Cambridge Journal of International and Comparative Law

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ISSN 2050-1706 (Print)
ISSN 2050-1714 (Online)

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

http://www.cjicl.org.uk

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DOI: 10.7574/cjicl.03.03.239
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EDITORS' REMARKS

Naomi Hart[*]
Emma-Louise Bickerstaffe[†]

Any observer of global events in 2014 would be reminded of the enduring pre-eminence of nation-states as a fundamental organising principle of domestic and international legal orders. This primacy has found expression in the contested territorial status of Crimea, in fresh acts of recognition of Palestine as a state, in the referendum on Scotland's independence, and even in the savage pursuit of a caliphate by the Islamic State terrorist organisation. These events have demonstrated that citizens continue to look to their states as reflections of their cultural, religious and civic identities. On the international stage, they have thrown into stark relief the abiding significance of states as repositories of legal rights and obligations.

The Third Annual Conference of the CJICL, held on 10–11 May 2014 in the Divinity School of St John's College at the University of Cambridge, provided a welcome reminder that an exclusive focus on states as legal actors provides an incomplete picture of how the law operates in the twenty-first century. Under the theme of 'Stepping away from the State: Universality and Cosmopolitanism in International and Comparative Law', contributors explored normative and pragmatic reasons to couple state-centric paradigms with approaches that eschew state boundaries. The papers presented at the Conference, a selection of which are published in this edition, devoted attention to legal structures, values and communities that transcend the grid of nation-states.

The Conference opened with a keynote address by Judge Kenneth Keith of the International Court of Justice. His address, reproduced as the first article in this volume, explores institutions—many predating states—that provide a counterpoint to states in terms of how legal systems and obligations are structured. He contends that numerous organisations view states as inapposite vehicles for achieving their objectives and so deliberately operate 'away from the state'.

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The articles in this edition explore numerous ways in which international and comparative law have sidestepped or superseded state boundaries, and have been divided into subsections accordingly. The first concerns the recent developments in international organisations and courts in developing laws outside of national strictures. Elisabetta Morlino explores whether the procurement practices of international organisations have given rise to a global public law that applies to private actors irrespective of their nationality and location. Michelle Grando analyses whether decisions of courts and tribunals have led to an international law of privilege when it comes to the admission of certain items of evidence. In his contribution, Jed Odermatt analyses the practice of the Court of Justice of the European Union in terms of incorporating international law into its judgments. He argues that the Court's mixed record shows at least a tentative willingness to impose legal interpretations of a universalist bent, displacing the privilege historically accorded to interpretations that are consistent with European Union member states' laws. Finally, Merryl Lawry-White conducts a broad survey of international bodies implementing international human rights, criminal and investment law. She demonstrates the contributions of these bodies in forging a universal approach to awarding reparation for moral damage.

The second section of this issue concerns comparative and cosmopolitan perspectives on the law. In this connection, Jason Rudall offers an insight into the theoretical dimensions of cosmopolitanism and the methodology by which scholars may frame a workable definition of the concept. This piece incorporates both historical and interdisciplinary perspectives and advocates greater precision in conceptualising cosmopolitanism. In turn, Caterina Sganga points to the appearance of cosmopolitan influences in property law. She argues, however, that this area of law, closely associated with sovereignty and control over resources, is singularly resilient to cross-border trends and structures. The final paper in this section, by Siyi Huang, argues that approaching comparative law through a cosmopolitan lens will help eliminate subjective value judgments and facilitate a 'deep understanding' of foreign legal systems that is so crucial to comparative endeavours.

The issue's third section concerns one of the most dynamic areas of international law at present: the international investment regime. Practising lawyers Simon Maynard and Manish Aggarwal explore two investment disputes involving Argentina. They shed light on the ways in which collective claims undermine the primacy of the state in investment proceedings, including by interpreting states' consent to mass claims liberally and by showing flexibility in the jurisdictional requirements for such claims, favouring claimants over state respondents. In his

contribution, Prabhash Ranjan considers whether proportionality, a concept borrowed from transnational public law, can be legitimately imported into decisions regarding bilateral investment treaties, especially given the important textual and contextual differences between investment and other categories of disputes.

The final category of papers concerns rights enshrined in domestic and international law. Nino Guruli's piece explores the circumstances under which governments may strip individuals of their citizenship, a keystone right in domestic legal orders. Using case studies of the United States and the United Kingdom, she addresses the primacy accorded to state interests in citizenship decisions during the War on Terror. Graziella Romeo, in turn, argues that cosmopolitanism has led to a pattern of recognising and enforcing the rights that states owe to individuals irrespective of their citizenship. Finally, Jason Mazzone scrutinises the mixed blessing of human rights being defined in universal terms, especially the potential for a dilution of protection standards based on comparisons with foreign jurisdictions.

In his Closing Remarks at the Conference, published as the final piece in this issue, Professor John Bell comments on the ubiquity of cross-national approaches in modern legal scholarship. Using the case study of judges citing decisions from foreign jurisdictions, he advocates research methodologies that realistically balance cosmopolitan and universalist patterns and preferences against a recognition of the enduring centrality of states in defining legal orders.

It remains only to express our gratitude to the many people without whom the conference and this edition could not have materialised. Our conference team, comprising Maximillian Evans, Stephanie Forte, Angelika Bialowas and Miriam Boxberg, worked assiduously in bringing the conference to fruition. The CJICL Editors-in-Chief, Cameron Miles, Daniel Clarry and Valentin Jeutner, provided essential support throughout all stages of the conference planning and, alongside the Editorial Board, in preparing this volume for publication. We are grateful for the support of the many members of the Cambridge Faculty of Law who chaired panels and reviewed papers, and particularly to Professors James Crawford, Christine Gray, David Feldman and John Bell for their invaluable assistance. More than 40 speakers contributed to the conference, and our especial thanks go to our Guest Speakers, Judge Angelika Nussberger, Lord Kerr and Dexter Dias QC. The conference also would not have been possible without the support of St John's College and our sponsors, the Whewell Trust, Hart Publishing and Cambridge University Press.

DOI: 10.7574/cjicl.03.03.229
Cambridge Journal of International and Comparative Law **(3)**3: 628–646 (2014)

STEPPING AWAY FROM THE STATE

Kenneth Keith[*]

Abstract
Judge Kenneth Keith delivered the Keynote Address of the Third Annual CJICL Conference on Saturday 10 May 2014 at the Divinity School of St John's College in the University of Cambridge. He spoke to the Conference theme of 'Stepping Away from the State', and detailed the various institutions that may exist outside of the state but nevertheless prove capable of producing rules that provide structure to human interaction and which may furthermore contribute to the wider development of public international law.

> The difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those of us brought up as most of us have been, into every corner of our minds.[1]

1 'Escaping from old ideas...'

My task is to question the state-centric view of the law that so many lawyers, national, comparative or international, have. So, international law is very often defined in the first words of books on the subject as law operating between states and made by them. Descriptions of national legal systems generally have state institutions—legislatures, courts and executives—at their centre. Think of the lists of references found at the outset of many law books—constitutions, statutes, subordinate legislative instruments, treaties and cases—sometimes only the last which highlights the all too frequent court-centred perspective of the writer.

What I suggest we do is to think in a different way about the systems, the institutions, the rules and the practices we are all familiar with, looking away from, or even ignoring, the State. Think about the various institutions and groups we all belong to—families, schools and universities, religious bodies, sports and other clubs and no doubt many others, especially in this electronic age, and their rules, practices, processes and institutions. There is a danger of our getting

[*] Judge, International Court of Justice. My thanks to Amelia Keene for her comments on this lecture.

[1] J M Keynes, *General Theory of Employment, Interest and Money* (1935) preface.

trapped in familiar narrow patterns if we use ideas or terms like 'the state' or its close relatives 'sovereign' or 'sovereignty' without challenging them from time to time. You might like to consider a lecture given about 10 years ago in this university in honour of a great law professor and Vice-Chancellor under the title 'Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?',[2] and an excellent essay by the holder of the Whewell Chair in Public International Law, 'Sovereignty as a Legal Value'.[3] The former quotes this wise caution from 180 years ago stated by the great American judge and scholar, Joseph Story: 'the term "sovereign" or "sovereignty" is used in different senses which often leads to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions'.[4]

To be a little concrete, I begin with the place we are, in a divinity school, in a university, with a rugby ground not far away. Organised religions and universities, their systems, institutions, rules and practices, go back to times long before the establishment of the modern state, with its systems. They did not 'step away' from the state—they preceded it. The same cannot be said of rugby, but as with religion and universities, the state did not establish its systems, institutions, rules and practices. Rather, representatives of individual clubs playing various forms of 'football' came together in London restaurants or public houses to write the rules and create the unions and associations.[5] The state, through its agencies and laws, generally has a limited role, if any, in respect of their laws, institutions and operations. That is too absolute a statement and I will qualify it in the course of this paper. Let me first mention two recent books which I have found stimulating in thinking about this paper. Each has the value, as I see it, of being written by a philosopher, in the one case, and by a sociologist, in the other—and not by lawyers. Looking back over my reading, listening and thinking over many years since I first studied law, I would urge you to read, listen and think well beyond the law.

The first of two books is by John Searle, a professor of mind and language at University of California, Berkeley. It is called *Making the Social World: The*

[2] K J Keith, 'Sovereignty at the beginning of the 21st Century: Fundamental or outmoded?' (2004) 63 *CLJ* 581.

[3] J Crawford, 'Sovereignty as a Legal Value', in J Crawford & M Koskenniemi (eds) *The Cambridge Companion to International Law* (2013) 117.

[4] Joseph Story, *Commentaries on the Constitution of the United States*, vol 1(1833) book 2, para 207.

[5] See e.g. Melvyn Bragg, 'The Book of Rules of Association Football (1863)', in Melvyn Bragg, *Twelve Books that Changed the World* (2006). For a fascinating bottom up account of the formulation of the 'rules of the game', in this particular case the rules of marbles, see Jean Piaget, *The Moral Judgment of the Child* (1932, tr 1962).

Structure of Human Civilisation, and in it he develops a three part thesis:

1. all human institutional reality is created by a single logico-linguistic operation;

2. this operation he calls a 'Status Function Declaration'; and

3. this operation is not restricted in subject matter.[6]

Think of the ways in which the institutions you know are created and operated. Does this thesis work? Does it help explain those institutions and those I discuss?

You may find more interesting and richer in historical reference and reasoning Richard Sennett's *Together: The Rituals, Pleasures and Politics of Cooperation*, one of three books (one still to come) he is writing about the skills people need to sustain everyday life.[7] He begins with the 'Cooperative Frame of Mind' (instancing musical rehearsals and the use of the subjunctive). Next he considers 'Cooperation Shaped', ending with Hans Holbein the Younger's *The Ambassadors* (1533). That painting, he says, marks (1) the Reformation, with an open printed hymnal in the native language, (2) changes in the organisation of workshops, with precision instruments for navigation on show, (3) a death's head, visible only when the painting is viewed from the side, a symbol of the vanity of human wishes and (4) the two young men, not ambassadors in the strict sense but envoys sent to London by Catholic France to deal with the turmoil caused by Henry VIII's marital troubles. We would now say they were on a special mission. Sennett's third part is about 'Cooperation Weakened' dealing with matters which are increasingly in public debate—growing inequality, embittered social relations at work and the uncooperative self, arising from withdrawal.[8] The book ends, subject to a Coda, with an upbeat part headed 'Cooperation Strengthened', discussing the workshop (making and repairing), every day diplomacy (with valuable comments on indirection and silence, as well as on active participation) and the community in which commitment is practiced. The Coda is about Montaigne's cat: When I am playing with my cat, how do I know she is not playing with me? For Sennett, Montaigne—born in the year *The Ambassadors* was painted—was asking what passes in the

[6] John Searle, *Making the Social World: the Structure of Human Civilisation* (2009) 201.

[7] Throughout this part, see generally Richard Sennett, *Together: The Rituals, Pleasures and Politics of Cooperation* (2012).

[8] See e.g. Ferdinand Mount, *The New Few: or a Very British Oligarchy* (2012) and Thomas Piketty, *Capital in the Twenty-First Century* (2014) and the controversy it has caused.

minds of those with whom we cooperate? Montaigne, he says, was concerned with aspects of practicing cooperation: dialogic (not dialectic) practices which are skilled, informal and empathic.

I have engaged in this summary of an excellent book to emphasise the centrality of cooperation in human existence, a centrality deeply embedded in much law, particularly international law. It also helps lead into the areas of law and practice which I will consider. But before I enter into those areas, one general comment on cooperation in international law and one further reference to another outstanding scholar, this time a lawyer.

The general comment relates to the development of international law over the course of the last two centuries. The law of relations between States in a narrow sense, the law of coexistence, has been increasingly supplemented by a law of cooperation, for instance in the 19th century in the treaties setting up the commissions and rules to regulate major European rivers and the institutions regulating the post and telegraph, and, more generally, in the Charter of the United Nations (Article 1(3) and Chapter IX) and in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and in the duty of cooperation spelled out there—the title to which is too often wrongly abridged, by me among others.[9] Fifty years ago Wolfgang Friedmann had recorded and assessed these major changes in his outstanding *Changing Structure of International Law*.[10]

I have one last reference before I consider a range of institutions and systems set up in large part, or even in full, away from the state. It is to another great legal scholar of the mid 20th century, Lon L Fuller. In his 1969 paper, 'Two Principles of Human Association',[11] he begins with himself and four of his fifth grade classmates who used to gather at lunchtime in the corner of the playground to discuss *Idylls of the King* and *Treasure Island* and to engage in a game of literary one-upmanship. Wilber, a somewhat unprepossessing classmate, hovered about and reluctantly they let him join. They soon realised they had made a bad mistake. They decided they had to expel him. How should they communicate their decision? This had to be accomplished in a manner befitting the literary dedication of their society—by giving him a Black Spot, a negative judgment as in *Treasure Island*.[12]

[9] GA Res 2625 (XXV) (24 October 1970).

[10] Wolfgang Friedmann, *Changing Structure of International Law* (1964).

[11] Republished in Kenneth I Winston (ed), *The Principles of Social Order: Selected Essays of Lon L Fuller* (revised edn, 2001) 101.

[12] Robert Louis Stevenson, *Treasure Island* (1883) ch 3.

Wilber could not fail to understand what they meant. They drew straws to select the messenger. Fuller has written very interestingly about the use of lot, along with other means, in resolving issues.[13] Wilber did not understand the message and broke into tears. Years later, Fuller was sharply reminded of the Petition of *Wilber v The Young Literary Snobs* when he became aware of the decision of a New York Appellate Court upholding the summary dismissal by Syracuse University of Susan Anthony at the beginning of her fourth year in home economics.[14] The only justification given by the University was that she was 'not a typical Syracuse girl'. Fuller thought that the failure of the University to specify grounds and to give Miss Anthony a hearing was outrageous. But then he wondered whether a formal hearing devoted to the issue: is she or is she not 'the type' would call to mind the horrors of Kafka's *The Trial*[15] and the caricature of the judicial office presented by the Red Queen when she sat in judgment of Alice.[16]

Fuller then goes on to discuss, by contrast to the principle of associations formed by 'shared commitment', 'the legal principle'—that is the situation with which, as lawyers, we are more familiar. The association is held together and enabled to function by formal rules of duty and entitlement. Very often of course the two will go together. A formal relationship—a marriage, a law firm partnership, a coalition government, a church, an alliance between states for instance—may well come apart if the shared commitment fails and creeping or galloping legalism prevails. Recall Alexander Pope's lines: 'For forms of Government, let fools contest / Whate'er is best administer'd is best'.[17]

Against that broad background, I now consider a wide range of bodies, groups, systems which, in some degree or other, are or wish to be outside the state and its legal system and the international legal system. As I run through them I will raise questions about the extent to which those bodies are or should be outside the law. Later, I discuss other bodies, separate from the state, which do

[13] Winston (ed), above n 11, 41, 189–90, 218. One nice coincidence is that lot was used in a case in the International Court between Malaysia and Singapore to determine which pleaded first in a dispute about sovereignty over a small island and certain maritime features; the light on the top of the lighthouse erected on the island was made by another member of the Stevenson family who were major lighthouse builders: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Reports 2008 p 12, 20.

