon to recuse themselves from a particular case if they have previously taken part as "agent, counsel, or advocate of one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity" related to the case. As notes P. Couvreur, 'Article 17', in Zimmerman, *supra* note 26, 337, at 346 no member of the Court has ever been impugned with violating this provision.

[29] See R. Mackenzie *et al*, *Selecting International Judges: Selecting International Judges: Principle,*

the emphasis on judicial independence and high qualifications stipulated in Article 2 of the Statute,[30] Article 9 embodies the notion that "as a whole", the Court should ensure the representation of "the main forms of civilization and of the principal legal systems of the world."[31] This representational element permeating the judicial role has raised, and continues to raise, concerns that the role of the Court's judges is constrained: already during the time of the PCIJ, Moore, Loder and Anzilotti cautioned that "of all the influences to which men are subject, none is more powerful, more pervasive, or more subtle"[32] than that of national bias; that preoccupation underlies the exhortation towards impartiality embodied in the judicial oath.[33] That distinction, between judge and judicial institution, permeates the discussion that follows below.

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*Process, and Politics* (OUP, 2010), at 25 who argues that this is perhaps no different than in domestic courts, where there is increasing demand that the judiciary "needs to be broadly reflective of the make-up of society in order for it to command public confidence and maintain political legitimacy as an unelected institution of power". It should be noted that considerations of "representation" on the domestic plane turn primarily on ethnicity, gender and socio-economic status. See for example Lucy, supra note 19, at 15-6 referring to B. Wilson, 'Will Women Judges really make a Difference?', (1990) 28 *Osgoode Hall Law Journal* 507; and B. Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?', (2001) (Autumn) *Public Law* 489.

[30] According to Article 2 of the ICJ Statute, *supra* note 28, the Court shall be composed of a body of "independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

[31] Article 9 of the ICJ Statute, *supra* note 28, The exact terms in this provision came at the insistence of Adatci (Japan) in 1920: *see* PCIJ Advisory Committee of Jurists*, Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes* (Van Langenhuysen Bros, 1920) [hereinafter *Procès-verbaux'*], at 118, 136, 168; nationality was obviously an important silent consideration. G. Abi-Saab, 'Ensuring the Best Bench: Ways of Selecting Judges: Presentation by Professor Georges Abi-Saab', in C. Peck and L. Roy (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Nijhoff, 1997), at 168 resolves the "whiff (*soupcon*) of contradiction" between the two provisions by emphasising that the representational qualities stipulated in Article 9 are in regard to the legal systems of the world rather than judges' national States.

[32] Report of Judges Loder, Moore, and Anzilotti to the Permanent Court (2 September 1927), PCIJ Series E No 4 (1927-28), at 75.

[33] Article 20 of the ICJ Statute, *supra* note 28, provides that "[e]very member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."

# 3 Certain constraints on judicial behaviour

## 3.1 Legal education and training; views on the function of law

Legal education and training constitute a constraint upon both domestic and international judges, who are institutionally "conditioned in such a way as to virtually preclude the possibility of stepping outside the bounds of legitimate judicial reasoning".[34] Judges also demonstrate loyalty to their oath of impartiality, characterised as "sacred" by Lauterpacht, who considered judicial impartiality a conscious decision to assume the moral duty of "the enlightened consideration of the paramount interest of peace and justice entrusted to the care of judges."[35]

As mentioned earlier, besides the obligation to remain impartial, Article 9 also suggests that within the Court, there should be representation of the "main forms of civilization and of the principal legal systems of the world."[36] From the outset, these provisions aimed to reflect the "distinct forms of legal education" through which one could approach a unified public international law.[37] This seems borne out in practice: there appears to exist a remarkable intellectual homogeneity amongst the judges, one which transcends their varied origins.[38] Though this in no way implies universality of thought, the extent to which Western conceptions of public international law and the judicial function

[34] Thomas, *supra* note 15, at 245.

[35] Lauterpacht, *Function of Law, supra* note 12, at 215. Lauterpacht argued that although international judges can act impartially, institutional steps should be taken to ensure said impartiality, primarily through the proscription of any factors of national representation, especially taking issue with the institution of the judge *ad hoc*, which he criticised as possessing a "fatal lack of rationality", at 233-6. He also freely acknowledged that "by birth, training, and community of sentiment and interest", judges belonged to one particular section of a population, at 216-7.

[36] Although, as S. Rosenne, *The Law and Practice of the International Court 1920-1996, Vol. 1* (Nijhoff, 1997) [hereinafter 'Rosenne, *Law and Practice*'], at 367 concludes, the substance of Article 9 is hardly to impose an obligation on the electors, and there is no obligation on States.

[37] B. Fassbender, 'Article 9', in Zimmermann, *supra* note 26, 261, at 267. In practice, "diversity" seems to be ensured through a convention whereby the Court's composition broadly resembles that of the Security Council, with a "tradition" that its permanent members also are continually represented on the bench.

[38] An unpublished memorandum prepared by former Registrar Hambro for the ASIL Study Panel on the Future of the International Court of Justice was reprinted in E. Gordon, 'Observations on the independence and impartiality of the Members of the International Court of Justice', (1987) 2 *Connecticut Journal of International Law* 397 [hereinafter 'Gordon'],

permeate their legal training is remarkable, to the point where distinction between Western and non-Western judges on the basis of their expressed legal reasoning is impossible.[39] The duopoly of English and French as the Court's sole working languages perhaps compounds the problem,[40] and might partly explain why all of the current judges—and the vast majority of its past judges—have read law in universities in the United States, the United Kingdom or France.[41] Doubtless there is great diversity in the perception of the judicial function within even those three traditions: the distinction between the civil law traditions and common law traditions embodied by these three jurisdictions could be argued to be broadly representative of a fair, if not universal, sampling of States.[42] Yet overall, if one moves away from pure geographical representation and considers other factors, the reputed

at 407. Hambro argued that "[Judges] are to apply international law, but even international law is taught differently and applied differently in different countries according to the legal systems prevailing … Nobody can doubt that the judges in applying such principles are influenced by their backgrounds. … This explains sufficiently why the voting at times looks as if it goes according to nationality; but this does not in any way even remotely imply that the judges receive any kind of intimation, let alone instructions, from their governments on how they should vote."

[39] L.V. Prott, 'The Style of Judgment in the International Court of Justice', (1970-1973) *Aust. YBIL* 82. See also R. Hoffman and T. Laubner, 'Article 57', in Zimmermann, *supra* note 26, at 1211 who claim that any distinctions between the judges having existed within the Court (i.e. developed/developing States) have become much less apparent since the early 1990s; and M. Shahabuddeen, *Precedent in the World Court* (Grotius Publications, 1997), at 204. The reverse was true regarding Soviet (although not Polish) judges during the Cold War. See for example Z.L. Zile, 'A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy', (1964) 58 *AJIL* 359, at 381; and K. Grzybowski, 'Socialist Judges in the International Court of Justice', (1964) 3 *Duke Law Journal* 536.

[40] For further consideration of the intricate relation between linguistic competence and legal concepts see G.I. Hernández, 'On Multilingualism in the International Legal Process', in H. Ruiz-Fabri *et al* (eds), *Select Proceedings of the European Society of International Law, Volume 2* (Hart, 2010) 441. Mackenzie, *supra* note 29, at 82, note that the relatively confined choice of official languages in fact constrains the candidate pool in States where neither of these is spoken as an official language, thus further narrowing the possibilities only to those candidates who have had the opportunity to become competent in one of the two official languages.

[41] Of the present fifteen judges, six studied or researched postgraduate law in the United Kingdom (five at Cambridge), five in the United States (three at Harvard) and three in France (two at Paris). Judge Yusuf, the lone judge neither to have studied nor have taught in one of these three States, completed his doctorate at HEI-Geneva, an institution very closely connected to the French international legal tradition.

[42] As Fassbender, *supra* note 37, at 275 summarises, in practice this means the influence of legal systems based on English common law and on Roman civil law, with Islamic law traditions are also generally represented. See also Mackenzie, *supra* note 29, at 41-3, who express

diversity of the bench takes on a different cast: the homogeneity of their legal training arguably conditions their adherence to a specific vision of the judicial role, establishing common shared assumptions which serve to integrate their contribution in a manner that will persuade and appeal to, or at least not affront, their colleagues.[43]

## 3.2 Conceptions of institutional propriety and 'belonging'

Judges have a keen sense of their own participation in upholding the function of the court of which they are a member; and they inevitably perceive themselves as "part of an institution and an ongoing legal process that began well before them and that will continue long after they have gone."[44] This sense of continuity and institutional belonging is entrenched and formalised by the collective drafting process of the Court, creating a sense of collective loyalty where each judge will strive to meet the individual and collective expectations of their colleagues in respect of their expectations of the judicial role and that of a member of the institution.[45] In "complete equality" with their peers,[46] judges *ad hoc* are held to the same standard, although the specific nature of that institution creates a somewhat different expectation of their role, which will not be explored here.[47]

Consistent with the sense of institutional propriety and belonging is the sense by judges of their own individual function. As Theodor Meron has suggested, any person accepting international judicial office must accept "the values, the duties, and the instincts of one who holds such an office."[48] There is doubtless heterogeneity in these self-perceptions, with divergence in judges'

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concerns about the neglect of other systems at the expense of these systems; but *cf.* Rosenne, *Law and Practice*, *supra* note 36, at 397 decrying the heterogeneity of the Court as a possible cause of unpredictability in litigation.

[43] E. McWhinney, *The International Court of Justice and the Western Tradition in International Law* (Nijhoff, 1987), at 151, applauds this homogenization as part of an "internationalising, universalising force" in international society.

[44] Thomas, *supra* note 15, 246.

[45] *Ibid.*, at 247. See also Cass, *supra* note 3, at 970-2.

[46] Article 31 ICJ Statute, *supra* note 28.

[47] See G.I. Hernández, *The International Court of Justice and the Judicial Function* (OUP, forthcoming 2013), Chapter V, where an expanded version of this present article will further explore the role of the judge *ad hoc*.

[48] Meron, *supra* note 25, at 360.

perceptions of the role of the Court in law-making, for example,[49] and with some judges arguably even defining their role in opposition to the institution of which they form a part.[50] Yet, for all this, some broad-brush, basic notions of a judge's role can be identified.[51] A judge is held to decide a case in line with a correct or 'proper' interpretation of the applicable law: in short, deciding similar cases consistently with other decisions and more general legal principles.[52] In line with this requirement, a judge is called upon to strive to decide in a principled, objective manner,[53] with the absence of prior emotional attachment to a given case, either by direct personal interest or through strong political or ideological views that would predetermine the outcome.[54] Frédéric Mégret calls this a *dédoublement*, the ability of the individual to reduce him/herself to the function of the judge, and to limit the subjectivity of the person.[55]

An interesting area in which institutional propriety may have imposed itself is in relation to gender balance on the bench. Given the paucity of female representation on international benches generally, efforts have been made in other courts to ensure a more appropriate gender balance,[56] with the view

[49] Ginsburg, *supra* note 2, at 668 argues that many international judges will have internalised a limited conception of their law-creating role. See also *Declaration, S*eparate Opinion (Judge Simma) in *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America),* Merits, Judgment, ICJ Reports 2003, p. 161, 324, at 325, inveighing against the "inappropriate self-restraint" of his colleagues in addressing the legal limits on the use of force. In his final Separate Opinion, this time in the *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, Judge Simma characterised the Court's abstinence in clarifying the legal status of the *exception non adimpleti contractus* rule a "transactional" approach (para. 6), and as a form of "*haptophobia*" (fear of being touched) (para. 7).

[50] It is true that the occasional 'great dissenter' appears within the Court, who consciously casts him or herself in the role of challenging the institution from within, and calling it to account for failing to conform with that judge's expectations of the judicial role. That role seems presently to be occupied by Judge Cançado Trindade, whose lengthy dissenting opinions regularly exceed the length of the Court's own judgments.

[51] See for example B.N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), at 12-3.

[52] Lucy, *supra* note 19, at 23, calls this principle of treating like cases alike a "bulwark against partiality", as it imposes a burden on a court to explain why a putatively similar case is not actually sufficiently legal similar to the current case, and that burden at least makes improper partiality more difficult than it might otherwise be.

[53] Cass, *supra* note 3, at 947-8.

[54] As Mégret, *supra* note 4, at 44 points out, obvious ethnic, racial or religious biases would figure amongst such predispositions.

[55] *Ibid*.

[56] See for example Article 36(8)*(a)*(iii) of the Rome Statute for the Establishment of an Interna-

put forward that this would ensure that certain values are considered by the bench. In some respects, this might be true: certainly a feminist approach to law and legal reasoning might yield different judicial outcomes, inasmuch as the law sometimes contains aspects of context or situation which do not address the specific concerns of the feminist critique.[57] But that is altogether a different assertion than claiming that the mere presence of women necessarily modifies judicial reasoning. For example, it can safely be asserted that a consciously gendered approach to international law is wholly absent in the long line of case law in which the Court's first female judge, Dame Rosalyn Higgins, participated in or presided over.[58] Although generalisations based on Judge Higgins' tenure are incautious, given her singular role for many years,[59] the recent election of additional women judges—Xue Hanquin, Joan Donoghue

tional Criminal Court, 2187 UNTS 90, which requires that each gender be represented by no less than one third of the bench, or Article 12(2) of the Protocol on the African Court of Human and People's Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (9 June 1998), which contains a more general exhortation.

[57] See for example the study by R. Hunter *et al*, *The Feminist Judgments* (Hart, 2010), where several well-known judgments in English law have been drafted from a consciously gendered perspective; and S. Sherry, 'The Gender of Judges', (1986) 4 *Law and Inequality* 159, who examines the different claim that women judges reason differently from men. But *cf.* the observation by H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000), at 81-2 concluding with rue, that the international legal training of women conditions them to think about law no differently from men; and that in any event, the practice of collective drafting is such that it would reduce the scope of alternative or controversial approaches in the majority opinions.

[58] This is surely intentional. In the words of Judge Higgins herself: "Men sometimes speak about women having more intuition and so forth. I don't accept that. I think we're either smart lawyers or not smart lawyers; we either know a lot or we don't know a lot. Gender has nothing to do with it. In the international criminal field some of the women judges say it really does make a difference whether you're a woman judge when you're looking at issues of rape and so forth. I cannot stand in their shoes, and disagree with them. But at the same time I like to think that both sexes are equally appalled at such things. And coming back to the work of the International Court of Justice, I cannot believe that anything I've said about where I think a border runs, or a use of force has occurred, or a resource belongs to one State or the other, has anything to do with gender. Nothing!" The full transcript of the interview can be found at <http://www.peacepalacelibrary.nl/2011/12/interview-with-prof-rosalyn-higgins> [last accessed 30 August 2012].

[59] In fact, as Malleson *et al*, *supra* note 14, at 163, have calculated, if expressed in female and male "court years", over the period of ICJ history until Judge Higgins' retirement in February 2009, there have been fifteen female years compared to nine-hundred and forty-five male years. Even when States have been given a choice to nominate a woman as judge *ad hoc*, they have only elected to do so twice: Suzanne Bastid was nominated by Tunisia in *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya),* Judgment, ICJ Reports 1985, p. 192, at

and Julia Sebuntinde—may yield more possibilities for scholarly treatment of the question of gender balance and whether it may influence or modify judicial behaviour at the Court.[60]

## 3.3 Wider external community expectations

The Court's judges are obliged to pay heed to the expectations of States and the wider United Nations framework.[61] In the early days of the Court, then-President Basdevant admitted candidly that its docket would be dependent on governments, the political organs of the UN, and the decisions that these might choose to bring before it.[62] Efforts were made from the outset to separate nominations from States, placing the process with the four members of the 'national group' of the Permanent Court of Arbitration, which nominates a candidate under Article 4 of the Statute.[63] Even though the national group is not recommended to consult States under Article 6 of the Statute,[64] they remain central throughout the entire process: they nominate the four members of the Permanent Court of Arbitration; they finance and control the campaigning process; and of course, it is States who cast final votes in the General Assembly and the Security Council.[65] Moreover, whatever the merits of the election procedure,[66]

194, para. 6; and Christine van der Wyngaert was nominated by Belgium in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* Judgment, ICJ Reports 2002, p. 3, at 6, para 3.

[60] The sentiment in other international courts with more experience with female judges suggests that gender equality is perceived with some ambivalence. See for example Mackenzie *et al*, *supra* note 29, at 48-9.

[61] But *cf.* L. Baum, *Judges and their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006), at 4 who claims that judges are sensitive to the "regard" of salient audiences simply for the sake of that regard.

[62] J. Basdevant, 'The Judiciary in the International Sphere', (1949) (No 9) 7 *United Nations Bulletin* 503.

[63] Mackenzie and Sands, *supra* note 12, at 226.

[64] But see P. Georget *et al*, 'Article 6', in Zimmermann *et al*, *supra* note 26, at 250 suggesting that consultation procedures with universities and learned international law societies seem uneven at best.

[65] The election process is carefully studied in Mackenzie *et al*, *supra* note 29, at 134, who conclude that ICJ elections are not afforded special consideration for the fact that they are high-level judicial vacancies, and instead seem increasingly "ever more highly politicized", as with the general UN election system.

[66] This was deliberate: see United Nations Organization Memorandum on the International Court of Justice, 26 September 1945, F.O. 371/50947/U7369. Yet see P. Sands, 'Global Governance and the International Judiciary: Choosing our Judges', (2003) *Current Legal Problems* 481, at 488-99 who studied records now in the public domain regarding the 1946,

there is no formal supervisory mechanism in place to review whether candidates for election meet the criteria provided for in Article 2.[67] Thus, nominated candidates will rarely hold views which are wholly irreconcilable with State concerns.[68] Furthermore, it has elsewhere been observed[69] how the Court's judges' career paths prior to election are relatively homogenous, with candidates primarily drawn from the diplomatic corps[70] or civil service of States, from academia, and, to a diminishing degree relative to the early days of the Permanent Court, from national judiciaries.[71] In fact, many nominated candi-

1954 and 1960 elections of Lord McNair, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, to recall the British Foreign Office's extensive contact with the national group in matters of nomination and selection. From the outset, the Foreign Office saw its role as "to persuade tactfully [its] national group to accept guidance" from the British Government. See also S. Rosenne, 'The Composition of the Court', in L Gross (ed), *The Future of the International Court of Justice, Vol. 2* (Oceana, 1976), 377, at 386-7 recounting similar challenges to the election process in 1972; and E. McWhinney, 'Law, Politics and 'Regionalism' in the Nomination and Election of World Court Judges', (1986) 13 *Syracuse Journal of International Law and Commerce* 1, at 4.

67 Lauterpacht, 'Amendments', *supra* note 12, at 103.

68 R. Mackenzie and P. Sands, 'Judicial Selection for International Courts', in K. Malleson and P.H. Russell (eds), *Appointing Judges in an Age of Judicial Power* (University of Toronto Press, 2007) 213, at 217. See E. Voeten, 'The Politics of International Judicial Appointments', (2009) 9(2) *Chicago Journal of International Law* 387, at 391 who suggested that States may wish to do any of the following: to increase the credibility of that State in relation to a certain cause or institution; may be motivated by the "distributive implications" of court judgments; may be influenced by norms of what an appropriate judge should be; and may be using international judicial appointments as a form of patronage. The latter point, whilst controversial, cannot be wholly discounted. See Mackenzie *et al*, *supra* note 29, at 2-3 who express concern with the "potentially distorting effects" the political element of judicial selection can have on meritorious and independent candidates. Their empirical study of the ICJ and the ICC attempts to test the validity of criticisms of the process of international judicial appointments more generally.

69 But *cf.* Aznar Gómez, 'Article 4', in Zimmerman *et al*, *supra* note 26, at 216-8, pointing out the "secondary tasks" of many of the individuals later elected to the Court, with jurisconsults often also acting in private practice or representing their State abroad.

70 See Abi-Saab, *supra* note 31, at 168 who refers to a "legal diplomat" as a person who has studied international law, yet, without being a "jurisconsult, practises it primarily through the fora of multilateral diplomacy."

71 Although many of the Court's judges have taught in universities, many in distinguished capacities, of the present bench, only Judge Keith, Judge Bhandari and Judge Sebuntinde have served as domestic judges in their national States. This is in fact an increase, as during the 2009-2012 triennium, Judge Keith was the only judge who could be so characterised. Conversely, generally more than half (of the present bench, President Tomka, Vice-President Sepúlveda-Amor, and Judges Owada, Abraham, Skotnikov, Xue, and Donoghue) have previously served in their national State's foreign ministry or diplomatic corps. Mackenzie *et*

dates spend extended periods serving in or close to their foreign ministries[72] or, in the case of academics, have often spent long periods being of counsel to governments on questions of international law.[73] At the very least, candidates rely on the support of their national State, which must invest considerable political capital in the campaign process.[74] Accordingly, by the time they are nominated, their career path will already have "sensitized them to be especially mindful of the prerogatives of national sovereignty."[75] This being the case, the selection process therefore guarantees a certain community of sentiment on the bench,[76] qualitatively different from the putative universalism imposed

*al*, *supra* note 29, at 57-9 suggest that despite contested definitions of judicial independence, States nevertheless feel comfortable putting forward diplomats for high judicial office due to their representational capacity and their negotiating experience.

[72] Rosenne, *supra* note 66, at 391 posits that the high proportion of judges who occupied the position of Legal Adviser to their foreign ministries puts them in delicate positions, given that such the exercise of duties relating to that office invariably requires them to acquaint themselves and form an opinion on most currently known international disputes prior to their election to judicial office.

[73] E. McWhinney, *Les Nations Unies et la formation du droit* (Pedone, 1986), at 124. Although he wrote about the elections to the ILC, the process is identical to that for election to Court. See also Samore, *supra* note 2, at 204-205 and Manouvel, *supra* note 12, at 210.

[74] E. Jouannet, 'Actualité des questions d'indépendance et d'impartialité des juridictions internationales', in H. Ruiz-Fabri and J.M. Sorel (eds), *Indépendance et impartialité des juges internationaux* (Pedone, 2010) 271, at 283.

[75] T.M. Franck and P Prows, 'The Role of Presumptions in International Tribunals', (2005) 4(2) *LPICT* 197, at 238-9. This was argued specifically in the *South West Africa* case, *supra* note 26. See W. Friedmann, 'The Jurisprudential Implications of the South West Africa case', (1967) 6 *Columbia Journal of Transnational Law* 1, at 3, who suggested that Judges Spender, Fitzmaurice and Gros were particularly liable to such a view; and C.J.R. Dugard, 'The Nuclear Tests Cases and the South West Africa Cases: Some Realism About the International Judicial Decision', 16(3) *VaJ Int'l L.* 463 [hereinafter Dugard], at 494, who analysed the wider bench in 1966 to conclude that a majority of the Court's judges had long histories of government service. Of the present bench, all Members have performed one or more of the following functions: represented their government as ambassador or other high representative; acted as counsel for their national State in international adjudication, whether before the International Court or another body; acted as legal officer to their foreign or justice ministry; or led a delegation of their national State at a diplomatic conference.

[76] Lauterpacht, *Function of Law, supra* note 12, at 217 refers to these as "class interests", although he also states that they are rare, by virtue of the "categorical imperative of duty" and the "powerful voice of justice"; and in Lauterpacht, 'Amendments', *supra* note 12, at 102, and Lauterpacht, 'Revision', *supra* note 12, at 124-6, he emphasises instead that judges should be experts in international law. Franck and Prows, *supra* note 75, at 242 claim that ICJ judges, sharing a common and self-imposed perception of the limits of their craft, seek refuge from politically or culturally freighted disagreements by way of "neutered disagreements" about facts, thus leaving an important part of its work—"promoting growth of the law through

by Article 9.[77] This view is distinct from the argument that individual judges are beholden to their State in an *individual* capacity,[78] and it does not require one to impugn the impartiality of members of the Court vis-à-vis their national State (or any other). Even so, it suffices to observe that the judges, as a group, are intellectually disposed to a legal reasoning broadly resembling that of the State with whom they have the closest connection, and that such judges will arrive at similar conclusions to the said States "par affinité, parenté ou identité intellectuelle."[79] Accordingly, one can identify objectively an *intellectual affinity* of international judges with the policies of States, a wholly different argument than that of *institutional control* by States over the work of international courts.[80]

Whilst compliance with ICJ judgments is generally considered high,[81] the continued activity of the Court depends on more than merely satisfying the parties before it (or the requesting international organ); it also must contend with potential and future disputes between States. Thus, the Court must not only demonstrate a modicum of independence and impartiality when deciding cases, but it must also demonstrate a view of substantive international law that

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conceptualization and intellectual struggle"—undone.

[77] Malleson *et al*, *supra* note 14, at 31 in conducting interviews with senior diplomatic staff, serving and retired judges, have called attention to a certain disquiet that the concept of "equitable geographical distribution" embodied in Article 9 is in fact unfair, "petrifying" power balances of the Charter era and strongly favouring Europe (including the geopolitically obsolete "Eastern European Group") to the detriment of Asia and other regions. That concept also applies, of course, in relation to the Security Council: see Article 23 of the UN Charter.

[78] *Ibid.*, at 26-7 recounting how an ICJ judge explained feeling like an "ambassador" of his State at times.

[79] G. de Lacharrière, *La politique juridique extérieure* (Masson, 1989), at 157; and as he points out, this is in fact in perfect harmony with the representational condition found in Article 9 of the ICJ Statute, *supra* note 28.

[80] *Cf.* the concerns over judicial independence expressed by E. Benvenisti and G.W. Downs, 'Prospects for the Increased Independence of International Courts and Tribunals', (2011) 12(5) *German Law Journal* 1057; Cogan, *supra* note 2; A. von Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification', (2012) 23 (1) *EJIL* 7; and R. Mackenzie & P. Sands, 'International Courts and Tribunals and the Independence of the International Judge', (2003) 44 *Harv. Int'l L.J* 271.

[81] C. Paulson, 'Compliance with Final Judgments of the International Court of Justice Since 1987', (2004) 98 *AJIL* 434, at 436-59, established that, of the fourteen cases filed since 1987, nine have been complied with in full and five have met with "partial compliance". See, generally, C. Schulte, *Compliance with the Decisions of the International Court* (OUP, 2004). *Cf.* Posner and Yoo, *supra* note 5, at 37 who claim that despite a compliance rate of 85.7% in cases brought to the Court via *compromis*, the rate falls to 60% in cases brought via compromissory clause and 40% in cases brought by way of the Optional Clause mechanism.

is State-centric, in the sense that it assigns a high value to considerations of State sovereignty and consent when ascertaining rules of international law.

## 3.4 Allegations of partiality, or of national/political bias

As noted above, the most controversial and damaging accusation levelled against judges of the Court is that they are guilty of partiality, or of national or political bias; and numerous academic studies have been devoted to either proving or disproving this very point.[82] Consideration of bias is not easily discernible from the Court's judgments, as it has not made many statements regarding the requirement of impartiality and conscientiousness embodied in Article 20 of its Statute,[83] and in the various safeguards built into its Rules.[84] However, it may be helpful to consider the experience of other judicial institutions, especially the Rules of the European Court of Human Rights,[85] and the Code of Judicial Ethics of the International Criminal Court,

[82] See *supra* note 2, for a list of these studies. Mégret, *supra* note 4, at 48-62 elucidates a list of factors relevant in assessing the partiality of statements or declarations made by judges, or experts required to be impartial. Distilled as much as possible, the criteria are as follows: (i) whether such statements/declarations are sufficiently *related* to a given case; (ii) whether they are sufficiently *specific* as to relate strongly to a case; (iii) whether they are sufficiently recent in time so as to have weight in assessing the present partiality of the judge; (iv) whether they are *absolute* statements, or merely relative (*i.e.* whether the statement would suggest that the judge remains open to inquiry or counter-proof); (v) whether the statements are of a *consensual* or of a *polemical* nature, in that they merely restate widely-held positions, or they arrive at conclusions before investigations have taken place; (vi) whether the statements represent the *taking of a legal position* or merely a view about what facts actually occurred; (vii) whether statements were made in an *official* capacity, or merely in a *private* capacity; (viii) whether the statements are made in an *expert* (*ie* as a normative conclusion based on expertise) or *activist* (ie as a argumentative position taken within a debate) capacity; (ix) whether the statement was made in a *private* or *public* setting.

[83] Article 20 ICJ Statute, *supra* note 28. Guidance is sparse on this point. It is perhaps telling that for D.E. Kahn, 'Article 20' in Zimmermann *et al*, *supra* note 26, at 369, there is no selected bibliography.

[84] The equality of the parties is a consideration that permeates the Rules in general, with extensive deference to the views of both parties throughout the decision of a case. See especially the rules regarding the submission of written documents (Articles 44-53), the conduct of oral proceedings (Articles 54-72), and those relating to the composition of the Court and the procedures for nominating judges *ad hoc* (Articles 32-37 of the Rules).

[85] Rule 28.2 of the 2012 Rules of the European Court of Human Rights (last amended 1 May 2012) provides that "a judge may not take part in the consideration of any case if … he or she has expressed opinions publicly, through the communications media, in writing, through his

both of which place a high emphasis on the *appearance* of impartiality.[86] One might also wish to consider the ICTY's *Furundžija* judgment, issued in response to the defendant's attempt to disqualify the presiding trial judge, Florence Mumba, on the basis of her prior membership of the UN Commission on the Status of Women. Mr Furundžija claimed that the trial judgment was used by Judge Mumba to promote the legal and political agenda of that Commission. [87] Rejecting this submission, the Tribunal elaborated a relatively broad interpretation of the similar requirement of "impartiality and integrity"[88] contained in its Statute, placing an emphasis on the "appearance of impartiality."[89] The Special Court for Sierra Leone has also moved towards this broader standard, suggesting that the apprehension of bias by a reasonable bystander was legitimate reason to consider that an objective test of impartiality was not met.[90] Extra-judicially, ICTY President Meron has called attention to the "importance of being sensitive to the possibility of a public perception of bias."[91]

A contextual analysis of the Court's case law reveals at least two instances where considerations of impartiality manifested themselves in the opinion of a member of the Court. Politically, the *Nicaragua* judgment placed the Court on

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or her public actions or otherwise, that are objectively capable of adversely affecting his or her impartiality."

[86] Article 4, *Code of Judicial Ethics,* ICC-BD/02-01-05 (adopted 09.03.2005): "1. Judges shall be impartial and *ensure the appearance of impartiality* in the discharge of their judicial functions. 2. Judges shall avoid any conflict of interest, *or being placed in a situation which might reasonably be perceived* as giving rise to a conflict of interest" [Emphasis added].

[87] *Prosecutor v Furundžija*, Judgment of 21 July 2000, Case No IT-95-17/1A, 2002, at 169-70.

[88] *Ibid.,* at 189: "A) A Judge is not impartial if it is shown that actual bias exists; B) There is an unacceptable appearance of bias if: (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."

[89] Article 13, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827, UN Docs S/25704/36, annex (1993) and S/25704/Add.1 (1993), UN Doc S/RES/827, 25 May 1993.

[90] *Prosecutor v Issa Hassan Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Roberston from the Appeals Chamber, Case No. SCSL-2004-15-AR15, 2004, at 15.