[14] *Anthony v Syracuse University*, 223 NY Supp 796 (1927); 224 App Div 487 (1928).

[15] Franz Kafka, *The Trial* (1925).

[16] Lewis Carroll, *Alice's Adventures in Wonderland* (1865) chs 11 & 12.

[17] Alexander Pope, *Essay on Man* (1732–1733) epistle iii, line 303. Fuller quotes this remark of a well-known theologian: 'when the spirit of God has burnt itself out, or lost its vigor, Canon Law proliferates': above n 11, 94.

engage with the state and its legal system or with the international legal system. That may indeed be their purpose, or, if not, the effect of their activities. In the final part of the paper I examine two cases of an international character in which the courts drew on a wide range of sources.

2 Bodies away from the state and wishing to remain so

I consider an array of such bodies, beginning with my earlier reference to organised religion, universities and sport. National litigation and legislation and international law are now to be seen in all three areas, in the third increasingly so, as more and more sport becomes professional and international big businesses, and fraud and cheating raise their ugly heads. But matters of religious belief, academic scholarship and 'the rules of the game' remain in large measure unregulated by public law—although with challenges increasingly being presented on the basis of universal human rights. Those matters remain essentially with those with the shared commitment.

Second, are bodies operating internationally in broadly commercial areas. Major corporates may provide in their contracts for private arbitration and aim to exclude national courts insofar as they can.[18] A notable English commercial lawyer of the 1920s, Lord Justice Scrutton, declared of such clauses that there must be no Alsatia in England where the King's writ does not run.[19] 'Alsatia' is used by the judge as a reference to an area of London which in the 17th century was a refuge for many criminals and where the execution of a warrant was attended with great danger. Over the years in different countries, different professional, legislative and judicial views have been adopted about the balance between the autonomy of the parties and the requirements of the legal system in which issues about the arbitral process and the award may arise by way of enforcement or

[18] For a recent account see 'Exorbitant Privilege' (*The Economist*, 10 May 2014).

[19] *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, 488 (CA). As recently as 2007 another notable member of the Court of Appeal of England and Wales made a different use of the reference when he declared that 'in setting up the Serious Organised Crime Agency the State has set out to create an Alsatia, a region of executive action free of judicial oversight': *UMBS v SOCA* [2007] EWCA Civ 406, para 58. Christiania in Copenhagen provides a very different further example of a self-proclaimed autonomous community. It was set up in a few streets 40 years ago inside an old Danish military base. A modern day Alsatia, perhaps? See Tom Freston, 'You Are Now Leaving the European Union' (*Vanity Fair*, 12 September 2013). But what about garbage collection, water supply, heath care, pensions and rates—not to mention criminal law enforcement?

annulment.[20] One notable instance of an international business running its own legal system of self-regulation is provided by the world diamond industry.[21] The author of a valuable study of that industry begins with this description:

> The diamond industry has systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members.[22]

She ends with this passage which may be related back to Lon Fuller's principle of shared commitment:

> In the diamond industry, 'trust' and 'reputation' have an actual market value. As an elderly Israeli diamond dealer explained […] 'when I first entered the business, the conception was that truth and trust were simply *the way* to do business, and nobody decent would consider doing it differently. Although many transactions are still consummated on the basis of truth and truthfulness, this is done because these qualities are viewed as good for business, a way to make a profit.'[23]

Another example under this broad heading consists of the international ratings agencies, such as Standard and Poor's, Moody's and IHS.[24] They in fact exercise huge power—as smaller national credit rating agencies also do in their areas—over national economies, particularly over their ability to borrow. There are occasional, it seems very occasional, law suits brought against them for negligence and for anti-competitive behaviour. But they do appear to operate in significant part beyond the law.

My final instance of bodies that operate outside the state are the Mafia in its various forms[25]—organisations created for profit, bound by an oath of

[20] See e.g. *New Zealand Law Commission Report No 20: Arbitration* (1991).
[21] See e.g. Lisa Bernstein, 'Opting out of the Legal System: Extra Legal Contractual Relations in the Diamond Industry' (1992) 21 *JLS* 115.
[22] Ibid, 115.
[23] Ibid, 157 (emphasis original).
[24] See e.g. Benedict Kingsbury, *Governance by Indicators* (2012).
[25] See e.g. Misha Glenny, *McMafia: Crime without Frontiers* (2008).

silence—*omerta*—and more broadly transnational organised crime.[26] They are of course set up to operate outside and in breach of the relevant law but with their own systems nonetheless. This instance highlights the need for strong national law enforcement, increasingly backed by treaties and related arrangements. Those treaties can be traced back to the 19th century slavery treaties with many more being adopted in the last century, notably the UN Convention against Transnational Organised Crime and the UN Convention against Corruption.[27] Among the many related arrangements are those administered by the Financial Action Task Force established by the G7 in 1989 'to set standards and promote effective implementation of legal, regulatory and operational measures for combatting money laundering, terrorist financing and other related threats to the integrity of the international financial system'.[28]

3 Bodies away from the state or the international legal system and contributing to the law or its operation

This grouping of bodies which are to a greater or lesser degree independent of states but which may contribute to the making of the law or to its practical content, at national, regional and international levels, has very many members. I am very selective. Three subgroups can be identified: first, those groups that are set up to develop or codify law or to assist with the process; second, those that establish terms of trade for ease of usage; and third, the practices and standards developed by occupational groups.

The first is exemplified by bodies such as the International Law Commission and national law (reform) commissions, on the one side, and the *Institut de Droit international* and the American Law Institute, on the other, the former pair being established by states, but with a certain independence, and the latter by private initiative and with full independence. Each of these bodies has a general mandate over the whole of international law or national law as the case may be. Others will

[26] See e.g. Moises Naim, *Illicit: How Smugglers, Traffickers and Copycats are Hijacking the Global Economy* (2006).

[27] UN Convention against Transnational Organised Crime, 15 November 2000, 2225 UNTS 209; UN Convention against Corruption, 31 October 2003, 2349 UNTS 41. For an earlier still valuable account see R S Clark, 'Offences of International Concern: Multilateral State Treaty Practice in the Forty Years since Nüremberg' (1988) 57 *Nordic JIL* 49.

[28] See <http://www.fatf-gafi.org/pages/aboutus/> [accessed 7 November 2014].

have a particular focus, such as the International Committee of the Red Cross which had its beginnings 150 years ago and has large responsibilities in respect of the preparation of the drafts of Geneva Conventions for the protection of the victims of armed conflict and their implementation. Another is the *Comité Maritime International*, an international NGO founded in 1897 and made up of national NGOs, with the purpose of contributing in all appropriate ways to the unification of maritime law in all its aspects. Its work has provided the basis for several major maritime treaties, work which in recent years has been handled through the Legal Committee of the International Maritime Organisation. More recent instances are NGOs concerned with human rights (although antislavery bodies can be traced back to the 18th century), environmental matters and international criminal law.[29]

Those bodies illustrate, in their establishment and their operation, choices to be made. So far as their establishment is concerned, the founders of the *Institut de Droit international* took the view that the codification and development of international law was too important to be left to governments, it was to be an exclusively learned society, without any official nature, and with the purpose of promoting international law. In the 1920s, by contrast, the Member States of the League of Nations decided that they should undertake the task of codification, work that was however preceded by a report of a Committee of Experts—an effort which essentially failed.[30] In 1947 the General Assembly took a middle course when it set up the International Law Commission consisting of individuals who are to be persons of recognised competence in international law. They sit in their individual capacities and not as government representatives. It follows that they cannot be replaced by alternates. They are however elected by states on the nomination of states; further, the proposal that the nomination and election of the Commission's members be modelled on that for the ICJ was rejected on the basis that the Court was a special case and the work of codification had been entrusted to the General Assembly by Article 13 of the Charter.[31]

By contrast, other bodies established by the General Assembly to address matters of the codification and progressive development of international law consist of Member States but with a recommendation to them that they appoint persons of appropriate calibre and qualifications.[32]

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[29] See e.g. Alan Boyle & Christine Chinkin, *The Making of International Law* (2007) 77–97.

[30] *Report of the International Law Commission on the work of its 64th session*, UN Doc A/67/10 (3 August 2012) 3-4.

[31] Ibid, 10.

[32] See e.g. GA Res 1966 (XVIII) (16 December 1963) para 2 (regarding the Special Committee on

A second matter of choice relates to the form of the product of the process. A valuable UN Secretariat Report, prepared in 1966, on the Progressive Development of the Law of International Trade, on the basis of existing international practice identified three possible methods:

1. normative regulations drawn up in the form of treaties accepted by states;

2. model laws to serve as guides for national adaptation and legislation and uniform laws to be incorporated by states into their legislation;

3. standard terms relating to commercial customs and practices adopted with an international body, notably the International Chamber of Commerce (*ICC*).[33]

Another, fourth method, illustrated by the activities of the Financial Action Task Force, has already been mentioned—the elaboration of supplementary processes, often on a recommendatory and voluntary basis. The first, second and fourth of those listed require state action. The third (considered further later) does not; it depends on the willingness of those entering into contracts to adopt the terms.

The work of UNCITRAL, over the past 40 years, set up by the General Assembly following that Secretariat Report, includes the three listed and indeed another category:

- 11 Conventions;

- 8 model laws and 8 model legislative guides;

- 12 Incoterms and similar texts endorsed by it, and 4 adopted by it.

The new category includes 11 recommendations and guides relating, for instance, to arbitration proceedings and cross-border insolvency cooperation.

I have already mentioned the principal example of my third group: the Incoterms and Uniform Customs and Practices prepared by the ICC. The ICC

Friendly Relations and Cooperation among States); GA Res 2205 (XXI) (17 December 1966) (establishing the UN Commission on International Trade Law).

[33] *Progressive Development of the Law of International Trade: Report of the Secretary-General of the United Nations*, UN Doc A/6396 (23 September 1966) paras 190–5, in UNCITRAL *Ybk* 1968–1970/I, 18. For an excellent discussion of the choice of method see R Cranston & R Goode (eds), *Commercial and Consumer Law: National and International Dimensions* (1993) ch 1.

first prepared Incoterms in 1936 for the purpose of facilitating global trade by providing trade terms that clearly defined the respective obligations of Parties and reduced the risk of legal complications. The latest version adopted in 2010, to quote UNCITRAL:

> [O]ffered a simpler and clearer presentation of all the rules, taking into account of the continued spread of customs-free zones, the increased use of electronic communications in business transactions, heightened concerns about security in the movement of goods and changes in transport practices.[34]

The ICC in fact asked UNCITRAL to endorse the revised text, which it did, congratulating the ICC for its further contribution to the facilitation of international trade by making Incoterms simpler and clearer, reflecting recent developments in international trade, and recommending the use of the terms, as appropriate, in international sales transactions.[35] UNCITRAL had taken much the same action a few years earlier in respect of the 2007 revision of the Uniform Customs and Practice for Documentary Credits.[36] The ICC, said UNCITRAL, in preparing the revision, had 'made a further contribution to the facilitation of international trade by bringing up to date its rules on documentary credit practice to allow for developments in the banking, transport and insurance industries and new technological applications'.[37]

UNCITRAL has even taken similar action in respect of texts adopted by an intergovernmental body, UNIDROIT, but again in respect of a text the effectiveness of which essentially depends on the will of the parties to the contract, as it emphasised in the preamble to its decision.[38]

The final group under this heading is made up of the practices and standards of relevant occupational groups. Consider the broad terms to be found in certain maritime conventions. The Hague-Visby Rules for the Carriage of Goods by Sea, adopted in 1924, in Articles 3(1) and (2) require the carrier to:

> (1) exercise *due diligence* to
>
> (a) make the ship *seaworthy*;

[34] *Work of the International Law Commission* (8th edn, 2012) para 143.
[35] Ibid, para 144.
[36] Ibid, paras 356–7.
[37] Ibid, para 357.
[38] Ibid, para 140.

> (b) *properly* man, equip and supply the ship;
>
> (c) make […] all […] parts in which goods are carried *fit and safe* for their reception, carriage and reservation;
>
> (2) […] *properly and carefully* load, handle, stow, carry, keep, care for, and discharge […] the goods.[39]

In the 90 years since that text was adopted shipping, including cargo handling, has changed in major ways. That is reflected in the resolution of the General Assembly adopting in 2008 the new United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea[40] and in the preamble to the Convention itself.[41] The General Assembly expressed its concern that:

> [T]he current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents.[42]

The General Assembly expressed its conviction that:

> [T]he adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international trade of goods and reduce legal obstacles to the flow of international trade among all States.[43]

The preamble to the Convention recognises the significant contribution of the 1924 Convention and the related protocols and the 1978 Hamburg Convention

[39] Known formerly as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, 120 LNTS 187, and adopting its present title with the passage of the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 23 February 1968, 1412 UNTS 127 (emphasis added).

[40] 11 December 2008 (not yet in force).

[41] GA Res 63/122 (2 February 2009).

[42] Ibid, preamble, para 2.

[43] Ibid, preamble para 4.

on the Carriage of Goods by Sea,[44] but then mentions the later technological and commercial developments, and states the belief that:

> [T]he adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally.

The central obligation of 'due diligence' (now in Article 14) is stated in essentially the same terms as it was in 1924 in Article 3—the same adjectives and adverbs, with an addition in the paragraph equivalent to Article 3(2) to 'any containers supplied by the carrier'. The words are the same, the tests for liability also, but can that really be said of the content of the obligations 90 years after they were written when it comes to their being applied? Surely not.

The same question, no doubt, with the same answer, can be asked of the conventions for assistance and salvage at sea adopted since 1910.[45] The 1910 and 1989 Conventions, and the related provisions contained in the 1958 Geneva Convention on the High Seas[46] and 1982 UN Convention on the Law of the Sea,[47] impose generally stated obligations on masters of ships, insofar as they can without serious danger to the ship, the crew or the passengers, to render assistance to any person found at sea in danger of being lost. After the development of long distance marine communications an obligation was imposed by the 1929 Convention on the Safety of Life at Sea[48] to have that radiotelegraphic equipment on board. The Master on receiving a wireless distress signal was obliged to proceed with all speed to the assistance to the persons in distress unless he was unable or considered, in the special circumstances of the case, that it was unreasonable or unnecessary to do so. That obligation too was carried forward into the 1958, 1982 and 1989 Conventions without any change in the general terms of the obligations. In the opinion of the ILC,[49] the draft it proposed for the

[44] 31 March 1978, 1695 UNTS 3.

[45] International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea and Protocol of Signature, 23 September 1910, Cd 6677; International Convention on Salvage, 28 April 1989, 1953 UNTS 165.

[46] Geneva Convention on the High Seas, 29 April 1958, 450 UNTS 82, Art 14

[47] UN Convention on the Law of the Sea, 10 December 1982, 1834 UNTS 397, Art 98.

[48] International Convention for the Safety of Life at Sea, 31 May 1929, 136 LNTS 81.

[49] ILC Articles concerning the Law of the Sea, ILC *Ybk* 1956/II, 265, commentary to Art 36.

1958 text stated customary international law. To repeat the point, the practical content of those obligations has no doubt greatly changed since 1910 and 1929, given changes in technology and related maritime practices.

Such changes in application, even in the interpretation, of generally worded rules of law are not new. To anticipate M Portalis, one of Napoleon's code commissioners, quoted later, not everything can be written in precise terms. I give three instances:

1. how is the exception in the 1951 Refugee Convention[50] of refugee status for a person who has been guilty of 'acts contrary to the purposes or principles of the United Nations' now to be applied to a major drug dealer;

2. how is tenancy protection legislation benefitting 'members of a family' or 'spouses' to be seen when social attitudes to non-married couples and gay couples have changed; or

3. does a power recognised in a treaty of 1854 to regulate the use of a border river on which the neighbouring state has freedom of navigation extend to regulation for the purposes of environmental protection?[51]

In such areas, and there are many more, developments beyond the law or certainly beyond the contemplation of those who wrote it may have a real impact on the current meaning and application of that law.

I earlier mentioned, instancing the work of the FATF, the 'other arrangements' which may, and frequently do, operate in support of binding international law. That Task Force is a means of facilitating and when appropriate regulating global transactions—the flow of people, goods, services including financing—additional to those listed earlier. I take a final example from APEC—the Asia Pacific Economic Cooperation, a most unusual entity, if it can even be called that. A former Australian Foreign Minister and Attorney-General, Gareth Evans QC, once referred to it as four adjectives in search of a noun or a verb. That is not quite right, given that the word 'Cooperation' does appear at the end of the list, but what does that word do? The entity, the process, brings together 21 economies from around the Pacific Rim, including Chinese Taipei and Hong Kong as well as mainland China. It is not a formal international organisation. It is not treaty

[50] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

[51] *Pushpanathan v Canada* [1998] 1 SCR 982; *Dyson Holdings Ltd v Fox* [1950] 2 KB 328; *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ Reports 2009 p 213.

based and, with one exception, it has not assisted in the preparation of binding texts. It operates on the basis of non-binding commitments which are undertaken on a voluntary basis. One major benefit of the process for members is the reduction in barriers to trade across borders. I give two examples from a wide range. In 2007 the APEC Single Window was established.[52] It enables governments to process electronically information, documents and fees more quickly and accurately with the consequence that businesses and consumers benefit from faster clearance times, speeding up the supply chain. The goal is to establish that system for all member economies by 2020. The second example concerns faster and more efficient travel for business people. That is facilitated by an APEC Business Travel Card. It allows:

> business travelers pre-cleared, facilitated short-term entry to participating member economies. It removes the need to individually apply for visas or entry permits, saving valuable time, and allows multiple entries into participating economies during the three years the card is valid. Card holders also benefit from faster immigration processing on arrival via access to fast-track entry and exit through special APEC lanes at major airports in participating economies.[53]

Those and many other arrangements are developed through meetings of ministers, officials, experts and business people and others and much national deliberation and action. These are matters of practical cooperation where formal legal rules are not required; moreover, the preparation of such rules may cause difficulties both in terms of drafting and of national constitutional and legal processes.

4 As a source of law for judges in hard cases

In this part of the paper, I take two cases both with international elements, the first from the mid 18th century, the second from the early 20th, but with a modern day complement. They both demonstrate, as I read them, the need for litigators

[52] APEC Sub-Committee on Customs Procedures, Single Window Strategic Plan (*APEC*, June 2007) <http://www.apec.org/About-Us/About-APEC//~/media/Files/AboutUs/AchievementsBenefits/07_sccp2_013a.pdf> [accessed 7 November 2014].

[53] See <http://www.apec.org/About-Us/About-APEC/Business-Resources/APEC-Business-Travel-Card.aspx> [accessed 7 November 2014].

and judges to look broadly at possibly relevant material in arguing or deciding hard cases.

In 1759, Lord Mansfield was faced with a question about the freight to be paid by the owner of goods where the ship was taken by a French ship on the 17th day of a 21 day voyage and was then retaken by an English privateer to which the owner of the freight, on the goods' return, paid half the value for salvage. Was the owner obliged to pay freight and if so at what rate? Yes, said Mansfield, and the rate was 1/2 x 17/21. How did he establish the rule of law 'certain and notorious' and fix that figure? Not by reference to any English statute or case (one decided in the House of Lords he said was also on point, the reasons in the judgment, for which he gave no reference, being given at length). Maritime law is not the law of a particular country but the general law of nations and he quoted Cicero: '*non erit alia lex Romae, alia Athenis; alia nunc, alia post hoc; sed et apud omnes gentes et omni tempore, una eadem que lex obtineit*'.[54]

Accordingly, he began with the 'ancientist laws in the world (the Rhodian Laws) that the master shall have a rateable portion'. And *Consolato del Mare*, a Spanish book, agreed. Ever since *The Laws of Oleron*, a French book, he says, it has been settled thus. He refers to the *Laws of Wisby* and the *Hansetown Laws* and other sources which in turn cite extensive authorities with a final reference (before the House of Lords gets a mention) to an Ordinance of Louis XIV from 1681.[55]

My second case is about piracy. Was actual robbery an essential element of piracy or did a frustrated attempt to rob also qualify? That question was put to the Privy Council in 1934 by a reference seeking its opinion. After three days of argument and only three weeks of deliberation Viscount Sankey, the Lord Chancellor, gave the report of their lordships that a frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*.[56] The opinion reviews 'opinions of jurisconsults[57] and text book writers'—more than 20 of them—from Grotius to Kenny, from eight countries, several decisions, legislation, the Harvard Research[58] and the work of the League of Nations Codification Committee. The

[54] Cicero, *De re publica* (G W Featherstonhaugh ed, 1820) 3.33: 'not one law for Rome and another for Athens; nor one for now and another later; but one for all nations and for all time'.

[55] *Luke v Lyde* (1759) 97 ER 614.

[56] *In Re Piracy Jure Gentium* [1934] AC 586.

[57] In so far as I can determine this word is rarely used in writing in English, Article 2 of the Statute of the ICJ being one exception instance—but that was a direct copy from the French original in the Statute of the PCIJ. The *Oxford English Dictionary* gives no reference later than 1871.

[58] Harvard Research Draft Articles on Piracy (1932) 26 *AJIL Spec Supp* 739.

Board makes several interesting points about:

1. the wider range of authority on which it may consult and act than that which it examines in determining municipal law;

2. the sources which include treaties, state papers, national legislation, national court decisions and last but not least opinions of jurisconsults;

3. the inductive process in which it was engaged;

4. the living and expanding character of international law which was not crystallised in the 17th century; and

5. its refusal to hazard an overall definition of piracy. In support of that refusal, it recalled the words of Jean-Étienne-Marie Portalis, one of Napoleon's commissioners charged with preparing the Civil Code:

> We have guarded against the dangerous ambition of wishing to regulate and foresee everything. A new question springs up. How then is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences and not to descend to the detail of all questions which may arise upon each particular topic.[59]

The Board commented that a careful examination of the topic shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the jurisconsults were expressing their opinions.[60]

I now come forward a further 80 years to a decision of the Ninth Circuit of the US Court of Appeals in a case brought by the Japanese Institute of Cetacean Research against Sea Shepherd. The Court decided that Sea Shepherd was engaged in piracy in the Southern Ocean and issued appropriate injunctions.[61] The Opinion, delivered by Chief Judge Kozinski, began with this striking paragraph:

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[59] [1934] AC 586, 600.

[60] Ibid.

[61] *Institute of Cetacean Research, Kyodo Senpaku Kaisha Ltd, Tomiyugi Ogawa & Toshiyuki Miura v Sea Shepherd Conservation Society & Paul Watson*, Court of Appeals, Ninth Circuit, No 12-35266, DC No. 2:11-cv-02043-RAJ, Order, 25 February 2013.

> You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.[62]

In terms of the law, the Court relied primarily on the terms of the definition of piracy included in the 1958 and 1982 Conventions on the Law of the Sea. Those preparing that text, particularly the International Law Commission, in the 1950s were able to rely, as they willingly acknowledged, on the excellent Harvard Research of 1932,[63] which, in turn, was able to draw on at much more extensive body of material, with more time and wider participation than a Court process allowed. The ILC Members also had the advantage of the detailed comments of Governments on the draft proposals and the debates within the Commission itself. Those widely accepted codifications had further widened the scope of piracy from that found in 1934 and they also greatly facilitated the US Court's task. It no longer had to read across the material reviewed in 1934.

5 Concluding thoughts

I conclude with three reflections. The first is to be ready to challenge our comfortable ways of thinking. Leo Tolstoy ends *War and Peace* with a marvelous reflection on the Copernican Revolution. He drew a parallel between astronomy and history:

> In the first case [that is of astronomy], we had to get away from a false sensation of immobility in space and accept movement that we

[62] Ibid, 2. Herman Melville should not be neglected. 'Whether owing to the almost omniscient look-outs at the mast-heads of the whaleships, now penetrating even through Behring's straits, and into the remotest secret drawers and lockers of the world; and the thousand harpoons and lances darted along all continental coasts; the moot point is, whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff': *Moby Dick* (1851) ch 105, quoted in part by Justice Marshall in *Japan Whaling Association v American Cetacean Society*, 478 US 221, 250 (1986). Neither Melville nor Kozinski were quoted in the recent whaling case in the ICJ: *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)*, ICJ, Judgment of 31 March 2014.

[63] Harvard Research, above n 58.

> could not feel. In the present case it is no less essential to get away from a false sensation of freedom and accept a dependence that we cannot feel.[64]

My second point is related. It is about cooperation, in Sennett's word, about being together, and about dialogue, talking together, rather than dialectic, which has a much more disputatious, argumentative sense. It is striking how much the law, reflecting a better side of life, emphasises cooperation.

Finally, to balance the emphasis in this paper on principle and on large ideas I recall the central role of facts. Many a beautiful hypothesis is destroyed by an ugly fact, declared T H Huxley[65], a great Victorian scientist and Darwin supporter, or, to, relate the point to legal process, consider the marvelous cartoon by Leo Cullum in the *New Yorker*: a lawyer is earnestly asking the Judge, no doubt without success: 'Can we, just for a moment, Your Honor, ignore the facts?'[66]

[64] Leon Tolstoy, *War and Peace: A Historical Novel* (1869, tr 1886) 390–1.

[65] T H Huxley, 'Biogenesis and abiogenesis (1870)', in T H Huxley, *Collected Essays*, vol 8 (2011) 229.

[66] See <http://www.condenaststore.com/-sp/Can-we-just-for-a-moment-Your-Honor-ignore-the-facts-Cartoon-Prints_i8534482_.htm> [accessed 8 November 2014].

DOI: 10.7574/cjicl.03.03.225
Cambridge Journal of International and Comparative Law **(3)**3: 647–665 (2014)

COSMOPOLITAN DEMOCRACY OR ADMINISTRATIVE RIGHTS? INTERNATIONAL ORGANISATIONS AS PUBLIC CONTRACTORS

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Abstract
International organisations contract with other subjects, private and public, in order to procure goods, services and works and perform their institutional functions. In 2012, the organisations belonging to the United Nations system spent more than USD15.4 billion in procuring goods, services and works. From 2000 to 2012 the value of purchases made by the UN alone went from over USD687 million to almost USD3 billion. This significant growth trend has been gradually emerging since the founding of these organisations, reaching a peak in the past decade. The expenditure for international organisations has a significant impact on governmental budgets and contributors and is a business opportunity for companies and individuals. To manage these resources and balance the interests connected to them, it has been gradually developed a body of rules aimed at regulating the relationships between international administrations and private parties, both in the vendors' selection phase and in contract execution. Despite the economic importance of the issue and this emerging regulatory framework, the legal aspects of procurement activity of international organisations has never undergone an in-depth analysis. The paper should then try to answer the following questions: does this body of procurement rules allow observers to argue in favour of a global public law, which is produced by international institutions and has a direct impact of individuals irrespective of their location, nationality and culture? Does this harmonized codification process, if any, create new rights for individuals vis-à-vis international organisations? What are the main features and principles that characterize this body of rules and does the content of such rules go beyond and differ from the states' legal frameworks? Do these rules fill legitimation and accountability gap of international organisations?

Keywords
International organisations, procurement

1 Introduction

To fulfil their institutional mission, international organisations turn to other subjects, both private and public, to procure goods, services and works. Moreover,

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some international organisations have financed projects and programmes on the condition that that the financial resources bestowed by the international organisation to the recipient states are spent through procurement processes that are compatible with those of the international organisation, are regulated by the international organisation and/or are supervised by the international organisation.

Direct (the former) or indirect procurement (the latter) is essential to allow the functioning of the organisations and the fulfilment of their institutional goals. Indeed, there is a strict link between the functions performed by the international organisations, their administrative structure and procurement. The volume of procurement activity has steadily increased together with the size and functions of the international organisations. In 2012 the organisations belonging to the United Nations system spent more than USD15.4 billion in procuring goods, services and works. From 2000 to 2012, the value of purchases made by the UN alone went from over USD687 million to almost USD3 billion. This significant growth trend has been gradually emerging since the foundation of the organisations, reaching a peak in the past decade (USD3.5 billion in 2009) and with a slight drop after 2009 due to the economic crisis.[1] It is made possible by member state contributions, which in many cases—like in those of the United States, Japan, Germany, and Great Britain—amount to considerable sums. Thus, on one hand the increased volume of international organisations' procurement has a significant impact on governmental budgets and taxpayers, on the other hand it is a good business opportunity for companies.

From a legal point of view, the rise of international organisations' institutional complexity and procurement volumes had several implications. International organisations' chances to directly or indirectly affect individuals either as contractual counterparts, final beneficiaries of international organisations' procurement or taxpayers have multiplied. Consequently, conflicting interests belonging to the international organisations, the donor states, the recipient states and individuals have emerged. With the objective of setting priorities among those interests, international organisations have gradually developed and codified a body of rules regulating their procurement activity and the relationship between their bureaucratic bodies and private parties both in the vendors' selection phase and in contract execution.