[91] Meron, *supra* note 25, at 362. Although Meron retains faith in international judges acting in a conscientious, scrupulously impartial manner, he argues that the mere *appearance* of bias can compromise the reputation of the judiciary, and as such, must remain a foremost consideration for judges.

the defensive after the United States publicly impugned its members for lacking impartiality, failing to consider "irrefutable evidence" and characterising its judgment as a "departure from its tradition of judicial restraint."[92] In the merits phase, Judge Lachs appeared to rebut American accusations levelled against him:[93]

> A judge—as needs no emphasis—is bound to be impartial, objective, detached, disinterested and unbiased. In invoking the assistance of this Court or accepting its jurisdiction, States must feel assured that the facts of the dispute will be properly elicited; they must have the certainty that their jural relationship will be properly defined and that no partiality will result in injustice towards them. Thus those on the bench may represent different schools of law, may have different ideas about law and justice, be inspired by conflicting philosophies or travel on divergent roads—as indeed will often be true of the States parties to a case—and that their characters, outlook and background will widely differ is virtually a corollary of the diversity imposed by the Statute. But whatever philosophy the judges may confess they are bound to "master the acts" and then apply to them the law with utmost honesty.
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> […]
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> This variety of origin is certainly the great strength of this Court. It is a major contributory factor to the confidence that all states may feel in the balanced nature of the Court's decisions and the broad spectrum of legal opinion they represent. But can this diversity

[92] 18 January 1985 statement of the US State Department, reprinted in M.N. Leich, 'Contemporary Practice of the United States Relating to International Law', (1985) 79 *AJIL* 431, at 440-1, reprinted in *New York Times*, 19 January 1985, at 4, cols 1-6.

[93] The State Department was unequivocal, *ibid.*: "We will not risk US national security by presenting … material … before a Court that includes two judges from Warsaw Pact nations. This problem only confirms the reality that such issues are not suited for the International Court of Justice." Judge Jennings, albeit not directly targeted himself, nevertheless felt obliged to defend his brethren, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgment, ICJ Reports 1986, p. 14, at 528 (Judge Jennings, Dissenting Opinion): "I also wish to express my regret that, in a Court which by its Statute is elected in such a way as to assure 'the representation of the main forms of civilisation and of the principal legal systems of the world', the United States in its statement accompanying the announcement of the non-participation in the present phase of the case should have chosen not refer to the national origins of two of the Judges who took part in the earlier phases of the case."

> justify an invidious distinction between Judges according to their nationality or the alliances of which their countries may happen to be members? All Judges "should not be only impartial but also independent of control by their own countries or the United Nations Organization". In fact, while they may have served their countries in various capacities, they have had to cut the ties on becoming a Judge.[94]

Interestingly, he also cited a former American member of the Court, Judge Jessup, who had summarily dismissed the notion that the Court's judges defended their national states, and noted that to prove some kind of national alignment "is often not supportable and may be quite misleading."[95] Judge Lachs even took great pains to comment on and make extensive reference to American jurists (notably Judges Cardozo, Frankfurter and Holmes), almost certainly to rebut the accusation of specifically anti-American bias.[96]

The second example is Judge Elaraby in the *Israeli Wall* Order of 2004.[97] He quoted Judge Lachs' "wise maxim" approvingly at the start of his opinion, which was perhaps unnecessary in that he had voted with the majority on the entire *dispositif*. However, further study of the historical context behind that Order reveals that Judge Elaraby had been subject to a complaint by Israel regarding his impartiality,[98] on the basis of his role as a legal adviser to the Egyptian Ministry of Foreign Affairs and Legal Adviser to the Egyptian Delegation at Camp David in 1978, as well as an interview given by him in 2001. Although Israel's

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[94] *Nicaragua (Merits)*, *ibid.*, p. 158, at 158-9 (Judge Lachs, Separate Opinion). For further discussion of the 'individualisation' of the international judge, see for example *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)*, Judgment, ICJ Reports 1952, p. 93, at 161 (Judge Carneiro, Dissenting Opinion) who noted that "it is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin"; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, at 275 [hereinafter '*Nuclear Weapons*'] (Judge Herczegh, Declaration).

[95] *Ibid.*, at 159.

[96] Gordon, *supra* note 38, at 405. It should be noted that Judge Lachs voted in favour of the United States in *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Provisional Measures ICJ Reports 1979, p. 7, at 44-5; and *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)*, Order ICJ Reports 1982, p. 3, at 8.

[97] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ICJ Reports 2004, p. 136, at 246 [hereinafter '*Israeli Wall*'] (Judge Elaraby, Separate Opinion).

[98] *Ibid.*, Order of 30 April 2004 on the Composition of the Court ICJ Reports 2004, p. 3, at 4, para. 2. The exact complaint of Israel was that Judge Elaraby "had previously played an active, official and public role as an advocate for a cause that is in contention in [that] case".

request was dismissed by thirteen votes to one,[99] Judge Buergenthal, the lone dissentient, openly questioned Judge Elaraby's impartiality in his dissenting opinion appended to the Order.[100] Given a situation where even one of his own colleagues doubted his capacity to act impartially, one cannot but infer that Judge Elaraby's separate opinion was motivated by the controversy surrounding him.[101]

Extra-judicially, Judge Schwebel has proffered the following explanation about the (lack of) impartiality demonstrated by international judges which, in the light of criticism of some of his votes in *Nicaragua*, takes a discernibly defensive tone:

> "We [judges] are all prisoners of our own experience. Such measure of objectivity as may be humanly possible may come more easily to some than others, depending in part on that experience, in which the legal and political culture that conditioned it is important. Clearly judges manifest and in the history of civilisation have manifested a measure of objectivity. If not, the judiciary would not exist."[102]

These rare individual excursions are illustrative of why explicit discussion of this topic by the Court is so exceptional. Even so, the statements reviewed

[99] *Ibid.*, para. 9.

[100] *Ibid.*, (Judge Buergenthal, Dissenting Opinion), p. 9, para. 11: "[a] court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues raised in a case or advisory opinion in a fair and impartial manner, that is, that he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court. That is what is meant by the dictum that the fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done".

[101] Another instance was arguably Judge Nagendra Singh in *Nuclear Tests (Australia v France; New Zealand v France)*, Judgment ICJ Reports 1974, p. 253, at 457. Dugard, *supra* note 75, p. 498 contrasted Singh's vote with the majority in December 1974 with his extensive extra-judicial writings condemning the use of nuclear weapons in war and their testing as illegal, cautiously intimating that the fact that India detonated its first nuclear weapon in May 1974 may have influenced his vote.

[102] Schwebel, *supra* note 2, at 895. Perhaps Judge Schwebel was also responding to murmurs that he was guilty of bias, as it should be noted that Judge Schwebel voted as the sole dissentient in a case involving his national state four times in the *Nicaragua* case, *supra* note 93. See Order on Provisional Measures of 10 May 1984, ICJ Reports 1984, p. 169; Order fixing Time-Limits of 4 October 1984, ICJ Reports 1984, p. 209; Declaration of Intervention, ICJ Reports 1984, p. 215, and Nicaragua, *supra* note 93, Jurisdiction, ICJ Reports 1984, p. 392, and once in *Elettronica Sicula S.p.A. (ELSI) (United States v Italy)*, ICJ Reports 1989, p. 15.

above demonstrate that concerns about impartiality colour judicial reasoning and condition perceptions of the judicial role. Thus, the structural safeguards built into the Court's Statute[103] and the Court's collective drafting procedure—namely, avoidance of the *juge rapporteur*[104] and the collective drafting process, the composition of the Court,[105] and its election procedures[106]—seem justified. Finally, and more concretely, concerns about impartiality are the clear impetus behind the practice of "conscientious self-disqualification", when conflict of interest or undue involvement in other aspects of the dispute may exist.[107]

[103] Articles 16 and 17 of the ICJ Statute, *supra* note 28, prohibit judges from assuming certain functions in view of possible conflicts; Article 23 establishes both the right to vacations and the requirement that judges remain at the disposal of the Court; and Article 32(5) provides that their salaries may not be decreased whilst they are in office. These constitute safeguards for the judges against possible institutional interference over selection and tenure, legal discretion, and control over material and human resources. See R.O. Keohane *et al*., 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organization* 457, at 460.

[104] Sturé Petrén has extra-judicially listed several factors that made employing a *juge rapporteur* unworkable for the Court, going so far as to hint at national bias on the part of the member of the Court called upon to fulfil that function. See S. Petrén, 'Forms of Expression of Judicial Activity' in L. Gross (ed.), *The Future of the International Court of Justice Vol. 2* (Oceana, 1976), at 448.

[105] See Article 9 ICJ Statute, *supra* note 28, which exhorts the electors to bear in mind the "body as a whole"; but *cf.* L Oppenheim, *The Future of International Law* (Clarendon Press, 1921), at 43, arguing that the composition of the Court should not be guided by conceptions of sovereign equality. An excellent early analysis of the composition of the Court and the politics of representation remains that of Rosenne, 'Composition', *supra* note 66, at 377. He exhorts moving beyond traditional dichotomies between civil law and common law in favour of a "judicious balance" between all legal cultures, rather than any quantitative analysis.

[106] Meron, *supra* note 25, at 362 has called outright for the abolition of electioneering by judges, and suggested that international courts not allow for the re-election of judges for that same reason: campaigning is "incompatible with the dignity of the judicial function". See also the suggestion by J. Dugard, 'Article 16', in Zimmermann *et al*, supra note 26, 303, at 313 that longer terms of office, with no possibility of re-election, might further depoliticise the process; and ABILA Committee for the Settlement of Intergovernmental Disputes, 'Reforming the United Nations: What About the International Court of Justice?', (2006) 5(1) *Chinese Journal of International Law* 39, at 50, calling for judges to be elected for a single twelve-year term; Lauterpacht, 'Revision', *supra* note 12, at 122, proposing a single fifteen-year term.

[107] Very little can be abstracted from these practices because the Court is usually content with a brief statement in its Yearbook, providing little public explanation. One can note, however, the factual instances of recusals and study the external facts which might explain these recusals. See for example *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain)*, Second Phase ICJ Reports 1970, p. 3, where an unnamed judge recused himself. In *Frontier Dispute (Burkina Faso/Mali)*, Judgment ICJ Reports 1986, p. 554, there was a

# 4 Final Reflections on Impartiality

The notion of judicial impartiality being wedded to concerns over nationality and bias ignores the indirect stake that many states and international actors have in the judicial pronouncements of the Court. With its increased docket, genuine concerns over the structural and institutional constraints described above are ever more salient, and the Court's understanding of its judicial function should be approached from all possible angles.

The Court might indeed—to paraphrase Allott—speak to states the words states want to hear.[108] Yet even if this is so, that phenomenon ought best to be understood in the context in which the Court operates, instead of simply indicting the Court as a biased, subordinate institution. It is true that cannot always come to a case dispassionately and with only knowledge of the case that is put before a court. Experienced judges often come to a case with substantial knowledge of the context or facts surrounding it, and may be chosen precisely because of this relative legal and political 'worldliness'.[109] Yet the fact that judges have convictions and make value judgements, in good faith, in the exercise of their function is not necessarily problematic:[110] the very ability to abstract

problem in that one of the judges in the Chamber had previously presided over a conciliation commission which attempted to resolve that dispute. Judge Jessup recused himself from the *Temple of Preah Vihear (Cambodia v Thailand)*, Judgment ICJ Reports 1962, p. 6, in which he had previously been connected as counsel, as did Sir Hersch Lauterpacht in *Nottebohm (Liechtenstein v Guatemala),* Second Phase ICJ Reports 1955, p. 4; the *qualités* of the judgment did not mention this fact. When Judge Higgins recused herself in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Judgment ICJ Reports 1998, p. 9, at p. 13, para. 9, she was not mentioned by name. Judge Abraham in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment ICJ Reports 2008, p. 177, at 181-2, para. 6, was referred to as "the Member of the Court of French nationality." Recusal has also been involuntary: in *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase ICJ Reports 1966, p. 6, President Spender summarily announced at the start of oral proceedings that Judge Zafrullah Khan had been recused. For a history of this incident, *see* W.M. Reisman, 'Revision of the South West Africa Cases' (1966), 7 *Virginia Journal of International Law* 3, at 55 and Rosenne, 'Composition', *supra* note 66, at 389-90. See R.Y. Jennings, 'Article 24', in Zimmermann *et al*, supra note 26, at 420-1, footnote 19, for further examples.

[108] P. Allott, *The Health of Nations* (CUP, 2002), at 296.

[109] Meron, *supra* note 25, at 365: "judges are not empty vessels that the litigants fill with content." See also, generally, J. Frank, 'Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave like Human Beings', (1931) 80 *University of Pennsylvania Law Review* 17, at 25-9 on the personal element in judicial decision.

[110] Dworkin, *supra* note 11, at 8-9; Thomas, *supra* note 15, at 242.

oneself from one's individual predilections and to consider all viewpoints with a fair, open mind could even feed on one having a 'relatively vigorous subjectivity' in the first instance.[111] In short, the very notion of impartiality is relatively indeterminate.

I suggest instead that the notion of impartiality should be understood "against a background of partiality",[112] as an understanding by judges that they do carry with them prior experiences and predispositions that they must rationalise when making decisions based on law. Far from a praetorian guard of states' interests, the Court's judges define themselves through their fidelity to the rules of international law itself.[113] The Court's judges perceive the essence of their role to remain faithful—or partial—to the rules, standards and values that constitute the legal system.[114] As such, the concept of judicial impartiality would better be conceptualised by "visualising"[115] the judges within the context of the rules that they apply, rather than to be impartial *in respect of* the rules that they apply.[116] Rather than to extinguish them fully, judges should strive to remain aware of pre-judgements and values,[117] and retain a "reflective critical attitude" to the standards (or rules) they follow, apply and interpret.[118] For in the final analysis, what is asked of judges is good judgement, and not simply a resolution of the dispute: the judicial role requires constant, discerning assessment of what the law, and its underpinning purposes, require in a particular case.

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[111] Mégret, *supra* note 4, at 44.

[112] Lucy, *supra* note 19, at 15.

[113] Meron, *supra* note 25, at 369 expressly invokes the term "fidelity."

[114] D. Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology', (1986) 36 *Journal of Legal Education* 518, at 522 characterises the interplay between values and these 'pseudo-objective' rules as perhaps one of the major constraining factors on judicial work.

[115] J. Dickinson, 'Legal Rules: Their Function in the Process of Decision', (1931) 79 *University of Pennsylvania Law Review* 833, at 844 who suggests that one know the "rule of decision"; that is, not only the substantive rules in issue, but rather, how judges perceive and implement the rules, which turns on the judges' views on the function of the law, as well as their own function.

[116] Lucy, *supra* note 19, at 25.

[117] As concludes Minow, *supra* note 20, at 1217: "[w]e want judges … to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration."

[118] Hart, *supra* note 21, at 57.

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# The *Amicus Curiae* in Investor–State Arbitration

*Lucas Bastin*[*]

**Keywords**
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## 1 Introduction: the *amicus curiae* in international courts and tribunals

The role of the *amicus curiae* in international law varies according to the court or tribunal before which it seeks to appear. Through their respective procedural rules, international courts and tribunals have variously given *amici curiae* virtually no access to their chambers or given them full third party rights to participate. Drawing general conclusions about how international law regards *amici curiae* is thus very difficult.

The result of this difficulty is evident in the literature on *amici curiae* in international litigation. Commentators typically discuss the role of *amici curiae* in one forum,[1] in several fora in parallel,[2] or through a comparative study discussing how one forum is more favourable than or exercises influence upon another forum.[3] No commentary ever goes so far as to articulate a general international legal principle governing the admission of *amici curiae* to international tribunals. As Sir Arthur Watts observed, such procedural questions "can in practice only be pursued on a tribunal-by-tribunal basis."[4]

[*] BA (Hons) (Syd), LLB (Hons) (Syd), BCL (Dist) (Oxon). The author thanks the organisers of and participants in the CJICL Conference, and the anonymous referee, for their comments on earlier versions of this paper. All errors and opinions remain exclusively those of the author.

[1] See e.g. P. Mavroidis, '*Amicus Curiae* Briefs before the WTO: Much Ado About Nothing', in A. Bogdandy *et al* (eds), *European Integration and International Co-ordination* (2002) 317.

[2] See e.g. L. Bartholomeusz, 'The *Amicus Curiae* before International Courts and Tribunals', (2005) 5 *Non-State Actors and International Law* 209.

[3] See, e.g., J. Viñuales, 'Amicus Intervention in Investor–State Arbitration', (2007) 61 *Dispute Resolution Journal* 72.

[4] A. Watts, 'Enhancing the Effectiveness of Procedures of International Dispute Settlement', (2001) 5 *Max Planck Yearbook of United Nations Law* 21, at 21.

A brief review of the scope for *amicus curiae* participation in the various international tribunals confirms this view. The International Court of Justice ("ICJ" or "Court") has no formal regime for the participation of *amici curiae* in proceedings before it. According to the Statute and Rules of the ICJ, non-disputing parties may appear before the Court only in certain circumstances. These circumstances are: in contentious proceedings, intervention by a state pursuant to Articles 62 and 63 of the Statute, provision of information by "public international organizations" under Article 34(2)-(3),[5] and conduct of an enquiry or provision of an expert opinion by an "individual, body, bureau, commission, or other organization" under Article 50; and in advisory proceedings, participation by states or "international organizations" pursuant to Article 66 of the Statute,[6] and submission of written statements and documents by "international non-governmental organizations" ("NGOs") pursuant to Practice Direction XII.[7] No individual has ever acted as *amicus curiae* to the Court,[8] and, despite some informal participation of states and organisations otherwise than in accordance with the above procedures,[9] there has been no hint of the Court adopting a formal *amicus curiae* regime.

[5] The Court's Rule 69(4) clarifies that a "public international organization" means an "international organization of States", which excludes NGOs: D. Shelton, 'The Participation of Nongovernmental Organizations in International Proceedings', (1994) 88 *AJIL* 611, at 620-2. The Court used Art. 34(2) to seek information from the International Civil Aviation Organization in *Aerial Incident of 3 July 1988 (Iran v United states)*, ICJ Pleadings, Vol. II, 618.

[6] Note, however, the participation of Palestine, which is neither a state nor an international organisation in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136.

[7] The Court allowed an NGO to submit a written submission in 1950, but rejected similar requests in 1971: *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, p. 128; *Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Pleadings, Vol. II, 639-40, 647. In 1996, unsolicited written submissions from NGOs were made informally (but reluctantly) available to the Court: Bartholomeusz, *supra* note 2, at 222. Eventually, the Court adopted Practice Direction XII (30 July 2004), which clarifies that unsolicited NGO submissions will not be part of the case file but will be made available: <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> [last accessed 28 June 2012].

[8] Professor W Michael Reisman's application was rejected by the Court's Registrar because individuals did not fall within the term "international organization" in Art. 66(2): Letter from Professor Reisman to the Registrar, 10 September 1970, ICJ Pleadings 1971, Vol. II, 636; Letter from the Registrar to Professor Reisman, 6 November 1970, ICJ Pleadings 1971, Vol. II, at 638.

[9] The Court informally accepted a communiqué from Yugoslavia in *Corfu Channel (United Kingdom v Albania)*, Judgment, ICJ Reports 1949, p. 4. The Court also accepted informally NGOs' submissions in the *Nuclear Weapons* advisory proceedings: *Legality of the Use by a state of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, p. 66; *Legality of*

Like the ICJ, the International Tribunal for the Law of the Sea ("ITLOS") has no formal regime for *amicus curiae* participation in its Tribunal or Seabed Disputes Chamber. Participation of non-disputing parties is limited to specified situations. In contentious proceedings, the Tribunal or Chamber may request or permit "intergovernmental organizations" to furnish information relevant to cases before them orally or in writing under Article 84 of the ITLOS Rules. In advisory proceedings, under Article 133 of the ITLOS Rules, the Chamber will receive written and oral statements from states parties and those intergovernmental organizations which are notified of the case.[10] In the single instance where entities (two NGOs) requested leave to participate as *amici curiae*, the request was rejected.[11] While there has been some informal participation of non-disputing entities in disputes before the Tribunal,[12] ITLOS mirrors the ICJ by dealing with *amici curiae* restrictively.[13]

The World Trade Organization ("WTO") dispute settlement system is a forum in which the participation of *amici curiae* is arguably "the most sensitive issue among the membership related to issues regarding participation of non-Members".[14] On the one hand, the Appellate Body has repeatedly affirmed that both it and Panels have authority to accept and consider *amicus curiae* submissions.[15] However, on the other hand, WTO Members have been, with few exceptions,[16] critical of this position, arguing that there is no place for

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*the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226. Further: Bartholomeusz, *supra* note 2, at 222.

[10] In the only Advisory Opinion given by the Chamber to date, numerous states and intergovernmental organizations (notably the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources) provided statements: *Responsibilities and Obligations of states Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, ITLOS Case No. 17, 1 February 2011, para. 11.

[11] See *ibid*, paras. 13-4, rejecting the requests of Greenpeace International and the World Wide Fund for Nature to participate in the advisory proceedings.

[12] Documents produced by non-disputing parties have been attached to parties' submissions (e.g., Australia's in the *Volga* case and Ireland's in the *MOX Plant* case): P. Gautier, 'NGOs and Law of the Sea Disputes', in T. Treves *et al* (eds), *Civil Society, International Courts and Compliance Bodies* (2005), 233, at 240-1.

[13] Further, in 2005 the Tribunal commented that "it was premature to develop guidelines on the matter and that this view could be reassessed in the future": *Annual Report of the International Tribunal for the Law of the Sea for 2004*, UN Doc. SPLOS/122 (2005), at 9.

[14] Statement of New Zealand, WTO General Council Minutes, 22 November 2000, WT/GC/M/60 (2001), para. 87.

[15] See e.g. Appellate Report, *US - Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998, WT/DS58/AB/R, para. 108.

[16] Statements of the United states, Hong Kong and China, Dispute Settlement Body Minutes, 14 December 1998, WT/DSB/M/50 (1998), 11-6.

non-member *amicus curiae* participation.[17] Although this conflict of views arose more than a decade ago after the *US – Shrimp* case, the passage of time has not produced clarity of principle. The prevailing stalemate is that the WTO Panels and Appellate Body assert authority to accept *amicus curiae* submissions, but as a practical matter have never meaningfully considered such submissions.

The International Criminal Tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL") and the International Criminal Court ("ICC") are generally open to *amicus curiae* participation.[18] The ICTY and ICTR have identical rules in their Rules of Procedure and Evidence empowering them to "invite or grant leave to a state, organization or person to appear before it and make submissions".[19] This power has been used regularly by the ICTY and ICTR to appoint, and to accept requests to act as, *amici curiae*.[20] The SCSL has an almost identical provision,[21] which it has used to both seek and accept *amicus curiae* participation.[22] Finally, the ICC also has a provision which is "substantially similar"[23] to that of the ICTY and ICTR,[24] which it has also used a number of times.[25] Unlike in the ICJ and ITLOS, the admission of *amici curiae* in cases before the international criminal tribunals is thus clearly established.

Like the criminal tribunals, the European Court of Human Rights ("ECtHR") is permissive of *amicus curiae* participation. After admitting an *amicus curiae* for the first time in 1981,[26] the ECtHR's Rules of Procedure were amended explicitly to enable its President to invite or grant leave for *amici curiae* to make written submissions.[27] Subsequently, Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") entered into force in 1994, amending the Convention to reflect this rule. Eventually, the ECtHR's Rules of Procedure were amplified, and a detailed procedure for the

[17] Statements of Thailand, Pakistan, Malaysia, India, Brazil, Japan and Mexico, Dispute Settlement Body Minutes, 14 December 1998, WT/DSB/M/50 (1998), at 2-17.

[18] See S. Williams and H. Woolaver, 'The Role of the *Amicus Curiae* before International Criminal Tribunals', (2006) 6 *ICLR* 151.

[19] Rules of Procedure and Evidence of the ICTY, UN Doc. IT/32 (1994), Rule 74.

[20] Bartholomeusz, *supra* note 2, at 244-8.

[21] Rules of Procedure and Evidence of the SCSL, Rule 74, <http://www.sc-sl.org/LinkClick.aspx?fileticket=Psp%2bFh0%2bwSI%3d&tabid=176> [last accessed 18 September 2002].

[22] Bartholomeusz, *supra* note 2, at 253-4

[23] *Ibid*., at 243.

[24] Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3(Part II-A) (2002), Rule 103.

[25] See e.g. *Prosecutor v Jean-Pierre Bemba Gombo*, Case ICC-01/05-01/08.

[26] *Young v United Kingdom* [1981] 44 ECHR (Ser A) (1981).

[27] Rules of Procedure of the ECtHR, former Rule 37(2).

admission of *amici curiae* was established.[28] This procedure has been used regularly. As one review notes, it served to allow *amicus curiae* participation in 35 cases between 1 November 1998 and 31 March 2005.[29] Although this represents a small proportion of the ECtHR's case-load, it nevertheless signifies probably the most active *amicus curiae* forum in international law.

Like many of the above fora, investor–state arbitral tribunals have recently witnessed increasing *amicus curiae* activity. Over the past decade, tribunals constituted pursuant to the North American Free Trade Agreement ("NAFTA"), bilateral investment treaties ("BITs") and Free Trade Agreements ("FTAs") have received numerous requests by NGOs, individuals, industry bodies and other entities to participate as *amici curiae*. The requests have varied in detail, but overall have sought leave to file written submissions, access case documents, attend hearings, make oral submissions, and/or respond to questions from the tribunal. The requests have met with limited success. The earliest request was rejected entirely, and subsequent requests struggled to gain much more than leave to file written submissions.

The poor reception which *amici curiae* initially received from tribunals prompted heavy criticism of investor–state arbitration. The *New York Times* labelled the International Centre for Settlement of Investment Disputes ("ICSID") tribunals as "Secret Trade Courts".[30] Commentators criticised the lack of transparency of, and civil society's access to, investor–state arbitrations.[31] One NGO denied *amicus curiae* status lambasted the decision as "profoundly undemocratic", "inexcusable", a "closed-door process" and an "extreme example of excessive power granted to corporations".[32]

Criticism prompted change. The system of investor–state arbitration started to grant more—but not unfettered—access to *amici curiae*. As discussed below, some states signed BITs and FTAs, or promulgated model BITs, which

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[28] *Ibid*., Rule 44, <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf> [last accessed 18 September 2012].

[29] Bartholomeusz, *supra* note 2, at 235.

[30] Editorial, 'The Secret Trade Courts', *The New York Times*, 27 September 2004, <http://www.nytimes.com/2004/09/27/opinion/27mon3.html> [last accessed 28 June 2012].

[31] See e.g. B. Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?', (2008) 41 *Vanderbilt JTL* 775.

[32] Earthjustice, 'Secretive World Bank Tribunal Banks Public and Media Participation in Bechtel Lawsuit', Press Release, 12 February 2003, <http://earthjustice.org/news/press/2003/secretive-world-bank-tribunal-bans-public-and-media-participation-in-bechtel-lawsuit-over-access-to-water> [last accessed 18 September 2012].

allowed *amici curiae* to participate in arbitrations brought under those treaties. ICSID amended its Arbitration Rules to allow *amici curiae* to file submissions, subject to certain criteria to be applied by the tribunal. The NAFTA states issued a statement acknowledging that non-disputing parties may seek leave to make *amici curiae* submissions in chapter 11 arbitrations, and establishing guidelines for the acceptance of such submissions. And tribunals began to allow *amici curiae* to participate, in limited ways, in the cases before them.

Engaging both with these developments and with the criticisms of the transparency of investor–state arbitration, commentary on the role of *amici curiae* increased. Most scholarship welcomed the arrival of *amici curiae* in investor–state arbitration, and identified ways in which their role could be expanded. Objections to expansion—chiefly the increase in costs and the lack of consent of the arbitrating parties—were usually put aside or dismissed.[33] Only a minority of contributions saw increased costs as a concern requiring positive regulation, such as the deposit by *amici curiae* of security for costs.[34]

In commentary which supports *amicus curiae* participation in investor–state arbitration, several contributions advocate a significant expansion of their role. One proposition is that the entire system of investor–state arbitration should be amended so that *amici curiae* would have a right of participation upon satisfaction of set criteria, notwithstanding that this would "require significant revision to the provisions of many prominent rules".[35] Another proposition is that investor–state tribunals be required, upon accepting an *amicus curiae* submission, to "take the submission seriously" because its acceptance "create[s] a legitimate expectation on the part of the *amicus*" that it will do so, with the result that tribunals must "as a minimum requirement ... summarize the arguments made in the submission and *respond* to them."[36]

The position of this article is that these instances of previous scholarship define a role for *amicus curiae* which is impracticably extensive at this stage of the development of investor–state arbitration. This article advocates that the present goals of would-be *amici curiae* in investor–state arbitration should be

[33] See e.g. T. Ishikawa, 'Third party Participation in Investment Treaty Arbitration', (2010) 59 *ICLQ* 373, at 391-401.

[34] P. Friedland, 'The Amicus Role in International Arbitration', Conference Paper at the School of International Arbitration, London, 12 April 2005, at 10.

[35] E. Levine, '*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation', (2011) 29 *Berkeley JIL* 200, at 222. See also K. Gómez, 'Rethinking the Role of the Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest', (2012) 35 *Fordham ILJ* 510, at 562-3.

[36] Ishikawa, *supra* note 33, at 410-1 (emphasis original).

more limited than the "significant revision" of all major arbitral rules and less prescriptive than imposing "minimum requirements" on tribunals dealing with *amici curiae*. Rather, the development of the role of *amici curiae* in investor–state arbitration must be premised on their winning and deepening the familiarity and trust that states (which create and augment the system) and tribunals (which administer it) have with and in them. Reasonable and targeted demands, which do not entail dramatic overhaul of the investor–state arbitration system or unduly fetter tribunals, may then be advanced by *amici curiae* in a climate which is more receptive, and to an end which is more practicably attainable.

In advocating this position, this article provides a brief summary of both the investor–state arbitrations in which *amici curiae* have sought to participate to date, and the key issues which scholarship has identified *vis-à-vis* such participation. Having provided this summary, this article considers whether *amici curiae* are worthwhile in the investor–state arbitration system, what role they play in it and how commentary evaluates that role, and on what goals they might focus to increase their role. To assist its analysis, this article attaches as Appendix 1 a table summarising the *amici curiae* applications made in investor–state arbitrations to date, and the success which those applications have achieved.