Despite the economic importance of the issue and this emerging regulatory

[1] Data concerning all the organisations of the UN family are collected by the United Nations Procurement Division: <http://www.un.org/depts/ptd/statistics.htm> [accessed 26 September 2014].

framework, the phenomenon as well as its consequences on the exercise of international public authority and on international organisations' legitimation and accountability were largely neglected by the literature and have not yet undergone an in-depth legal analysis.[2]

When focusing on international organisations, for instance, the debate on cosmopolitanism evolved around their democratisation through political tools such as the adoption of the majority principle.[3] Within this line some scholars have made proposals of reforms aimed at achieving greater democratisation of in-

[2] Indeed, very few and sectional have been the studies on international organisations' procurement, see generally B R Killmann, 'Procurement Activities of International organisations: An Attempt of a First Insight in Evolving Legal Principles' (2003) 8 *Austrian RIEL* 277; Y Renouf, 'When Legal Certainty Matters Less Than a Deal: Procurement in International Administrations' (*IILJ*, 19 March 2009) <http://www.iilj.org/gal/documents/GALch.Renouf.pdf> [accessed 26 September 2014]; T Sakane, 'Public Procurement in the United Nations System', in K V Thai (ed), *International Handbook of Public Procurement* (2009) 233. With a special focus on development aid, some aspects of international organisations' procurement have been analysed in A La Chimia, *Tied Aid and Development in the Framework of EU and WTO Law* (2013). Between the 1960s and the 1970s some works were published on the contracts concluded by international organisations, which focused, however, mainly on the contractual phase and related issues such as the law applicable to contracts: see C W Jenks, *The Proper Law of International Organisations* (1962); F A Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 *BYIL* 34; H Batifol, 'Problèmes des Contrats Privés Internationaux' (1962) *Association des Études Internationales* 54; G R Delaume, 'The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast' (1962) 56 *AJIL* 63; G R Delaume, 'Issues of Applicable Law in the Context of the World Bank Operations', in N Horn & C M Schmitthof (eds), *The Transnational Law of International Commercial Transactions* (1982); P Glavinis, *Les Litiges Relatifs aux Contrats Passés entre Organisations Internationales et Personnes Privées* (1990) 183–236; N Valticos, 'Les Contrats Conclus par les Organisations Internationales avec des Personnes Privées' (1977) 57 *Ann d'Inst* 38; G van Hecke, 'Contracts between International Organisations and Private Law Persons', in *Encyclopedia of Public International Law*, vol 1 (1992) 812; V M E Schneider, 'International organisations and Private Persons: The Case for a Direct Application of International Law', in C Dominicé, R Patry & C Reymond (eds), *Études de Droit International en l'Honneur de Pierre Lalive* (1993); M H Sinkondo, 'Le Rôle de la Volonté de l'Organisation Internationale dans la Détermination du Droit Applicable aux Contrats Conclus avec les Personnes Privées' (1997) 4 *RDIDC* 367; F Seyersted, *Common Law of International Organisations* (2008); M Audit, 'Les Marchés de Travaux, de Fournitures et de Services Passés par les Organisations Internationales' (2008) 4 *JDI* 941; B Heuninckx, 'Applicable Law to the Procurement of International Organisations in the European Union' (2011) 20 *Public Procurement LR* 103. More attention has instead been devoted to procurement by EU institutions. However, these studies have often focused on single aspects of the procurement procedure or on single judicial cases: see, *inter alia*, J B Auby, 'Accountability and Contracting Out by Global Administrative Bodies: The Case of Externalization Contracts made by European Community Institutions' (Paper presented at the Global Administrative Law Workshop, New York University, 18 October 2006).

[3] D Archibugi, 'Cosmopolitan Democracy and Its Critics: A Review' (2004) 10 *EJIR* 437, 448.

ternational organisations' political institutions; such as establishing a parliamentary assembly within the United Nations liable to directly represent citizens instead of governments,[4] reforming the Security Council and the veto power mechanism and requiring the compulsory jurisdiction of the International Court of Justice.[5] The theoretical premises of these proposals lie in juridical pacifism and the idea that by globally granting stakeholders' participation, democracy within international organisations favours peace and enhances their decision-making capacity on issues that supersede states' borders.

Taking an opposite stand, other scholars have argued that democratic mechanisms cannot be transposed into international organisations: 'an international organisation is not and probably cannot be a democracy'.[6] It can be interpreted instead as a *bureaucratic bargaining system* where 'leaders cannot indefinitely ignore the limits set by the opinions and desires of the governed'.[7]

Following the sceptic views on international organisations' democratisation through political tools and building up on the definition of international organisations mainly as bureaucratic systems, this paper explores the rising phenomenon of international organisations' procurement regulation and its implications on the relationship between international public authority and individuals. In particular, it aims at tackling four main research questions.

First, does the development of international organisations' procurement regulation amount to a body of rules which is produced by international organisations and has a direct impact on individuals irrespective of their location, nationality and culture; that is, hence, administrative and *global* in nature?

Second, has this harmonised codification process created new rights for individuals *vis-à-vis* international organisations?[8] And more specifically, what are the main features and principles that characterise this body of rules?

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[4] R Falk & A Strauss, 'Toward Global Parliament' (2001) 80 *Foreign Affairs* 212.

[5] D Archibugi, 'The Reform of the United Nations and Cosmopolitan Democracy' (1993) 30 *Journal of Peace Research* 301.

[6] R A Dahl, 'Can International Organisations Be Democratic?: A Skeptic's View', in I Shapiro & C Hacker-Cordón (eds), *Democracy's Edges* (1999) 19. With reference to the EU alone, see P Schmitter, 'Is it Really Possible to Democratise the Euro-Polity?', in *European Consortium for Political Research* (1996). On global democracy, see R Dahrendorf, *Dopo la Democrazia* (2001).

[7] Dahl, above n 6, 34.

[8] The term 'right' is here used in a wide meaning that is to be entitled by hard or soft rules to *expect* a certain conduct from a subject, e.g. an international organisation whose activity affects my interests. For an analysis of hard and soft rules as *modus operandi* of international administrations see D Zaring, 'Informal Procedure, Hard and Soft, in International Administration' (IILJ Working Paper No 6, 2004).

Third, in terms of the interplay of interests, how do we explain the specific features of the governance and implementation of the procurement process? Does the image of the *bargaining system* apply also to this piece of law?

Finally, can the actual and future development of such administrative rules fill the legitimation and accountability deficit that proposals for a cosmopolitan democracy and international organisations' democratisation tend to address?[9]

2 A Historical Overview

In 1962, Jenks envisaged the development of an international administrative law that would go beyond governing relationships between the organisation and its officials to apply to relationships between international administrations and third parties:

> As international organisation develops certain matters cease to be governed by the conflict of laws and become subject to international administrative law. Within a generation, this process has been virtually completed in respect of the legal relations of international organisations with their officials and employees and has been significant in respect of their relations with other agents. The law applicable to their relations with third parties continues for the most part to be governed by the conflict of laws [...] At a later stage some of the legal relations and transactions of international organisations

[9] Whether and to what extent administrative rules can foster legitimation and accountability of global governance institutions has been widely discussed in the literature. To mention but a few see S Cassese, 'Is There a Global Administrative Law?', in A von Bogdandy & J Bast (eds), *The Exercise of Public Authority by International Institutions* (2010); S Chesterman, 'Globalization Rules: Accountability, Power and the Prospects for Global Administrative Law' (2008) 14 *Global Governance* 39; D C Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale LJ* 1490, B Kingbury, N Krisch & R B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *L & Contemp Probs* 15; A D Mitchell & J Farnik, 'Global Administrative Law: Can It Bring Global Governance to Account?' (2009) 37 *Federal LR* 237; L B de Chazournes, 'Concluding Remarks: Changing Roles of International Organisations: Global Administrative Law and the Interplay of Legitimacies' (2009) 6 *Int'l Org LR* 655; J Delbruck, 'Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies' (2003)10 *Ind J Glob Leg Stud* 29; P L Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 *Columbia LR* 628; R Wolfrum, 'Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime organisation (IMO) and International Fisheries organisations' (2008) 9 *German LJ* 2039.

> with third parties may become subject to international administrative law. At each successive stage of development difficulties may arise in determining whether the balance of advantage lies in applying the normal rules of conflict and substantive law [...] or in evolving special rules which may progressively develop into a body of international administrative law.[10]

The traditional concept of national administrative law was centred on the dualism of systems by virtue of which there is a domestic law of the state and an international law among states. The subjects of domestic law were individuals; the subjects of international law were states and only states. Thus, it was felt that on one hand international law could not directly affect the legal rights of the citizens of a state, and on the other hand that administrative law, as such, would govern and define *only* these rights, that is the rights emerging from the relationship with governmental public power.

Based on these premises two subsequent formulations of the concept of administrative law were developed. As the first international administrative unions arose, the body of laws produced by these organisations was denoted as international administrative law. It was above all organisational in nature; it governed primarily the structure of the unions and the decision-making mechanisms within the unions. It was a law produced by 'an association of states'—[11]in this sense international—and its content was administrative.[12]

With the creation of the League of Nations this first concept was joined by another. The League of Nations had its own Secretariat comprised of officials, international civil servants, who according to the Drummond model did not represent states but were bound solely to the organisation they served. Appearing for the first time was the idea of a direct relationship between international administrations and private subjects and an international administrative law, which unlike administrative international law, was a body of rules, produced by the organisation that governed an internal relationship between the organisation and private parties (its officials). With the establishment of the United Nations the alleged violation of the rights recognised by these rules became actionable in an *ad hoc* court: the United Nations Administrative Tribunal. This administrative law has, hence, three characteristics. First of all, it is an internal law as it refers to

[10] Jenks, above n 2, xxxviii–xxxix.

[11] D Anzilotti, 'Gli Organi Comuni nelle Società di Stati' (1914) 8 *Rivista di Diritto Internazionale* 156.

[12] U Borsi, 'Carattere ed Oggetto del Diritto Amministrativo Internazionale' (1912) *Rivista di Diritto Internazionale* 365; Jenks, above n 2; S Battini, *Amministrazioni senza Stato* (2003).

a relationship between the organisation and its officials.[13] In addition, although the private party is not subject to this law through the ties of citizenship, he/she is subject to it by virtue of a working relationship: the official is part of the organisation.[14] Finally, this administrative law governs both the selection of the official and the service relationship.

Achieving what Jenks had predicted decades ago, contemporary organisations have developed a third line of administrative rules related to the procurement designed to carry out their institutional mission. Since the origins of the organisations, there has been a gradual shift from procurement carried out in informal ways according to a loose set of internal administrative circulars mainly through direct contracting, to procurement performed according to a much better developed body of hard and soft rules found in financial regulations, procurement manuals and guidelines,[15] following a pre-defined procedure and, to some extent, granting competition among vendors, publicity and transparency of the operations. Furthermore, this body of regulations in the last decade is undergoing a process of harmonisation, at least among international organisations belonging to the United Nations system.

The historical reasons for this gradual shift are to be found in the political pressure for administrative reform exerted by the major donors to international organisations' budgets, such as the United States. Historical changes in the life of the organisations led those states to ask for administrative reforms including procurement reform. The end of the Cold War, the decolonisation process and the emergence of new cross-border problems brought about on one hand an increase of size and activities of the organisations, on the other hand the participation of new states in the management of international organisations' re-

[13] S Battini, 'International Organisations and Private Subjects: A Move Towards Global Administrative Law?' (IILJ Working Paper No 3, 2005).

[14] Ibid.

[15] See e.g. FAO, *Procurement Manual* (2003); FAO, *Financial Regulations* (2008); United Nations, *Procurement Manual* (2013); United Nations, *Financial Regulations and Rules of the United Nations*, UN Doc ST/SGB/2003/7 (9 May 2003); United Nations, *UN Procurement Practitioner's Handbook* (2006); UNDP, *Financial Regulations and Rules* (2000); UNDP, *Guidelines for Direct Execution* (2001); UNDP, *Procurement Manual* (2005); UNDP, *United Nations Development Programme Procurement Manual (User Guide)* (2006); UNOPS, *Procurement Manual* (2007); UNOPS, *Procurement Manual* (2010); WFP, *Non-Food Procurement Manual* (1999). For financial institutions see African Development Bank, *Financial Regulations of the African Development Bank* (2002); African Development Bank, *Rules and Procedures for Procurement of Goods and Works* (2008); African Development Bank, *Rules and Procedures for the Use of Consultants* (2008); Asian Development Bank, *Procurement Guidelines* (2010); International Fund for Agricultural Development, *Project Procurement Guidelines* (2010).

sources. Procurement was affected under both respects as the volumes of goods, services and works to be procured grew. At the same time, though, the array of vendors to whom tenders could be awarded became more diversified, including not only companies incorporated in the major donor states, but also companies from developing countries. As the potential diversification of contractors would not guarantee financing states a return in terms of contracts awarded to their companies—which previously was a common practice—those states were also the main promoters of an administrative reform that pursued publicity, transparency and international competition in international organisations' procurement procedures. International competition, in particular, tended to favour big companies (or companies legally incorporated in the major donor states whose production took place in a developing country) as those were able to make the most competitive offers.[16]

3 Principles Guiding Administrative Action and New Rights for Individuals

Against Jenks' anticipations, such international organisations' administrative rules are built on a more complex relationship than the simple one between an international organisation and a private subject. Procurement rules and regulations allow to identify two basic types of procurement that international organisations can carry out: direct and indirect procurement. In the former international organisations' officials identify the needs of the organisation, prepare a contract, launch a public tender if the circumstances require it, evaluate the offers, award the contract. The final contract is signed between the international organisation and a private (or public) counterpart. The overall procedure as well as the rights and duties within it are regulated by the international organisation's financial rules and regulations and their procurement manuals. Direct procurement can serve internal or external purposes. An example of the former is the acquisition of office supplies for international organisations' headquarters. Examples of the latter include the acquisition of aircrafts for peace-keeping operations or the construction of shelters to house refugees. International organisations' indirect procurement consists in procurement procedures whose regulation is set by the international organisations but whose concrete implementation is left to the states. Indeed, to

[16] For an historical overview see E Morlino, *Il Contratti delle Organizazioni Internazionali* (2012) 37–78.

fulfil their institutional mission some organisations finance development projects or programmes that are then carried out by the states, subject to the condition that the procurement procedures within such a project are implemented according to the rules set by the international organisation or national rules as long as these are compatible with the procurement guidelines set by the international organisation.

Both direct and indirect procurement consist of a multi-phase process codified in the relevant rules; registration of vendors, solicitation of offers, evaluation and award. The regulation of such phases is guided by five basic principles—most of the time expressly mentioned in the procurement manuals as the promotion of institutional objectives—competition through fairness, integrity and transparency, economy and effectiveness, best value for money, accountability. The same principles usually guide national government procurements. However, when applied to international organisations' procurement, competition and accountability show several peculiarities compared to government procurement procedures.

4 Competition

Competition is usually the leading principle guiding government procurement. The Government Procurement Agreement[17] as well as the European procurement directives require national administrations to comply with a whole set of publicity, transparency and accountability requirements designed to ensure competition and non-discrimination. Both the WTO and the EU have, indeed, as institutional mission the creation free market economies. Rules governing international organisations' procurement give, on the contrary, less emphasis to competition. Some examples may be worth mentioning.

1. *Advertisement.* In the very first phase, the general rule on vendors' selection is that potential vendors are identified by placing an advertisement.

[17] Marrakesh Agreement Establishing the World Trade organisation, 15 April 1994, 1867 UNTS 3, Annex 4B (Agreement on Government Procurement) (*GPA*). On the WTO, procurement and competition see, *inter alia*, S J Evenett & B M Hoekman, 'Government Procurement: Market Access, Transparency and Multilateral Trade Rules' (2005) 21 *EJ Pol Econ* 163 (2005); R Hunja, 'Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines' (1997) 6 *Public Procurement LR* 216; T Tucker, 'A Critical Analysis of the Procurement Procedures of the World Bank', in S Arrowsmith & A Davies (eds), *Public Procurement: Global Revolution* (1999) 139; S Arrowsmith, 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organisation' (2003) 37 *JWT* 293.

However, in direct procurement this rule has exceptions which are widely used. Procurement manuals allow procurement officers to decide not to post an Expression of Interest (*EOI*) because circumstances of the case do not warrant doing so. No specific justification is required for such a decision. In practice, especially for some organisations such as WFP or FAO this exception is widely used.

2. *Solicitation.* Whereas in government procurement there are usually three tendering methods (open tendering, restricted tendering, negotiated procedures; in the EU directives there is also competitive dialogue), in international organisations' direct procurement the system does not provide for open procedure as a basic procedure, but only for selective tendering procedures: the vendors who can take part to the selection are only those who receive the solicitation documents sent by the procurement officer. Again, the giving of no reason is required to motivate the exclusion.

Furthermore, the Procurement Manuals generally *suggest* to invite all the vendors registered for a certain sector of activity but at the same time allow to limit the number of potential vendors to be invited. This can be done *inter alia* in virtue of the 'interest of the organisation', or if the list of potential recipients of solicitation documents is 'unduly long', or more generally 'whenever the particular circumstances of the case render it impractical or not feasible', and in all other circumstances that the competent administrative bodies deem to be exceptional. A significant room for discretionary evaluation is, hence, left to the procuring entity.

It is not usually so for indirect procurement where, instead, the organisation requires the national administration to adopt open tendering procedures as basic procedures. Limited international bidding, national international bidding or direct contracting are also allowed but only in the cases listed by the organisation. Furthermore, the possibility of putting direct contracting procedures in place is subordinated to the authorisation of the international organisation. In some cases international organisations grant the national procuring entity the possibility of giving a preference margin to local companies in the evaluation of bids (domestic preference). Such an option has to be approved, however, by the international organisation. Finally, international organisations usually require the national procuring entity to explain to the affected parties the reasons of its award decision. Reason giving is also bolstered by a mechanism of subsidiarity according to which if the national procuring entity fails to comply with this duty

either because the reasons given are insufficient or because no reason was given, the affected parties can turn to the international organisation to seek further explanations.

4.1 Accountability

Accountability of procuring entities is crucial to ensure that the provisions set up in the rules and regulations are observed by the competent administration. Under this respect direct and indirect procurement differ.[18] Four main types of accountability can be identified:

1. *Hierarchical Administrative Accountability (direct procurement).* In direct procurement international organisations usually provide for the opportunity to complain against procurement decisions (e.g. disqualification from registration or award) in front of the same administrative authority which took the decision or in front of higher level administrative authorities. In some organisations, as for instance the European Space Agency (*ESA*), the review procedure is highly formalised and proceduralised and foresees three incremental steps (Head of the Procurement Department, the Ombudsman for ESA, the Independent Procurement Review Board). In some other organisations as the UN and UNDP, a formalised debriefing process is granted. In many others as the WFP, FAO and UNICEF the complaint remains informal.

2. *Institutional Accountability (direct and indirect procurement).* Some international organisations, e.g. EU institutions and ESA set up third, impartial bodies such as the ombudsman, which can be activated on request of private parties. Such bodies have jurisdiction over the administrative activity of the international organisation and are vested with investigative powers. An interesting variant of this kind of accountability may be found in

[18] On accountability of international institutions see *inter alia* L Casini & B Kingsbury, 'Global Administrative Law Dimensions of International organisations Law'(2009) 6 *Int'l Org LR* 319, which suggests that the adoption of a GAL approach would foster international organisations' accountability; Kingbury, Krisch & Stewart, above n 9; R W Grant & R Keohane, 'Accountability and Abuses of Power in World Politics' (IILJ Working Paper No 7, 2004); A Reinisch, 'Securing Accountability of International Organisations'(2001) 7 *Global Governance* 131; A M Slaughter 'The Accountability of Government Networks' (2000) 8 *Ind J Glob Leg Stud* 347; K Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organisations: The Role of the Judiciary in Closing the Gap' (2004) 25 *Mich JIL* 1.

indirect procurement. Procurement guidelines of the World Bank, for instance, provide for *ex-ante* and *ex-post* mechanisms to make national administrations accountable to the World Bank.[19] *Ex-ante* mechanisms include the World Bank's review of the state's procurement procedures, documents, bid evaluations, award recommendations and contracts to ensure that the procurement process is carried out in accordance with the World Bank guidelines. *Ex-post* mechanisms consist of complaints filed from the bidders in front of the World Bank's authorities. The World Bank may then take action and ask the national administration to provide all the relevant documentation for the Bank's review and comments. At the end of the process, the World Bank may recommend to the national administration that further steps be taken.

3. *Legal accountability (direct procurement)*. Only the EU has set a third, impartial judicial body to decide on complaints against procurement decisions of EU institutions and this is the European Court of Justice.

4. *'International' accountability (direct and indirect procurement).* Assuming an extensive definition of accountability, this concept may also include the possibility for private parties to file an informal complaint in front of state representatives in international organisations. These may, at their will, exercise a political pressure on the competent administrative authorities in order to obtain a review of the decision.

5 Multipolarity in International Organisations' Procurement as a Source of Global Administrative Law and Its Limits

Direct and indirect procurement differ in one fundamental way: the relationship between public power and private subjects. In direct procurement, the relationship is bilateral, it is tied between a private subject and the international administration. In indirect procurement, the relationship is trilateral, it is tied between a private subject, a national administration and an international administration, with the second one accountable to the third by virtue of the initiative of the first. However, in international organisations' procurement even when the relationship is formally bilateral, states as members of organisations play a fundamental

[19] World Bank, *Procurement Guidelines*, Appendix 3, para 15.

role in both determining the rules for the pre-contractual and contractual phases, and in the concrete implementation of the procurement contract.

The rules that govern international organisations' procurement are thus constructed around a multipolarity of actors—international organisations, financing states, recipient states and individuals either as vendors, taxpayers or final beneficiaries of procurement—and a relative multipolarity of interests.[20] The rules are then *global* because they are produced by supranational entities, encompass and govern the interactions of different levels of governance and affect individuals irrespective of their location, nationality and culture.

They are built around a notion of public interest that not only goes beyond the monolithic concept of unitary public interest—long abandoned with theories of pluralism in administrative law—but has expanded beyond the purely governmental dimension: not one public interest but several public interests are not only attributable to the domestic sphere, but contemporaneously belong to a number of domestic spheres and to the supranational sphere.

It is this multipolarity and the tensions between different interests that have brought about the development of international organisations' procurement regulation but also have set the limits to this development.

As seen above, the proceduralisation of procurement activity circumscribes the power of international organisations' by setting the boundaries of their legitimate action. At the same time, it gives private parties parallel rights *vis-à-vis* international organisations. This proceduralisation has some peculiarities. The development of a procedure and the configuration of rights for private parties has historically been achieved through a particular interplay of the economic and political interests held by states who have been members of the organisations. Democratic proceduralisation, if it can be so defined, is not—or is not merely—the goal and the result of a shifting concept of the relationship between the international administration and private parties, but is primarily the instrument required to fulfil states' interests. Institutions' need for legitimacy, which has often been referred to as one of the reasons for proceduralisation, does not fully encompass the deeper reasons for the phenomenon.

[20] The link between self-interests (of states or of supranational institutions) and the development of constitutional and administrative rules has been suggested by several authors (intergovernmentalism and neo-functional approaches). See, *inter alia*, A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998); A S Sweet & T L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *A Pol Sci R* 63.

Moreover, proceduralisation and the recognition of new rights to individuals are modelled upon public procurement regulations adopted by states, for instance the European procurement directives. Nevertheless, the adoption of principles similar to those which govern public procurement of states is not a simple legal transplant of rules. In international organisations' procurement, these principles have a substance, a mutual equilibrium, and a concrete application that differ from those detectable in public procurement by states. These principles are indeed tied to the peculiar institutional context and to the various interests at play in the global arena. Apart from general statements, the examination of rules that govern relationships between the international administrations that award contracts and private subjects, the relative practice, and the guarantees of implementation that surround these relationships are the result of different priorities among principles compared to what occurs in the national sphere.

In national public procurement, according to for instance the European Procurement Directive and the Government Procurement Agreement (*GPA*), the principles of cost effectiveness and impartiality serve the primary objective of competition with the consequent multiplication and strengthening of the rights of individuals before the administration.

This does not occur in *direct procurement* of international organisations. When scrutinised through a comparative analysis, the three principal elements that characterise the relationship between the administration and private parties in procurement, i.e. competition, transparency (intended primarily as advertisement and reason giving) and accountability prove to have limited implementation, although they represent a significant innovation in the history of international organisations. While the relationship between the administration and private parties has been proceduralised, it remains still characterised by the predominance of public powers' determinations over that of private parties, as demonstrated by the limited forms of competition, scanty advertising content, scarce reason giving requirements and appeals of a primarily administrative nature. Thus, the need for cost effectiveness and impartiality—with the latter intended as the administration's defence against itself, e.g. corruption of its officials—prevails over the need for competition and impartiality, intended as equal treatment of private subjects in their relationships with the administration. That is, the interplay of interests produces the opposite result from national procurement: competition and impartiality for purposes of cost effectiveness, and not, as in national procurement, impartiality for purposes of competition. A single exception to this structure is direct procurement of European institutions, which follows a more protective approach towards private parties' rights.

As mentioned above, the different order of priority among guiding principles can be explained by a peculiar interplay of interests of the international organisations, financing states and their citizens, and of recipient states and their citizens.

In direct procurement the interests of international organisations are based on four circumstances. The first is that the very existence of the organisation depends on financing from certain states. The second is that due to the international organisations' budget rules the international administration has no sufficient incentives to engage in virtuous management.[21] The third is that the system of internal controls, while more developed and detailed than accountability to private parties, has certain weaknesses that inhibit its full effectiveness. The fourth is that none of these organisations, except for the European Union, include competition among its institutional objectives.

The interests of financing states are based on two other needs. One is that the resources granted are not wasted or poorly managed. An additional objective is to use those resources to create business opportunities for companies (private subjects) which are incorporated in their jurisdiction. In other words, it is to guarantee an internal economic return from the financing disbursed to international organisations, which can also take the express form of conditional financing. Finally, the interests of recipient states include not only the obvious one of being able to enjoy the final result of the procurement, but also to see contracts awarded to companies incorporated in their territory.

The interaction and balancing of these three categories of interests have determined the emergence of private parties' rights *vis-à-vis* international administrations, but also circumscribe their scope by creating a group of administrative rules still characterised by the predominance of public power. In fact, the interests of financing states combined with the financing needs of international organisations and, indirectly, of financed states have contributed to a recognition of rights that extends only as far as necessary to achieve these interests or to achieve certain political objectives. Moreover, this interpretation also explains why the gradual process of proceduralising international organisations' administrative activity began when various political motivations began to arise in financing countries and the interests of recipient countries began to emerge after decolonisation.

Some different considerations apply for *indirect procurement*. Here, the pro-

[21] In most organisations the budget for the following year is calculated on the basis of the resources spent in the previous year. This implies that the administrative official has no interest in spending less in a certain year because this would cause less resources to be allocated for the following year.

cedure performed by national administrations but based on the guidelines of international organisations is modelled upon the procedure for governmental public procurement subject to national, European or supranational law. The stated principles are again those of competition, impartiality and cost effectiveness, but unlike direct procurement, their relative weight is more favourable to the recognition of full rights to individuals. Open competition, indicated as the primary manner of selecting contractors, the requirement of advertising and its detailed contents, the requirement of reason giving bolstered by the mechanism of subsidiarity among levels of government, the ability to file complaints against the actions of national administrations by directly petitioning international organisations, and the right to file fraud and corruption charges against national administrations directly before the international organisation are justified by a framework of interests that is more nuanced and less clear than what emerges in direct procurement, and where the main players are the three actors already noted: international administrations, financing states and their citizens, and recipient states and their citizens.

The international organisations' primary objective is to ensure that the state uses the financing for the purpose for which it was granted—i.e. for the implementation of the project or program—and that the resources are not wasted through bad management by national administrations. This is granted by the application of the principles of competition (intended as equal treatment of vendors and impartiality of state authorities), transparency of the administrative action and accountability of institutions to each other and to the vendors that participate in the tender procedures. By giving private parties these instruments to hold national administrations accountable, international organisations cannot only do an inter-institutional check over national administrations, but also an indirect check that is multiplied by all private subjects who enter into a relationship with the national administration and can report violations to the organisation. Thus, in pursuing its own institutional interest, the international administration achieves another objective: broadening the legal rights of private parties.

Financing states encourage this dynamic through market considerations that in part replicate those involved in direct procurement. The primary interest is to ensure that contracts are awarded to companies incorporated in their jurisdiction and competition is the best way to achieve this if we consider that the large multinationals incorporated in these states are favoured in market transactions.

Diversely, recipient states have strong opposing interests. In addition to the goal of obtaining the financing, which is a political aspect of the operation

and does not directly regard procurement, there is the goal of ensuring that contracts are awarded to their companies. In these cases, however, unlike direct procurement, financing states can invoke the institutional objectives of the international organisations and concrete advantages on the market. This consists, in particular, of the territorial proximity of national companies to the to recipients of the services, goods and works provided and savings that can follow in terms of operating costs, transport and labour. This advantage becomes even greater because it coincides with the international administrations' interest in cost effectiveness and with their institutional objectives. Under these specific circumstances, this can create a balancing of interests that favours the recipient states and translates into the possibility of allowing domestic preference, notwithstanding the principle of competition.

6 Cosmopolitanism Revisited: Administrative Procedure in Lieu of Political Democratisation

Democratisation through political tools and proceduralisation of administrative activity that creates new rights for individuals differ in many respects.

First, in the former case the community affected is wide and indefinite—a global *demos* which should take part in the political life of the international organisations— in the latter case the community is made of natural or legal persons identified because part of an administrative procedure and of selected communities which benefit from the outcomes of international organisations' procurement, e.g. humanitarian assistance.

Second, proposals for cosmopolitanism aim at fostering popular control over international organisations' policies and decisions. Critics have, however, argued that size and complexity of international organisations and the scale and heterogeneity of the matters to be decided would abolish the opportunities for citizens to participate effectively in the decision of a world government.[22] The delegation link seems too loose and not effective. On the contrary, although international organisations' administrative rules do not formally regulate the capacity of individuals to influence international organisations' decisions, they provide formal and informal methods of private parties' participation as well as mechanisms through which international organisations are held accountable. In direct procurement, besides bid protest tools, private parties can—and sometimes

[22] Dahl, above n 6.

do—resort to their state representatives to bring their claims to the international administration. In indirect procurement, international organisations can be called upon by natural and legal persons to review the procurement activity carried out by the financed states. Thus, the link between the international organisations and individuals is tighter and more effective.

Third, as to the degree of implementation, while proposals for a greater democratisation of international organisations remains dead letter, the development of rules regulating international organisations' administrative activity is an ongoing process. In the last thirty years international organisations have created a body of rules which regulate a substantial part of their own activity—i.e. procurement—confer up to a certain point rights to individuals *vis-à-vis* international administration and set accountability mechanisms which foster international organisations' legitimation. These rules are fairly harmonised, at least among international organisations that belong to the UN system (which are also those who have the biggest procurement volumes). These rules are global as they strike a balance among interests pertaining to different levels of governance and to an array of individuals irrespective of their nationality. They are also administrative as they regulate the relationship between international administrations and private parties.

If one considers who is concretely affected by the activity of international organisations, it seems that, better than reforms of international organisations' political institutions, administrative reforms can open those institutions to citizens' participation and foster their accountability and legitimation as bureaucratic systems.