## 2 The *amicus curiae* in investor–state arbitration: the cases and key issues in scholarship

Investor–state arbitrations in which *amici curiae* have sought to participate can be grouped into three categories, according to the combination of the consent to arbitrate and arbitral rules which are applicable in the arbitration. The categories are: arbitrations under BITs (or the Energy Charter Treaty) and the ICSID Arbitration Rules; arbitrations under NAFTA and the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules; and arbitrations under some other combination of a consent to arbitrate and arbitral rules. This article summarises first the cases falling within each category, and secondly the key issues which scholarship has drawn from these cases.[37]

[37] Instances where a state other than the respondent state participates as a third party in an arbitration pursuant to its right in the treaty containing the consent to arbitrate fall outside the ambit of this article, and are thus not considered. An example of such a provision is Article 10.20.3 of the Central America-United States-Dominican Republic Free Trade

## 2.1 BIT/ICSID arbitrations

The BIT/ICSID category comprises eight cases.[38] The first case to receive an *amicus curiae* application was *Aguas del Tunari, SA v Republic of Bolivia* ("*AdT v Bolivia*"). In that case, the claimant won a concession to operate water services in Bolivia, but encountered opposition from local citizens. The claimant abandoned the project and commenced arbitration. Several NGOs and individuals sought to intervene either as parties or as *amici curiae*. In the latter capacity, they sought to: make written and oral submissions; receive disclosure of case materials; attend hearings; and respond to arguments concerning their application. The Tribunal rejected the requests entirely, concluding that they were "beyond the power or the authority of the Tribunal to grant" without the parties' agreement.[39]

The next BIT/ICSID case to receive an *amicus curiae* application was *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic* ("*Suez/Vivendi v Argentina*"). The claimants commenced arbitration in respect of measures taken by Argentina during its economic crisis, which they said injured their investment procured through Argentina's privatisation of water services. Five NGOs sought leave to attend the hearings, make submissions and access case materials. The Tribunal held that the *amici curiae* could not attend the hearing as the parties to the arbitration had not so consented,[40] but that it was entitled to accept *amicus curiae* submissions under its general procedural power.[41] The Tribunal reasoned that acceptance of a submission should be based on: (i) the appropriateness of the subject matter of the case; (ii) the suitability of the non-party to act as *amicus curiae*; and (iii) the procedure to apply to the submission.[42] The Tribunal held that the NGOs

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Agreement, mentioned below.

[38] This figure, like its counterparts below, is current to 28 June 2012 and reflects publicly-available information. Note that the United states requested *amicus curiae* participation in a ninth case (*Siemens v Argentine Republic*, ICSID Case No. ARB/02/8), but the proceedings were discontinued before the tribunal decided the request.

[39] *AdT v Bolivia*, ICSID Case No. ARB/02/3, Letter from the President of the Tribunal, 29 January 2003, at 1.

[40] *Suez/Vivendi v Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, at 3-4. The applicable ICSID Arbitration Rule 32(2) read: "The Tribunal shall decide, with the consent of the parties, which [non-disputing parties] ... may attend the hearings."

[41] *Ibid*. The applicable Article 44 of the ICSID Convention provides: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

[42] *Ibid*., at 7-8.

should formally apply to make *amici curiae* submissions, at which point it would decide the matter.[43] The Tribunal found that the NGOs' subsequent application satisfied the criteria, allowed them to file a joint *amici curiae* submission,[44] but refused them access to case materials as they were already sufficiently well-informed.[45]

The third BIT/ICSID case to encounter *amici curiae* was *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales v Argentine Republic* ("*Suez/InterAguas v Argentina*"). The case arose in similar circumstances to *Suez/Vivendi*, and the tribunal was identically constituted. Accordingly, when an NGO and three individuals requested leave as *amici curiae* to attend hearings, make written and oral submissions and have access to case materials, the tribunal unsurprisingly applied the three criteria from *Suez/Vivendi*. Unlike in *Suez/Vivendi*, however, the tribunal declined the request on the basis that the would-be *amici curiae* had not shown that their "experience, expertise and perspectives will assist the Tribunal", and had "not provided ... sufficient information and reasons to [show] that they qualify as *amici curiae*".[46]

Apparently in response to perceived inconsistencies between *Suez/Vivendi v Argentina* and *Suez/InterAguas v Argentina*[47] and criticisms relating to the lack of transparency of the investor–state arbitration system,[48] ICSID's Arbitration Rules were amended on 10 April 2006 to provide for limited participation of non-disputing parties. Arbitration Rule 37(2) was inserted, empowering tribunals to allow non-disputing parties to file written submissions "regarding a matter within the scope of the dispute". It also provides that, when deciding whether to allow such a filing, tribunals must consider (non-exhaustively) whether: (i) the submission would assist it in determining a factual or legal issue related to the proceedings by bringing a perspective or particular knowledge or insight different from that of the parties; (ii) the submission would address a matter within the scope of the dispute; and (iii) the non-disputing party has a significant interest in the proceeding. Arbitration Rule 37(2) also requires the tribunal to ensure that the submission does not disrupt the proceeding

[43] *Ibid*., at 12-3.

[44] *Suez/Vivendi v Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition By Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, 12 February 2007, at 12.

[45] *Ibid*., 12-3.

[46] *Suez/InterAguas v Argentina*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, 17 March 2006, at 13.

[47] Ishikawa, *supra* note 33, at 384.

[48] A. de Lotbinière and A. Santens, 'ICSID Tribunals Apply New Rules on Amicus Curiae', (2007) 22 *Mealey's IAR* 18, at 18.

or unduly burden or unfairly prejudice either party, and that the parties are able to comment on the submission. A second notable amendment concerned Arbitration Rule 32(2), which was reworded to allow the parties to veto the access of non-disputing parties to the hearing (absent which the tribunal would decide the matter).

The first BIT/ICSID arbitration which applied the amended ICSID Arbitration Rules was *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ("*Biwater Gauff v Tanzania*"). The claimant commenced arbitration after Tanzania's cancellation of a water supply contract which it had concluded with the claimant two years earlier. Five NGOs sought: (i) status as *amici curiae* (and thus capacity to file written submissions); (ii) access to key documents; and (iii) permission to attend oral hearings and respond to questions of the tribunal. The Tribunal applied Arbitration Rule 37(2), and concluded that it "may benefit from a written submission" from the *amici curiae*, and thus allowed that request.[49] However, the tribunal rejected the requests to access documents, because the relevant information was already in the public domain, and to attend the hearing, because the claimant withheld its consent.[50]

The fifth and sixth examples in this category were a pair of arbitrations brought before ICSID pursuant to the Energy Charter Treaty. In *AES Summit Generation Limited & Another v Republic of Hungary* ("*AES v Hungary*") and *Electrabel SA v Republic of Hungary* ("*Electrabel v Hungary*"), the claimants alleged that Hungary had breached the Energy Charter Treaty through measures it had taken contrary to power purchase agreements signed by the claimants and a Hungarian state-owned entity. The European Commission sought to participate in the arbitrations as it believed that such agreements were unlawful under European Community Law. Although the requests made by the Commission are not public, each tribunal permitted it to file written submissions.[51] The award in *AES v Hungary* indicates that the Commission received no other allowances as *amicus curiae*,[52] and one may expect the forthcoming award in *Electrabel v Hungary* to do likewise.

The next BIT/ICSID case to receive an *amicus curiae* application was *Piero*

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[49] *Biwater Gauff v Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007, at 14.

[50] *Ibid*., at 19-21.

[51] *AES v Hungary*, ICSID Case No. ARB/07/22, Procedural Details, <http://icsid.worldbank.org/ICSID/FrontServlet> [last accessed 28 June 2012]; *Electrabel v Hungary,* ICSID Case No. ARB/07/19, Procedural Details, <http://icsid.worldbank.org/ICSID/FrontServlet> [last accessed 28 June 2012].

[52] *AES v Hungary*, ICSID Case No. ARB/07/22, award, 23 September 2010, para. 8.2.

*Foresti & Others v Republic of South Africa* ("*Piero Foresti v South Africa*"). The case challenged South African legislation which vested mineral rights in the state, invited previous rights owners to apply to convert their "old order rights" into "new order rights", and required them to demonstrate commitment to South Africa's black economic empowerment objectives. Five NGOs sought, as *amici curiae*: (i) leave to file written submissions; (ii) access to key documents; and (iii) permission to attend and make oral submissions at the hearing. The Tribunal granted leave to file written submissions and allowed the *amici curiae* access to documents which would assist them "focus their submissions upon the issues arising in the case and to see what positions the parties have taken on those issues."[53] The Tribunal did not allow the *amici curiae* a role in the hearings.

The final BIT/ICSID case in which *amici curiae* sought to participate was the joined arbitrations of *Bernhard von Pezold & Others v Republic of Zimbabwe* and *Border Timbers Limited & Others v Zimbabwe* ("*von Pezold/Border v Zimbabwe*"). The arbitrations concerned alleged breaches of applicable BITs resulting from Zimbabwe's conduct in relation to the forestry and timber processing industry. One NGO and four indigenous communities requested: (i) leave to file written submissions; (ii) access to key documents; and (iii) permission to attend the hearing and respond to questions posited by the tribunals. The identically constituted tribunals rejected all these requests. They held that the *amici curiae* failed to satisfy any paragraph of Rule 37(2). The potential submissions, which related to the interaction of international investment and human rights/indigenous law, would: be "unrelated to the matters" in dispute and thus would not assist "the determination of a factual or legal issue related to the proceedings"; concern "a matter outside the scope of the dispute, as it is presently constituted"; and not derive from a "significant interest in the proceeding".[54] More significantly, however, the tribunals held that it "is implicit in Rule 37(2)(a)" that an *amicus curiae* must be independent of the parties.[55] This requirement of "independence" was inferred from Rule 37(2), and supported by reference (only) to the *Suez/InterAguas v Argentina* decision (which predated the insertion of Rule 37(2) into the ICSID Rules).[56] Applying this condition of independence, the tribunals held that the "apparent lack of independence or

[53] *Piero Foresti v South Africa*, ICSID Case No. ARB(AF)/07/01, Letter from ICSID regarding non-disputing parties, 5 October 2009, at 2.

[54] *von Pezold/Border v Zimbabwe*, ICSID Case No. ARB/10/15; ICSID Case No. ARB/10/25 (joined), Procedural Order No. 2, 26 June 2012, paras. 57-61.

[55] *Ibid*., para. 49.

[56] *Ibid*.

neutrality of the [*amici curiae*] is a sufficient ground to deny" their requests.[57]

## 2.2 NAFTA/UNCITRAL arbitrations

The second category of arbitrations in which *amicus curiae* participation has been sought is NAFTA/UNCITRAL arbitrations. This category comprises six cases. The first is *Methanex Corporation v United states of America* ("*Methanex v US*"). The dispute concerned a Californian ban of a certain gasoline additive, of an element of which the claimant was a producer. Three NGOs sought *amici curiae* participation in the form of, collectively: (i) making written submissions; (ii) receiving the parties' pleadings; (iii) attending the hearing; and (iv) making oral submissions at the hearing. The Tribunal noted its general power in Article 15(1) of the UNCITRAL Arbitration Rules,[58] and granted the *amici curiae* leave to apply to file written submissions.[59] However, it rejected all other requests made by the *amici curiae*, noting that Article 25(4) of the UNCITRAL Arbitration Rules provided that hearings would be *in camera*, and that the parties had previously agreed that the arbitration would be confidential.[60]

A few months after this decision, the tribunal in *United Parcel Service of America Inc v Canada* ("*UPS v Canada*") considered a similar application. The claimant impugned Canadian measures which it said unfairly restricted access to the Canadian postal services market. A workers' Union and one NGO sought to be joined as parties or, failing that, to participate as *amici curiae*, requesting in that capacity: (i) the right to make submissions (presumably written and oral); and (ii) access to case materials. The Tribunal invoked Article 15(1) of the UNCITRAL Arbitration Rules in order to allow the *amici curiae* to file written submissions,[61] but relied on Article 25(4) to refuse them access to the oral hearing.[62] The Tribunal also refused access to the case materials, indicating that this was a matter for the parties to agree.[63]

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[57] *Ibid*., para. 56.

[58] Article 15(1) of the UNCITRAL Arbitration Rules, now Article 17(1), provides: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate".

[59] *Methanex v US,* UNCITRAL (NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae', 15 January 2001, at 23.

[60] *Ibid*., at 19-21.

[61] *UPS v Canada,* UNCITRAL (NAFTA), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, paras. 61, 73.

[62] *Ibid.*, para. 67.

[63] *Ibid*., para. 68. The parties ultimately agreed to publicise pleadings and other materials, a decision generally followed in NAFTA arbitrations since.

Perhaps sensing the beginning of a trend, the NAFTA states parties addressed the role of *amici curiae* in the NAFTA Free Trade Commission ("FTC"). In a 2003 statement, the FTC confirmed that *amici curiae* could apply for leave to submit written submissions in NAFTA arbitrations. The FTC statement then set guidelines regarding such submissions. Key guidelines were that tribunals, when deciding whether to grant leave to file a submission, should consider whether: (i) the submission would assist it in determining a factual or legal issue by bringing a perspective, particular knowledge or insight different from the parties'; (ii) the submission would address matters within the scope of the dispute; (iii) the would-be *amicus curiae* has a significant interest in the arbitration; and (iv) there is a public interest in the subject-matter of the arbitration. The FTC Statement also requires the tribunal to ensure that the submission will not disrupt the arbitration, and that neither party is unduly burdened or unfairly prejudiced by the submission.[64] Although these guidelines in the FTC statement are "recommendations", NAFTA tribunals have in practice followed them closely.

The next NAFTA/UNCITRAL arbitration to receive an *amicus curiae* application was *Glamis Gold Ltd v United states of America* ("*Glamis Gold v US*"). The claimant complained that regulations implemented by California requiring metal mining companies to backfill open-pit mines and take steps to return the land to usable conditions and preserve Native American sites breached the NAFTA. Several NGOs applied to act as *amici curiae*, as did the National Mining Association, a mining industry representative body, and the Quechan Indian Nation, the indigenous population whose land rights could be directly affected. The applications sought permission only to file written submissions, and most referred explicitly to the FTC statement when framing their applications. The Tribunal, invoking the FTC Statement and observing that "leave to file and acceptance of submissions should be granted liberally", granted the requests of the *amici curiae*.[65]

The fourth NAFTA/UNCITRAL arbitration involving *amici curiae* is *Merrill & Ring Forestry LP v Canada* ("*Merrill v Canada*"). The claimant alleged that Canada had breached the NAFTA by administering a log export restraint regime which only applied to logs grown on privately-owned forestlands in British Columbia. A coalition of three Canadian labour unions jointly applied

[64] Statement of the Free Trade Commission on non-disputing party participation, 7 October 2003, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf> [last accessed 18 September 2012].

[65] *Glamis Gold v US,* UNCITRAL (NAFTA), Award, 8 June 2009, para. 286.

for leave to submit a joint written *amicus curiae* submission in the arbitration. The tribunal, following the FTC statement, accepted the submission.[66]

The fifth instance of *amicus curiae* participation in this category is slightly unusual. In *Grand River Enterprises Six Nations Ltd et al v United states of America* ("*Grand River v US*"), in which the claimants alleged that actions taken by the United States to settle litigation against domestic cigarette manufacturers breached the NAFTA, the tribunal received an unsolicited letter from the National Chief of the Assembly of First Nations. While the letter expressed support for the claimant, it did not request leave to make further submissions or for any action to be taken to formalise the status of the National Chief in the arbitration. Despite noting that the letter should be dealt with according to the FTC statement,[67] the tribunal ultimately did not decide the issue. Rather, the claimants "included the National Chief's letter as a supporting exhibit ... [and] in that context, it was read and considered by the Tribunal."[68]

The final NAFTA/UNCITRAL arbitration in which *amicus curiae* participation has been sought is *Apotex Inc v United states of America* ("*Apotex v US*"). The arbitration concerned decisions by United states courts which allegedly impaired the access of the claimant to the United states market for antidepressant drugs. The only *amicus curiae* that sought to participate was the Study Center for Sustainable Finance, the research and development arm of an Italian management consulting firm. It sought to file written submissions. The tribunal refused this request on the basis that the application had not satisfied the guidelines in the FTC statement. In particular, the application had "not pointed to any knowledge, experience or expertise" which the would-be *amicus curiae* would bring to the arbitration, had "not defined any significant interest in this arbitration", and had "failed to explain the particular public interest it would be seeking to address".[69]

## 2.3 Arbitrations under other combination of consents to arbitrate and arbitral rules

The final category of arbitrations in which *amici curiae* participation has been sought are those brought pursuant to some other combination of a consent to

[66] *Merrill v Canada*, UNCITRAL (NAFTA), award, 31 March 2010, paras. 22-5.

[67] *Grand River v US*, UNCITRAL (NAFTA), Letter from the Tribunal to the Parties, 27 January 2009.

[68] *Grand River v US*, UNCITRAL (NAFTA), award, 12 January 2011, para. 60.

[69] *Apotex v US*, UNCITRAL (NAFTA), Procedural Order No. 2, 11 October 2011, paras. 23, 28, 29.

arbitrate and arbitral rules (that is, non-BIT/ICSID and non-NAFTA/UNCITRAL arbitrations). This category comprises three cases.

The first is *Eureko BV v Solvak Republic "Eureko v Slovak Republic"*). This arbitration was initiated under the Dutch-Slovak BIT and conducted pursuant to the UNCITRAL Arbitration Rules. In the course of considering its jurisdiction to hear the dispute, the tribunal, with the parties' agreement, invited two entities to submit written *amici curiae* submissions.[70] The first was the Netherlands, in its capacity as the other state party to the BIT, and the second was the EU Commission, in its capacity as an organ with oversight of EU law (which was relevant due to the intra-EU nature of the BIT). The Tribunal did not invite the *amici curiae*, nor did they seek, to participate in any other way. The Tribunal did not explain the legal basis on which it requested, or then accepted, the submissions. Presumably the agreement of the parties was deemed sufficient. Thus the submissions were accepted and considered in detail by the tribunal.[71]

The second instance of *amicus curiae* participation in this category occurred in *PacRim Cayman LLC v Republic of El Salvador* ("*PacRim v El Salvador*"). The claimant asserted that regulatory measures taken by El Salvador prevented it from developing gold mining rights in breach of the investment protections in the Central America-United states-Dominican Republic Free Trade Agreement ("CAFTA-DR"). The arbitration proceeded under the ICSID Arbitration Rules. A coalition of NGOs sought permission to participate jointly as *amici curiae*, seeking leave to file written submissions, and to attend and make oral submissions at the hearing on jurisdiction. Relying on provisions in both the CAFTA-DR and the ICSID Arbitration Rules, the tribunal granted leave for the NGOs to submit a joint written submission but refused them permission to appear and make oral submissions at the hearing.[72]

The final arbitration in this category is *Chevron Corporation and Texaco Petroleum Corporation v Republic of Ecuador* ("*Chevron v Ecuador*"). This arbitration was commenced pursuant to a BIT and conducted under the UNCITRAL Arbitration Rules. It concerned allegations that domestic proceedings pursued in Ecuadorian courts in relation to remedial measures taken by the claimants after their exit from an oil concession consortium violated the Ecuador-United states BIT. Two NGOs jointly sought permission as *amici curiae* to: (i) file a written submission; (ii) attend the hearing and either present oral submissions

[70] *Eureko v Slovak Republic*, PCA Case No. 2008-13, award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 154.

[71] *Ibid*., Section V.

[72] *PacRim v El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 March 2011, at 2.

or act as observers and respond to the tribunal's questions; and (iii) access key documents. The Tribunal rejected each request. Access to the oral hearing was denied because Article 25(4) of the UNCITRAL Arbitration Rules provides that hearings will be *in camera*, while the other requests were rejected apparently because the NGOs were deemed ill-equipped to comment on the jurisdictional matters being decided.[73]

## 2.4 Key issues in scholarship on the *amicus curiae* in investor–state arbitration

Because the commentary regarding *amici curiae* in investor–state arbitration has centred on whether they should play a role in the system, or if they do play a role whether it should be expanded, the key issues in scholarship read somewhat like a balance sheet. Most of the discussion has focused on identifying and evaluating the problems associated with not allowing *amici curiae* a role, or an expanded role, in investor–state arbitration, or conversely the problems associated with granting them that role. This article now summarises the scholarship on each side of this ledger.

Numerous contributions have emphasised the problems with withholding from *amici curiae* initially a role, and more lately an expanded role, in the system of investor–state arbitration. These problems can be grouped into two main categories.

The first category is that the transparency, legitimacy and accountability of the system of investor–state arbitration, as it is perceived from without, suffers. Virtually all scholarship which favours *amici curiae* in investor–state arbitrations stresses this point. The argument has various strands. Some authors emphasise procedural transparency, arguing that participation of *amici curiae* "promote[s] a general interest in procedural openness and ensure[s] that the broader public does not perceive the arbitration process as 'secretive'".[74] Other authors highlight the need for tribunals to be well-informed, maintaining that *amici curiae* "address certain factors the parties are unable or unwilling to address", "supply the tribunals with more comprehensive legal arguments ... [and] an extra layer of factual information", and "inform the tribunal of the broader implications of a decision".[75] Still others focus on the public interest,

[73] *Chevron v Ecuador*, UNCITRAL, Procedural Order No. 8, 18 April 2011, paras. 17-20.

[74] Levine, *supra* note 35, at 217. See also J. VanDuzer, 'Enhancing the Procedural Legitimacy of Investor–State Arbitration through Transparency and *Amicus Curiae* Participation', (2007) 52 *McGill LJ* 681.

[75] Ishikawa, *supra* note 33, at 402-3.

noting that decisions which "may require a change in the law and practice of the state party and [require] the public ... to pay for any liability imposed on a State" necessitate greater transparency than, say, private commercial arbitration.[76] The most robust proponents of transparency assert that *amici curiae* help rescue a system which places its "legitimacy in peril",[77] contributes to "the democratic deficit"[78] and can constitute "an assault on the ability of governments to regulate investment".[79] The more involved that *amici curiae* are, so the argument goes, the more transparent, legitimate and accountable investor–state arbitration becomes.

The second category of problems arising from the marginalisation of *amici curiae* is that their absence means investor–state arbitral tribunals, as they operate from within, cannot competently undertake their mandate. Because the "investor–state arbitration process allows investors to bypass domestic courts and challenge democratically enacted legislation through a private process", the admission of *amici curiae* helps "provide information and raise public policy issues that are necessary to properly decide the dispute."[80] As investor–state arbitrations consider a wide variety of regulatory measures, an understanding of the public impact of the implementation of the measure, and its potential modification, is fundamental to the fulfilment of a tribunal's task appropriately to "review and discipline legislators, judges and other public officials".[81] Facilitating that understanding may not always be in the parties' interests,[82] and perhaps especially not that of the investor,[83] making it crucial for *amici curiae* to be heard when the impugned "regulation ... goes to the core

[76] C. Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration', (2003) 14 *American Review of International Arbitration* 121, at 134-5. See also: F. Marshall and H. Mann, 'Good Governance and the Rule of Law: Express Rules for investor–state Arbitrations Required', International Institute for Sustainable Development Submissions, September 2006, at 2-3, <http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf> [last accessed 18 September 2012]; Ishikawa, *supra* note 33, at 375-6, 394; Gómez, *supra* note 35, at 526-9.

[77] Marshall and Mann, *supra* note 76, at 3.

[78] Choudhury, *supra* note 31.

[79] As paraphrased in A. Newcombe and A. Lemaire, 'Should Amici Curiae Participate in Investment Treaty Arbitrations?', (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 22, at 30.

[80] *Ibid*.

[81] G. van Harten, 'A Case for an International Investment Court', *Investment Treaty News*, 1 September 2008, <http://www.iisd.org/itn/2008/08/07/commentary-a-case-for-an-international-investment-court> [last accessed 28 June 2012].

[82] Ishikawa, *supra* note 33, at 402-3.

[83] Viñuales, *supra* note 3, at 75.

of domestic regulatory authority ... [such as] to protect the environment and human and animal health."[84]

Not all commentary, however, believes that negative consequences arise only when *amici curiae* are excluded from investor–state arbitration. Some authors express concerns about the inclusion of *amici curiae*. The literature identifies three main concerns.

The primary concern regarding the admission of *amici curiae* is the increase in cost and delay for the parties. It is axiomatic that the parties "must analyse and respond to an *amicus* submission, which accordingly increases the cost and duration of the arbitration."[85] In a context where proceedings "already run, on average, several years and entail large costs",[86] further burdening the parties is undesirable. And yet, as two practitioners have noted, the "costs and time involved in the parties' review of and response to non-party submissions" can be "significant",[87] and will fall more heavily on the "party opposing the amicus submission".[88] The concern regarding costs and delay, therefore, has two dimensions. The first is that both will necessarily increase if *amici curiae* are allowed to participate in the arbitration. The second is that one party to the dispute is likely to bear a greater proportion of the increased costs, thus introducing inequality between the parties.

The second concern is that the participation of *amici curiae* subverts the consensual nature of arbitration, and thus erodes the parties' enthusiasm for that type of dispute settlement. parties conduct investor–state arbitration upon the perfection of their mutual consent to do so. By granting third parties a role in such proceedings, tribunals permit "a fundamental departure from this established arbitral principle".[89] It also damages the conduct of the arbitration in practical terms, through the enforced reduction of party autonomy and the possible loss of confidentiality and privacy.[90]

The third concern about *amici curiae* participation is that it re-politicises

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[84] Newcombe and Lemaire, *supra* note 79, at 23.

[85] *Ibid*., at 33. See also Gómez, *supra* note 35, at 552.

[86] K. Tienhaara, 'Third party Participation in Investment-Environment Disputes: Recent Developments', (2007) 16 *Review of European Community and International Environmental Law* 230, at 240.

[87] N. Rubins, 'Opening the Investment Arbitration Process: At What Cost, for What Benefit?', (2006) 3 *TDM* 3, at 8.

[88] Friedland, *supra* note 34, at 10. See also Newcombe and Lemaire, *supra* note 79, at 33.

[89] Newcombe and Lemaire, *supra* note 79, at 32.

[90] See A. Boralessa, 'The Limitations of party Autonomy in ICSID Arbitration' (2004) 15 *American Review of International Arbitration* 253; Buys, *supra* note 76; Levine, *supra* note 35, at 220.

the dispute. "The provision of a neutral forum for the resolution of investment disputes is one of the achievements of the international investment dispute resolution system."[91] By granting non-parties access to an arbitration, the risk is that political or ideological views may be introduced, contrary to the parties' wishes, into what was intended as an apolitical environment. One author maintains that admission of *amici curiae* may push tribunals towards "courts of public opinion", and that in any event resolution "of disputes in conditions of complete publicity does not lend itself to principled outcomes".[92]

To these concerns about the involvement of *amici curiae* a fourth concern can now be added. Brought to the fore by the recent decision in *von Pezold/Border v Zimbabwe*, it is the fear that entities that are not independent of the parties to the dispute will seek to influence, and create an imbalance in, the arbitration through participation as *amici curiae*. Although little has yet been written about the significance of this development,[93] one may expect considerable discussion of the concerns surrounding "non-independence" of *amici curiae* to emerge in due course.

# 3 The worth, role and (attainable) goals of *amici curiae* in investor–state arbitration

As one commentator concludes, "the trend in favour of amicus participation seems to be strengthening ... [so that] amicus curiae participation is becoming a fixture in investor–state arbitration in cases implicating important public policy considerations."[94] If one accepts that *amici curiae* are significant participants in the investor–state arbitration system,[95] the questions thus raised are what worth they have in that system, what role they play in it (and what role should they play), and for what goals should they strive to expand their participation.

It appears undeniable that *amici curiae* are worthwhile participants in investor–state arbitrations. Those who believe most strongly in the value

[91] Newcombe and Lemaire, *supra* note 79, at 34.

[92] Rubins, *supra* note 87, at 7.

[93] See L. Peterson, 'Tribunal's Reading of Amicus Curiae Tests Could Make Life Difficult for Antagonistic Amici—And Those Seeking to Raise Novel Concerns Such as Human Rights Law', *Investment Arbitration Reporter*, 28 June 2012, <http://www.iareporter.com/articles/20120628> [accessed 28 June 2012].

[94] VanDuzer, *supra* note 74, at 723.

[95] Which Friedland reportedly does not accept: L. Achtouk *et al*, 'Conference Report', [2006] 1 *Stockholm IAR* 239, at 250-1.

of *amici curiae* regard them as a "solution for balancing public interest with investment arbitration" because they "infuse the arbitration process with democracy and help dispel criticisms based upon secrecy",[96] and call for a "reassessment of the current frameworks ... in order to formalize amicus curiae status in investment arbitration, and thereby promote its procedural and substantive legitimacy".[97] However, even sceptical authors, who doubt the staying power of *amici curiae* and feel that their participation injures the equality of treatment of the parties,[98] acknowledge that investor–state arbitration "need not be blind to the social impact of the awards which it generates" and that "the greater social good [has been] sought through the mechanism of amicus submissions".[99] Tribunals, too, find worth in *amici curiae*. As Appendix 1 illustrates, the clear majority of *amicus curiae* applications since the initial rejection in *AdT v Bolivia* have been granted some form of participation. Accordingly, the weight of scholarship and jurisprudence supports the view that the transparency, legitimacy and accountability of the investor–state arbitration system benefit from the involvement of *amici curiae*. This article accepts, and agrees with, this position.

A more difficult question relates to the extent of the involvement of *amici curiae*. This article does not agree with the proposition that concerns about *amicus curiae* participation are "either misplaced or avoidable, and therefore do not constitute valid objections".[100] The problems linked to *amicus curiae* participation are real. In particular, the increase in costs and delay militates against their participation. The true monetary impact of the introduction of an additional participant, albeit a non-disputing one, is likely hard to appreciate without having conducted the day-to-day prosecution of an investor–state arbitration. It is unsurprising, then, that the authors who express greatest concern over this issue are practitioners,[101] who are perhaps reluctant to rely on the "discretion of the tribunal ... to determine whether the added burdens of amicus involvement are justified,"[102] and thus determine the amount of additional legal fees which they must justify to their client. In such a context, asking *amici curiae* to "pay in advance a lump sum to cover the attorneys' fees of the party opposing the submission, as a form of security for costs," may be a

[96] Choudhury, *supra* note 31, at 807, 818.
[97] Levine, *supra* note 35, at 223-4.
[98] Achtouk, *supra* note 95, at 251.
[99] Friedland, *supra* note 34, at 9.
[100] Ishikawa, *supra* note 33, at 391.
[101] Friedland, *supra* note 34, at 10; Rubins, *supra* note 87, at 8.
[102] Choudhury, *supra* note 31, at 817.

contentious, but is certainly an understandable, proposal.[103]

Tribunals are aware of the issue. In the two earliest decisions on *amici curiae* in NAFTA/UNCITRAL arbitrations, the tribunals expressed concern about the increase in costs, particularly when borne disproportionately by one party. Thus in *Methanex v US*, cost considerations "weighed heavily" on the tribunal, while in *UPS v Canada* the tribunal wished to avoid intervention which was "unduly burdensome for the parties or which unnecessarily complicates the Tribunal process".[104] Furthermore, as noted above, both ICSID Arbitration Rule 37(2) and the FTC statement highlight the need to ensure that *amici curiae* submissions do not disrupt the arbitration or unduly burden the parties. This point has since been affirmed repeatedly by tribunals.[105]

As Appendix 1 demonstrates, investor–state tribunals have only occasionally allowed *amici curiae* a role which goes beyond the filing of written submissions. They have never granted them more than leave to file written submissions and access case materials. The most recent consideration of an *amicus curiae* application was rejected entirely by the tribunals in *von Pezold/Border v Zimbabwe*. This record makes investor–state arbitration more receptive to *amici curiae* than the state–state fora discussed earlier in this article (ICJ, ITLOS, WTO), but less receptive than other international tribunals where states are not the only litigants (ICTY, ICTR, SCSL, ECtHR). The limited penetration by *amici curiae* in investor–state arbitrations has been in spite of persistent requests by them for broader rights, including the opportunity to attend and make submissions at hearings. From a review of the jurisprudence, this reluctance to accord *amici curiae* a greater role appears rooted in tribunals' desire to avoid increasing the costs and delay borne by the parties. The role of *amici curiae*, as currently defined by tribunals, is thus defined by a willingness to give them a voice and an unwillingness to allow anything more than minimal disruption to the arbitration and minimal additional cost to the parties.