A multiplicity of actors—the international organisations, financing and recipient states, natural and legal persons—have thus given rise to a body of administrative rules by pursuing each their own interests. The content of these rules, however, shows also that the peculiar interplay of interests is the obstacle to fully meeting the standards of transparency, publicity and accountability that one finds in public procurement regulation at the state level. Following this observation, at least three different scenarios open up. The first is that new interests come into play and/or existing interests change, creating a new interplay of interests and favourable conditions for further developments towards greater international organisations' transparency and accountability. The second is that the current set of interests remains the same except for minor changes. If this is the case, however, one may ask if then reforms towards an alignment of international organisations' standards of accountability and transparency to state administrative ones are not suited to address the peculiar needs emerging in a

multipolar context which is different from the states' standard. But then the quest for legitimacy of international organisations would remain unanswered and would become more urgent given the foreseeable expansion of functions and tasks of international organisations.

DOI: 10.7574/cjicl.03.03.223
Cambridge Journal of International and Comparative Law **(3)**3: 666–695 (2014)

AN INTERNATIONAL LAW OF PRIVILEGES

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Abstract

The statutes and rules governing proceedings before the International Court of Justice, World Trade Organization panels, and International Center for the Settlement of Investment Disputes tribunals are silent on the question of evidentiary privileges. Moreover, there is no established international law of procedure and evidence to which the disputing parties and tribunals can refer. Yet questions regarding privileges have been presented to them, and as the number of cases brought before them increases, such questions are likely to become even more common. How should international tribunals decide claims of privilege presented to them? This article will argue that there are two approaches to answering this question: (i) a choice of law approach, by which the law of a domestic jurisdiction is selected and applied; and (ii) an approach which would lead to the development of international rules of privilege. The latter approach is favoured because privileges reflect the public policy of the state that creates them and international tribunals do not have a mandate to enforce the public policies of any one state. On the contrary, their mandate is to enforce the policies of the international community as reflected in international law. This is not to say that there is nothing to be learned from domestic rules of privilege. Accordingly, the article will explore how domestic rules can help in establishing an international law of privileges. It will examine rules and policy rationales adopted by a few representative jurisdictions for the protection of types of information that are likely to be relevant for the adjudication of disputes brought before international tribunals, such as classified government information, communications involving in-house counsel and government lawyers, and proprietary information.

Keywords

Privileges, choice of law, arbitration, international dispute resolution, public international law

1 Introduction

The law of privilege is comprised of those rules of evidence that allow information—testimonial and documentary evidence—to be withheld from a

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legal proceeding.[1] They bar fact-finders from considering relevant information. The grounds for exclusion are not the reliability of otherwise relevant evidence, but rather considerations of social policy.[2] Privileges advance social policies such as the protection of national security and the privacy of individuals, and the encouragement of the full, free, and frank communication necessary for the adequate provision of professional services such as legal and medical services. They reflect a judgment that an extrinsic value is more important than an accurate decision, and 'an instrumental assumption that the exclusion of evidence would be effective in preserving that extrinsic value.'[3] In short, privileges reflect value judgments of the specific legal system of which they are part and might constitute barriers to the establishment of the truth in a legal proceeding.

The last fifteen years have seen a significant increase in international judicial activity with international tribunals such as the International Court of Justice (*ICJ*), World Trade Organization (*WTO*) panels, and International Center for the Settlement of Investment Disputes (*ICSID*) tribunals being called to decide a myriad of public international law disputes between states, and private investors and states.[4] As the world becomes more integrated, such activity is bound to increase even further. In this context, international tribunals will be, and have already been,[5] presented with claims of privilege by litigants trying to prevent the disclosure and use of information in international proceedings.[6]

Unlike their domestic counterparts, however, most international tribunals do not have an established body of international rules of evidence on which they

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[1] R M Mosk & T Ginsburg, 'Evidentiary Privileges in International Arbitration' (2001) 50 *ICLQ* 345, 346.

[2] See G Fisher, *Evidence* (2nd edn, 2008) 842; M Hor, 'Evidential Privilege: Sacrifice in the Search for Truth' (2001) *Sing JLS* 410, 410.

[3] M Hor, above n 2, 411.

[4] See UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)' *(IIA Issues Note*, April 2014) 2, <http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf> [accessed 7 November 2014] (presenting a statistical analysis of cases under BITs); WTO Dispute Settlement Body, 'Overview of the State of Play of WTO Disputes: Annual Report 2013', WTO Doc WT/DSB/61/Add.1 (1 November 2013) (listing the initiation of 467 disputes from 1995 to 2013, of which 148 were resolved by WTO panels).

[5] See, for example, *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22 (Procedural Order No 2, 24 May 2006) (*Biwater*); *United Parcel Service of America v Canada*, UNCITRAL/NAFTA (Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege, 8 October 2004).

[6] Throughout this essay, the expression 'international tribunals' encompasses ICSID and *ad hoc* tribunals adjudicating disputes under investment treaties (investor-state tribunals), the ICJ, and WTO panels.

can rely to decide such claims.[7] In particular, the statutes and rules governing proceedings before the ICJ, WTO panels, and ICSID tribunals are silent on the question of privileges. This silence encompasses the complete absence of rules establishing and defining the scope of privileges under international law (e.g., attorney-client, settlement, national security) as well as of any reference to whether international tribunals should enforce domestic rules of privilege and, if so, how a tribunal must choose among the rules of all potentially relevant jurisdictions. In this regard, commentators have noted, for instance, that the status and operation of the rules of privilege 'in the conduct of ICJ proceedings is far from clear.'[8] Yet another commentator has noted that no general rules of privilege have evolved in proceedings governed by international law.[9]

In light of this, how should international tribunals decide claims of privilege presented to them? This article argues that there are two approaches to answering this question: (i) a choice of law approach, by which the law of a domestic jurisdiction is selected and applied; and (ii) an approach which would lead to the development of international rules of privilege. This article favors the latter approach. Among other reasons supporting this choice is the fact that, as noted above, privileges reflect the public policy of the state that creates them. This means that as policy choices vary across jurisdictions, so does the nature and scope of privileges, which translates into a wide variety of rules[10] and the choice of one over others is bound to create inequalities and frustrate expectations. Moreover, except when specifically provided for, international tribunals do not have a mandate to enforce the public policies of any one state; their mandate is to

[7] The International Criminal Court (*ICC*) is perhaps one of the few exceptions to this rule. Rule 72 of Rules of Procedure and Evidence of the ICC sets out the national security privilege and Rule 73 establishes several privileges, including the attorney-client, the doctor-patient and a privilege protecting information that has come into the possession of the International Committee of the Red Cross as a consequence of the performance of its functions. The attorney-client privilege is also recognized in Rule 97 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (*ICTY*) and of the International Criminal Tribunal for Rwanda (*ICTR*). On the rules of privilege applicable to these tribunals, see K A A Khan & G Azarnia, 'Evidentiary Privileges', in K A A Khan, C Buisman, & C Gosnell (eds), *Principles of Evidence in International Criminal Law* (2010) 551.

[8] A Riddell & B Plant, *Evidence before the International Court of Justice* (2009) 206.

[9] R Pietrowski, 'Evidence in International Arbitration' (2006) 22 *Arb Int'l* 373, 404.

[10] See G B Born, *International Commercial Arbitration* (2009) 1911, noting that 'there are significant differences in the nature and scope of privileges under different national laws. In particular, there are substantial differences in the categories of privilege that are recognized, the treatment of waiver of privileges, the persons entitled to invoke privileges (e.g., in-house counsel) and the scope of privileges'.

enforce the policies of the international community.

This article is divided in three parts. The first examines choice of law criteria that have been proposed to help international commercial arbitration tribunals to decide claims of privilege presented to them. The main advantages and disadvantages of each criterion are also discussed. Part Two then discusses the main problems with applying a choice of law approach to decide claims of privilege in public international law disputes. Finally, Part Three explores the question of how international tribunals could go about establishing international rules of privilege. This is followed by some concluding remarks.

2 Choice of Law

A typical dispute submitted to an international tribunal involves litigants from at least two different nationalities. However, the formal litigant may in fact represent the interests of many more parties which might be nationals from different states. For example, in a dispute between a foreign investor and a host state, i.e. the state in which the investment is made), the foreign-investor-litigant may be incorporated in state A, but be a wholly-owned subsidiary of a company based in state B. While the company in state B is not formally a party to the proceedings, it clearly has a direct interest in the dispute and might hold information relevant to the proceedings. Moreover, third parties who do not have a direct interest in the dispute, but who hold relevant information, may yet be based in other states. For instance, the lawyers who represented the foreign-investor-litigant in the organization of its investment in the host state might be based in state C. In short, this indicates that an international tribunal adjudicating a dispute under a treaty may be presented with claims of privilege based on the law of several different states. The question then is whether the tribunal should recognize such privileges. In particular, on the basis of which law should such recognition take place? Should the party invoking the privilege be allowed to choose the law of one state? For example, if the foreign-investor claimed that certain information regarding the organization of its investment was protected by the attorney-client privilege, could the investor choose among the laws of state A, state B, state C, or the host state?

Similar questions have occupied the mind of commercial arbitrators adjudicating international disputes between private parties pursuant to an arbitration agreement and applying the substantive law of a specific domestic jurisdiction

(e.g. the contract law of France) chosen by agreement of the disputing parties.[11] As is the case with international tribunals, the rules of the major arbitral institutions such as the International Chamber of Commerce (*ICC*) and the London Court of Arbitration (*LCIA*), and the arbitration laws of most, if not all, jurisdictions do not address the question of how international commercial arbitrators should decide claims of privilege.[12] The only major institution which has addressed the question of how claims of privilege are to be decided is the International Center for Dispute Resolution (*ICDR*). Article 22 of the ICDR International Arbitration Rules contains a choice of law rule that provides that arbitrators 'should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.' This rule is also known as the most-favored-privilege and will be discussed in more detail below.

There are also no internationally recognized guidelines establishing rules to decide claims of privilege. The International Bar Association's Rules on the Taking of Evidence in International Arbitration (*IBA Rules*)[13] provide that arbitrators may refuse to order the production of evidence protected by a 'privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.'[14] However, the IBA Rules do not provide detailed guidance on how arbitrators are to determine the applicable rules other than stating that arbitrators 'may take into account' the need to enforce the attorney-client and settlement privileges and that in doing so they may take into account the 'the expectations of the Parties and their advisors' and the 'need to maintain fairness and equality as between the Parties.'[15] Accordingly, the IBA Rules do not set out specific rules

[11] The expression 'international commercial arbitrators' is used throughout this article to refer to arbitral tribunals adjudicating private disputes between parties from different jurisdictions and applying the substantive law of a specific domestic jurisdiction.

[12] Born, above n 10, 1911; F von Schlabrendorff & A Sheppard, 'Conflict of Legal Privileges in International Arbitration: an Attempt to Find a Holistic Solution', in G Aksen et al (eds), *Global Reflections in International Law, Commerce and Dispute Resolution: Liber Amicorum in Honor of Robert Briner* (2005) 743, 757–8; M de Boisseson, 'Evidentiary Privileges in International Arbitration', in A J van den Berg (ed), *International Arbitration 2006: Back to Basics?* (2007) 705, 706.

[13] The IBA Rules are guidelines drafted by the International Bar Association (*IBA*) for use in international arbitration. The Rules are not binding unless adopted by the parties, the institution administering the arbitration, or the arbitral tribunal. The current version of the Rules was approved by the IBA in May 2010.

[14] IBA Rules, Article 9.2(b).

[15] IBA Rules, Article 9(3). See K P Berger, 'Evidentiary Privileges under the Revised IBA Rules on the Taking of Evidence in International Arbitration' (2010) 13 *Int'l Arb LR* 171, 171. stating that '[Art] 9(2)(b) refrains from providing a specific conflict rule for the application of privileges in international arbitration. At the same time, the rule is not specific enough to provide

of privilege or a choice of law rule, but instead adopt two guiding principles: respect for the equality of the parties and their expectations. Because of their fundamental nature, these principles have framed most of the debate on choice of law even before their adoption by the IBA Rules.[16] For this same reason, this article also refers to them in analyzing and proposing a solution to deal with the issue of privileges in the context of international tribunals.

Possibly due to the larger number of international commercial arbitrations—and the correspondingly higher frequency of privilege claims—as compared to public international law disputes, the question of privileges has been more vigorously debated among commentators in the field of international commercial arbitration than those in the field of public international law. The focus of the international commercial arbitration debate has been on choice of law, that is, on establishing principles to guide international commercial arbitrators in choosing among the possibly applicable domestic rules of privilege. The following options have been considered: (a) the law of the place of arbitration; (b) the substantive law governing the dispute; (c) the law of the domicile of the person or entity claiming the privilege; (d) the law of the place where the communication was generated; (e) the law of the jurisdiction most closely connected to the allegedly privileged communication; (f) the most-favored-privilege; and (g) the least-favored-privilege. These options, including their advantages and disadvantages, are discussed in turn.

2.1 The law of the place of arbitration

When private parties agree to arbitrate a dispute they must designate a place for the arbitration (i.e. the seat of the arbitration), which means that the arbitration law—e.g. in the United States, the Federal Arbitration Act—of that jurisdiction will govern the procedural aspects of the arbitration. As noted above, however, domestic arbitration laws are silent on the question of privileges. In the absence of guidance from the arbitration law, one option could be the application of the rules of privilege applicable in the courts of the selected seat.

The advantage of this approach is that the same privilege rules apply to all parties.[17] There are, however, two problems with applying the rules of privilege

international arbitrators with concrete guidance as to the practical handling of privilege issues'.

[16] See, for example, Berger, above n 15, 508 (stating that 'it is generally acknowledged that in making choice of law decisions, international arbitral tribunals should do justice to the legitimate expectations of the parties.').

[17] Schlabrendorff & Sheppard, above n 12, 769.

of the seat of the arbitration. First, it does not take into account the social policy aspects of privileges.[18] This is so because parties often choose a neutral jurisdiction to be the place of arbitration, which means that the seat might have little connection with the parties and the matter at issue in the arbitration. In this context, the place of the arbitration has no interest in enforcing its policies against conduct which takes place outside its boundaries and has no effect within its boundaries. That is to say, the place of the arbitration has no interest in, for instance, encouraging frank communications between a lawyer and a client both of whom are outside its borders, regarding a transaction which has no connection with the jurisdiction. Second, application of the law of the seat is likely to violate the expectations of the parties.[19] When the parties have no connection with the seat and the communications or documents at issue were created in another jurisdiction (perhaps years before the seat was chosen), the parties were likely not expecting that the disclosure of their allegedly privileged communications would be governed by the laws of the seat.

On balance there are more problems than advantages in applying the law of the seat to decide claims of privilege and, accordingly, this approach has had no or little support.

2.2 The substantive law governing the dispute

Another option which would have similar advantages and disadvantages to applying the law of the seat of the arbitration is the application of the substantive law governing the dispute.[20] When private parties agree to arbitrate a dispute they choose the substantive law to be applied by the arbitrators in deciding the case. As is the case with the law of the place of arbitration, the law governing the dispute might have no connection with the parties nor with the transaction – e.g., a company from Italy and a company from France contracting for the transfer of technology from the former to the latter may choose the contract law of Switzerland to govern their contract. Moreover, the parties are unlikely to take

[18] Ibid.

[19] K P Berger, 'Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion' (2006) 22 *Arb Int'l* 501, 508. See also Schlabrendorff & Sheppard, above n 12, 769, noting that 'it would come as a surprise to the parties if they were to learn from the arbitrators that, by choosing a place of arbitration for their dispute, they had also chosen the privilege rules applicable in its courts'; J Waincymer, *Procedure and Evidence in International Arbitration* (2012) 803.

[20] Schlabrendorff & Sheppard, above n 12, 770; Berger, above n 19, 509–10.

rules of privilege into account in choosing the substantive law to govern their disputes.[21]

As is the case with the law of the place of arbitration, on balance there are more problems than advantages with applying the law governing the dispute to decide claims of privilege and, accordingly, there is no or little support for the application of this approach.