This position of *amici curiae*, while a significant advancement since *AdT v Bolivia*, meets with some dissatisfaction. One writer doubts whether tribunals pay anything more than "lip service" to *amicus curiae* submissions.[106] The writer

[103] Friedland, *supra* note 34, at 10. In *Gallo v Canada*, the claimant asked the tribunal to obtain $25,000 from *amici curiae* for this purpose: L. Peterson, 'Claimant in garbage disposal dispute with Canada', *Investment Arbitration Reporter*, 12 November 2008, <http://www.iareporter.com/articles/20090930_7> [last accessed 28 June 2012].

[104] *Methanex v US*, *supra* note 59, para. 50; *UPS v Canada*, *supra* note 61, para. 69.

[105] See, e.g., *Suez/InterAguas v Argentina*, *supra* note 46, para. 15; *Biwater Gauff v Tanzania*, *supra* note 49, at 17-8; *Merrill v Canada*, *supra* note 66, para. 25.

[106] Ishikawa, *supra* note 33, at 408-9.

argues that tribunals should be required to "take the submission seriously", and when fulfilling this duty must "as a minimum ... summarize the arguments made in the submission and respond to them ... [and] explain the reasons for agreeing or disagreeing with them."[107] In a similar vein, another author envisages "significant revision" to "many prominent rules" so that "a harmonized approach to third-party participation" can be developed which will, upon satisfaction of uniform criteria, allow a "guaranteed or mandatory, rather than purely discretionary, right of participation".[108]

These calls for reform are, in the view of this article, impracticable and unhelpful. To overhaul the system of investor–state arbitration to introduce uniform minimum requirements for either the admission of *amici curiae*, or the treatment of their submissions once admitted, would be an enormous task. It would certainly require amendment of all major arbitral rules, and possibly also renegotiation of multilateral treaties such as the ICSID Convention. Even then, *ad hoc* arbitrations may still occur pursuant to instruments containing certain types of arbitration clauses, meaning that harmonisation could only fully occur upon the review and amendment of all such instruments (covering both treaties, such as BITs and FTAs, and international investment agreements, such as concession contracts). This would be a process far more complex than the amendment of the ECtHR's Rules of Procedure and the addition of Protocol 11 to the ECHR, which was the only previous successful example of an international tribunal recalibrating its constitutive instruments to allow greater access to *amici curiae*. More than simply impractical, however, the endeavour would likely be contrary to the desire of states, the ultimate creators and amenders of the system. states' desire for gradual rather than grand change is evidenced by the piecemeal fashion in which they have augmented the system to date. A (small) number of states have granted *amici curiae* limited participation rights under model BITs, entered into BITs and FTAs which do likewise, and established guidelines for participation under certain multilateral trade and investment agreements.[109] Equally gradual were the amendments to the ICSID Arbitration Rules and the changes effected by the FTC statement. Rather than granting *amici curiae* all participation rights they had previously sought, the new Arbitration Rules only introduced a tribunal discretion to allow the filing of written submissions upon satisfaction of set criteria, while the FTC statement largely reiterated the principles articulated in *Methanex v US* and *UPS v Canada*.

[107] *Ibid*., at 410-1.

[108] Levine, *supra* note 35, at 222.

[109] For example, NAFTA states issued the FTC Statement, but the Energy Charter Treaty states have not done likewise.

As evidenced in other international fora, such as the WTO, states can be hesitant about increasing the participation of *amici curiae*. The expansion of the *amicus curiae* role is thus a matter more likely to be achieved by degrees. Advocates for *amicus curiae* participation who seek holistic reform of the investor–state arbitration system may thus, by their overreaching, hinder efforts by *amici curiae* to expand their role in the system incrementally. states will not be reticent to object if they feel the role of the *amicus curiae* is expanding too quickly or beyond their control. That, surely, is the lesson of states' reaction to the *US—Shrimp* decision of the WTO Appellate Body. By pushing for too much, too soon, proponents of an expansive and harmonised role for *amici curiae* in investor–state arbitration may alienate states, retard the gradual process of reform witnessed in recent years and make it harder for tribunals to lend a sympathetic ear to the submissions of *amici curiae*.

It is the position of this article that any development of the role of *amici curiae* in the system of investor–state arbitration will most readily be achieved through their efforts to win and deepen the familiarity and trust that states and tribunals have with and in them. By making reasonable and targeted demands, which seek to augment by gradations the current structure of the system and not to overhaul it holistically, *amici curiae* will be more likely to achieve institutional reform granting them greater access. To this end, *amici curiae* would be better served focusing on goals which are more easily attainable, and to which they might reasonably expect states and tribunals to agree. The promulgation of the FTC statement and the introduction of ICSID Arbitration Rule 37(2) are good examples of how erstwhile aspirations for *amicus curiae* participation have now been realised, even if they represent only the first of several steps towards greater participation. That gradual improvement of *amicus curiae* access is the model to follow.

In pursuing this more attainable expansion of their role, *amici curiae* might reasonably, at the present stage of development of the investor–state arbitration system, seek to achieve three goals. The first goal is to become a more familiar part of the system. Would-be *amici curiae* could achieve this by taking every appropriate opportunity to participate. This involves not simply ensuring that all appropriate arbitrations attract the attention and application to participate of relevant *amici curiae*. It also entails *amici curiae* engaging, when appropriate, in repeat interventions. Although there are examples of *amici curiae* participating in multiple arbitrations,[110] repeat participation is far

[110] The standout *amicus curiae* is the Center for International Environmental Law, having participated in: *Methanex v US*, *supra* note 59; *Suez /Vivendi v Argentina*, *supra* note 40; *Biwater*

from the norm. An increased rate of both one-off and repeat *amicus curiae* participation will increase the familiarity which states and tribunals have with *amici curiae*, and logically precede amendments to the investor–state arbitration system which facilitate, and potentially expand, the orderly conduct of that participation.

The second goal is to become a more trusted part of the system. This could be achieved by *amici curiae* continuing to impart their expertise efficiently and for the purpose of assisting the tribunals. Simple though the observation is, helpful and efficient participation will encourage tribunals to view *amici curiae* not as interlopers in a traditionally private affair, but as entities which provide necessary assistance directly to the tribunals. The consequences of otherwise appearing as partial advocates have been illustrated clearly by the recent *von Pezold/Border v Zimbabwe* decision. Efficient and expert conduct will also help *amici curiae* win the trust of States, particularly if they are more likely to make submissions supportive of states' right to regulate.[111] Trust of this kind makes it easier, in turn, for *amici curiae* to request and justify the grant to them of the next level of participation—which, for now, should be more consistent access to case materials, following on from the breakthrough in *Piero Foresti*—both in a given arbitration and in the system of investor–state arbitration more generally.

With familiarity and trust thus being cultivated, the third goal for *amici curiae* would be to call for states and the relevant institutions to implement three targeted changes to the system. The first targeted change would be to support the introduction of a provision akin to ICSID Arbitration Rule 37(2) into the UNCITRAL Arbitration Rules. This would bestow express power on tribunals constituted under the UNCITRAL Arbitration Rules to accept written *amicus curiae* submissions, rather than relying solely on their general power to manage arbitral procedure. The insertion of such an express power has been proposed to the UNCITRAL Secretariat previously.[112] However, the proposal was not discussed at the key meeting of the UNCITRAL Working Group on Arbitration and Conciliation, the minutes of which suggest that the focus was on how the planned amendments would apply to international commercial arbitration.[113] Reiterating the importance of an express provision relating to the filing of

*Gauff v Tanzania*, *supra* note 49; *PacRim v El Salvador*, *supra* note 72; and *Piero Foresti v South Africa*, *supra* note 53.

[111] Viñuales, *supra* note 3, at 75.

[112] J. Paulsson and G. Petrochilos, *A Report: Revision of the UNCITRAL Arbitration Rules* (2009).

[113] Report of Working Group II on the work of its forty-ninth session, 30 September 2008, UN Doc.A/CN.9/665. There has, however, since been some consideration by the Working Group of reopening the issue: Gómez, *supra* note 35, at 542.

*amicus curiae* submissions in investor–state arbitrations under the UNCITRAL Arbitration Rules would thus be an attempt to entrench the *amicus curiae* role which is targeted, reasonable and expressly supported by earlier proposals.

The second change for which *amici curiae* could call is the deletion of the veto power of the parties in ICSID Arbitration Rule 32(2). This would allow ICSID tribunals to decide for themselves whether to permit *amici curiae* access to the hearing. The elimination of the veto in Arbitration Rule 32(2) could be achieved simply by removing the prerequisite of "the consent of the parties", or by introducing criteria similar to those in Arbitration Rule 37(2) concerning written submissions. Again, this change has been suggested previously. The ICSID Secretariat apparently posited giving tribunals the power to grant hearing access to non-disputing parties if certain criteria were satisfied (similar to the power in Arbitration Rule 37(2)).[114] However, the suggestion was not included in the amendments of 10 April 2006. Renewing the call for the deletion of the veto of the parties in relation to the attendance of *amici curiae* at oral hearings under the ICSID Arbitration Rules would be another attempt to increase the remit of *amici curiae* which is targeted, reasonable and supported by previous suggestions.

The third change for which *amici curiae* might press is the adoption by individual states of model BITs, and the conclusion by States of BITs or FTAs, which expressly allow for *amicus curiae* participation in arbitrations conducted pursuant to those treaties. Several states now promulgate model BITs, and increasingly these contain *amicus curiae* provisions. Article 28(3) of the 2012 United states Model Bilateral Investment Treaty, for instance, provides that the "tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party".[115] The same provision is also present in several BITs and FTAs recently concluded by the United states.[116] Whenever arbitration is commenced pursuant to these treaties, and irrespective of the arbitral rules which apply, the tribunal will be empowered to accept submissions from *amici curiae*. While this method of attaining *amicus curiae* participation is not as all-encompassing as amending the UNCITRAL or ICSID Arbitration Rules, it has an incremental effect. Urging states habitually to include such provisions in their BITs and FTAs thus allows *amici curiae* to seek to increase their role in the investor–state arbitration system

[114] A. Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes', (2007) 41 *International Lawyer* 1, at 47, 56.

[115] Cf 2004 Canadian Model Foreign Investment Protection Agreement, Art. 39.

[116] See: 2005 US-Uruguay BIT, Art. 28(3); 2005 US-Rwanda BIT, Art. 28(3); 2004 US-Chile FTA, Art. 10.19(3); 2004 US-Morocco FTA, Art. 10.19(3); 2006 US-Peru FTA, Art. 10.20(3).

in a way which is not only targeted and reasonable, but also (unlike seeking the above amendments to the UNCITRAL or ICSID Arbitration Rules) capitalises on a trend already apparent in that system.

# 4 Conclusion

In the first edition of his *Principles of Public International Law* in 1966, Brownlie observed that:

> More interesting than the political factors, however, and more within the competence of the jurist, are the practical questions involved in giving procedural capacity to individuals. ... The finding of solutions to the practical problems involved will no doubt be complicated by the need to resort to devices which will make governments more ready to take part in arrangements without seeming to depart from their more inflexible positions on the large question as to whether the individual is a subject of international law.[117]

Brownlie's statement is as apposite now as it was almost 50 years ago. If individuals want to participate in the system, they must do so in ways which states will tolerate. Would-be *amici curiae* in investor–state arbitrations are no different. If *amici curiae* want to increase their role in that system, demands for extensive and holistic reform are not the path forward. Rather, targeted and reasonable demands, which states (and thus tribunals) can support, are the best hope that *amici curiae* have for winning any greater access they desire.

[117] I. Brownlie, *Principles of Public International Law* (1966), 482.

# Appendix I–*Amici curiae* requests in investor–state arbitrations and their levels of success (current to 28 June 2012)

A Request to file written submissions
B Request to access case materials
C Request to attend oral hearing
D Request to make oral submissions at hearing (including answering tribunal's questions)
E Request to cross-examine witnesses at hearing
✓ Request granted
× Request denied
— Request not made

| Case (Date of decision on *amicus curiae*) | A | B | C | D | E |
|---|---|---|---|---|---|
| **BIT/ICSID Cases** | | | | | |
| 1. *AdT v Bolivia* (29/1/2003) | × | × | × | × | — |
| 2. *Suez/Vivendi v Argentina* (19/5/2005) | ✓ | × | × | × | — |
| 3. *Suez/InterAguas v Argentina* (17/3/2006) | × | × | × | × | — |
| 4. *Biwater Gauff v Tanzania* (2/1/2007) | ✓ | × | × | × | — |
| 5. *AES v Hungary* (26/11/2008) | ✓ | × | — | — | — |
| 6. *Electrabel v Hungary* (28/4/2009) | ✓ | — | — | — | — |
| 7. *Piero Foresti v South Africa* (5/10/2009) | ✓ | ✓ | × | × | — |
| 8. *von Pezold/Border v Zimbabwe* (26/6/2012) | × | × | × | × | — |
| **NAFTA/UNCITRAL Cases** | | | | | |
| 9. *Methanex v US* (15/1/2001) | ✓ | × | × | × | — |
| 10. *UPS v Canada* (17/10/2001) | ✓ | × | × | × | — |
| 11. *Glamis Gold v US* (16/9/2005) | ✓ | •* | — | — | — |
| 12. *Merrill v Canada* (2/10/2008) | ✓ | • | — | — | — |
| 13. *Grand River v US* (12/1/2011) | — | — | — | — | — |
| 14. *Apotex v US* (11/10/2011) | × | • | — | — | — |
| **Other Cases** | | | | | |
| 15. *Eureko v Slovak Republic* (24/4/2010) | ✓ | — | — | — | — |
| 16. *PacRim v El Salvador* (2/2/2011) | ✓ | — | × | — | — |
| 17. *Chevron v Ecuador* (18/4/2011) | × | × | × | × | — |

*Due to the NAFTA states' practice of publicity, *amici curiae* in NAFTA cases do not request access to materials.

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# Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge

*James Fowkes*[*]

**Keywords**
Civil procedure, public interest litigation, managerial judges, Indian public interest litigation

## 1 Introduction

Public interest litigation has been the site of considerable change and creativity in the last forty or fifty years. It must be ranked, over that period, among the most important innovations in the way in which individuals participate in domestic legal systems. This paper seeks to advance the argument that too little attention has been paid in the context of public interest litigation to civil procedure as a positive, sympathetic project.

Procedure was traditionally the device that regulated the role played by individuals in their legal systems. Since this role of individuals has been transformed by public interest litigation, by implication we should also think about a corresponding transformation in procedure. But this is seldom the focus of writing on the topic. Most discussion is concerned with rights and with remedies. When civil procedure is mentioned, it is usually as the target of criticism. It is cast as stale adversarialism, inappropriate in public interest contexts, and as the formal shackles from which litigation seeking substantive justice must break free. Form is supposed to give way to substance; worrying about form, accordingly, is at best pettifogging, at worst a moral abdication, a betrayal.

This paper argues against that grain. One can believe that substance should trump form without necessarily wanting to minimize procedure, because

[*] JSD Candidate, Yale Law School <james.fowkes@yale.edu>.

procedure (at its best) is concerned with protecting issues of substance. Good procedural rules serve substantive ends like fairness (real and perceived), transparency, predictability, and judicial accountability. Good rules also contribute to the achievement of substantive ends in general, because they are the most obvious way in which a court keeps control of a case and moves it along to its resolution. As we will see, these are all areas of concern for public interest litigation around the world, and in my view this is no coincidence. Problems arise because too little has been done to provide new procedural rules in public interest cases when traditional rules are set aside as inadequate. In an earlier paper, I argue that some of the key problems of India's model of public interest litigation are, in fact, problems of procedure, though they are not always recognized as such.[1]

Accordingly, it is important to ask whether we can do more to proceduralise (introduce procedure?) into public interest litigation without crippling its ability to respond to problems in non-traditional ways where necessary. Sometimes, flexibility and informality can be uniquely valuable. But given the work that traditional procedure does, we should not be too quick to accept more of its erosion than actually serves the ends of public interest cases. Furthermore, the admitted limitations of formal procedures in some situations do not necessarily mean that we should abandon formal procedures altogether. Such limitations might just indicate that we need new procedures, and I will offer illustrations at the end of the paper of what these might look like. All of this shows why the 'substance over form' injunction is too simple: it begs the question of when sacrificing form is the best means to substantive ends and when it is not.

A further implication of this discussion is that the real procedural question in the public interest context is about *when* to follow which procedure. In order to help us think about procedural choices here, I offer as a paradigm the idea of the managerial judge, which arose in the US in the 1970s.[2] For the managerial judge, formal procedures are always the default—but they are a default to be avoided wherever possible. She is constantly open to flexible, informal methods when they are feasible, but falls back on more formal back-ups when they are not. This paradigm fits a situation where, as I will argue, each of the standard

[1] J. Fowkes, 'How to Open the Doors of the Court—Lessons on Access to Justice from Indian PIL', (2011) 27 *South African Journal on Human Rights* 434, at 458-61.

[2] For a summary of the origins, see e.g. R. L. Marcus, 'Malaise of the Litigation Superpower' in A. S. Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives on Civil Procedure* (OUP, 2000) 99, at 102-03. The seminal article is J. Resnik, 'Managerial Judges', (1982) 96 *Harvard Law Review* 374.

procedural ideas has something to contribute, though none is entirely adequate on its own. It also shows the need to think about new kinds of formal back-ups.

A final preliminary comment. My primary interest in these questions is practical, but grappling with procedure also yields theoretical insights, and one in particular deserves mention here. Famous articles like Abram Chayes' *The Role of the Judge in Public Law Litigation* and famous public interest models like India's can make us think of public interest litigation as a unitary phenomenon, as one kind of thing.[3] That is sometimes necessary for the purposes of argument but—as the Indian example shows and as is implicit in Chayes' account[4]—public interest litigation is a complex and varied phenomenon. Trying to think about its procedural needs is a good way to see that 'public interest litigation' is several things, not one, requiring multiple procedural tools and approaches.

## 1.1 An illustration: Indian PIL and procedure

It is helpful to begin with an example, and Indian PIL, which is as expansive a model as any around and has a comparatively long track record, offers a convenient case. (To avoid confusion, I will follow standard usage and speak of India's model as 'PIL', as distinct from 'public interest litigation' in general.)

Indian PIL began when certain Indian Supreme Court judges in the late 1970s began to take deliberate steps to engage with the problems of the poor. They slashed procedural obstacles, began to take over the work of gathering evidence, and adopted expansionary approaches to interpretation and remedies.[5] All parties were supposed to approach litigation in a collaborative, problem-solving spirit.[6] Judges were supposed to retain jurisdiction until a problem was solved and do whatever was necessary in the way of evidence-gathering, interim orders and the like until that point was reached.

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[3] A. Chayes, 'The Role of the Judge in Public Law Litigation', (1976) 89 *Harvard Law Review* 1281, at 1304-5.

[4] Since his article is trying to label a new trend, Chayes understandably often talks about public interest litigation as if it were one thing. But he also notes the multiple factors in play, such as 'multiple forms of relief' (*Ibid.,* at 1284, emphasis added) and is hardly blind to the multiple forms the welter of new pressures and devices can take: see e.g. *Ibid.,* at 1313, and A. Chayes, 'The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court', (1982) 96 *Harvard Law Review* 4, e.g. at 54.

[5] See Fowkes *supra* note 1 and further sources there cited, esp. at 436 n3, 437-43, 454-55.

[6] See e.g. P. N. Bhagwati, 'Judicial Activism and Public Interest Litigation', (1985) 23 *Columbia Journal of Transnational Law* 561, at 574 and his judgment in *SP Gupta v Union of India* AIR 1982 SC 149, paras 13-17 on new methods and strategies adopted by the Court to provide access to justice for the disadvantaged.

It is not too much of an exaggeration to say that PIL procedure can be just what the judge wishes it to be.[7] As one might expect, this vast discretion has had mixed results. It permits the sort of flexibility that allows the Supreme Court to run a case like the *Right to Food* petition, currently approaching its twelfth year of litigation. Since the case began the Court has issued hundreds of interim orders in response to myriad problems associated with a 2001 drought in northeastern Indian and aspects of the government response to it.[8] The case has acquired the status of poster-child, and while inevitably it has its problems, the case demonstrates the virtues of creative procedural responses when a court is confronted with a highly complex, polycentric (and urgent) problem and a persistently inadequate state response to it. But this flexibility also prompts concerns: very *procedural* concerns that parties are not always receiving an adequate hearing and are having judge-designed settlements forced upon them;[9] concerns that fact-finding is insufficiently rigorous and that judgments are showing 'a reliance on unquestioning presumption and reiteration rather than empirical evidence';[10] concerns that PIL today is 'characterised by excessive and overweening judicial power, where judges adopt "command and control" strategies in PIL cases';[11] concerns that PIL is insufficiently regulated by predictable law and has become politicised as a result.[12] Judges, for their part, express frustration at cases that drag on for years with little or no progress being made.[13] An argument can also be made that the

[7] A particularly notable example (which extends outside the PIL context) is the expansive use made by the Indian Supreme Court of Article 142 of the Indian Constitution, which empowers the Court to do what is necessary to do 'complete justice': see A. Chandra, 'Under the Banyan Tree: Article 142, Constitution of India and the Contours of "Complete Justice"' (unpublished manuscript on file with author). I am grateful for her permission to refer to the article, which is still in draft form.

[8] *PUCL (People's Union for Civil Liberties) v Union of India* (Writ Petition (Civil) 196/2001); for key orders, see <http://www.righttofoodindia.org/orders/interimorders.html> [last accessed 22 July 2012].

[9] Chandra, *supra* note 7.

[10] V. Iyer, 'The Supreme Court of India' in B. Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (OUP, 2007) 121, at 122.

[11] A. K Thiruvengadam, 'Swallowing a Bitter PIL? Brief Reflections on Progressive Strategies for Public Interest Litigation in India' in S. Narrain & M. Suresh (eds), *The Judicial Nineties* (Routledge, forthcoming 2012).

[12] See the various criticisms and calls for reform over the years collected by M. Godbole, *The Judiciary and Governance in India* (Rupa, 2009), at 122-35; B. L. Hansaria & V. Hansaria, *Writ Jurisdiction* (Universal Law Pub Co, 2007) at 532-37; B. P. Banerjee, *Writ Remedies* (Eastern Book Company, 2007) at 1305-08, 1315-16; and Iyer, *supra* note 10, at 151-52.

[13] See e.g. *MC Mehta v Union of India* AIR 1999 SC 300, para 1—and nearly thirteen years after

lack of regulation has undermined PIL's ability to expand access to justice.[14]

As I will argue in more detail below, PIL reflects the basic procedural challenge posed by public interest cases: the tendency for the problem and the facts, instead of traditional pleadings and procedural rules, to determine the shape and course of the litigation. This open-endedness can be a virtue in some contexts, as we will see, and it can make PIL admirably focused on the real-world problem. But it can also make litigation as hard to define, control and resolve as the problem itself often is, and this inability to give the litigation a defined and predictable shape is reflected in the concerns just cited.

## 2 Some procedural models for public interest litigation

The quick sketch of PIL's problems just offered might mean nothing more than that every scheme has its difficulties and bold ones more than most. A scholar like Sathe is not blind to PIL's faults when he defends it as a justified judicial response to widespread governance failures.[15] It might also simply show that the regulatory demands of the welfare state have outstripped the capacity of traditional court institutions and that we need new ones.[16] These are plausible possible conclusions, but I believe there is room for reform within the traditional institutions if we re-think their rules of procedure.

One possible way to approach this task is to think of public interest litigation as its own distinct kind of litigation requiring its own unique procedural model: a collaborative, problem-solving, complete justice model. This looks especially plausible in the context of the expansive, creative steps sometimes taken in Indian PIL.[17] Other examples suggest different paradigms.

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that statement the case has still not been resolved: L. Rajamani & A. Sengupta, 'The Supreme Court of India' in N. G. Jayal & P. B. Mehta (eds), *The Oxford Companion to Politics in India* (OUP, 2010) 80, at 87.

[14] Fowkes *supra* note 1, at 451-61.

[15] S.P. Sathe, *Judicial Activism in India* (OUP, 2002), esp. at 249-311.

[16] See e.g. B. Ackerman, 'The New Separation of Powers', (2000) 113 *Harvard Law Review* 633, esp. at 691-93 on the submisison of state bureaucracy to the rule of law; see also B. Ackerman, *Reconstructing American Law* (Harvard University Press, 1984), at 6-22 on the realist legacy for the legal profession.

[17] Indian PIL offers examples, as do some recent Latin American developments – see e.g. M. J. Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court', (2004) 3 *Washington University Global Studies Law Review* 529; B. M. Wilson, 'Institutional Reform and Rights Revolutions in Latin

The emerging South African model, which (to the regret of its critics) can be quite cautious in comparison to these other examples, often looks simply like traditional common law adversarialism with some modifications, rather than a new type of litigation.[18] Then again, the suggestion has been made in some common law countries, including the US and India, that public interest litigation represents a step in the direction of the *continental* model.[19] So we might try to think about public interest procedure as following a continental model with some modifications. This approach is also, naturally enough, a plausible way to think about public interest litigation in continental jurisdictions. For example, Colombia's model, where the Constitutional Court's use of the *tutela* action created by the 1991 Constitution for the protection of human rights has 'established a solid doctrine of precedent', and so can also be thought of as a modified version of the traditional continental model.[20] I will work through these possibilities in turn.

## 2.1 Traditional common law adversarialism and the analogy to private law

The inadequacies of the common law adversarial model in the public interest context are familiar, but several of the standard points are important to note here. As Chayes famously argued, public interest litigation looks significantly different from bilateral, private dispute resolution. The judge becomes a more

America: The Cases of Costa Rica and Colombia', (2009) 1 *Journal of Politics in Latin America* 59; C. Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', (2011) 89 *Texas Law Review* 1669—and some US cases—see Resnik, *supra* note 2, at 393-95 and sources there cited; O. Fiss, *The Civil Rights Injunction* (Indiana University Press, 1978). For accounts of the implementation of *Brown v Board of Education* by the US Circuit courts, a representative example, see e.g. M. J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (OUP, 2004) at 321-63; J. Bass, *Unlikely Heroes* (University Alabama Press, 1990).

[18] Modifications include regular condonation of procedural violations and some loosening of the rules on new factual evidence (on which see below). For criticism, see esp. the work of Jackie Dugard, most recently J. Dugard, 'Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice', (2008) 24 *South African Journal on Human Rights* 214; see also S. Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta, 2010) at 43-4, 71-8.

[19] See e.g. J. Cooper, 'Public Interest Law Revisited', (1999) 25 *Commonwealth Legal Bulletin* 135, at 136; Chayes, *supra* note 3; Fowkes, *supra* note 1.

[20] See e.g. L. Eslava, 'Constitutionalisation of Rights in Colombia: Establishing a ground for meaningful comparisons', (2009) 22 *Revista Derecho del Estado* 183; Cepeda-Espinosa, *supra* note 17, at 552-54.

central figure. The fact-finding enquiry becomes concerned with the facts as they really are, rather than simply the version that one party can prove as against the other. The complexity of the problems addressed regularly necessitates engagement with an issue over a period of time. A process that ends with the outcome sought by one party or the other is replaced by an ongoing series of interventions trying to produce a publicly desirable outcome. The legal aim of the litigation is no longer simply 'an increasingly more systematic and refined articulation of the governing legal rules'.[21] Instead, public interest litigation is concerned with producing change in the legal system and/or producing change in the real world.

The differences between public interest litigation and bilateral, private dispute resolution are clear enough, and they also arise in relation to continental model, as we will see. I discuss the procedural consequences of this in relation to both models below. For now, common law adversarialism deserves two arguments in mitigation.

First, whatever else we might say about it, common law adversarialism does represent a carefully refined model for protecting substantive procedural goods and structuring cases, which is a good reason not to give it up unnecessarily. The argument that public interest litigation is not a unitary phenomenon is important here. It reminds us that the failure of traditional methods to handle some kinds of cases is not, without more, a reason to be suspicious of them in public interest litigation generally. It is also relevant that adversarial procedures, whatever their defects, are the system with which common law lawyers are most familiar and which they will most naturally perceive as fair.

The second, related point is that we should be suspicious of any sharp distinctions between public interest litigation and private litigation. The implication of that distinction is that traditional adversarialism fits private bilateralism but not public interest cases, an implication drawn by Chayes in his argument. But Chayes was working on ideal types for the purposes of argument, and was also writing at a time when the distinction between public and private litigation was a lot more plausible than it is today. At that time, 75% of US civil trials were classical, traditional cases about tort and contract.[22] A great deal has changed since. Modern private litigation has expanded into new areas and become much more flexible than the classical picture of bilateral adjudication implies. Public concerns are also increasingly built into

[21] Chayes, *supra* note 3, at 1286.

[22] M. Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', (2004) 1 *Journal of Empirical Legal Studies* 459, at 466-73.

private law enquiries via indirect horizontal constitutional application.[23] In this environment, sharp distinctions are increasingly untenable, and private law adjudication may offer important lessons. This diverse nature of private litigation motivates both my argument against treating public interest cases as a special type of their own, and my proposal to use the managerial judge paradigm, which is mostly applied in the private context—although, in line with this argument, those who study the paradigm use it to refer to a general phenomenon arising across all kinds of cases.[24]

## 2.2 Traditional continental procedure

Several features of public interest cases call to mind the continental model: the more central role of the judge, including in appointing experts and seeking evidence; the tendency towards a protracted series of hearings rather than a concentrated trial; and the judicial concern with solving problems, recalling the way continental judges actively seek settlement in a manner traditionally considered anathema by the common law lawyer.[25] Accordingly, it is worth asking whether a modified continental model can serve as a paradigm.

The continental comparison is worth taking seriously. The fact that these traditionally continental features are part of many public interest cases is also a reason why the managerial judge paradigm is helpful: it too contains many of these features.[26] But the analogy between the continental model and public interest litigation is not as strong or as helpful as it might at first appear. It is useful, but it is not the paradigm we need.

There are two main problems with the analogy. The first, which I have discussed elsewhere specifically in the Indian context, is that the court-appointed officers of public interest litigation cannot be equated with court-appointed experts in the continental system. They are not necessarily experts, and their

[23] This is an established feature of legal systems such as the Canadian and German systems. It is also a process South African judges are obliged to conduct, see Constitution of the Republic of South Africa, 1996, s 39(2); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), paras 33-41; *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC), para 48.

[24] For example, Judith Resnik notes Chayes' arguments in the public context as part of the trend she is describing mostly in the private one: Resnik, *supra* note 2, at 377-78, 424-44.

[25] On these common law/continental differences, see e.g. M. Damaska, 'Presentation of Evidence and Factfinding Precision', (1974) 123 *University of Pennsylvania Law Review* 1083, at 1088-91, 1103-6; Resnik, *supra* note 2, at 384-86; J. Langbein, 'The German Advantage in Civil Procedure', (1985) 52 *University of Chicago Law Review* 823, at 826-41 and further sources cited therein.

[26] Resnik, *supra* note 3, at 425-29; Langbein, *supra* note 25, at 825, Marcus, *supra* note 3, at 110-11.

evidence is not confined to subjects of special expertise: their task may simply be to report what they see happening.[27] As a result, it is not obvious that one can place the same sort of weight on commissioner evidence that is placed on court-appointed expert evidence in a continental system. The problem illustrated by the Indian usage is a general one, because the more a court tackles complex, contested social issues, the more the questions it needs to resolve will tend to expand beyond discrete, objective or scientific ones, and so the less court-appointed persons will look like traditional experts if they are used to help answer them.[28]

The second problem with the analogy is that the factual enquiries of public interest cases can be far more free-wheeling and unfettered than anything in ordinary continental practice. A free-ranging, inquisitorial judge exists in these systems in *criminal* law. But in civil cases, most continental judges are confined to investigating matters defined by the parties, and those that have a more wide-ranging discretion to shape their own factual enquiries tend to use it narrowly in practice.[29] In practice, the standard continental model is not used to handling the sort of enquiries that public interest litigation can produce. Nor, as I will now turn to argue, can we just 'scale up' continental tools by encouraging judges to use their investigative powers more expansively to match the scope of public interest litigation. The differences, I contend, are of kind and not merely degree. To see this, we need to consider more precisely what it is about (some) public interests cases that makes them not fit traditional models, of either common law or continental varieties.

## 2.3 Limitations of traditional theories

As noted above, I believe that the key procedural challenges that public interest litigation poses relate to the way in which such litigation can erode the traditional means of shaping, controlling and terminating litigation. I make this claim subject to the argument already made, that public interest litigation does not always display these features and does not have a monopoly on them. Nevertheless, to the extent some public interest cases do not fit the traditional models, it is important to understand why those cases do not fit.

On the traditional paradigm, in common law and continental systems alike, an initial pleading stage sets out the legal relief sought. That initial pleading

[27] Fowkes, *supra* note 1, at 458-59.

[28] But see below on cases susceptible to resolution by scientific investigation.

[29] M. Damaska, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments', (1997) 45 *American Journal of Comparative Law* 839, at 841-43.

determines what factual questions will need to be answered. Established rules about burdens of proof tell us who must prove what and how we will know when they have succeeded or failed. The link between that enquiry and the initial pleading, in turn, tells us the consequences of that success or failure: the judge gives the relief asked for, throws out the case, or concludes some interlocutory stage. These steps are also fairly rigid. There are stages at which legal issues are defined, after which parties are, exceptions aside, usually held to their legal challenge as pleaded. The same applies to facts, which are determined in retrospective fashion—what happened?—and then adjudicated upon, with new facts generally being inadmissible beyond a certain point at trial, and on appeal.[30] Remedies follow from what was pleaded, and this ends the litigation. This summary glosses over many differences, but it will suffice for present purposes.

Public interest cases can erode every one of these features. The legal form of the dispute will often not be clear in a public interest case where the whole point of the litigation may be to raise a problem for which there is no existing legal solution in order to argue that there should be one. In that situation, the law cannot do the same work to shape the factual enquiry. Instead, it is the facts that are being raised to shape the law. Indian PIL brings this problem out particularly clearly. With its relaxed pleading standards, the PIL petition often serves to do nothing more than raise a factual problem for the court to solve: there is a drought occurring at this place, the government is not responding, and the following problems are resulting. On this sort of fact-only pleading, an argument is made that what is going on cannot be constitutional, but it is up to the court to figure out precisely why. The court is also potentially left to investigate the whole situation, rather than those just aspects of it that are pre-identified by established legal pleadings as facta probanda. Given the complexity of some public interest issues, the result can be a vast enquiry, on which a court can struggle to get purchase. In the *Right to Food* case, almost any fact relating to the drought or its effects or responses to it looks relevant. (We shall see in a moment how something else was substituted to limit factual enquiries in that case).

The factual enquiry stage of public interest cases is much more open in time

[30] Continental systems may permit a first 'appeal' that can amount to a de novo hearing of the case. See e.g. B. Kaplan, A. T. von Mehren & R. Schaefer, 'Phases of German Civil Procedure (Part II)', (1958) 71 *Harvard Law Review* 1443, at 1443-4, 1449-51. However, the point will hold good for appeals beyond that, and even at the first appeal, 'the main task in review de novo is not, however, gathering new evidence, but considering afresh the record and the judgment from below' per Langbein, *supra* note 25, at 857.

as well. A court may conduct a fact-finding exercise to investigate a complaint only to discover further violations that may require more investigation. Once the litigation is conceived as an attempt to grapple with the real problem, it is hard to rule new facts out. Without the specific framing of an initial pleading of an established sort, the court has no real basis for saying that the further factual investigation falls outside the scope of the applicant's case.

This openness extends into the remedial stage. The reason is that even if a finding is made about the legal violation, that may not do very much to cut down the factual enquiry. Learning that the lack of adequate government response to the drought in the *Right to Food* case violates the right to life still does not tell us very much about what to do next—it really just tells us that, indeed, the Constitution does require the problem to be remedied. The scope of the case is as wide as ever, and so the scope of potential fact-finding remains similarly wide open. It is hard to find a principled way to end the remedial stage unless and until some decisive progress is made to solve the problem.

The remedial enquiry is also open in time, too. This is illustrated by a recent decision of the South African Constitutional Court in its first decision on water rights.[31] After going through two lower courts, the government sought to introduce new evidence of its ongoing efforts and adjustments it had made to solve problems, including some that had been brought to light by the litigation. Under the usual approach of the Court , and the traditional approach to appeal, the new evidence would have been inadmissible. But one can see why the Court found it hard to reject. Why make a finding that old facts disclosed a violation and issue a remedy on that basis when the situation had already changed and the state had already responded? The Court created an exception and admitted the evidence.[32]

A sufficiently detailed account of the right concerned, and the nature and extent of the violation might indeed serve as a basis to define and guide the subsequent remedial activity. But the more one tries to narrow the problem down legally, at an early stage, in order to make it easier to handle, the more one risks having this categorisation undermined by the openness to new facts. Judges will also have incentives to avoid making detailed findings: considerations of minimalism can loom large in public interest cases, which

[31] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

[32] *Ibid*., paras 39-41. The exception is ostensibly narrowly crafted and confined to socio-economic rights cases, but in fact invites a wide-ranging reconsideration of the Court's approach to factual questions, in line with the arguments presented here about problem-defined litigation. Or at least so I contend, and will attempt to show in future work.

can be complex, politically charged, and raise new or critical questions with potentially vast consequences.[33]

It is therefore unsurprising that public interest cases often become lengthy exercises in jurisdiction punctuated by interim orders, without a comprehensive judgment defining the legal violation being issued. The court will often take incremental stabs at the problem, and it is the court, rather than a legal pleading, that continues to define the litigation. Traditional procedures break down here, and without a substitute the work they usually do simply goes undone.

## 2.4 The collaborative, problem-solving paradigm

Is that substitute party co-operation? Some in India insist that PIL 'is' a collaborative, problem-solving form of litigation.[34] The claim that this is what PIL *is* represents a stronger version of the more common idea that this is what public interest *can* or *should* be. For example, in Latin American discussions one finds references, in the public interest context, to the ways in which courts 'may promote a collaborative search for solutions'[35] and to ideas of participatory and deliberative democracy.[36] *Mazibuko* similarly refers to ideas of participation, and speaks of courts as a forum for government reason-giving.[37] As was illustrated by the *Right to Food* case, adopting a more informal approach can allow courts to engage with a complex, shifting reality. It is, in sum, undeniably appealing to urge everyone to set aside formalities, roll up their sleeves and tackle the problem. Problem-tackling itself erodes procedure; and when this works, it is natural to understand the result as a new kind of litigation, a new role for courts, a new, sophisticated form of democracy in action.

The primary problem with all this, however, is precisely that it is aspirational, and whether these aspirations will be fulfilled is mostly not in the court's control. Basing one's whole model on collaboration means that the model has no answers when parties do not wish to collaborate. When that happens,

[33] C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999) at 24-45, on the connection between minimalism and democracy.

[34] See e.g. *Dr Upendra Baxi v State of UP* (1986) 4 SCC 106, 117; Banerjee, *supra* note 12, at 1305, 1306.

[35] Rodríguez-Garavito, *supra* note 17, at 1695-96.

[36] A. Ely Yamin, 'Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health', (2008) 10 *Health and Human Rights Journal* 2, at 6-7; see also R. Gargarella, 'Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?' in S. Besson & J.L. Martí (eds), *Deliberative Democracy and its Discontents* (Ashgate, 2006) 233.

[37] See *Mazibuko, supra* note 31, paras 71, 160, 163.

the attractiveness of collective problem-solving and democratic participation is greatly diminished. The focus on the problem can become counter-productive. Absent willing parties, the court may be unable to make much progress on the problem, and absent anything other than the problem to shape the litigation, an unsolved problem can mean that there is no principled way to end the case. The risk is litigation as interminable as it is unproductive.

Put another way, the problem is that problem-solving and party co-operation, when they work, are filling in the gaps created by the abrogation of traditional procedures. Progress with the problem takes over the task of defining the steps of the litigation and provides the basis for its ultimate termination. Party co-operation deals with problems like fairness and the allocation of burdens of proof. It signifies consent to informal, ad hoc procedures, and if everyone is collaborating, these problems are less urgent anyway, since they only arise if one is regulating combat. But when parties do not co-operate, and when problems prove intractable, the gaps go unfilled. That does not necessarily prevent the judge from acting. She can override recalcitrant, combative parties, or try to act despite their apathy or inability, and attempt to do the best she can even with a hard problem. But she will then be trying to do these things, and do them in a fair, transparent, *judicial* manner, in the absence of both the traditional back-and-forth process of adversarial procedure *and* the deliberative, collaborative processes advocated by the alternative models.

Even the best judges can be expected to struggle in these circumstances, because they are being asked to satisfy demands for procedural goods without a process. The imperative to respond to the problem can lead judges to act expansively, especially if parties are not co-operating. But if judges do act expansively, overriding traditional procedures but also overriding parties' wishes, one has a recipe for unfairness, or the perception of it. Add in the way that public interest cases can produce years of activity without a reasoned judgment, and we can understand how the absence of constraints can make judges a law unto themselves, or make them appear as such, as we saw in the Indian context.[38]

Collaboration and participation, when forthcoming, also play the procedural role of a *checking* function. Multiple engaged parties, all scrutinising courses of action from their different standpoints and contexts, can be a functional substitute for the back-and-forth of adversarial pleading (and may be an improvement upon it). But suppose the applicant is a hard-line activist with little interest in compromise, or a grand-standing political figure mostly interested in

[38] See the sources cited in notes 9-13 *supra.*

publicity, or a sincere private citizen with very limited means. Suppose that the respondent is a recalcitrant government agency or a disengaged public official. Differing degrees of blame aside, it is unlikely that any of these actors will perform a robust checking function. A great deal will then come to depend on the judge, who may be left to try to appoint experts and committees and otherwise simply be the best philosopher king she can. If the judge herself seeks publicity[39] or feels urged by the problem-solving imperative to act rapidly, it is easy to see how a court might rush into ill-considered activity based on inadequate facts.

It is important to note two particular aspects of this problem, since certain features of a case can lessen or exacerbate the impact of these difficulties. The first concerns experts. The trite concern in public interest cases is that they are often polycentric.[40] But some polycentric problems are more susceptible of expert resolution than others. Deciding on the size of greenbelts surrounding mines so as to minimize impacts on neighbouring wildlife, residential and tourist areas is a polycentric problem, yet much of the decision-making is about noise levels and dust levels and the distance they travel, and those are all questions with reasonably firm scientific answers.[41] Thus, even if collaboration is not forthcoming in a case like this, there are credible ways for a judge to move the case forward. What effectively happens is that the scientific answer reduces the openness of case. Instead of having to confront the whole problem, the court can focus on implementing the scientific solution. Other polycentric problems, like how to find housing for evicted slum-dwellers or determining the distribution of healthcare resources, do not necessarily have this feature, and the problem of openness will loom much larger in those cases as a result.

Similar narrowing can occur where a court confronts a problem to which government has already enacted a solution, but that solution has proved partially inadequate or has been defectively implemented. The court can focus on reviewing the program and the officials in charge of it, rather than on the problem itself and the universe of possible plans that might be issued in response. It is this feature has narrowed down much of the *Right to Food* case: the problem of starvation in northeastern India becomes the problem of getting

[39] See the acerbic account of certain Indian judges' concern with international human rights prizes by the polemicist A. Shourie, *Courts and their Judgments: Premises, Prerequisites, Consequences* (Rupa, 2001) at 402.

[40] L. Fuller, 'The Forms and Limits of Adjudication', (1978) 92 *Harvard Law Review* 353, at 394 on the adjudication of polycentric tasks.

[41] See *MC Mehta v Union of India* AIR 1996 SC 1977.

schemes like the enacted but dormant Mid-Day Meal Scheme implemented.[42]

I would thus argue that it is no coincidence that Indian PIL has attracted praise in areas where one or both of these conditions are met. For example, environmental cases where the court can draw on scientific expertise, or as Sandra Fredman concludes, 'when the court intervenes to require implementation of policies which have already achieved broad consensus but through apathy, disorganization or failure to prioritize have not been put into action.'[43] It might be too early to draw such conclusions in the Latin American context. But I see it as telling that Colombia's bold moves into healthcare rights, where many cases relate to 'goods and services which the state had already agreed to provide … and which theoretically should have been financed' seem to have produced fewer problems than Brazil's, where the courts have made orders for novel entitlements.[44] Many factors are in play here, but I contend one of them is the problem of openness.

Bringing the arguments of this section together, we can see how the various problems have an unfortunate tendency to bring out the worst in each other. The more the court struggles to bring a case into focus and determine the conditions for its termination, the more dangerous it is to impose a strong problem-solving imperative. Such an imperative makes it hard for a court to reject or terminate cases on the grounds that they are bad vehicles through which to engage with a problem.[45] Instead, that imperative leads the problem-solving court to take more of the tasks of the litigation upon itself. But the less a problem can be focused by scientific evidence or the presence of an existing program, the more problematic it becomes for the court to do anything without assistance from the ostensibly collaborating parties.

When public interest litigation goes bad, it is because courts have declared problems to be in violation of the constitution, and thus accepted responsibility for fixing them, in circumstances where that is very hard to do and so the responsibility is hard to discharge in any principled fashion. Non-traditional ideas of collaborative and problem-solving adjudication *can* be very good tools, and a court should be open to these approaches and have the flexibility to try

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[42] For the scheme, see e.g. J. Kothari, 'Social Rights and the Indian Constitution', *Law, Social Justice and Global Development Journal* (2004), <http://www.go.warwick.ac.uk/elj/lgd/2004_2/kothari> [last accessed 22 July 2012].

[43] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008) at 141; see also Fowkes, *supra* note 1.

[44] Yamin, *supra* note 35, at 7; O. L. Motta Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?', (2009) 11(2) *Health and Human Rights* 33.

[45] For the role this sort of test in PIL, see Fowkes, *supra* note 1, at 446-47, 452-56.

them. But it is dangerous to rely on them.

## 2.5 The managerial judge

The analysis set out above suggests that we need a model for public interest litigation that can draw on different ideas in different cases, and this is what prompts the proposal to draw on the paradigm of the managerial judge. The idea of judicial management originating in the US, describes the trend toward judges 'not only adjudicating the merits of issues presented to them by litigants, but also … playing a critical role in shaping litigation and influencing results', with a judge being 'assigned a case at the time of its filing and assum[ing] responsibility for shepherding the case to completion.'[46] The managerial judge is called upon to run trials in accordance with traditional common law adversarial rules, but also to conduct novel tasks that break with that approach. Managerial judges supervise preparation for trial and actively pursue settlement, meeting with the parties informally to do this. Evidence is produced by the regulated mechanism of discovery, but the interrogation of that material is mainly done on an informal, ongoing basis as it informs negotiations and the judges and parties calculations about settlement, rather than at the trial. The judge's role is more in the continental mould and investigative, and she draws on a variety of experts and other actors to assist her. As the number of cases resolved at the pre-trial stage continues to rise, this more informal process usually represents the totality of the litigation in the US.[47]

The parallels between such a judicial role and the situations we have seen that can arise in the public interest context should be manifest. It should be added that similar concerns arise due to the abrogation of traditional procedures, the extent to which the litigation is conducted outside standard rules, and the decline in judges being 'required to reason in public about their decisions to validate one side of the dispute.'[48] Here too, democratic participation is an aspiration not always achieved.[49] The managerial judge is a paradigm, not a panacea. It is simply a useful way to think about the judicial role and procedure in a situation where, in order to respond to extraneous

[46] Resnik, *supra* note 2, esp. 376-78; see also the sources she cites therein in notes 14-15.

[47] See e.g. Galanter, *supra* note 22.

[48] J. Resnik, 'Managerial Judges, Jeremy Bentham and the Privatization of Adjudication' in J. Walker & O. G. Chase (eds), *Common Law, Civil Law and the Future of Categories* (LexisNexis, 2010) 205, at 209; see also J. Resnik, 'Managerial Judges: The Potential Costs', (1985) 45 *Public Administration Review* 686.

[49] Resnik, 'Privatization', *Ibid*., at 218, 223

pressures and serve extraneous ends, new informal procedures arise where traditional formal ones do not fit. Like problem-solving litigation, it is focused on identifying and taking whatever procedural steps will satisfactorily resolve the litigation, rather than being tied to a pre-defined series of formal steps. As such, the managerial judge is always open to the possibility of proceeding in a collaborative manner where the parties can be persuaded to do this. However, unlike these models, the managerial judge always operates against the backdrop of formal procedures: if you cannot negotiate a solution, then the rules are applied and the case goes to trial.

The concept of the managerial judge stands in deliberate counterpoint to the idea that the judge should just focus on the substance and forget the form, but it is also not blind to the value that flexibility and collaboration can have. It focuses judicial attention on constantly defining how litigation should proceed and how it can be satisfactorily resolved. It hardly solves all problems, but it does offer an already well-researched starting point for thinking more carefully about procedure in the public interest context.

An illustration may assist here. Consider a PIL case like *Bandua Mukti Morcha*, which concerned bonded labour.[50] The case began with a letter petition. An advocate was dispatched to confirm its contents, after which a commissioner conducted a more detailed enquiry. One could use this report as a basis for trying to move rapidly to solve the problem. But if we adopt the perspective of the managerial judge, we might instead be inclined to proceed in a way that keeps both informal and formal procedural options open. We could treat the letter plus the advocates initial report fleshing out its factual averments as if they were an initial pleading from the plaintiff. The judge could then hold a meeting of the parties to solicit their engagement with the petition, to get a sense of stances and explore opportunities for collaboration. On the basis of that hearing, the judge could determine how to proceed. If the parties can be convinced to collaborate, then they can broadly accept the founding affidavit and/or constructively supplement it. If, on the other hand, they cannot be so convinced, then the judge can fall back on the standard adversarial procedure and require answering pleadings, from which the judge can determine what disputes of fact exist and proceed in the ordinary way.[51] The meetings will also

[50] *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.

[51] It is true that a more formal procedure raises problems of expense for poor litigants. The scenario sketched assumes that the court has appointed people to advance the aspects of the case that the applicant cannot, as happened in *Bandhua*, *ibid*., or that civil society actors can play this role. To the extent that this does not happen, a managerial judge would need to take the position of poor litigants into account—but, as argued in this paper, it is far from

provide an opportunity to explore opportunities for collaboration and to see whether the problem displays the sort of helpful narrowing features discussed above. This permits the judge to make early decisions about how to approach the litigation, as well as deciding whether it is likely to be productive to take it to trial at all. She does not have to wait until a violation has been found and the court is committed.

## 2.6 New formal procedures for public interest problems: two sketches

Just as in other cases where special needs arise and special procedural vehicles are designed to meet them—for example, habeas corpus or class actions—the same can be done to deal to meet the needs of public interest litigation. I confine myself to two brief illustrations.

Public interest courts that engage with failures by the government to deal with complex, open-ended problems—like the *Right to Food* petition or the *Forestry Case* in the Indian context[52]—can end up like a substitute government, co-ordinating responses to the issue. These cases in fact look a great deal like the situation in which a company is placed under administration. If a company's management fails dramatically, the court can take over the administration of the company to protect other interested parties. Formal procedures govern this process. Something similar can be envisioned for cases of systemic government failure like the aforementioned examples. The issue can be put, temporarily, under judicial management (or, as in the forestry case, in the hands of a court-appointed committee, analogous to a curator).[53] The analogy to judicial management suggests that even complex and open-ended situations can be handled in a way that complies with familiar, formal procedural standards.

Another concern in public interest cases (as well as with managerial judging) is that if many cases are resolved by negotiated settlement, precedents are not established. The same concern arises if a court proceeds by interim orders, and ultimately provides only a limited reasoned judgment concluding the case, or no judgment at all. This is not necessarily merely judicial laziness. As we saw,

clear that it is ultimately more cost-effective or better serves the poor litigant's interests to dispense too hastily with procedural steps. I have argued elsewhere that insufficient regulation of Indian PIL has likely tended to exclude the poor—Fowkes, *supra* note 1, at 451-61.

[52] See A. Rosencrancz & S. S. Lélé, 'Supreme Court and India's Forests' *Economic and Political Weekly* (2 February 2008) 11.

[53] Chandra, *supra* note 7.

the open-endedness of public interest cases can resist the sort of factual and legal capturing required to write a judgment.

We might learn here from the Colombian *tutela* system. The *tutela* is a formal rights-protecting procedure, with a strict time limit by when a judgment must be issued. The process is rapid and the argument not necessarily very detailed or comprehensive. However, the Constitutional Court reviews all *tutela* decisions. It selects those it considers necessary to correct or *pertinent for the development of its own case law*, and issues a judgment in those cases.[54] The effect is to separate the business of finding a solution to the case, done by the lower court, from (most of) the business of articulating law, done by the Constitutional Court, after the fact, in notable cases only.

These are merely two suggestions of the sorts of formal devices that can added to the toolkit of the managerial judge. They offer illustrations of the kind of proceduralisation that I argue is needed in order to safeguard the substantive goods protected by traditional procedures and processes, while rejecting the chauvinistic view that these traditional structures alone are adequate to deal with the realities of modern public interest litigation.

# 3 Conclusion

It is too simple to respond to the challenges of procedure in public interest cases by merely advocating substance over form. That says no more than that we should avoid procedure for procedure's sake. While true, it tells us little about whether and when substantive ends are better served by eliminating procedural rules, or insisting upon them, or re-designing them. The same goes for arguments that one particular kind of procedure fits public interest litigation. In fact, such litigation takes multiple forms and its procedural needs vary with the nature of the problem and the attitude of the parties. Creativity is vital to ensure that litigation serves the public interest as much as possible, but based on the challenges described in this paper, we should take seriously the possibility that what serves the public interest might be more procedure, not less. If we do, the global growth of public interest litigation means we will have rich comparative resources to draw upon.

[54] Cepeda-Espinosa, *supra* note 17, at 552-4 (emphasis added). See also Eslava, *supra* note 20, at 204.

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# NGOs, the Judiciary and Rights in Bangladesh: Just Another Face of Partisan Politics?

*Adeeba Aziz Khan*

**Keywords**
Bangladesh, Courts, Judges, Judiciary, Judicial Independence, Judicial Activism, Corruption, Constitutionalism, New Democracies, NGOs, Politics, Media

## 1 Introduction

On 16 December 1971, Bangladesh emerged as an independent state after a 267-day war against Pakistan. The Bangladesh Liberation War is known as one of the worst genocides of the 20th century that killed, according to some estimates, 3 million Bengalis.[1] Bangladesh's independence came from a legacy of rights violations through internal colonization and against the backdrop of genocide. Formerly known as East Bengal and East Pakistan, Bangladesh operated under colonial rule for centuries: the loss of Nawab Sirajjudawllah's throne to the British was followed by the exploitation of its eastern territory by West Pakistan. After living under the domination of the British, Bengali Hindus and West Pakistani Muslims, Bangladeshis became their own masters under the leadership of Bengali Muslims for the first time in 1971.[2] Under British colonization and West Pakistani economic colonization, Bangladeshis experienced rights only as the subjects of an imperial ruler and had few opportunities for self-realization. Kamal Hossain, an eminent Bangladeshi jurist, notes that "in a colonial society, a person was the subject of an imperial ruler, whose viceroys exercised executive authority without constitutional limits. They were thus under no constitutional obligation to respect the fundamental rights of their subjects, nor in these societies could the subjects seek judicial protection of their rights."[3]

[1] Bangladesh Genocide Archive <http://www.genocidebangladesh.org/> [last accessed on 2 May 2012].

[2] S. Ahmed, *Bangladesh: Past and Present* (APH, 2004) at 1.

[3] K. Hossain, 'The Role of the Judiciary as a Catalyst of Social Change' <http://www.supremecourt.gov.pk/ijc/Articles/9/3.pdf> [last accessed 27 October 2012]

Following Bangladesh's independence, citizens were provided with fundamental rights fully recognized by law. The 1972 Constitution, adopted by a newly formed Bangladesh, was a beacon of hope for Bangladeshis. The Constitution guaranteed fundamental rights and was based on the principles of nationalism, democracy and socialism. The incorporation of a Bill of Rights in the Constitution and the conferment of the power of judicial review "enabled the judiciary to play a dynamic role in facilitating and promoting social change".[4] However, since 1971, Bangladesh has witnessed a number of *coup d'états* that resulted in two long periods of authoritarian military government. Democratic norms and civil liberties have been hard to establish due to frequent intervention in state affairs and the absence of democracy.[5] To make matters worse, frequent tampering with and the suspension of the Constitution resulted in a volatile political system and an ineffective government. Bangladesh returned to democracy in 1991 in the wake of mass uprisings when political parties united to fight President Ershad's ten year authoritarian rule (1982-1991). A fragile democracy remains in place today, despite a two year emergency declared by the military-backed caretaker government in 2007 and 2008.[6] Zafrullah notes that in Bangladesh "there is a lack of political consensus, weak legislative authority, unhealthy modes of political competition, undemocratic political party structures, political and administrative patronage, and weak local governance. All these problems have produced social tension, a lack of equal access to natural justice and abuses of human rights."[7]

Despite executive interference and a lack of separation, the judiciary has been applauded for its role in upholding human rights. At the head of the judiciary is the Supreme Court of Bangladesh, comprised of the High Court and Appellate Divisions. The thriving non-governmental organization ("NGO") network in Bangladesh is also credited with bringing gains in the economic and social rights of the poor. Literature on the higher judiciary in Bangladesh, especially with respect to public interest litigation ("PIL"), generally accepts that the expansion of judicial review and a proactive approach has enabled the judiciary to draw upon constitutional provisions in order to promote social change. For example, Hossain writes that

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4 *Ibid*.

5 For a detailed discussion of the Bangladeshi military era see D. Lewis, *Bangladesh: Politics, Economy and Civil Society* (CUP, 2011).

6 *Ibid.* at 3.

7 H. Zafrullah and M. Rahman, 'Human Rights, Civil Society and Non-Governmental Organizations: The Nexus in Bangladesh', (2002) 24 *Human Rights Quarterly* 1011 at 1013.

> [t]he judiciary has been promoting social change through rights-friendly interpretations of the Constitution aimed at implementation of economic and social rights. The increasingly positive attitude of the judiciary towards public interest litigation, overcoming earlier inhibitions, which had constrained the role of the judiciary, has enabled the judiciary to play a dynamic role in facilitating and promoting social change.[8]

NGOs in Bangladesh have played a leading role in upholding rights by bringing democracy back to Bangladesh, promoting awareness of legal rights and providing legal support through the use of rights advocacy for the development of civil, economic, political, and social rights through PIL.[9]

This paper analyses how the political mood surrounding PIL initiated by NGOs at the Supreme Court sheds light on the use of the Court as a political forum. It also considers the influence of the political climate on the Court. The analysis results from a review of constitutional and statutory legal rules, case law, academic literature, policy papers and practice-oriented research. Media and human rights reports have also been reviewed. The analysis focuses on two landmark decisions of the Supreme Court that were selected for their capacity to show the influence of the government and opposition parties on NGOs and the Supreme Court. Both the cases also reflect the nature of judicial behaviour at different periods of the post-1991 democratic era, enabling a study of PIL and what influenced it soon after PIL first took off during the period of elected government and then 30 years later during the emergency declared by the army-backed caretaker government in 2007. The high-profile nature of the cases, covered extensively in the media, provides an understanding of the context in which the cases took place. Notably, the significant attention these cases received may have contributed to the pro-rights decisions given by the Supreme Court.

In discussing the judicial development of human rights and the role of NGOs in Bangladesh, the bulk of the literature, which in itself is very limited, has focused on judicial decisions or actions taken by NGOs in promoting human rights. There is little discussion on the backdrop against which these decisions or actions were taken, particularly to what extent the support of the state, the opposition, or public outcry through media intervention encouraged and contributed to the positive role of the courts and NGOs. This study

[8] *Supra*, note 3; see also R. Hoque, 'Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh', (2006) 15(4) *Contemporary South Asia* 399.

[9] *Supra*, note 7 at 1012.

explores the context of the two selected cases and situates them within a discussion of the global movement towards "juristocracy",[10] considering the question of the proper role of the Bangladeshi judiciary that invokes the power of judicial review to make policy decisions that could be seen to impinge on the role of the executive and the separation of powers. While the judiciary has been giving pro-rights judgments since 1991 and NGOs have been using PIL as a method to hold the executive accountable, court decisions and NGO intervention is frequently fuelled by statist and political motives. While the development of fundamental rights by NGOs and the judiciary in Bangladesh has been based on elite or political interests, the judiciary and NGOs should be applauded for their positive role in protecting human rights.

## 2 Framework and state of human rights

The Constitution of Bangladesh was drafted and adopted through a rushed process in 1972.[11] It declared a number of fundamental principles of state policy,[12] which include nationalism,[13] democracy (which includes the guarantee of fundamental human rights and freedoms and respect for the dignity and worth of the human person)[14] and socialism (meaning economic and social justice).[15] These principles of state policy are to be a guide in the interpretation of the Constitution and laws of Bangladesh. According to the judgment delivered in *Hamidul Huq Chowdhury v Bangladesh*,[16] in the event of a conflict between fundamental principles and rights, the rights will prevail.[17]

Constitutionally-entrenched rights include the right to equality, the right to non-discrimination, the rights to life and liberty, safeguards regarding arrest and detention, prohibition of forced labour, freedom of movement, freedom of speech, assembly and association, and the right to property.[18] The Constitution

[10] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004) at 1.