2.3 The law of the domicile of the party claiming the privilege

Claims of privilege could also be decided by reference to the law of the domicile of the person or entity claiming the privilege.[22] The main advantage of this approach is that it takes the expectations of the parties into account in the sense that parties are familiar with the laws of their jurisdictions and should expect those laws to apply to their conduct.

Apart from the fact that in certain circumstances it might be difficult to determine the domicile of a certain party,[23] equality of treatment is the main problem with applying the law of the domicile of the party claiming the privilege. Parties might be treated differently in that the rules of privilege of their respective jurisdictions will apply to them and such rules might not be the same or similar. A frequently cited example of this problem involves the extension of the attorney-client privilege to in-house counsel. Jurisdictions such as France, Italy, Switzerland and Sweden do not recognize the privilege with respect to in-house counsel, while others including the US, England, Spain, and Belgium do so.[24] Accordingly, if the law of the domicile of the parties applies, in a dispute between a French and a US company, the US company will be able to invoke the privilege, whereas the French company will not.

At this point, it is worth noting that variations in the rules of privilege result not only from different policy choices among jurisdictions, but also from

[21] O Meyer, 'Time to Take a Closer Look: Privilege in International Arbitration' (2007) 24 *J Int'l Arb* 365, 368. See also Waincymer, above n 19, 803.

[22] Schlabrendorff & Sheppard, above n 12, 770.

[23] For instance, when a Bahamian subsidiary of a German company is formally the party to a dispute, but all decisions regarding the Bahamian subsidiary are made at the German headquarters.

[24] M R Vargas, 'Los Privilegios Probatorios (Evidentiary Privileges) en Arbitraje Internacional, en Especial el Secreto Profesional, Privilegios Abogado-cliente y Privilegio de Negociación (Settlement Privilege)' (2012) 15 *Spain Arb R* 79, 83; Schlabrendorff & Sheppard, above n 12, 770; Waincymer, above n 19, 812; Berger, above n 15, 172.

variations in the way proceedings are conceived and structured in common law and the civil law jurisdictions.[25] As a general rule, civil law jurisdictions do not have discovery as it is known in common law countries, i.e. non-voluntary disclosure of information. The general rule is that parties do not have a right to demand their opponent to produce information in its possession. While courts in some jurisdictions have the power to request production of information, the exercise of this authority does not lead to a process in any way resembling common law discovery. As a civil law commentator has noted, '[w]e react to the notion of discovery, be it English or, worse, American style, as an invasion of privacy by the court which is only acceptable in criminal cases'.[26] Because parties do not have an obligation to produce documents aside from those on which they rely upon, the situations where claims of privilege might arise are limited. In contrast, in common law jurisdictions the general rule is that all information must be disclosed. As the US Supreme Court has noted, there is a 'longstanding principle that the public [...] has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege'.[27] The result of these differences is that the law of privileges in civil law jurisdictions is not as developed as in common law countries. In light of this, if the law of the domicile of the parties applies in an international commercial arbitration with some form of non-voluntary disclosure,[28] the French company might be placed in the odd position of not being able to invoke the attorney-client privilege to protect communications with in-house counsel from disclosure, while it would likely have no obligation to produce such information in a proceeding before French courts owing to the absence of non-voluntary disclosure.

In sum, because of this inequality of treatment problem, there has been no support to the idea that international commercial arbitrators should rule on questions of privilege based on the law of the domicile of the party claiming the privilege. While the law of the domicile of the party claiming the privilege has been rejected as the sole criterion for choosing the applicable law, it has been accepted as a component of more elaborate approaches to choice of law. These

[25] Ibid 772; Meyer, above n 21, 369-370; Waincymer, above n 19, 804, 806.

[26] C Reymond, 'Civil Law and Common Law: Which Is the Most Inquisitorial? A Civil Lawyer's Response' (1989) 5 *Arb Int'l* 357, 360.

[27] *Branzburg v Hayes*, 408 US 665, 668 (1972).

[28] In this regard, Born notes that while there is no uniform standard of disclosure in international commercial arbitration, 'there is an emerging consensus among experienced arbitrators and practitioners that a measure of document disclosure is desirable in most international commercial disputes': Born, above n 10, 1895.

are discussed below.

2.4 The law of the place where the communication was generated

Another option would be to decide claims of privilege by reference to the law of the place where the allegedly privileged communication was generated.[29] At first sight, this would seem to be reasonable from the perspective of the parties' expectations in that they might expect to be bound by the rules of the jurisdiction where they create a document or make a communication. However, because the communication might take place at a random location unrelated to the parties or the transaction—e.g. a business trip for an unrelated matter—it cannot be said that the parties expect that by holding the meeting at that place they would attract its rules of privilege. The potential difficulty of identifying where a communication is generated would also lead to speculation and uncertainty.[30] This criterion would also be problematic from the perspective of equality of treatment as different laws might apply to the parties depending on where a specific communication was made.

While there is little or no support for the use of this criterion alone, some commentators have suggested that the place where the communication was generated could be a factor to be balanced against other factors with a view to establishing the jurisdiction with the closest connection to the allegedly privileged document or communication.[31] The closest connection criterion is discussed in turn.

2.5 The law of the jurisdiction most closely connected to the allegedly privileged communication

Several commentators have argued that arbitrators should 'accede to a claim of privilege valid under the municipal law of the jurisdiction with the closest

[29] Schlabrendorff & Sheppard, above n 12, 770.

[30] In this regard, Schlabrendorff and Sheppard refer to the situation where, in the context of the attorney-client privilege, the lawyer gives advice from his laptop while travelling. They note that in this situation 'the place of production may be difficult to determine and/or be wholly unrelated to any aspect of the transaction or advice': Schlabrendorff & Sheppard, above n 12, 770.

[31] C Tevendale & U Cartwright-Finch, 'Privilege in International Arbitration: Is it Time to Recognize the Consensus?' (2009) 26 *J Int'l Arb* 823, 831.

relationship with the allegedly privileged evidence'.[32] The following factors would be taken into account in determining which jurisdiction has the closest relationship with the evidence: (i) nature of the evidence; (ii) place where the document was created or where the communication occurred; (iii) the likelihood that the parties expected that the evidence would be governed by their local privilege rules.[33]

The advantage of this approach is said to be that the parties' expectations are respected if the law with the closest connection with the allegedly privileged evidence is applied.[34] This is questionable, however, given the fact that the closest connection test is not a hard and fast rule and that there is no guarantee that in balancing the different factors described above the arbitrators will reach the same conclusion which the parties would have reached at the time the communication was made.[35] This is illustrated, for instance, by the lack of consensus as to whether in the context of the attorney-client privilege the closest connection test would lead to the application of the law of the state where the attorney practices, of the state where the attorney-client relationship has its predominant effect, or of the state where most of the attorney-client contact occurred.[36]

Other disadvantages of this approach include: (i) unequal treatment, since different rules of privilege might apply to the parties; and (ii) the cost of deciding and lack of uniformity which might result in situations in which arbitrators are presented with numerous claims of privilege.[37]

2.6 The most-favored-privilege

With a view to addressing the inequality of treatment problem which affects some of the approaches described above, some commentators have suggested the

[32] Mosk & Ginsburg, above n 1, 346. See also Berger, above n 19, 510–11; C Tevendale & U Cartwright-Finch, 'Privilege in International Arbitration: Is it Time to Recognize the Consensus?' (2009) 26 *J Int'l Arb* 823, 831.

[33] Mosk & Ginsburg, above n 1, 381; Tevendale & Cartwright-Finch, above n 32, 831. The *Restatement (Second) of Conflict of Laws* refers to a similar test—the most significant relationship with the communication—in setting out principles for state courts in the US to determine the applicable rules of privilege in cases where the laws of more than one state are potentially applicable.

[34] Mosk & Ginsburg, above n 1, 382; Tevendale & Cartwright-Finch, above n 32, 831.

[35] Along these lines, Meyer argues that '[a] certain degree of arbitrariness and subjectivity is unavoidable' in the exercise of determining the law with the closest connection with the allegedly privileged evidence: Meyer, above n 21, 369.

[36] See Berger, above n 19, 511 (referring to all of these possibilities).

[37] H Alvarez, 'Evidentiary Privileges in International Arbitration', in A J van den Berg (ed), *International Arbitration 2006: Back to Basics?* (2007) 663, 685.

adoption of the most-favored-privilege approach.[38] According to this approach, a party may request the application of any rule of privilege that would be applicable to any other party.

The most-favored-privilege approach may be combined with any of the approaches described above which do not guarantee equality of treatment. For instance, Schlabrendorff and Sheppard would combine the most-favored-privilege approach with the closest connection test. They propose that arbitrators first determine the applicable privilege rules based on the closest connection test and then grant any party to the arbitration the 'same legal privileges as are available to any other party'.[39] Others have suggested combining the most-favored-privilege approach with the law of domicile of the parties.[40] For example, in a dispute between a French and an American company, the French company would be able to invoke the attorney-client privilege with respect to communications with its in-house counsel.

The inspiration for this approach might have come from the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (*Hague Convention*).[41] The Hague Convention establishes a framework for mutual assistance between countries for the taking of evidence in one signatory for use in a proceeding before the courts of another signatory. According to Article 11 of the Convention, a person may refuse to give evidence when the evidence is protected by a privilege under the law of the assisting court, or under the law of the court requesting assistance whenever such court has specified or otherwise confirmed the existence under its law of a privilege protecting the evidence from disclosure.

Apart from ensuring the equal treatment of the parties, the other positive aspect of the most-favored-privilege approach is that by allowing the parties to claim the privileges that would apply to them as well as the privileges that would apply to the other parties, the expectations of all the parties are respected.[42]

[38] See Mosk & Ginsburg, above n 1, 384; Berger, above n 19, 520; J H Rubinstein & B B Guerrina, 'The Attorney-Client Privilege and International Arbitration' (2001) 18 *J Int'l Arb* 587, 601; Boisseson, above n 12, 716; M F Gusy & M H Illmer, 'The ICDR Guidelines for Arbitrators Concerning Exchanges of Information: a German/American Introduction in Light of International Practice' (2008) 6 *Int'l Arb LR* 195, 201–2; Berger, above n 15, 176.

[39] Schlabrendorff & Sheppard, above n 12, 773.

[40] Rubinstein & Guerrina, above n 38, 599; Berger, above n 19, 518.

[41] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970, 847 UNTS 231.

[42] Rubinstein & Guerrina, above n 32, 598, 601; P Heitzmann, 'Confidentiality and Privileges in Cross-Border Legal Practice: the Need for a Global Standard?' (2008) 26 *ASA Bulletin* 205, 223; Berger, above n 19, 518; Boisseson, above n 12, 714; M F Gusy & M H Illmer, 'The ICDR Guidelines

The extent to which expectations are protected, however, depends on which approach—e.g. domicile of the party, closest connection—is combined with the most-favored-privilege rule.

The main disadvantage of this approach is that it is over-inclusive. It even protects expectations which the parties do not have. Consequently, the approach might lead to the exclusion of too much evidence, constituting a barrier to accurate fact-finding.[43] For example, because of the absence of non-voluntary disclosure in civil law jurisdictions, there is no attorney-client privilege as it is understood in common law jurisdictions. Instead, civil law jurisdictions protect communications between attorneys and their clients through the much broader notion of professional secrecy.[44] Such notion requires lawyers not to disclose any information that has come to their knowledge in the course of conducting their profession, no matter whether the client has not otherwise kept that information confidential.[45] In certain jurisdictions such as France, lawyers are exposed to criminal penalties if they violate their obligation to maintain professional secrecy.[46] Moreover, in many jurisdictions the notion of professional secrecy encompasses not only lawyers but all professional services providers.[47] Another broad notion of privilege is found in Argentine law, according to which 'witnesses may refuse to answer questions when an answer will reveal "professional, military, scientific, artistic or industrial secrets"'.[48] Accordingly, in an arbitration involving Argentine, French, and American parties, a lot of information might be excluded from production if all the parties are allowed to invoke the broad notion of professional secrecy and the Argentine rules of privilege. This might have a negative impact on the establishment of the facts.

Notwithstanding the over-inclusiveness problem, there is increasing support for the most-favored-privilege approach.[49] The ICDR International Arbitration

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for Arbitrators Concerning Exchanges of Information: a German/American Introduction in Light of International Practice' (2008) 6 *Int'l Arb LR* 195, 201.

[43] Meyer, above n 21, 371.

[44] Alvarez, above n 37, 669; Berger, above n 15, 172; Vargas, above n 24, 80.

[45] Vargas, above n 24, 81-82; Schlabrendorff & Sheppard, above n 12, 752, 754 (referring to the cases of Germany and France). This notion may be analogized with the general duty of confidentiality imposed by Rule 1.6(a) of the 2004 ABA Model Rules of Professional Conduct. However, under the ABA Model Rules, information which must be kept confidential is not necessarily protected from disclosure in judicial proceedings.

[46] Schlabrendorff & Sheppard, above n 12, 754.

[47] Alvarez, above n 37, 669.

[48] Mosk & Ginsburg, above n 1, 350.

[49] Supporting the most-favored-privilege approach: Mosk & Ginsburg, above n 1, 84; Berger, above

Rules have adopted the most-favored-privilege rule in its Article 22.

2.7 The least-favored-privilege

The least-favored-privilege is an alternative which would ensure equal treatment of the parties and address the over-inclusiveness problem posed by the most-favored-privilege approach. The least-favored-privilege approach would work similarly to the most-favored-privilege rule except for the fact that under the former the parties would be limited to invoking the less protective of all potentially applicable rules. In other words, this approach would favor disclosure over exclusion of evidence on grounds of privilege. This is the approach adopted by the *Restatement (Second) of Conflict of Laws* for resolving conflicts between the rules of privilege of the different states in the US.[50]

The obvious weakness of this approach is that it frustrates the expectations of the parties which would be subject to higher protection from disclosure under the privilege rules otherwise applicable to them.[51] For this reason, the least-favored-privilege approach has not had much support in the international commercial arbitration community.[52]

3 Problems with Choice of Law for Public International Law Disputes

As discussed above, international arbitration commentators have overwhelmingly focused on the choice of law approach, that is, they have sought to establish criteria to assist arbitrators in choosing among the potentially applicable domestic rules of privilege. Notably, some of those commentators have considered under the rubric of 'international arbitration' not only international commercial ar-

n 19, 520; Rubenstein & Guerrina, above n 32, 601; Boisseson, above n 12, 716; Gusy & Illmer, above n 42, 201–2.

[50] §139 of the *Restatement Second* provides: '(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum. (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.'

[51] Berger, above n 19, 519.

[52] See Tevendale & Cartwright-Finch, above n 32, 834.

bitration but also public international law adjudication.[53] This section contends that the choice of law methodology, which ultimately results in the application of domestic rules, is not well suited for public international law disputes. Instead, it argues that claims of privilege before international tribunals should be adjudicated by reference to international rules of privilege that take into account the particularities of public international law disputes.

There are many problems with the choice of law methodology; some are of a general character and others specific to each of the criteria discussed above. Apart from the problems with some of the criteria that were noted in the previous section, the following are some of the more specific problems that would militate against the adoption of the choice of law approach in public international law disputes.

First, applying the law of the place of the arbitration is not an option in public international law disputes because as a general rule such disputes do not have a seat.[54] They are not adjudicated under the framework of a domestic arbitration law, but instead under a separate framework which has its foundations in public international law.