[11] For a detailed study of this process see A.F. Huq, 'Constitution-making in Bangladesh', (1973) 46(1) *Pacific Affairs* 59.

[12] Part II, Articles 8-25, Constitution of Bangladesh.

[13] Article 8, Constitution of Bangladesh.

[14] Article 11, Constitution of Bangladesh.

[15] Article 8, Constitution of Bangladesh.

[16] (1982) 34 DLR 190 at 200.

[17] I. Omar, *Rights, Emergencies and Judicial Review* (Kluwer, 1996) at 32.

[18] Articles 27, 29, 28, 32, 33, 34, 36, 39, 37, 38, and 42 respectively of the Constitution of Bangladesh.

also guarantees the protection of the law and to be treated in accordance with the law.[19] Certain social and economic rights are guaranteed for specific segments of the population such as women,[20] peasants and workers,[21] and within certain social sectors such as education.[22] It is widely accepted that "human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible".[23] This perception is also vigorously espoused by civil society and by specific NGOs. Besides constitutionally guaranteeing fundamental rights, Bangladesh has bound itself to upholding human rights law by committing to a number of international human rights treaties.[24] It is therefore obliged to take legislative measures in accordance with the treaties it has ratified and to fully implement them.

Despite the guarantees of fundamental rights within the Constitution, the state of human rights in Bangladesh has been criticized to the extent that it is said that "the boundaries of freedom in Bangladesh are clearly demarcated by the use of crossfire, torture and other potent threats".[25] Successive governments continue to use the Special Powers Act, the Code of Criminal Procedure and the Public Safety Act to suppress political opposition. Extra-judicial killing, police brutality and torture, prolonged detention of citizens without formal charges are common. The 2010 US human rights country report reveals:

> Security forces committed extrajudicial killings and were responsible for custodial deaths, torture, and arbitrary arrest and detention. … Prison conditions at times were life-threatening, lengthy pretrial detention continued to be a problem, and authorities infringed on citizens' privacy rights. … The government limited freedom of speech and of the press, self-censorship continued, and security forces harassed journalists. The government curbed free-

[19] Article 31, Constitution of Bangladesh

[20] Article 10, Constitution of Bangladesh.

[21] Article 14, Constitution of Bangladesh.

[22] Article 17, Constitution of Bangladesh.

[23] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, A/CONF. 32/41 at 3.

[24] For a list of international human rights treaties ratified by Bangladesh see <http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=22> [last accessed 27 October 2012].

[25] B. Fernando, 'Lawless Law Enforcement and the Parody of Judiciary in Bangladesh' <http://www.humanrights.asia/resources/journals-magazines/article2/0504/foreword-short-stories-about-home-truths-in-bangladesh> [last accessed 27 October 2012].

> dom of assembly, and politically motivated violence remained a problem. … Discrimination against women, and violence against women and children remained serious problems, as did discrimination against persons with disabilities and against persons based on their sexual orientation. … Violence against religious and ethnic minorities still occurred. … Limits on worker rights and child labor remained problems.[26]

Most recently, the failure of law enforcement agencies and the actual lack of fundamental rights and democracy has been highlighted by the disappearance of the central organizing secretary of the opposition, Ilias Ali, and his driver on 17 April 2012. Law enforcement agencies have been unable to discover their whereabouts and the opposition has launched a non-stop agitation movement through the use of *hartals* (political strikes) and street violence until their safe return.[27] In another case, the government has been unable to locate the killers of a journalist couple, Meherun Runi and Sagar Sarwar, who were murdered in their home on 11 February 2011.[28] In terms of economic and social rights, the most recent failure was on 4 April 2012, when one of the largest forceful slum evictions in the history of Dhaka took place in Korail bustee. Despite the government having received permission to proceed from the Supreme Court, provided certain conditions were followed, victims claimed that they were given only one day's notice. NGOs have termed the evictions "inhumane".[29]

Having set out the legal basis of fundamental human rights in Bangladesh and showing the poor human rights record, this article now moves on to an exploration of the state of democracy in Bangladesh, its impact on the independence of the judiciary, and its ability to uphold human rights.

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[26] 2010 Human Rights Report: Bangladesh <http://www.state.gov/j/drl/rls/hrrpt/> [last accessed 27 October 2012].

[27] S. Hammadi and J. Burke, 'Bangladesh police out in force as tension rises over missing politician', *The Guardian*, 22 April 2012 <http://www.guardian.co.uk/world/2012/apr/22/bangladesh-police-tension-missing-politician> [last accessed 27 October 2012].

[28] M. Malick, 'UN moved for faster Sagar-Runi probe', *BDNews24*, 6 March 2012 <http://www.bdnews24.com/details.php?id=219684&cid=2> [last accessed 27 October 2012].

[29] BRAC, 'Forceful eviction of Korail Slum' 8 April 2012 <http://blog.brac.net/2012/04/forceful-eviction-of-korail-slum.html> [last accessed 27 October 2012].

# 3 State of democracy

The literature describing the state of democracy in Bangladesh since the democratic era began in 1991 reveals the main problem as widespread corruption among politicians and public employees, including the judiciary and law enforcement agencies. Other problems with the democratic system include the increasing use of political violence and "muscle politics" through *mastaans* (political strongmen) and terrorists; marginal enforcement of the rule of law with access to justice being impaired by corruption and the politicization of state agencies; frequent disruptions to the everyday flow of life through *hartals*, curfews, and confrontational politics of the street; and the resultant lack of civil rights, basic security, and redress mechanisms from these mutually reinforcing phenomena.

One major cause of Bangladesh's ineffective democracy is the intensity of division between the two major political parties, the Awami League ('AL') and the Bangladesh Nationalist Party ('BNP'). Both the AL and BNP view the other party as illegitimate. According to *Time*, "[r]ejecting any notion of bipartisanship, both parties seem to keep the nation perpetually on the verge of chaos alternating between state repression or crippling national strikes aimed at toppling the government, depending on who is in power. With politics often reduced to little more than a big brawl, violence infects much of daily life."[30] Given the dynastic nature of politics, where the parties have significant historical baggage that has carried over from Bangladesh's authoritarian period,[31] the leaders of the two parties today question the very legitimacy of the other to exist, let alone to play a role in politics.

Because of their dynastic nature, the parties are also characterized by a lack of internal democracy with a highly centralized and personalized governance structure vesting near absolute power in the party chairperson. This further compounds the problem as personal rivalries between the two leaders take precedence over real political differences.[32] BRAC's 2006 report terms this "the rise of partyarchy", a system where the winning party enjoys the monopoly of power for the duration of their electoral term.[33] As the report notes, "[t]he innermost circle has *de facto* command over the entire party, legislature,

[30] A. Perry, 'Rebuilding Bangladesh', *Time* 10 April 2006.

[31] A. Hossain, 'Anatomy of Hartal Politics', (2000) 40(3) *Asian Survey* 508.

[32] BRAC, 'The State of Governance in Bangladesh 2006' <http://igs-bracu.ac.bd/UserFiles/File/archive_file/State%20of%20Governance%20in%20Bangladesh%202006.pdf> at 16 [last accessed 27 October 2012].

[33] BRAC is the largest NGO in Bangladesh.

parliamentary committees, procurement policies, development allocations, bureaucracy and law and order enforcement agencies".[34]

This dynastic mode of politics and the extreme centralization of power in the hands of the executive is widely regarded as the most fundamental flaw in Bangladesh's parliamentary democracy. All the other issues of corruption, lack of accountability, exclusionary and confrontational politics, and the partisan use of the judiciary and law enforcement agencies are seen to originate from the unbridled power exercised by the government of the day in harassing the opposition and forcing it to resort to politics of the street to make its voice heard.

Moving politics from the parliament to the street is seen to be a failure of the opposition in questioning the executive and holding it to account. The impotence of the opposition is therefore another criticism levied against Bangladeshi democracy, with the argument being made that the government effectively avoids having to respond to an informed, vigilant, and present opposition everyday that the parliament is in session. This in turn is part of a larger concern of a general lack of accountability in Bangladeshi democracy.

One finding of the BRAC report is that formal accountability mechanisms in Bangladesh are weak. The report notes that "[t]he formal institutions to enable accountability are either absent or underdeveloped".[35] The report identifies weak horizontal legislative accountability from the opposition and members of parliament, parliamentary oversight committees that are restrained by lack of formal authority, and non-functional agencies of horizontal accountability such as the Anti-Corruption Commission, which was started by the government largely under pressure from the international community. This is exacerbated, the report argues, by a lack of formal accountability mechanisms within the judicial system. The report observes that

> [j]udges are not accountable for the efficiency or lack thereof of their performance [*sic*] Corruption in key justice institutions, most notably the lower courts and the police force, is a serious problem. Practices of requiring informal payments for basic services effectively blocks access to the criminal justice system by the poor.[36]

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[34] *Supra*, note 32 at 20.

[35] *Ibid.* at 7.

[36] *Ibid.* at 63.

As far as accountability in justice institutions and government agencies go, however, petty corruption is only the tip of the iceberg. Politically-motivated appointments and recruitment–distorting initiatives, weakening service delivery, and undermining governance through weak enforcement of the rule of law have a range of other negative impacts on human security and economic development.

# 4 State of judicial independence

An impartial judiciary is fundamental to rule-based governance and to sustaining a culture of accountability rather than one of impunity. As Hossain Mollah notes, a dysfunctional judiciary impacts society more severely than any other dysfunctional institution, as it removes a forum for social grievance and reduces social attachment.[37] Unfortunately, impunity, rather than accountability and law-compliance, appears to be ascendant in Bangladesh.[38] For example, the BRAC report noted that the judiciary in Bangladesh has been particularly affected by the lack of separation of powers, which in turn has affected its ability to function as a forum for upholding the rights of citizens.

The Constitution guarantees independence to all judicial officers unconditionally. This ideal is provided by Article 22, which stipulates that the state shall ensure the separation of the judiciary from its executive organs. The Article then addresses the methods of appointment of the judiciary. However, as the BRAC report concludes, possibly the most serious governance failures in Bangladesh have resulted from a lack of judicial independence. Under the existing system of appointments, the lower judiciary and magistrates are functionally dependent on the executive, being appointed through the administrative service by the Ministry of Establishment and the Ministry of Law, Justice and Parliamentary Affairs. Personnel and spending decisions thus allow for the politicization of key personnel.[39] The Supreme Court issued its *Secretary, Ministry of Finance v Md. Masdar Hossain*[40] judgment in 1999 that included 12 directives to strengthen the independence and separation of the judiciary in line with the Constitution. Yet successive governments found it expedient to main-

[37] A.H. Mollah, 'Separation of Judiciary and Judicial Independence in Bangladesh' <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan020065.pdf> at 1 [last accessed 27 October 2012].

[38] *Supra*, note 32 at 62.

[39] *Ibid.* at 63.

[40] (1999) 52 DLR (AD) 82.

tain control over the lower judiciary, the magistracy in particular. Harry Blair notes that the Supreme Court, presumably anxious to avoid direct confrontation with the executive, continued granting extensions for the government to comply with these requirements.[41] It was only during the period of emergency declared by the caretaker government in 2007 that the implementation of this judgment began. Therefore, while political discourse professes commitment to judicial independence, practical measures have been too few.

The key issue of the non-separation of the judiciary from the executive is the politicization of the justice sector. Through the use of muscle politics and *mastaans* the party in power uses the magistracy and the criminal justice system to harass political opponents while absolving themselves of wrongdoing. As the Judicial Independence Overview conducted by the Asian Development Bank notes, "[t]oo often changes of government result in the dismissal of criminal and corruption cases against members of the newly instated ruling party and the institutionalization of dozens of criminal and corruption cases against ministers and important bureaucrats from the last government".[42] It is also alleged that High Court judges are increasingly recruited on the basis of systematic political calculation in order to ensure that in the near future Chief Justices will remain loyal to the ruling/appointing party. This system resulted from the 13th Amendment to the Constitution, which stipulates that the immediate past Chief Justice will head the neutral caretaker government. The decline of the independence of the judiciary, in violation of the Constitution, reinforces weak adherence to the rule of law through a failure to hold other organs of the government into account.

# 5 Judicial activism and the rights movement

Having set out the state of independence of the judiciary in Bangladesh we can now analyse the role that the judiciary has played in upholding fundamental rights and in developing PIL. Has the judiciary been "statist" and "developmentalist" as defined by Rajagopal?[43] Or has it had the courage to take

[41] H. Blair, 'Party Overinstitutionalization, contestation, and democratic degradation in Bangladesh' in *Handbook of South Asian Politics* (Routledge 2010) at ch. 6.

[42] Asian Development Bank, 'Judicial Independence Overview and Country-Level Summaries' <http://www2.adb.org/documents/reports/Law_Policy_Pov_Red/Part2.pdf> at 44 [last accessed 27 October 2012].

[43] B. Rajagopal, 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective', (2007) 18(3) *Human Rights Review* 157 at 158.

on the executive? In what circumstances has the judiciary been willing to stand up as a protector of rights and the Constitution?

Judicial activism and PIL are fairly recent concepts in the context of Bangladesh. PIL refers to "activist jurisprudence that enables someone without actually being aggrieved to activate the judicial method to pursue a public cause or the rule of law, and allows the court to provide unorthodox remedies."[44] PIL first took off in India in the 1970s and was seen as largely successful in terms of advancing progressive rights.[45] However, since democracy was only re-established in Bangladesh in 1991, PIL is a more recent phenomenon. Along with the restrictions imposed on the judiciary by martial law[46] it is said that "the primary reason behind Bangladesh's belated embrace of PIL appears to have been judicial unwillingness to break away from colonial legal thinking and abandon constitutional textualism or legal formalism".[47] It is only after 1991, and the return to democracy, that judges became willing to extend the application of the law as a result of overwhelming pressure from legal quarters and civil society.

In 1996, after a drawn–out jurisprudential battle, the High Court, in its landmark decision in *Dr Mohiuddin Farooque v Bangladesh*,[48] liberalized the requirements of *locus standi* by granting standing to an environmental organization to challenge a flood control project. This was allowed on grounds of a rights violation and breach of the law. The Court stated that a liberal interpretation of the Article 102 phrase "a person aggrieved" should be taken based on the indigenous nature of the Constitution, which was not the outcome of a negotiation with a colonial power but the result of a war of independence fought by its people for a common cause. Based on the origins of the Constitution, the ambit of Article 102 could not be limited to a narrow understanding of an "aggrieved person" but must be read in a way to expand the concept of *locus standi* and the constitutional mandate for social justice and judicial consciousness.

PIL in Bangladesh started developing after the liberalization of *locus standi* in *Dr Mohiuddin Farooque* and gained momentum following the year 2000,

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[44] Hoque, *supra*, note 8 at 399.

[45] See U. Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', in N. Tiruchelvam and R. Coomaraswamy (eds), *The Role of the Judiciary in Plural Societies* (Francis, 1987), 32-59.

[46] See M.E. Bari, 'Martial Law in Bangladesh, 1975-1979: A Legal Analysis', Ph.D. thesis submitted to School of Oriental and African Studies, University of London, 1985.

[47] Hoque, *supra*, note 8 at 400.

[48] IX (1996) Bangladesh Supreme Court Report 27.

mainly because of judgments in environmental rights cases. Growing judicial environmental activism encouraged legal activists and NGOs to challenge a broad range of government actions and failures under the auspices of environmental rights. In order to receive positive judicial orders, many non-environmental rights claims were framed as environmental rights cases and brought as PIL. Challenges to corruption within the government was brought as environmental PIL by NGOs in the cases of *Khushi Kabir v Bangladesh*,[49] *BELA v Bangladesh* (2002),[50] and *BELA v Bangladesh* (2003).[51] In these cases, the government allocation of land to a Member of Parliament for the purpose of shrimp cultivation was challenged on grounds of damage to the surrounding environment, and the leasing of river land was challenged to protect labour rights of unregulated workers in the ship-breaking industry. These cases set the tone for the use of PIL as a political tool.

In more recent cases, the judiciary has declared punishment on the basis of *fatwa* as extra-judicial,[52] made it illegal to force students or workers in public schools or offices to wear religious clothing,[53] and banned Islamic political parties.[54] These orders show that the courts have been willing to embrace individual rights and interpret the fundamental rights broadly. It is interesting to observe that these judgments were issued during the tenure of the AL, which is known for its secular stance[55] and pro-Indian policies, following considerable press coverage and support from civil society.

In India, Rajagopal writes that "in cases relating to housing rights or the right to health, the Court has rarely shown the kind of aggressive public policy interventionism that it exhibits in other areas such as environment".[56] In Bangladesh, courts have addressed important policy issues concerning economic and social rights under the veil of protecting the right to life, among other constitutional rights. Hoque notes that judgments have been given which "seek to enlighten the executive (without specifically imposing positive

[49] Writ Petition No. 3091/2001.

[50] Writ Petition No. 4685/2002.

[51] Writ Petition No. 2911/2003.

[52] Writ Petition No. 5863 of 2009 and Writ Petition Nos. 754 and 4275 of 2010.

[53] E. Bock, 'Bangladesh court rules against mandatory religious clothing', *The Jurist*, 22 August 2010, <http://jurist.org/paperchase/2010/08/bangladesh-court-rules-against-mandatory-religious-clothing.php> [last accessed 27 October 2012].

[54] S. Alam, 'Bangladesh court bans religion in politics', 29 July 2010 <http://www.google.com/hostednews/afp/article/ALeqM5h_5T_bgbToWaGqK2gxXACMFuySog> [last accessed 27 October 2012].

[55] The Constitution of the Bangladesh Awami League, Fundamental Principles.

[56] *Supra*, note 43 at 161.

obligations on it) about its duty to increase social justice and provide the people with the minimum necessities of life".[57]

To understand these types of cases, it is important to look at the context of Bangladesh's political culture. The two selected cases illustrate that when the Supreme Court gives activist decisions, it does so with the backing of another institution (the opposition or the government coupled, with support from the media and popular opinion).

# 6 Judicial decisions: background conditions

In *Ain O Shalish Kendra (ASK) v Bangladesh (Slum Dwellers)*,[58] the Supreme Court held that the eviction of slums without the rehabilitation of slum dwellers amounted to a violation of the right to life. This case is important for three reasons. First, this decision had a significant impact on policy-making, the forte of the executive, and was of immense importance to what Justice Bhagwati described as the "teeming millions".[59] Second, the political nature of the circumstances surrounding this petition illustrates how the judiciary has been willing to give positive decisions and take a broad view of Article 32 when supported by other sectors of society, in this case the opposition. Third, the case provides an understanding of judicial attitudes to PIL and pro-people decisions soon after Bangladesh's return to democracy and liberalization of the *locus standi* rules. Some of the most activist decisions of the Supreme Court were given around the same time.

The second case reflects the manner in which judicial attitudes have shifted depending on who was in government. The *Dhaka (Rangs Bhaban)* trilogy dealt with the same high–rise building. In the first decision the Court stayed the demolition of the building, in the second it ordered the demolition, and in the third it directed the government to enforce the safety of construction workers after PIL following the partial collapse of the building during demolition that killed 13 people. This case is especially important because of the timing of each

[57] Hoque, *supra*, note 8 at 405.

[58] 19 BLD (1999) 488.

[59] The city of Dhaka is home to over 3 million slum dwellers. Each day brings 2000 newcomers to these slums. The impact of the judgment has been felt each year, most recently in Korail in March 2012 when approximately 2000 structures were bulldozed in accordance with the Supreme Court directions but nonetheless in an inhumane manner, according to NGOs. See V. Subramanian and M.A. May, 'Korail slum eviction in Dhaka: notes from the field', 9 April 2012 <http://www.globalhealthhub.org/2012/04/09/korail-slum-eviction-in-dhaka-notes-from-the-field/> [last accessed 27 October 2012].

decision: the stay, the demolition order, and the workers safety order. The moments in which each judgment was given illustrates that perhaps there is more influencing judicial behaviour than simply the legal merits of a case.

## 6.1 Case Study 1: Ain O Salish Kendra (ASK) v Bangladesh (Slum Dwellers)

Article 15 of the Constitution provides that the government has a responsibility to supply basic necessities, including shelter. Article 31 and 32 protect the right to life. The High Court has read Article 15 along with Articles 31 and 32 to provide the right to livelihood and the right to shelter. A number of writ petitions in the form of PIL have been brought to the court in relation to the eviction of slum dwellers, arguing that the rights under Articles 15, 31, and 32 were infringed.[60] Generally, judicial decisions have held that, while the government does not have the responsibility to immediately provide shelter to all persons, it does have a responsibility to ensure that citizens are not arbitrarily or forcibly evicted. High Court decisions have determined that, before evicting slum residents from their dwellings, the government must provide written notice, and, through an interpretation of the state's obligations to ensure protection from forced eviction, have required the authorities not to carry out any eviction without prior rehabilitation or resettlement.[61] Thus, we see very proactive judgments on the part of the courts in relation to economic and social rights and a willingness on the part of NGOs to utilise PIL for the development of such rights. In this case, it is important to highlight the background conditions behind the first slum eviction orders given by the Supreme Court and show how NGOs became involved after the opposition picked up on the issue in order to damage the government's reputation. The courts also directly confronted the government in a case that was hugely publicized and received support from the opposition and civil society, but they ultimately backed down when harassed by the executive.

In August 1999, the government started a major slum clearance program on the basis of improving law and order and to flush out terrorists and drug dealers. The opposition, however, charged that the clearance was politically motivated and aimed at cleaning out voters who could pose a threat to the reelection of a local AL member of parliament and enhance the standing of

[60] BLAST, 'Right to Shelter' <http://www.blast.org.bd/issues/shelter> [last accessed 27 October 2012].

[61] 19 BLD (1999) 488, judgment delivered on 29 July 2001.

the party among non-slum voters in the impending Dhaka mayoral elections. The eviction drive attracted major attention and criticism from the media and opposition, resulting in three NGOs and two slum organizations obtaining a stay from the High Court.[62]

At the time the writs were filed, the AL government was already at odds with the judiciary over a number of adverse rulings involving the illegal detention of three opposition leaders under the Special Powers Act and the court's role in reviewing an anti-defection case involving two BNP members of parliament who switched allegiance to the AL.[63] The Supreme Court was scheduled to hear the writs filed against the slum clearance operation on 19 August. However, on the night of 18 August, thousands of slum dwellers, tempted by promises of rehabilitation by AL leaders, entered the grounds of the Supreme Court and began to build makeshift houses on the lawn, turning them into a slum colony. An embarrassed High Court turned the case over to the Chief Justice, who assigned it to another bench of the court and set a new date of 23 August for the hearing. Using the same tactic, the government induced a group of slum dwellers to march in front of the house of Kamal Hossain, the lawyer involved in the case, and set up a slum colony on the sidewalk in front of his home.[64]

Despite requests by the Court to the police and the Home Ministry to remove the slum dwellers from the grounds, neither took action and cited the High Court's stay order on eviction. In fact, the government did not deny their role in encouraging the slum dwellers to occupy the Court's compound and the street in front of Kamal Hossain's house. The Minister lashed out at the courts, the NGOs and the opposition for opposing an eviction that enjoyed widespread popular support. According to the Minister, government land was being used for illegal slums that would become dens of terrorists, drug dealers and antisocial elements. He claimed that the government had a plan to rehabilitate the slum dwellers and condemned NGOs for spreading falsehoods.

The government's behavior toward the slum dwellers came under sharp criticism from the legal community, NGOs, and Western donors as a violation of human rights.[65] Kamal Hossain called the occupation of the Court grounds "unprecedented" and commented that "[t]he Supreme Court is a constitutional body and those responsible for protecting the court must be held accountable".

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[62] *Dhaka Courier*, 20 August 1999.

[63] In all of these cases we see how the courts in Bangladesh have become another forum for political competition and animosity.

[64] *Supra*, note 62.

[65] S. A. Kochanek, 'Governance, Patronage Politics and Democratic Transition in Bangladesh', (2000) 40(3) *Asian Survey* 530 at 544.

The incident, he insisted, amounted to contempt of the Court and an embarrassment to the entire nation.[66]

The government defended its actions and the Prime Minister spoke out against the NGOs responsible for filing the writ petitions. She accused these NGOs, most of which worked amongst the slum dwellers, of embezzling billions of Taka that had been ear-marked for slum dweller rehabilitation. The NGOs in turn called the campaign against slum dwellers state-sponsored terrorism and charged that the real purpose of the operation was to take over the land so that it could be sold.[67]

The High Court finally dispensed with the writ petition by ordering the eviction of the slum dwellers from the Supreme Court premises and allowing the government to proceed with the evictions with the advice that it be done in stages to facilitate rehabilitation.

Thus, in this case, we see that NGOs used judicial avenues for upholding human rights only after the opposition and the press got involved, perhaps indicating the elite-driven nature of PIL that combines political motives with a desire for media attention. Similarly, the courts were willing to take a strong stance when they received encouragement from the opposition, the media and the international community. However, when its own grounds came under attack the judges backed down and allowed the executive to proceed.

## 6.2 Case Study 2: BLAST v Bangladesh

In *BLAST v Bangladesh*,[68] two NGOs, the Bangladesh Legal Aid and Service Trust ("BLAST") and the Occupational Safety Health and Environment Trust ("OSHE") initiated PIL challenging the government on the failure of the Ministry of Housing and Public Works to secure compliance with safety and security regulations as provided in the Bangladesh National Building Construction Code 2006. It was argued that injuries and deaths resulting from the demolition of a high–rise building violated Article 32 of the Constitution and the right to life. The High Court disposed of the case in November 2011 with an order directing the government to secure immediate compliance with the safety regulations and to establish a code-enforcement agency. Further, the government was directed to submit progress reports to the Court at the end of three months. While this case was a victory for the NGOs and construction

[66] *Dhaka Courier*, 27 August 1999.

[67] *Dhaka Courier*, 13 August 1999; *Dhaka Courier*, 20 August 1999; *Dhaka Courier*, 27 August 1999.

[68] Writ Petition No. 718 of 2008.

workers, and a pro-rights decision by the Court, it is interesting to see the events that led to the PIL and the judgment.

In 1999 a suit was filed against Dhaka's City Development Authority ("RAJUK") asking for the stay of an order of demolition.[69] "Rangs Bhaban", a 22-storied building was constructed after receiving appropriate approvals and permissions from RAJUK. However, because there was an aerodrome nearby, when the building was completed up to the 16th floor, the Bangladesh Air Force Head Quarters objected and asked RAJUK to demolish the high-rise construction beyond the permissible height set by the Civil Aviation Rules. RAJUK issued an order to the plaintiff to demolish the construction beyond the 6th floor, which was the permissible limit. The owners filed a suit against RAJUK. In May 2000, the High Court gave a verdict rejecting RAJUK's order to demolish the building on the grounds that RAJUK had neglected the question of legality when it decided to revoke its permission to construct the building. The Court emphasized that the construction had cost millions in accordance with a plan approved by RAJUK and therefore it was a property lawfully vested to the plaintiffs.

This decision was criticized on the grounds that the owners of Rangs Bhaban, large industrialists in Bangladesh, had acquired the rights to the land and the permission to construct the building illegally through contacts with influential ministers. It was also criticized because if the building was demolished and the land acquired by the government, a road linking two highways could have been built.[70] RAJUK filed an appeal but did not pursue it.

In January 2007, after months of street violence, economic disruptions and governmental paralysis, during which time the AL accused the BNP of preparing to rig the impending elections, the sitting caretaker government was replaced by an army-backed government. Elections were postponed indefinitely and a state of emergency was declared. One of the main agendas of the new government was to tackle corruption. The government arrested hundreds of political and business "bigwigs".[71] Rangs Bhaban at this time was seen as a "symbol of abuse of power" as stated by the Law and Public Works Advisor.[72] The government reactivated the appeal for the demolition

[69] 2000 DLR 52.

[70] Y. Suzuki and D. Miah, 'Alternative Visions of Incomplete Property Rights', Ritsumeikan Asia Pacific University, Working Paper No. 07-5, December 2007, at 11.

[71] Iftekharuzzaman, 'Making the Anti-Corruption Commission Effective: Why and How?' (Draft), Transparency International Bangladesh at 4.

[72] *The Daily Star*, 3 August 2007 (Dhaka).

of the building. During the tenure of the army-backed caretaker government, the Appellate Division overturned the High Court ruling and ordered the demolition of Rangs Bhaban. This was seen as a major success of the caretaker government and a win against corruption. As observed by one blog:

> Rangs Building is the monument of illegality. This is an example of how the influential in Bangladesh ignore rules of the land and ignore the orders of the governmental authorities. It shows how they influence the laws and ignore the courts. No political government so far could do anything in this regard and the owners were so confident that they invested about 700 crore taka in constructing this. This confidence came from the political linkage they have developed over the years with the political parties and our legal system.[73]

Thus, though not filed as a PIL, we see how the support of the army-backed caretaker government and popular opinion perhaps encouraged the courts to issue a decision against a large and influential business interest.

The Rangs Bhaban suit illustrated how courts and the prosecution often need government backing and popular support in order to pursue pro-people decisions. But it is also necessary to discuss how the decision given in the Rangs Bhaban case led to the NGOs filing a PIL and the judgment given in *BLAST v Bangladesh*.

Following the order of the Appellate Division in *A Rouf Chowdhury v Bangladesh*, the government took immediate steps to start the demolition. However, on 8 December 2007, nearing the end of the tenure of the army-backed caretaker government, part of the 17th floor caved in demolishing the floors beneath it. 13 people were killed while 100 others were injured.[74] With the popularity of the caretaker government waning, there was already a loud voice criticizing the demolition of one of Dhaka's tallest buildings because of the cost of building it and the number of businesses that had operated in the commercial space.[75] Criticism also focused on the way that the caretaker government carried on with the demolition.[76] Ironically, the demolition and deaths began to be seen as a symbol of the failure of the caretaker government.

[73] 'Rangs building "symbol of abuse of power" demolished', 3 August 2007 <http://bdoza.wordpress.com/tag/rangs-building/> [last accessed 27 October 2012].

[74] *The Daily Star*, 8 May 2008 (Dhaka).

[75] *The Daily Star*, 3 August 2007 (Dhaka).

[76] *The Financial Express*, 5 August 2007 (Dhaka).

Following these events BLAST started an investigation on the cause of the deaths from the collapse and found that the company assigned to demolish the building did not comply with the necessary safety measures. When AL came to power, the *BLAST v Bangladesh* case was initiated.

This case and the events that led up to it show that, although the judiciary in Bangladesh has been open to giving pro-people judgments, this is often done on the basis of support from other institutions, whether it is the government, the opposition, the media, or a popular social movement.

# 7 Conclusion

Charles Epp criticises the Indian rights revolution on the grounds of weak structural support and therefore failure to both encourage and take advantage of judicial activism. He states that the "Indian interest group system is fragmented, the legal profession consists primarily of lawyers working individually, not collectively, and the availability of resources for noneconomic appellate litigation is limited".[77] There has therefore been a weak growth of the human rights agenda since the post-emergency time. Likewise, in Bangladesh, NGOs have utilised legal channels for the protection of human rights when they have been motivated by self-interest, such as attracting media attention, or for political purposes.

As can be seen from *Ain O Shalish Kendra (ASK) v Bangladesh (Slum Dwellers)*, PIL has been employed when there has been a partisan agenda and the courts have been used as a forum to attack the incumbent by the opposition, when other avenues, especially parliament, has been monopolized by the party in power through modes of dynastic and highly centralized governance. In terms of the courts, the judiciary has been proactive in giving judgments in favour of the rights agenda only when it falls within Rajagopal's "statist" and "developmentalist"[78] boundaries, such as in environmental rights litigation. Judgments that have an impact on policy or threatened the monopolization of power by the executive and the patronage structure of politics are only forthcoming when the decision would be largely supported by the public and social movement organizations. In *BLAST v Bangladesh*, the Appellate Division overturned the High Court's decision during the tenure of the army-backed caretaker government seven years after the original stay on demolition, perhaps

[77] C.R. Epp, *The Rights Revolution, Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998) at 95.

[78] *Supra,* note 43 at 158.

because the government and popular support lay with demolition. The judiciary failed to take the political parties head-on as can be seen in their acceptance of the postponement of the implementation of *Secretary, Ministry of Finance v Md. Masdar Hossain*, although it relates to their own independence, and in the benign instructions finally handed out in *Ain O Shalish Kendra (ASK) v Bangladesh (Slum Dwellers)*. Further, partisan and patronage politics have infiltrated the courts, not only at the lower levels but also at the apex levels, through a system of non-separation of the executive and the judiciary and the level of control that the executive holds over judicial appointments and budgets.

It would seem that PIL in Bangladesh is motivated by elitist agenda. Much PIL involves political motivations and is principally driven by elites, consisting of individuals, associations of individuals, political pressure groups such as lawyers' bodies, civil society representatives and NGOs. The solution to the problem of a volatile civil liberties movement influenced by the political mood of the time does not seem to be an easy one.

Ridwanul Hoque writes that "PIL has a political and social function in that it seeks constantly to reshape and rebalance power relations".[79] Although there are limits to the judicial and NGO development of human rights through PIL, because of its elitist and political nature, it is important to point out that the elitist use of PIL has been a global phenomenon. Hoque argues that elites will, for the time being, continue to occupy the central position in the movement towards social change through the judicial enforcement of law given the nature in which Bangladeshi society operates. Therefore, as long as PIL upholds genuine complaints by the public and supports the realization of a constitutionally-promised just society, it will be an avenue towards justice.

Despite risks of opportunistic and politically motivated uses of PIL, an activist judiciary can successfully use PIL to hold the executive accountable for its actions and failures encroaching on fundamental rights as well as other constitutional issues, even when it is does so only when backed by other sectors. The judgments discussed in this paper, though fueled by support from institutions other than the judiciary or NGOs, show that the use of PIL has established social and economic rights for the poor. In *Ain O Shalish Kendra (ASK) v Bangladesh (Slum Dwellers),* the eviction of slum dwellers without prior rehabilitation was declared illegal, while in *BLAST v Bangladesh*, the safety of construction workers became an important state concern. The existing scenario in Bangladesh of "social deprivation and injustice, lack of rule of law, bad governance, and the flouting of the constitutional norms, rights and

[79] Hoque, *supra*, note 8 at 409.

mandates in running the business of the state is, by and large, a product of the lack of public accountability".[80] In this context, PIL and judicial activism can be used to hold the executive accountable through judgments that enforce constitutional standards and fundamental rights, even when influenced by third parties. Regardless of the background conditions that gave rise to the decisions in these cases, the fact remains that the government must comply with the orders of the Supreme Court, and whatever may have been influencing factors for the decisions, they are ultimately supportive of social justice.

[80] *Ibid*.

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# Agents of Change: Academics and the Spirit of Debate at International Conferences

*Aoife O'Donoghue*[*]

**Keywords**
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## 1 Introduction

'Agents of Change', while a flattering moniker for most individuals, carries with it a set of challenges and responsibilities that acted as catalysts over the course of this journal's inaugural Cambridge conference. This article aims to digest and evaluate some of the ideas that emerged over the course of the two days while also, hopefully, adding to the debate on agency.[1] While beginning this paper with effusive compliments may appear clichéd, this conference unfolded in the best tradition of academic fora, generous in disagreement and debate, while rigorous in critique. As such, the organising committee in bringing together an excellent cohort of speakers and audience alike ensured everyone left Cambridge more enlightened than they arrived, and are owed due recognition. It was an honour to be asked to conclude the conference, albeit as the programme proceeded, the task of closing became ever more daunting. This intimidation emerged not only from the high quality of the discussion, but also the character in which it was conducted. Thus, this article reticently attempts to bring some of the character of that conference to this special edition of the journal.

[*] Lecturer in Law, Durham Law School. I would like to thank Kevin J. Brown, Erika Rackley, Matt Saul and Colin Murray for their useful comments and discussion of this paper. All errors remain my own. Email: <aoife.o'donoghue@durham.ac.uk>.

[1] Details of the Conference are available at <http://www.cjicl.org.uk/index.php?option=com_conference&view=information> [last accessed 8 October 2012].

Questioning one of international law's shibboleths, the identification of the actors taking part in the international legal order, the conference facilitated debates upon some of international legal academia's fundamental characteristics. The evolution of the individual within international law, the current controversies and standing of individuals and, with perhaps some trepidation, accounts of potential developmental avenues, required the conference to cover a broad swathe of international law while keeping to its core premise. The conference's thematic considerations underlined much of the discussion around which the individual as agent served as fulcrum. This piece discusses the theme of the individual as an agent of change in the context of the papers delivered over the course of the two days, while also seeking to add to these debates by considering the wider role of the academic. More specifically, this article considers academic outputs or 'the teachings of the most highly qualified publicists of the various nations' as subsidiary sources of law and, as such, academics as developers and participators in international law. This piece particularly emphasises the role of conferences and considers whether there is a responsibility upon academia to consider the barriers to participation within the academic system and attempt their dismantlement.[2]

This paper focuses on two aspects of the legal academic conference. First, the role of individual academic as a conference participant and, second, the individual academic's involvement in the wider international legal order. This focus on academics is not as the atomised office-dweller, thinking profound thoughts on her own, but rather as a conference participant and basic unit of any worthwhile academic event and debate; Bourdieu's *homo academicus*.[3] The theme of this conference, the individual as an agent of change, provides a rare opportunity to consider the role of the academic as an individual participant within international law and academia and to question the role, relevance and the broader framework within which international legal conferences operate.

Academic conferences possess mercurial characters and often proceed in three modes.[4] First, the narrow subset of 'like-minded' individuals, second the broad range of perspectives brought together on a common theme that largely ignore each other's arguments and third, the broad range of perspectives on a common theme who directly engage with critiques and arguments. At times, orchestrating any of these three conference forms may be a Sisyphean task.

[2] 1945 Statute of the International Court of Justice, 33 UNTS 993 Art. 38 (1) (ICJ Statute).

[3] P. Bourdieu, *Homo Academicus* (trans. P. Collier) (Polity, 1988).

[4] For a discussion of the different types of academics, see J. Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship' in M. Happold (ed.), *International Law In A Multipolar World* (Routledge, 2011) 138.

The first 'like-minded' conference remains the easiest to orchestrate while the latter two can, at times, be a matter of luck, potentially revealing the status of academic debate within a discipline or sub-genre. When the third form or 'engagement' conference materialises, outcomes such as pushing a discipline further, formulating a new branch of scholarship, or re-invigorating a sidelined debate can emerge. The value of 'engagement' conferences becomes evident when academic interaction including debating, arguing, struggling to establish concepts and deconstructing ideas while simultaneously endeavouring to convince each other of their own perspective's veracity, occurs. It is in these moments that conferences come closest to embodying a spirit of debate that underpin the possibilities of being agents of change, a point of particular import within international law.

On the first morning of the Cambridge event, the 'engagement' conference was idealised in the first exchange of opposing perspectives by two of the keynote speakers. Leading by example, Professor Crawford and Judge Cançado Trindade exchanged ideas in an open and co-operative manner which, while they evidently thoroughly disagreed with each other, was conducted in an ideal academic fashion. In setting opposing perspectives of the individual within international law and directly contradicting each other but doing so with humour, humility and mutual respect, Crawford and Cançado Trindade set the tone of not only the Cambridge conference, but arguably presented a model for academic debate. Their discussion was both strident in view and passionate in belief, but not without a willingness to engage in dialogue. Naturally, all this reads rather Socratic in tone, and while not presenting the two keynote speakers in togas, it does recall questions regarding the value and worth of academic conferences. Naturally, there are the cynical, career-minded attendance requirements, but even when this is acknowledged, the wider purpose of the academic conference should be considered. The success of the inaugural conference of this journal presents an ideal opportunity to consider this question in the context of the concluding remarks of both this special edition of the journal and of the conference itself.

This paper begins with a discussion of the theme of the conference, 'Agents of Change: The Individual as a Participant in the Legal Process' and its impact upon the academic as an individual engaged with international legal order.[5] The article then moves on to consider the value of the academic conference as an embodiment of an academic ideal and follows this by a consideration of 'meetings' and what impact it can have upon academic work, while also taking

[5] See *supra* note 1.

a more critical consideration of some of the issues which surround the current conference landscape within international law. Finally, this paper considers the outcome of the conference itself and the legacy it has in the publications in this journal.

The aim of this paper is to consider the academic as an example of the agent of change at the core of this conference. In taking the opportunity to consider the role of the conference itself and the importance of the interaction between and among academics, it hopes to take the occasion to reflect upon how conferences can be a vehicle towards academics becoming agents of change within international law. Naturally, some of the points considered herein could apply to a much broader conference conglomeration than international lawyers, or indeed legal academia. Nonetheless, the international legal conference is the form which the author has experience of, and given the importance of an academic to international law itself in the guise of Article 38(1) of the ICJ Statute and the potential role of conferences as an avenue for the academic as agents of change, this will be the focus herein.[6] It is to the credit of the organisers that the aims and theme of the conference were such that these important considerations came to the fore and this paper attempts only to bring some flavour of these discussions to those unable to attend the event.

## 2 Theme of the conference and the academic

The theme of the conference 'Agents of Change: The Individual as a Participant in the Legal Process' immediately presented an issue ripe for debate.[7] The individual has long been a point of debate and its contemporary character as participant, as suggested by the title of the conference, rests upon international law's historical development.[8] This long development coupled with the high

[6] See *supra* note 2.

[7] K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011), R. Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010), R. Higgins, 'Conceptual Thinking about the Individual in International Law', (1978) 4 *British Journal of International Studies* 1, G. Manner, 'The Object Theory of the Individual in International Law', (1952) 46 *AJIL* 428, R. McCorquodale, 'An Inclusive International Legal System', (2004) 17 *LJIL* 477, C. Grossman and D.D. Bradlow, 'Are We Being Propelled Towards a People-Centred Transnational Legal Order?', (1993-4) 9 *Am U J Int'l L and Pol'y* 1, C. Ochoa, 'The Individual and Customary International Law Formation', (2007) 48 *Virginia JIL* 119, J.J. Paust, 'Non-State Actor Participation in International Law and the Pretense of Exclusion', (2011) 51 *Virginia JIL* 977.

[8] J. R. Strayer, *On the Medieval Origins of the Modern State* (Princeton University Press, 1979), S. Marks, 'State-Centrism, International Law and the Anxieties of Influence', (2006) 19 *LJIL*

number of papers from a broad array of perspectives presented over the two days indicates the individual's importance across international law. The prescience of this theme becomes apparent upon any search of recent articles and monographs, some of whose authors were present in Cambridge.[9]

Before beginning such an analysis, a few definitional delineations are necessary. First, in the course of this piece, 'conference', other than direct references to the Cambridge conference (the subject of this special issue), is used as an umbrella term for *inter alia*, conferences, workshops, symposia, colloquia and roundtables. Using 'conference' as a general term does not imply that these sub-categorisations are valueless, but rather this article uses 'conference' to mean any event where a group of academics or, academics and other stakeholders, come together to discuss an issue with a broad intellectual intent. Further, the use of 'academic' is intended to refer to all those engaged, through the higher education system, in research and teaching. This definition of academic enables a broad interpretation aiming for inclusivity in identifying the actors engaged in conferences.[10] The academic conference, with the Cambridge event at the forefront, stands as the pivot upon which the role of the academic as an agent of change within international law is discussed.

While the theme of the conference points toward the importance of the issue, it also highlighted the key role of the individual academic in debate and development of international law itself. Indeed, Michael Peil's paper on his empirical work entitled, 'Most Highly Qualified Publicists: Who Are They And How Are They Used?' underlined the importance of the academic in the sense of a subsidiary source of international law, but arguably the conference highlighted a much wider understanding of the individual and, by implication, the academic in international law.[11] This point is developed later, however, it is

339, M. Reisman, 'Designing and Managing the Future of the State', (1997) 8 *EJIL* 409, D. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow' (1994), *Transnational Law and Contemporary Problems* 329, S. Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Martinis Nijholf, 2004).

9 See Parlett, *supra* note 7, Portmann, *supra* note 7 and A. A. Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press, 2011).

10 This is broader than the classical view offered by Coser, which focuses on a closeted male brethren 'in a community of like-minded men', L. Coser, *Men of Ideas: A Sociologist's View* (Free Press, 1965) 34.

11 See *supra* note 2, Art. 38 (1)(d). The full paper is available at M. Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (1 July 2012), Research Paper No. 12-07-03, *Washington University in St. Louis Legal Studies*, available at <http://ssrn.com/abstract=2115529> [last accessed 8 August 2012] and in this volume.

important to highlight the role played by academics in developing legal norms. Within international law, the ICJ Statute coupled with subsequent use by the Court of academic writings makes this evident, although such use of academic work is by no means confined to international law.[12] In considering the role of individuals within international law, the individual scholar as part of the international legal order is embedded in its narrative.

Evidence of the breadth of academic debate at the conference was marked by the number of institutions and organisations invoked by different speakers over the course of the two days. A sample of juridical bodies called upon, including domestic courts' use of international law, proved the theme's expansive nature. The ICJ, the ICC, the ICTY, the ICTR, the Special Courts for Lebanon and Sierra Leone, the new African Human Rights Court, the Inter-American Court of Human Rights, the European Court of Human Rights, the numerous arbitrational tribunals such as ICSID and the Permanent Court of Arbitration underscored first, the range of expertise at the conference and second, brought to bear a reccurring theme: the individuals who stand in the spheres of these courts and the academics who stand as ever present critics of their operation.[13]

Key to these discussions were both the notions of accountability and responsibility. These included the accountability and responsibilities of the actors engaged by these courts and tribunals such as judges, prosecutors and arbitrators, but also the rights and obligations of the individuals who use these institutions and organisations as applicants or prosecutees. Thus, instead of a prosaic discussion of these organisations as hermetically sealed establishments, rather the 'veil' was lifted and questions asked about what we should expect from the individuals within these institutions. These discussions also highlighted the potential role of the academic in examining these organisations. Such scholarly analysis of organisations holds academics, in an unsystematic and unregulated fashion, as a form of academic Greek chorus opining on the legitimacy and accountability of their operation.[14]

As the vacuum of accountability within these organisations becomes more

[12] In Scotland, institutional writers are utilised by the courts: T. B. Smith, 'Authors and Authority', (1972-73) 12 *JSPTL* 3, K.G.C. Reid, 'The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland' in H. L. MacQueen (ed.), *Scots Law into the 2Ist Century: Essays in Honour of W. A. Wilson* (W. Green, 1996) 39. For England, see R. Braun, 'Burying the Living? The Citation of Legal Writings in English Courts', (2010) 58 *Am J Comp L* 27.

[13] See also L. Bastin, '*Amicus Curiae* in Investor State Arbitration', in this volume.

[14] Some of the issues relating to questions of democracy and the use of academics are considered in J.O. McGinnis and I. Somin, 'Should International Law Be Part of Our Law?', (2007) 59 *Stanford Law Review* 1175.

apparent, the importance of such a role for academics becomes essential and emphasises the need to consider how the academic contributes, as perhaps an agent of change, within international law.[15] Besides the various judicial and arbitral bodies, the institutional structures that accompany and support these institutions, most particularly, the UN, the ICC and the ICJ, were also among the contributions. These papers brought to the fore the need to consider how individuals within these organisations affect those who use, rely (in some cases entirely) and are subject to these organisations. Whether and how we regard these organisations as bound by international law (particularly human rights and international criminal law), how these institutions react to the individual and their internal response as individuals emerged repeatedly as a theme amongst papers given by panellists.[16]

Particularly emblematic of this debate was Dan Saxon's keynote paper on the need to consider the live experiences within these institutional structures, particularly how the individuals within organisations react to unfolding events.[17] Using the current situation in Syria, Saxon highlighted both the need to see the impact of the individual within the law, but also the role of the academic in these scenarios. Most particularly, Saxon highlighted the requirement to deal with active issues, when the academic theorising must lead to an answer for individuals both inside and outside of Syria. Further, the paper emphasised the real consequences of decisions made with immediacy and the responsibility that individuals charged with making legal judgments in both the judicial and non-judicial international arena possess. Saxon's discussion was well linked to Philippe Sands' keynote paper the following day on Lemkin and Lauterpacht, reminding the conference of both the limits of academic power, but also the responsibility of what we say, what we write and our limits as individuals within international legal world.

Over the course of the two days, the variety of institutions referenced was matched only with the multiplicity of names invoked across the conference. Such references included academics, whose individual contribution to the

[15] See for example, N. White, *The Law of International Organisations* (Manchester University Press, 2005) 189-230, A. Reinisch (ed.), *Challenging Acts of International Organisations before National Courts* (Oxford University Press, 2010), K. Anderson, 'What NGO Accountability Means—And Does Not Mean', (2009) 103 *AJIL* 170.

[16] C. Michaelsen, 'The Constitutionality and Justiciability of Security Council Measures Targeting Individuals', D. Saxon, 'The Prosecutor, Defence Attorney and Judge in the International Criminal Process' and Guilfoyle's discussion of the evolution of reaction to Somali pirates: D. Guilfoyle, 'Somali Pirates as Asymmetric Actor and Agents of Change in International Law-and Governance'.

[17] D. Saxon, 'The Syria Crisis and International Law: Reflections on Several Pertinent Issues'.

international academic and legal order remains steadfast, an accomplishment which most academics probably aspire towards but few actually achieve. From Vitoria to Dworkin, from Suárez to Hart, from Gentili to Lauterpacht and from Oppenheim to a very illuminating reference to Schwarzenberger during the after-dinner speech, each name-check illustrated the variety of academic heritage available to those concerned with the abstract individual.[18] This heritage was continuously summoned, be that in the context of, *inter alia*, the judge, the prosecutor, the defence attorney, the soldier, the head of state who we wish to hold account, the child, the pirate, the terrorist, the juridical person of the state, the corporation, the NGO, the international organisation and perhaps too the individual academic. The impact these individual writers had upon the development of international law and the norms associated within it remains evident.

Nonetheless, recurring throughout the conference remained the question, which is often of prime consideration to the academic: where to begin analysis or where to start considerations of relevant material. Regarding the individual as an agent of change opens the possibility of starting with the nineteenth century and the sovereign consent based system which was the hallmark of the majority of academic debate over the nineteenth and early twentieth centuries. This was of central import to Crawford's paper.[19] Or should one start with the seventeenth century and discuss the era in the pre-Vattellian/Bodin penumbra, when the state was not all encompassing and the individual not embodied by it? Or perhaps go further back to antiquity to show the undulation of formulations of law?[20] Alternatively, should examination begin with the creation of the UN and the establishment of what is described as the beginning of a fully fledged 'mixed actor' setting?[21] As was mentioned several times during the course of the conference, where one starts, sets one's paradigm. It would not be safe to claim that any of these four alternatives or combinations thereof was agreed among the assembled group. Nonetheless, what did appear to be established was that considering the potential for an evolutionary role for the individual

[18] After-dinner Speech given by Dr Roger O'Keefe (University of Cambridge) at the Gala Dinner of the Cambridge Journal of International and Comparative Law annual conference, St. Catharine's College, Cambridge, 19 May 2012.

[19] See for example, L. Oppenheim, 'The Science of International Law: Its Task and Method', (1908) 2 *AJIL* 313 at 328.

[20] See Beaulac, *supra* note 8, D. Bederman, *International Law in Antiquity* (Cambridge University Press, 2001).

[21] C. Harding, 'Statist Assumptions, Normative Individualism and New Forms of Personality: Evolving a Philosophy of International Law for the Twenty First Century', (2001) 1 *Non-state Actors and International Law* 107.

within international law was, at least, a possibility.

An alternative avenue for debate would be to consider the question without any historical paradigm. If a person examined the individual as participant and agent of change from coming to this conference or from considering practice, how would they perceive the state of play?[22] Starting afresh as Suárez, Gentili, Vitoria and Grotius were able to an extent to do, writing minus any reliance upon academic legacy, what would that freedom result in? How would they consider the contemporary state of play? Would an ahistoric academic consider the individual to be the basic unit of international law? Would the terminology within which we frame our academic debate re-emerge or would an alternative, more appropriate jargon surface, suggesting that our use of language stifles debate?[23] When terminology has not caught up with practice, confusion as to whether individuals are actors, subjects or objects, or indeed participants, forces academics and scholarly debate into categories which do not always reflect the nuance of what is being argued, and perhaps eschews our ability to discuss the core issues, as we are pigeon-holed into types. Which leads back to the starting point: how do individual academics contribute to such questions rather than obfuscating and confusing what would potentially be clearer to the ahistoric academic?

Yet, this ahistoric scholar would not benefit from the rich academic record that fills our footnotes and commentary. O'Keefe's after-dinner speech characterised the wealth of authority that we readily reach for when trying to articulate our own claims and assertions. Does the ahistoric academic, possessing the freedom to establish an account of the law, miss out on a wealth of academic discussion which diagnosed many of the issues alluded to at the conference and, as such, miss the opportunity to engage with the spirit of academic debate which conferences give the opportunity to do? Underestimating our inherited academic treasure trove leaves academia in a cycle of re-definition that while worthwhile in a critical analysis, is perhaps less than ahistoric analysis can bring to bear. Thus, it is necessary to ensure that academic heritage is brought to the fore without swatting academic opponents with great names from the past.

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[22] Naturally this has echoes of Rawls' veil of ignorance: J. Rawls, *A Theory of Justice* (Oxford University Press, 2009) 118-23.

[23] P. Goodrich, 'Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language', (1984) *OJLS* 88.

# 3 Idealised academic conference and the need to engage with its spirit

The changing character of third level education within UK academia has shifted scholarship towards a professionalisation evident across law schools, which arguably has a particular effect on international legal academics.[24] 'Gentlemen barristers' (and the gender connotations and effects upon the academic pool from which such dual mandate scholars were chosen that accompanies that phrase) are largely becoming absent from law schools.[25] Nonetheless, in some instances, international law bucks this trend, indeed Crawford and Sands are ample evidence of the continued role for the international practitioner which in other disciplines are becoming less a facet of the UK law school. The establishment of clear career routes, through undergraduate degree, Master's, PhD and the publication and conference circuit has shifted the trajectory of the average academic career.

Recently, Bill Bowring, focusing upon the development of a more critical approach to international law, lamented the lack of interaction between legal practice and academia.[26] While some evidence of interaction was clear at the conference in the shape of Crawford, Sands and Saxon, Bowring's commentary remains salient in a variety of areas within international law, particularly its practice before domestic courts. Bowring's broader point, the narrow character of critical commentary within international law, has much merit and has a bearing on the field of attendees of academic conferences. The increasing cost of a basic legal education combined with the lack of a dual mandate of practice and academia has the potential to further narrow the participants at conferences. Arguably, the support necessary to build and maintain such dual mandate careers limits the potential pool of such scholars, particularly when international legal practice, beyond domestic courts, remains restricted to a relatively small group. Potentially, the contraction of academic career paths within international law takes away from the conference as a fruitful and important avenue of academic engagement and learning, and

[24] F. Cownie, *Legal Academics: Culture and Identities* (Hart, 2004) 73-5.

[25] C. Wells, 'Women Law Professors—Negotiating and Transcending Gender Identities at Work', (2002) 10 *Feminist Legal Studies* 1, R. Collier, 'The Changing University and the (Legal) Academic Career—Rethinking the Relationship Between Women, Men and the Private Life of the Law School', (2002) 22 *Legal Studies* 1.

[26] B. Bowring, 'What is Radical in Radical International Law?', (2012) *Finnish Yearbook of International Law*, (forthcoming), available at <http://ssrn.com/abstract=1982159> [last accessed 23 October 2012].

enables its career-orientated justifications to take centre stage. Thus, the importance of engaging and inviting non-academic lawyers to such events, as Bowring points out, becomes essential. Nonetheless, while there is not a shortage of conferences to attend, the reasons for holding such conferences, beyond professional advancement, or indeed in the era of UK REF readiness, contribution to 'environment', needs to be brought to the foreground when both undertaking to give a paper or organising a conference structure.[27]

Arguably, academic conferences should have a number of aims. First, to ensure academics actually meet. This point will be returned to again, but this perhaps is the most critical reason and the one which the other aims stem from.[28] Further objectives include the furtherance of knowledge through international legal 'academic rhetoric'; to advance knowledge of a particular specialisation; and to contribute to the update of information on an area which, in our myopic academic concerns, may otherwise have passed unnoticed.[29] Good conferences should also expose us to perspectives on areas which we normally would not be drawn towards. Finally, a conference should give the opportunity to argue, discuss and fundamentally disagree with each other in an environment designed to further academic engagement.

As already mentioned, conferences can be categorised into three groups: the narrow subset of 'like-minded' individuals; the broad range of perspectives brought together on a common theme but who largely ignore each other's arguments; and the third, the broad range of perspectives on a common theme that directly engage with critiques and arguments. The Cambridge conference offered the best of the third category. While, generally speaking, most participants were international academic lawyers, the range of specialisations and perspectives was impressive. This was particularly evident on the second day, with a range of panels and discussions taking place around the central theme of the conference.

The maintenance of coherence among the panels on the second day

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[27] Research Excellence Framework, 2014 <http://www.ref.ac.uk/> [last accessed 8 October 2012]. See also Cownie, *supra* note 24, at 135-41. For a discussion of changing cultures in Law Schools, see E. McWilliam, 'Changing the Academic Subject' in R. Hunter and M. Keyes (eds.), *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 107. For a discussion of the historical variety among UK Law Schools, see W. Twining, 'Thinking About Law Schools: Rutland Reviewed' in A. Bradney and F. Cownie (eds.), *Transformative Visions of Legal Education* (Blackwell, 1998) 1.

[28] N. Gross and C. Fleming, 'Academic Conferences and the Making of Philosophical Knowledge' in C. Camic, N. Gross, and M. Lamont (eds.), *Social Knowledge in the Making* (University of Chicago Press, 2011) 153.

[29] See Bourdieu, *supra* note 3, at 209.

was a credit to the hosts, but also shone a light on the underlying purpose of hosting conferences. While all academics maintain a certain general expertise in their area, often this expertise can be in a minutia of law or theory. Often, with the exception of teaching responsibilities, the academic may be considered the opposite of the 'Jack of all trades' by being the master of one. In so becoming, academics often become blinkered and, unfortunately, unaware of the importance of other sub-genres even within the broad field where we place ourselves: public international law. This furtherance of knowledge and updating of information fulfils a key aim of re-invigorating academics' education and curiosity, which arguably should never end. Academic conferences that bring a wide range of voices together allow, at the very least, a casual interaction with areas that we naturally would not be drawn towards, but which inform an academic's perspective and, as such, are important to enable us to consider facts or areas of study which otherwise we would not naturally read or consider.

These papers, outside of an immediate interest, are important. While they may not instantaneously pique debate with every academic present, they do provide another important feature of conferences: arousing curiosity. Lucas Lixinski's paper on UNESCO was an excellent example of such a presentation.[30] The political implications and impact of the individual agent within UNESCO's workings and its coupled impact upon diverse areas of international law, from the use of force to sovereignty, was an area of analysis which was eloquently brought to the attention of the general international law audience. Conferences such as the Cambridge event enable the identification of areas of research, debate or simply coming across law that otherwise academics would have little or perhaps just a sketchy knowledge of, while enabling consideration of how our own research could be improved by understanding trends in these areas. The teaching implications are also manifest as such papers facilitate the use of examples from across a wider spectrum than perhaps would naturally be touched upon in the normal course of lecturing and preparation. Gleider Hernández's paper on the ICJ judiciary entitled, 'How ICJ Judges See Their Decision-Making Role' was another example of the development of this kind of knowledge. Judges as individual agents and participants may be obvious, but the underlying tenet of the paper, understanding perspectives, raised important questions central to any academic debate. The consideration of educational background raised the process of decision-making in a context

[30] L. Lixinski, 'Heritage for Whom? Individuals' and Communities' Roles in International Cultural Heritage Law'.

that brought to the fore the importance of all elements of the individual as a participant, and offered a reflection on the role of academics in informing such decision-makers.

This 'lite' exposure to other areas in international law also extends to other perspectives. As already mentioned, both Crawford and Cançado Trindade led by example in expressing opposing views in dialogue with each other. However, they were not alone in their debate on themes and issues. Virtually every panel contained competing views on the role of the individual within international law, from a multiplicity of perspectives such as *jus cogens* accountability, legitimacy or as law-makers.[31] These panel-led debates contribute to the expansion of knowledge in another, potentially more significant, manner by exposing academics to perspectives that they either had not previously considered (though most academics are loath to admit that there is nothing that they have not considered) or if they have already considered them, to re-evaluate the rational and reasoning behind these alternative perspectives.

Both of these, the exposure to aspects of law or ideas new or afresh, are reasons in themselves to maintain the practice of conferences, but both are predicated on the conference being of the third 'engagement' variety. This is not to suggest that conference organisers should necessarily set up a form of bread and circuses, where academics attend to watch a bloody exchange of views with personalities not only known to disagree, but who wholly have serious personality differences, leading the debate away from the academic into the personal. Indeed, attempts to do such should be shunned, though at times they are unpredicted outcomes of two contrasting personalities. Nonetheless, conferences should, as they did in this Cambridge event, unlock opportunities to present contrasting arguments to other academics and see what emerges from the mix of ideas. Discussing international law with those who agree with you over similar areas of research can be interesting, but arguably does not make for a conference which is academically worthwhile. This proposition leads directly to Sands' keynote paper on Lemkin and Lauterpacht, and the necessity, when possible, of ensuring that academics who do not agree meet to discuss their views.

[31] For example, T. Weatherall, 'Legal Effects and Structural Implications of Peremptory Norms of General International Law (*Jus Cogens*)', K. Bashir and M. Janaby, 'The Right of Individuals to Take Judicial Action Against International Persons', K. Miles, 'The Role of the Claimant as an Agent of Change in International Investment Law', D. Guilfoyle, 'Somali Pirates as Asymmetric Actor and Agents of Change in International Law and Governance'.

# 4 'Meetings'

Sands' paper, centring on two individual academics, opened up broader questions on the role of academics as agents of change in international law.[32] Focusing on Lemkin and Lauterpacht, two academics whose contribution to international law remains indisputable, Sands posed questions on the role of academics in shaping international law. Further, he incorporated queries on individuals within groups, the individuals as atomised actors and as focal points of accountability, all of which the audience eagerly engaged with. The paper opened the possibility of considering the role of academics when positioned in a particular theoretical group, how that grouping impacts upon debate and critique of work, what the categorisation should mean, as well as how much consideration should be given to the impact of categorisation upon the individual academic as an agent of change within international law. Standing alongside such questions are the accommodation and import of 'meetings'.

Rooted in the evolution of international law in the nineteenth and early twentieth centuries, the positions of individuals within international law, a point which was key to Crawford's account of the present operation of the law, was central to Lemkin and Lauterpacht's debate on piercing the veneer of state accountability for individual action. Their debate, on individual accountability within international law, set the tone for the manner in which the individual has emerged in the past half-century as a focus of international human rights and criminal law, both of which both Lemkin and Lauterpacht were instrumental in developing.[33] Besides the importance in law of the individual as either part of a group or as entirely separate, which was at the heart of their academic divergence, the gulf between Lemkin and Lauterpacht's positions is indicative of the import of the individual academic within the development of international law. Sands' paper focused the conference on the need to grapple with the individual academic, and this journal's special edition enables the continuation of such a debate.

The key point in Sands' paper was that while they influenced each other's

[32] P. Sands, 'The Individual as an Individual, or as a Member of the Group? *Lauterpacht v Lemkin*, Tuesday 1 October 1946, 10am, Palace of Justice, Nuremberg'.

[33] R. Lemkin, 'Genocide as a Crime under International Law', (1947) 41 *AJIL* 145, R. Lemkin, 'Genocide: A New International Crime, Punishment and Prevention', (1946) *Revue Internationale de Droit Pénale* 360, R. Lemkin, 'Genocide: A Commentary on the Convention', (1949) 58 *Yale Law Journal,* 1142, H. Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, 1933), H. Lauterpacht, 'The Subjects of the Law of Nations', (1947) 63 *LQR* 438, H. Lauterpacht, *International Law and Human Rights* (Stevens & Sons, 1950).

work, Lemkin and Lauterpacht appear to have never actually met, thus leaving an unanswerable question on what could have emerged had they been granted an opportunity to consider their opposing ideas in each other's company. Perhaps their positions would have remained unchanged, but also a personal meeting may have strengthened either's critique of their relative positions. Arguably, this holds true for any contemporary academic debate and the critical point to take from the conference for those who seek to be academic agents of change within international law is to engage with their academic opponents directly, and when possible, in person.[34]

Conferences enable academics to meet, to discuss, to take part in a panel, to give a keynote address, to receive an audience response, to have a personal conversation over coffee while precariously balancing a teacup, saucer, conference pack and biscuit while looking dignified, and yet engage with the other coffee-drinking academics in a open and, at times, conflicting style. It is often in meeting through introductions at conferences, or re-meeting with past acquaintances, that academics engage with those whose work they have read, relied upon, enjoyed, distrusted, become angry at, or simply perused, and allows us to engage with the person behind the article or book. Such meetings may not necessarily lead to a revelatory moment, but alongside the rationale outlined in the previous section, personal interactions can lead to better understandings of another's—and perhaps even our own—perspectives.

Of course, scholars may develop a negative view of a fellow academic at a conference and this is a risk any scholar runs when agreeing to give a paper, particularly the mounting pressure to be persuasive. Conferences enable an impression of the work of a particular scholar leading to either positive or negative prejudices. Nonetheless, such meetings de-mystify aspects of the academic process. This de-mystification holds particular relevance to those beginning their careers, particularly when certain figures who are held in reverence reveal their craft in an open and engaging manner. We are very good at, to use Sands' phrase, rarification. We build edifices. Rarification permeates any hierarchical structure. Conferences buttress elitism when keynote speakers are kept apart, at coffee or at dinner, from the attending great masses, and levels of formality become exaggerated. We thus have a responsibility to challenge our rarifications, our constructions and hopefully this conference, as all conferences should, gave those attending such an opportunity, allowing academics to engage with each other, enabling discussion and debate in a positive and constructive

[34] See also Goodrich's discussion of *lex amicitia* in shaping ideas in P. Goodrich, 'The Immense Rumor', (2004) 16 *Yale JL & Humanities* 199, at 205.

basis, not reliant on a veneer of edited writing.

In the concluding remarks at the conference I joked about meeting a fellow delegate, Ruvi Ziegler.[35] In meeting over a coffee, we did the classic academic conference activity of, 'you are at X, I work with Y who used to be at X do you know them?' attempting to make a connection while joking that we were partaking in stereotypical conference behaviour. While this can, at times, be part of the much derided 'networking' aspect of conference attendance, as Sands' paper recalled, this personal connection remains worthwhile. My concluding remarks may have ended with the statement that never will it be said that like Lemkin and Lauterpacht 'Ziegler and O'Donoghue never met'. While this was intended as a joke, underlying the comedy was a broader point that conferences allow us to meet and exchange ideas. The mutual respect and friendship was evidenced by Crawford and Cançado Trindade's papers. Even though it was clear that they had failed to convince each other to change their respective minds, each emphasised the importance of discussion. If individual academics can be considered agents of change, then an exchange of their propositions and theories with their peers is essential to establishing and disseminating ideas.

## 5 Barriers to participation

While deliberating upon the rationale and structures of the international legal conference, it is incumbent upon such an endeavour to also consider some of the issues related to participation in academic conferences. These issues, in many ways, reflect the structure of modern international legal academia and, in the context of the individual as a potential participant in international law, are most readily relevant to the conference. The role of the academic in international law is important and thus the ability to participate within the academic framework is manifestly linked to the potential of academics to be agents of change. Therefore considering the available points of participation is the most obvious matter to begin with when conducting a critical evaluation of conferences.

Issues relating to contributions to legal conferences include the relative openness of participation and identity, the representation of women, the presence of ethnic minority groups, barriers to disability access and the range

[35] Ziegler's paper was entitled, 'External State Protection and the Predicament of Recognised Geneva Convention Refugees'.

of views represented.[36] These questions, both individually and collectively, are critical considerations that both organisers and participants should be aware of when arranging and attending academic conferences. These questions of participation are part of a much broader debate within academia, but such issues deserve continuous discussion, as equality of participation remains a persistent problem, which perhaps is at its most visible during conferences.[37]

Arguably, this is a particularly important issue for international law. As previously mentioned, the academics or 'the teachings of the most highly qualified publicists of the various nations' are subsidiary sources of law.[38] This establishes an impetus among academics to consider the barriers to participation that are built-in to the academic system and attempt their dismantlement.[39] This should ensure that the most suitable and deserving individuals are brought to the fore and that diversity and equality are assured. While a variety of geography remains the only qualifier in the ICJ articles on judges, a broad reading of the article to include the implications of the meaning of 'highly qualified' in certain areas, such as, *inter alia*, development, human rights, self-determination and gender requires a much broader interpretation than simply holding a passport.[40] Participation in academic conferences is one method by which this can be assured, and warrants that all individuals can be participants and agents of change within international law and at least present for consideration by the ICJ as one of the most highly qualified publicists.

Both open-calls and invitation-only events are equally important in considering the role that conferences play in disseminating intellectual thought. While their comparative complications are somewhat different, the same considerations (their relative accessibility and the representation of women, ethnicities, sexual orientations, disabilities and educational backgrounds) must be borne in mind by organisers.[41] This is particularly relevant to international law, where

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[36] See Cownie, *supra* note 24, at 167-96.

[37] See Collier, *supra* note 25, at 15.

[38] ICJ Statute, Art. 38(1).

[39] See Cownie, *supra* note 24, at 167-96, F. C. Cownie, 'Women Legal Academics: A New Research Agenda?', (1998) *Journal of Law and Society* 102.

[40] A similar interpretation is used for the employment of the secretariat under Art. 101(3) of the Charter of the United Nations. See also H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 81 and 176.

[41] L. Louis-Jacques, 'Gaps in International Legal Literature', (2000) 1 *Chi J Int'l L* 101, at 107-8. While this article does discuss the absence of voice from various parts of the world, interestingly this special edition of the Chicago Journal of International Law (which asked the question of what was wrong with international law at the turn of the last century) did not identify subaltern issues or feminism, though it did mention critical legal studies.

consideration of feminist perspectives, sexuality and subaltern discussions of law are not, as yet, mainstream and the dominance of Euro-American scholarship has long been acknowledged.[42] These absences are beside the relative non-existence of discussion of disability or sexual orientation, beyond a human rights approach, within international law.[43]

Gleider Hernández's paper mentioned the educational background of ICJ judges and their rather narrow pool of educational geography.[44] Thus, the emphasis on 'geographical spread' in guidelines on appointment does not necessarily equate to a variety of opinion if all the voices come from the same sub-group of legal-educational backgrounds. Such narrowness among Schachter's 'invisible college of international lawyers' incurs a responsibility to ensure that an 'old-boy' network does not strangle debate or, at the very least, restrict its parameters.[45] Bordieu's work on the demographics of French academia in the 1980s highlighted the possibility of narrowness amongst the sistren and brethren of academia. While advances have been made within international law, such issues of participation remain critical in a genre that claims to be 'universal'.[46]

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[42] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007), B. S. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', (2007) 8 *MJIL* 499, M. Koskenniemi 'International Law in Europe: Between Tradition and Renewal' (2005) 16(1) *EJIL* 113, O. Yasuaki, 'When Was the Law of International Society Born?—An Inquiry of the History of International Law from an Intercivilizational Perspective', (2000) 2 *Journal of the History of International Law* 1, D. Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade', (2009) 10 *MJIL* 11, P. Berman, 'Power and Irony, or, International Law after the Après-Guerre' in E. Jouannet, H. Ruiz Fabri and J. M. Sorel (eds.), *Regards D'Une Génération de Juristes Sur Le Droit International* (Editions A Pedone, 2008) 79, F. Tesón, 'Feminism and International Law: A Reply', (1997) 33 *VJIL* 647, H. Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law' in S. Kuovo and Z. Pearson, *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart, 2011) 17. Though some do disagree and argue feminism is in the mainstream: see D. Buss and A. Manji, 'Introduction' in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (Hart, 2005) 13.

[43] M. J. Roseman and A. M. Miller, 'Normalizing Sexuality and its Discontents', (2011) 34 *Harvard Journal of Law and Gender* 313.

[44] The election of Judge Sebutinde to ICJ broadens this slightly, while maintaining the small number of countries in which the judge's postgraduate education took place.

[45] O. Schachter, 'Invisible College of International Lawyers', (1977-1978) 72 *Nw U L Rev* 217.

[46] H. Grotius, *De Jure Belli ac Pacis* (1625), G.C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco De Vitoria and Bartolome De Las Casas', (1990-1991) 3 *Australian Yearbook of International Law* 1, J. I. Charney, 'Universal International Law', (1993) 87 *AJIL* 529.

Sands' discussion of Lauterpacht and Lemkin emphasised the importance of two individuals within international legal academia who studied at, in today's world view, a university that does not figure at the top of global league tables,[47] emphasising the need to perhaps look beyond the more famous law schools when populating speaker guest-lists, particularly keynote speakers. This becomes increasingly important as the range of students travelling across the globe increases considerably and awareness of developments in regional legal systems become ever more pertinent to our understanding of international law.[48] Indeed, Cançado Trindade's comments on the Inter-American Court are one example of how generalisations about international law can by vastly inaccurate and the inclusion of such knowledge ever more pertinent to remedy its prior absence.[49] The geographical and economic difficulties associated with global participation in events remains a barrier but one, due to advances in technology, which is not insurmountable.

The same faces continually recurring at every conference potentially closes-off a genuine opportunity for active academic engagement. These kinds of conferences, which generally fall into the first category of 'like-minded' events, risk slipping into a reunion for the well-known to rehash the same argument, in different guises, that they have been having for several years. Obviously, when this frequent argument is fundamental to our understanding of international law or has changed fundamentally over a period, then perhaps this repetition remains worthwhile, but when conferences simply become a circuit with the same faces plus any additions to the cast-list, they vastly undermine the purpose and worth of holding such events. Thus, beyond the simple importance and arguments for inclusion, which are in themselves arguably sufficient, lies the importance of not re-hashing the same circuit for the entirety of academic careers. In its place, a much more diversely populated conference could bring a more thoughtful and engaging event to the fore, and contribute to international legal academia as a more contemplative and motivating space.

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[47] University of Lviv.

[48] According the Higher Education Statistics authority in 2010/2011 there were a total of 428,225 international students (including EU) studying in the UK: <http://www.hesa.ac.uk/content/view/1897/239/> [last accessed 8 August 2012]. According to the OECD in 2009, there were 3.7 million tertiary international students studying worldwide: OECD, Education at a Glance 2011, <http://www.oecd-ilibrary.org/education/highlights-from-education-at-a-glance_2076264x;jsessionid=13k95r2aep4ws.delta> [last accessed 12 August 2012].

[49] Bourdieu's consideration of the demographic make-up of French academia suggests the variety of capital which various groups possess and the impact upon academic debate. See Bourdieu, *supra* note 3, see also Cownie's discussion of the impact of Bourdieu and 'capital'.

As this article was written, the author received an email detailing a law conference to be held in London, of which, among the ten speakers, there was but one woman discussing equality. All other speakers were white men. Frustration which builds from continuously being confronted by such homogeneity among panels and keynote speakers remains present, and the Cambridge organisers are to be commended that only one panel was all-male and a broad spectrum of nationalities were present both on panels and in the audience. Unfortunately, there was but one woman, besides Rumiana Yotova as editor and organiser, who addressed the conference from beyond a panel, and there were no female keynote speakers.[50] Given that it is not that long since Judge Higgins in 1995 was the first female member of the ICJ,[51] and it was not until 2002 that the International Law Commission (ILC) possessed any female members, rather large representational gaps remain within international law.[52] Several recent high-profile appointments such as Nkosazana Dlamini Zuma as Chair of the African Union, Christine Lagarde as Managing Director of the IMF and Fatou Bensouda as Chief Prosecutor at the ICC suggest progress regarding women's participation in international law. Nonetheless, as international lawyers writing with a feminist critique have continued to point out, the ever-present inequality regarding women's participation within international law and academia remains steadfast.[53] As important offices within international law are often filled from academic ranks, participation at conferences remains

[50] See further <http://feministlawprofessors.com>, <http://www.intlawgrrls.com>, <http://www.good.is/posts/why-white-men-should-refuse-to-be-on-panels-of-all-white-men/>, <http://feministphilosophers.wordpress.com/2011/01/03/gendered-conference-campaign-letter/>, <http://beingawomaninphilosophy.wordpress.com/> [all last accessed 8 August 2012].

[51] More recently, Judge Julia Sebutinde became the fourth female permanent member of the Court. Suzanne Bastid was a judge ad hoc in the *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* Judgment, ICJ Reports 1985, p. 192. Bastid was also the first female Chair in International Law in France, and possibly anywhere, in 1946. In contrast, the International Criminal Court's balance is currently actually in favour of women, with ten of the eighteen judges being women, suggesting that both seniority and expertise among women in international law is available, if simply not chosen. Further, the 1998 Statute of the International Criminal Court, 2187 UNTS 90 Art. 36 (8)(a)(iii) requires 'a fair representation of female and male judges' without a specific quota, which assists in ensuring states both put forward and select women.

[52] Paula Escarameia and Xue Hanqin, now at the ICJ, were appointed to the ILC in 2002 and they were joined by Marie G. Jacobsson in 2007 and Concepción Escobar Hernández in 2011. There are currently two women serving on the 34 person Commission.

[53] S. B. Boyd, 'Spaces and Challenges: Feminism in Legal Academia', (2011) 44 *UBC Law Review* 205, F.C. Cownie, 'Dressing the Part: Gender, Performance and the Culture of Law Schools', (2006) 57 *NILQ* 557.

a critical path of development, and nurturing of new female talent to ensure that women are cemented as agents of change in a universal international law is important.

Particularly as presence in itself does not necessarily lead to an appreciation or active participation a quota system, ensuring every panel possesses a correct mix at each academic conference is not at the forefront of suggested proposals herein.[54] Nonetheless, this paper suggests that the customary response that there are simply no available individuals in an area of debate is insufficient.[55] This oft-proffered explanation—that nobody senior enough for a keynote address exists, or was available for a conference, or nobody replied to the call for papers—has become feeble. Remarkably, this lack of availability never becomes an issue for white male academics who are always available and invariably specialists in a given field.[56] Given the percentage of female to male undergraduates, it does suggest that if there are no women available with seniority or experience, there are other accompanying issues, including, perhaps, a lack of female role models showcased at conferences.[57] The absence of an ethnically diverse academy which leads to the same rationale being proffered also stems from similar problems within academia itself.

Possible remedies to move away from homogeneity include the spreading of calls for papers more widely and targeting the calls by sending them to individuals, law schools, groups or organisations which possess a more ethnically and gender diverse faculty. Panels could also be put together that remain coherent, but also representative of those affected by international

[54] See for example, Human Rights Council, 'Recommendations of the Forum on Minority Issues at its Fourth Session: Guaranteeing the Rights of Minority Women and Girls (29 and 30 November 2011)', UN Doc. A/HRC/19/71 (2012), M. Weller and K. Nobbs (eds.), *Political Participation of Minorities: A Commentary on International Standards and Practice'* (Oxford University Press, 2010) particularly I. Klímová-Alexander, 'Effective Participation by Minorities: United Nations Standards and Practice' at 286.

[55] L. Penny, 'So, it Turns Out Feminism is a CIA Plot to Undermine the Left', New Statesman, 29 February 2012 <http://www.newstatesman.com/blogs/laurie-penny/2012/02/women-white-miller-woman-young-2> [last accessed 23 October 2012].

[56] M. E. Kornhauser, 'Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors', (2005) 73 *UMKC Law Review* 293, D. L. Rhode, *The Beauty Bias: The Injustice of Appearance in Life and Law* (Oxford University Press, 2010), D. L. Rhode, 'Midcourse Corrections: Women in Legal Education', (2003) 53 *Journal of Legal Education* 475, C. M. S. McGlynn, 'Women, Representation and the Legal Academy', (1999) 19 *Legal Studies* 68.

[57] S. Bashi and M. Iskander, 'Why Legal Education is Failing Women', (2006) 18 *Yale LJ & Feminism* 389, L. Guinier, M. Fine and J. Balin, 'Becoming Gentlemen: Women's Experiences at One Ivy League Law School', (1994) 143 *U Pa L Rev* 1.

law. Another solution includes the embracing of communication technology. Advancements, particularly over the past decade, lends powerful support to the use of various electronic media to engage with academics who cannot attend a particular event in person, due to geographical, situational, caring, political or disability access. In places, the natural geographic and, importantly, economic, hindrances upon academic debate and participation can be ameliorated in ways which could not be envisaged even a decade ago. That being said, the importance of academics engaging in person should not be underestimated, but where a broader range of perspectives can be brought together through the use of technology, such opportunities should not be ignored.

Organisers maintain a full command of structure and participation at invitation-only events, thus engaging a responsibility to ensure wide participation among their speakers and audiences. These closed events posses the possibility to be academically dynamic, but also in having a small breadth of contribution, risk furthering narrowness within academia. Yet perhaps the greatest responsibility lies with the selection of keynote speakers for both open and invitation conferences. Ensuring, particularly when there are a number of individuals giving addresses, that they are not homogenous, should be an imperative organisational issue. Without such efforts, it is doubtful that the 'engagement' conference can ever fully take place, and what will be left is a group talking amongst themselves, excluding a wider academic audience from becoming agents of change, engaging in the spirit of debate which the Cambridge conference, in many ways, exemplified.

# 6 Conclusion

International legal academia, perhaps more than any other area of scholastic legal study, engages directly with the practice and development of law. Academics contribute through parallel practice, positions on courts and tribunals, advisory boards, contributions to reports and inquiries amongst other roles, to the system of international law. Importantly, however, academics also participate within international law as contributors to law in their capacity as scholars. The acknowledgement of their place within the ICJ Statute epitomises the importance of the individual academic as a potential agent of change and as a participant within the international legal system.

The implications and impact of individuals as agents and participants was at the heart of the Cambridge conference, and brought to the fore the importance of keeping the role of the individual in mind when considering international

law's development and operation. While there may not necessarily have been agreement on the individual as actor, subject or object of international law, there was recognition that international law is developing away from its several-century existence as a state-bound system.

The Cambridge conference enabled a number of dialectical exchanges, such as those between Crawford and Cançado Trindade, echoing Sands' consideration of Lemkin and Lauterpacht, and re-emphasised the importance of non-state interactions, which arguably only conferences can command. While an academic's written pieces stand as testament to her work, conferences enable a lively and engaged dialogue that moves an argument in an active, though perhaps not always progressive, fashion. Nonetheless, as this article has emphasised, this vigorous character can only be achieved if both organisers and participants are serious in their attempts to ensure participation is open, taking active steps to guarantee that academics engage in an open and positive fashion, and further take the opportunity to 'meet' in a constructive fashion within the academic collective. This may require positive steps to be taken by organisers to ensure this occurs, but such steps would be worthwhile.

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# From Access to Justice

## Book Review of Judge Cançado Trindade's *The Access of Individuals to International Justice*, Oxford University Press 2011

*Bart L. Smit Duijzentkunst*[*]

**Keywords**
Access to justice, the individual in international law, human rights

In the foreword of a recent book on the position of the individual in the international legal system, a well-known international lawyer noted in surprise that no work since the 1960s had comprehensively dealt with the issue of the individual's standing in international law.[1] The topic has recently drawn a flurry of interest, with a number of new books and articles addressing its core questions—this special issue of the CJICL being a case in point.[2] Yet while this matter may seem novel to some, others have devoted their life's work to advancing the role of the individual in the international legal order. As the former President of the Inter-American Court of Human Rights (IACtHR) and current Judge of the International Court of Justice (ICJ), Judge Cançado Trindade falls decisively in the latter category. His latest book on the access of individuals to international justice, derived from his 2007 General Course for the Academy of European Law in Florence, is thus a timely and fitting contribution to the growing field of literature on the individual in international law.[3]

Human rights lawyers often have to defend their field against claims that human rights are not law, but a system of "critical morality" applied to a system of law. In this book, Judge Cançado Trindade explains in detail how, in his

[*] Ph.D Candidate, Gonville and Caius College, University of Cambridge.

1 See James Crawford in K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP, 2011) at xiii.

2 For example, on subjectivity of individuals, see R. Portmann, *Legal Personality in International Law* (CUP, 2010). On the individual's role in international law creation, see A. Boyle and C. Chinkin, *The Making of International Law* (OUP, 2007); C. Ochoa, *The Individual and Customary International Law Formation*, (2007-2008) 48 VJIL 119; More generally, see J. d'Aspremont, (ed.), *Participants in the International Legal System: Multiple perspectives on non-state actors in international law* (Routledge, 2011); A. Bianchi, The Fight for Inclusion: Non-State Actors and International Law, in U. Fastenrath et al., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP, 2011) at 39.

3 A.A. Cançado Trindade, *The Access of Individuals to International Justice* (OUP, 2011).

view, human rights have matured from a moral system to a legal order. He focuses his account on the evolving access of individuals to international justice, with particular reference to the case law of the IACtHR, the European Court of Human Rights (ECtHR), and, to a lesser extent, the new African Court of Human and People's Rights (ACHPR).

After a brief historical excursus on the international legal personality of individuals, culminating in the conclusion that the human being is the "final addressee of all legal norms, of national as well as international origin"[4], Judge Cançado Trindade discusses a number of developments that he considers crucial to the "humanization" of international law.

First is the link between substantive norms of protection and the procedural capacity of individuals to petition international courts and tribunals. Driven by what he refers to as the "universal juridical conscience"[5], the Judge hails the increasing opening of regional human rights courts to direct participation of individuals in proceedings. Initially, individuals could only access the ECtHR and the IACtHR through the intermediation of the European and Inter-American Commissions of Human Rights. However, since the entry into force of Protocol No. 11 to the European Convention on Human Rights (ECHR) on 1 November 1998, individuals have direct access to the European Court. In the Inter-American system, the Commission remains the gateway to the Court for private parties. Yet while alleged victims cannot bring cases to the Court directly, since 1 June 2001 they are allowed to participate in all stages of the proceedings at the IACtHR.[6] This, the Judge argues, is a logical consequence, at the procedural level, of a system of protection, "as it is not reasonable to conceive of rights without the procedural capacity to vindicate them."[7]

While the Judge maintains that "the right of individual petition is undoubtedly the most luminous star in the universe of human rights"[8], standing at international courts is only one side of the matter. The book quickly moves to discuss more material aspects of the right of access to justice, at both the international and the domestic level. It explains how regional human rights tribunals, inspired by the 1948 Universal Declaration of Human Rights, have come to recognize a right to *effective* domestic remedies. Initially, courts may have considered this an "auxiliary right", but over time they have acknowledged its "au-

4 *Ibid*. at 16.

5 *Ibid.* at 18.

6 Prior to the entry into force of the fourth Rules of the Court, individuals could only appear before the court in the reparations phase. See *ibid*. at 43.

7 *Ibid*. at 42.

8 *Ibid.* at 29.

tonomous existence"—the violation of which constitutes a human rights breach in itself.[9] In the Judge's view, the right to an effective remedy entails not only access to courts, but, as succeeding chapters explain, guarantees of due process of law, harmonization of domestic legislation and jurisprudence with international norms, and international supervision over the implementation of judicial decisions.

Towards the second half of the book, the focus shifts decisively from a discussion of "access" to an examination of "justice". The procedural question of whether and how individuals can vindicate human rights at the international level is ultimately of residual importance; the Judge's real interest lies in developing a rich substantive conception of the right of access to justice. Where the book opens with a discussion of *ius standi* at the international level, it concludes with a call for a "right to the realization of justice, in the framework of the rule of law (*État de droit*) in a democratic society".[10] This ultimately entails a "*right to the Law*, that is, the right to a legal order which effectively safeguards the fundamental rights of the human person."[11]

As may be expected from one of the most progressive Judges ever to serve on the bench in San José and The Hague, the book makes various concrete suggestions for the future of international human rights law. Commenting on the question of reservations to human rights treaties, which led to much discussion in the International Law Commission before the finalization of its "Guide to Practice" last year[12], the Judge argues that reservations to non-derogable provisions in these treaties should be held inadmissible. To further preserve the "integrity" of human rights treaties, the Judge envisions international supervisory organs to have the last word on the compatibility of reservations with the object and purpose of human rights treaties. Other suggestions to enhance the protection of individuals include the expansion of the notion of the victim to include the "indirect" and "potential" victim. This, in the Judge's view, would bring human rights law one step closer towards its goal, namely being truly "victim-oriented".[13] The Judge draws attention to the plight of particularly vulnerable groups, such as street children, migrants,

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[9] *Ibid.* at 66.

[10] *Ibid.* at 75.

[11] *Ibid.* at 197 (emphasis in original).

[12] See International Law Commission, *Guide to Practice on Reservations to Treaties*, UN Doc. A/66/10 (2011), para. 75. The debates did not only take place within the ILC, but also between the Commission and human rights organizations, resulting in the "Conclusions on the reservations dialogue", annexed to the Guide to Practice.

[13] Cançado Trindade, *supra* note 3, at 125-131.

detainees and civilians in armed conflict. Perpetrators, however, are not forgotten: the book pleads for an end to "self-amnesties", under which leaders grant themselves immunity from prosecution following grave human rights abuses,[14] and argues that international tribunals should keep an eye on the implementation of judicial decisions. To complement this array of measures, the Judge commends the gradual expansion of the material content of *ius cogens*, to include the basic principle of equality and non-discrimination and, indeed, the right of access to justice.[15]

The book benefits greatly from Judge Cançado Trindade's extensive experience in human rights law, as a scholar, practitioner and international judge. Indeed, at times his work reads more as a commentary, or even a memoir, on the development of international human rights in the past four decades, than as an exposition of the law in this field. Many of the suggestions and proposals made in the book can be found in the Judge's earlier writings, some dating back to his PhD thesis prepared at the University of Cambridge.[16] Passages from his Separate or Dissenting Opinions as Judge and President of the IACtHR permeate the text. So do reflections from his time as rapporteur for various human rights bodies. These quotations demonstrate the passionate engagement of the Judge with the topic. They evidence his livelong advocacy for the individual in international law, even as a member of the international judiciary.

Notably absent from the book is a discussion of the access to international justice of non-state actors outside the human rights sphere. For example, the book never mentions the rise in investor-State arbitration, which allows private entities to bring investment claims directly against states on the international plane. Nor does it engage with questions relating to the domestic application of human rights treaties as between private entities residing in different countries, currently under discussion by the United States Supreme Court in the *Kiobel* case.[17] Given the Judge's experience and expertise, the focus on international human rights law is understandable. In his view, this field has freed international law "from the chains of statism"[18] and the "darkness"[19] of legal positivism, causing the "rescue of the individual as a subject of

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[14] *Ibid.* at 194-196.

[15] *Ibid*. at 212.

[16] See A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its rationale in the international protection of individual rights* (CUP, 1983).

[17] See *Kiobel v. Royal Dutch Petroleum*, US Supreme Court, No. 10-1491, argued on 28 February 2012 and reargued on 1 October 2012.

[18] Cançado Trindade, *supra* note 3, at 209.

[19] *Ibid.* at 4.

international law".[20]

In fairness to legal positivism, it is worth noting that the international legal system itself—as a system of law—has never excluded individuals as potential right holders. The Judge cites numerous scholars, from Georges Scelle to Hersch Lauterpacht, to support this claim.[21] Rather, the exclusion of individuals as international right holders emanates from theories about the role of the state, prevalent in the late nineteenth and early twentieth century. These theories defined the relationship between the state and the individual in such a way as to exclude the latter's capability to hold international rights.[22] While legal positivism is compatible with this view, it is by no means its corollary—positivism can equally explain the existence of international rights of individuals. In any case, legal and political philosophy have moved on from the *fin-de-siècle*. Some scholars continue to invoke this out-dated conception of the state as a straw man to discredit the virtues of positivist thought and to question the continuing relevance of the state in the international legal order. Judge Cançado Trindade, however, steers clear from this approach. Instead, his book points to the evolving responsibilities of states as guarantors of the adequate protection of human rights. It also shows the way in which international human rights law is to develop, if the protection of individuals is to be taken seriously: expanding the notion of the victim; restricting reservations to human rights treaties; and enhancing international supervisory mechanisms. The past sixty years have seen a remarkable development in the relations between the state and the individual; with Judge Cançado Trindade's recommendations in hand, we can feel more confident that the same will happen in the next sixty years.

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[20] *Ibid.* at 6. See also at 18 and 209.

[21] *Ibid*. at 6-10. These views can be summarized in the words of Eduardo Jiménez de Aréchaga, 'that "there is nothing inherent to the structure of the international legal order" which impedes the recognition of rights for individuals emanating directly from International Law,' *ibid*. at 10.

[22] For an elaborate discussion, see Portmann, *supra* note 2, at 42-125.