Second, the application of the law of the jurisdiction most closely connected to the allegedly privileged communication or of the law of the place where the communication was generated involves a certain degree of subjectivity. The ensuing uncertainty is one of the main drawbacks of these criteria because they lose what is purported to be their main advantage; that is, the promotion of certainty and predictability, and the protection of the expectations of the parties.

Third, the application of the law of the domicile, the law of the place where the communication occurred, and the closest connection do not guarantee the equal treatment of the parties because different rules of privilege will apply to them depending on their domicile and other considerations. This inequality of treatment would be particularly unfair when the privilege at issue concerns government classified information. This is so because this is a frequently invoked privilege in public international law disputes and all three criteria are likely to lead

[53] See e.g. Mosk & Ginsburg, above n 1.

[54] The main exception to this rule are *ad hoc* tribunals constituted pursuant to dispute resolution clauses of investment treaties providing for arbitration under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (*ICSID Additional Facility Rules*), the UNCITRAL Arbitration Rules, or the rules of other arbitral institutions. See, for example, Article 24(3)(b)–(d) of the 2012 US Model Bilateral Investment Treaty, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [accessed 22 August 2014].

to the application of the law of the state invoking the privilege. This means that if such criteria were applied, a party to a dispute would in effect be allowed to determine the rules that apply to it.

Four, the application of the closest connection, the law of the place where the communication was generated, and the most-favored-privilege criteria are time and resource consuming because for every piece of evidence for which a privilege is invoked it is first necessary to undertake a multistep analysis to determine which law among several possibilities applies, to only then finally apply such law.

Five, as noted above, privileges reflect the public policy of the state which creates them; because international tribunals do not have a mandate to enforce the public policies of any one state, except when specifically provided for, there is no justification for a tribunal to apply domestic law in deciding claims of privilege.[55]

Six, and relatedly, the application of domestic rules of privilege which have been designed to reflect domestic policy concerns may result in the exclusion of evidence that is crucial to the adjudication of international disputes. This affects all of the choice of law criteria discussed above. The following example may help to illustrate the problem. Assume that a government document concerning a decision which negatively affected the investment of a foreign investor protected under an investment treaty is privileged under the domestic law of the host state and of the home state of the investor. In this situation, an international tribunal adopting a choice of law methodology is likely to exclude the document from production. The exclusion of a document going directly to a question lying at the core of the mandate of the international tribunal, however, would put in question the very purpose of the tribunal. A similar concern guided the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (*ICTY*) in denying Croatia's claim of national security privilege. In the words of the Appeals Chamber: 'to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions'.[56]

[55] In this vein, the *Biwater* tribunal affirmed that '[i]t is hardly conceivable that, in this setting, a State might invoke domestic notions of public interest and policy relating to the operations of its own Government as a basis to object to the production of documents which are relevant to determine whether the State has violated its international obligations and whether, therefore, its international responsibility is engaged': *Biwater*, Procedural Order No 2, above n 5, 8.

[56] *Prosecutor v Tihomir Blaskic*, ICTY, IT-95-14 (Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29

Accordingly, because a communication may have a more significant role to play in a public international law dispute than in a domestic dispute, it is inappropriate to enforce domestic rules of privilege in public international law proceedings. In short, the factors involved in the balancing process that leads to the creation of a privilege are not necessarily the same at the domestic and international level and, therefore, there is no reason to believe that the end result should be the same.

Seven, while some might argue that the community of nations has manifested a preference for the most-favored-privilege approach through the adoption of the Hague Convention, the reality is that the Hague Convention is an instrument of private international law to promote cooperation in the taking of evidence between domestic courts in proceedings applying domestic law. In other words, there is no reason to believe that the principle established in the Hague Convention would be adopted for public international law disputes in light of the differences in nature and scope between public international law and domestic proceedings. International commercial arbitration, in contrast, is an alternative to litigation before domestic courts, which justifies the reference to the Hague Convention in that context.

Moreover, the support of the international commercial arbitration community to the most-favored-privilege approach is to a great extent influenced by the fact that the most-favored-privilege is the only choice of law criterion that ensures the parties equality of treatment and respect for their expectations.

International commercial arbitrators give special emphasis to these two factors because of the concern that unequal treatment and failure to respect the expectations of the parties—particularly when the expectation relates to the application of privileges recognized at the seat of the arbitration or where enforcement of the award might be sought—may provide grounds for domestic courts to set aside or refuse to enforce their awards.[57] This concern is fueled by the fact that the 1958 New York Convention on the Recognition and Enforcement

October 1997) 64. This is also analogous to the situation in which lawyers are accused of acting wrongfully during the representation of their clients. In such cases, there are exceptions to the attorney-client privilege that allow the disclosure of attorney-client communications necessary to decide the questions at issue. In this regard, see, for instance, Article 13(B) of the ICTY's Code of Professional Conduct for Counsel Appearing before the International Tribunal; *Restatement (Third) of the Law Governing Lawyers*, §83.

[57] Schlabrendorff & Sheppard, above n 12, 767-68 (referring to enforcement proceedings); Alvarez, above n 37, 687–8 (referring to enforcement proceedings); Meyer, above n 21, 366 (referring to enforcement proceedings).

of Foreign Arbitral Awards (*New York Convention*),[58] and domestic arbitration laws such as those based on the UNCITRAL Model Law on International Commercial Arbitration (*UNCITRAL Model Law*)[59] provide, respectively, that an award may be refused enforcement[60] or be set aside[61] if it conflicts with the public policy of the state. The concern is that an award which does not apply the same rules of privilege to both parties and which does not recognize a privilege of the jurisdiction where the award is made or where enforcement is sought might be found to violate the public policy of the seat or of the enforcing state. This system of enforcement and set aside of awards, however, does not apply to public international law disputes as general rule. The most significant exception regards awards issued by *ad hoc* tribunals constituted under investment treaties.[62] This, however, does not apply to investor-state tribunals operating under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (*ICSID Convention*).[63] While ICSID awards may be enforced through domestic courts if not voluntarily honored, according to the ICSID Convention an award rendered pursuant to the convention cannot be denied enforcement or be set aside by the domestic courts of a signatory.[64]

Importantly, if international rules of privilege are adopted as suggested here, equality of treatment would not be a concern since the same rules would apply to both parties. As for the expectations of the parties, it is arguable that the parties cannot expect to rely on their domestic law of privileges in a public international law dispute. This is in line with the principle of international law that a state cannot invoke its domestic law to justify non-compliance with international obligations.[65] While this principle might not directly apply to a foreign investor in investor-state arbitrations because an investor is not a state, it is fair to argue that when the foreign investor opts to pursue its case under a regime of public

[58] 10 June 1958, 330 UNTS 3. The Convention is the principal international instrument governing the recognition and enforcement of international commercial arbitration awards.

[59] UNCITRAL Model Law on International Commercial Arbitration (2006) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> [accessed 22 August 2014].

[60] New York Convention, Art V:2(b).

[61] UNCITRAL Model Law, Art 18.

[62] See, for example, Arts 24(3)(b)–(d) of the 2012 US Model BIT.

[63] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

[64] ICSID Convention, Arts 53 & 54.

[65] I Brownlie, *Principles of Public International Law* (6th edn, 2003) 34. See also Art 27 of the Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, which states that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'; *Biwater*, Procedural Order No 2, above n 5, 8.

international law, taking advantage of what that regime has to offer, it must be prepared to assume the ensuing obligations.

Admittedly, the proposed approach creates the risk that the international system will interfere with the achievement of domestic policies, for instance, when a privilege whose objective is to foster frank communications is recognized at the domestic but not at the international level. However, this situation is not unique to privileges; any rule of public international law has the potential to interfere with domestic policy-making. Nor is the situation unique to public international law dispute resolution. The same problem is present in federal states such as the US. In the US, Rule 501 of the Federal Rules of Evidence provides that when the rule of decision with respect to a claim or defense is federal, questions of privilege are 'governed by the principles of the common law as they may be interpreted by the courts of the United States'. In other words, in federal courts, state privilege law applies only with respect to claims or defenses grounded upon state substantive law, not those based on federal law.

Eight, enforcing domestic rules of privilege may also be problematic in that those rules reflect different approaches to disclosure in common law and civil law jurisdictions—i.e. civil law countries generally do not have non-voluntary disclosure. As a general rule, public international law adjudication provides for some non-voluntary disclosure but of a more limited scope than common law (particularly American) discovery. In public international law proceedings, disclosure is generally closely controlled by international tribunals. Requests for production of information must be specific[66] and the information must be shown to be relevant to the claims and defenses of the parties. Moreover, because the parties are required to submit written memorials explaining their case in detail, including how the evidence supports their case, international tribunals are better positioned than a typical common law court is at the stage discovery is conducted to determine which information is in fact relevant and necessary to decide the case. Accordingly, a unique international approach to claims of privilege is warranted—the next section discusses in more detail how the rules of privilege can be designed to reflect the particular structure of public international law proceedings.

Finally, even commentators who have supported the application of the most-favored-privilege criterion in international commercial arbitration have recog-

[66] Requests such as 'all correspondence from 1999 to 2001 between management of the subsidiary and the parent company relating to the establishment of the effluent treatment plant of the subsidiary' are not considered specific. A specific request must refer to a narrow and precisely described piece of information.

nized that 'having an autonomous set of privilege rules in international arbitration […] would be the best means of achieving predictability and equality of arms for parties in the arbitral process'.[67] Those commentators, however, have supported the adoption of the most-favored-privilege criterion because of the alleged difficulty of designing transnational rules.[68] This difficulty, however, is overestimated. There are a number of governmental and non-governmental international organizations, including the IBA, the International Law Association (*ILA*), and UNCITRAL, to name a few, which could assist in this task. Moreover, public international law adjudication has an advantage over international commercial arbitration in this regard, namely, the awards of international tribunals are usually publicly available. The public availability of awards encourages dialogue between different international tribunals as well as between tribunals and commentators, which is likely to facilitate the development of an international law of privileges.

Compared to domestic litigation, public international law adjudication is still in its infancy. This explains the lack of well established rules of privilege, and also suggests that with time such rules might well develop if international tribunals do not shy away from the task. In fact, some international tribunals have adopted the view that claims of privilege should not be decided by reference to the domestic law of the parties.[69] The decisions that provide guidance on how international rules can be developed are still very few, but hopefully more tribunals will follow

[67] Schlabrendorff & Sheppard, above n 12, 774. See also Meyer, above n 21, 377–8, arguing that '[u]ntil the debate surrounding privilege is uncoupled from national law, there will always be systematic infringements within the discovery procedure and arbitrary ad hoc decisions which are difficult to predict'.

[68] Schlabrendorff & Sheppard, above n 12, 774.

[69] See *Biwater*, Procedural Order No 2, above n 5, 8–9, rejecting Tanzania's objection to a request for production of documents on the grounds that the documents were protected by the doctrine of public interest immunity under Tanzanian law. The tribunal noted that it was mandated to apply international law, and that such doctrine has no equivalent in international law); *Pope & Talbot v Canada*, NAFTA (Award on the Merits of Phase 2, 10 April 2001) para 193, rejecting the application of Canadian law to a claim of privilege brought before it). But cf the following decisions which essentially apply the domestic law of one of the parties: *Glamis Gold Ltd v USA*, NAFTA (Decision on Parties' Request for Production of Documents Withheld on Grounds of Privilege, 17 November 2005); *S D Myers Inc v Canada*, NAFTA (Procedural Order No 10 (Concerning Crown Privilege), 16 November 1999); *Merrill & Ring Forestry LP v Canada*, NAFTA (Decision of the Tribunal on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, 3 September 2008); *Apotex Holdings Inc and Apotex Inc v US*, NAFTA (Procedural Order on Document Production regarding the Parties' Respective Claims to Privilege and Privilege Logs, 5 July 2013).

suit.[70]

The following section explores how international tribunals could go about establishing international rules of privilege.

4 The Path to an International Law of Privileges

4.1 General contours of the approach

The essence of the suggested approach is that in light of the special nature of public international law adjudication, international tribunals must decide claims of privilege by applying international rather than domestic rules. Where such rules do not exist or are not well developed, international tribunals must establish such rules using their inherent powers.[71]

In undertaking this task, international tribunals must consider the policy objectives that the privilege would promote as well as its impact on the accurate determination of the facts. As part of this analysis, tribunals should consider relevant international instruments setting out policy objectives of the international community. They may also wish to review representative domestic laws or transnational law principles with a view to determining whether there is a general principle regarding the proposed privilege. The existence of such principle would constitute evidence that the policy which the privilege is meant to promote is particularly important. The protection of communications between lawyers and their clients is likely to fall under this category.[72]

[70] See, for example, *Vito G Gallo v Canada*, NAFTA (Procedural Order No 3, 8 April 2009) paras 41, 46–7, 49; *Vito G Gallo v Canada*, NAFTA (Procedural Order No 4, 21 December 2009) paras 42–5; *St Marys VCNA v Canada*, NAFTA (Report on Inadvertent Disclosure of Privileged Documents by James Spigelman, 27 December 2012) 4.

[71] The power to manage the proceedings to the extent necessary to fulfil their adjudicative function has been recognized as inherent to international tribunals. This is particularly so because international tribunals do not benefit from comprehensive codes of procedure or guidelines. See A D Mitchell, 'The Legal Basis for Using Principles in WTO Disputes' (2007) 10 *JIEL* 795, 828–32 (discussing the inherent powers of international courts and tribunals and those of WTO panels); D V Sandifer, *Evidence Before International Tribunals* (revised edn, 1975) 40 (arguing that international tribunals have inherent powers); C Brown, *A Common Law of International Adjudication* (2007) 55–80 (arguing that international courts and tribunals have inherent powers); S Rosenne, *The Law and Practice of the International Court 1920–2005* (2006) 584 (on the inherent powers of the ICJ).

[72] See Mosk and Ginsburg, above n 1, 378. However, the specific contours of a privilege to protect communications between clients and their lawyers would still be an open question because, as noted above, such communications are protected differently in different countries, in particular

This approach is similar to that followed by the US Supreme Court in *Jaffee v Redmond*. In deciding whether there is a federal psychotherapist privilege under Rule 501 of the Federal Rules of Evidence, the Court started from the assumption that 'there is a general duty to give what testimony one is capable of giving'.[73] It then undertook an analysis of the social policy which the privilege would advance. In this regard, the Court concluded that '[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem'.[74] The Court also noted that '[t]he mental health of our citizenry […] is a public good of transcendent importance'.[75] The Court then focused on determining what would be the evidentiary benefit that would result from the denial of the privilege. It concluded that rejection of the privilege would likely have a chilling effect on communications between psychotherapists and their patients, which ultimately would mean that much of the desirable evidence to which litigants would seek access would never come into being.[76] In other words, denial of the privilege would not necessarily promote more accurate fact-finding. Finally, the Court noted that its understanding was confirmed by the fact that 'all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege'.[77]

A similar approach has also been adopted by international criminal tribunals when faced with novel questions of privilege. For instance,[78] in the *Brdjanin* case, the Appeals Chamber of the ICTY in deciding whether war correspondents were protected from testifying at trial took into consideration: (i) the interest in protecting the integrity of the newsgathering process in war zones so that the international community receives information about 'the horrors and reality of

in common law and civil law jurisdictions. Therefore, the work of the tribunal would not end with the identification of the privilege.

[73] *Jaffee v Redmond*, 518 US 1 (1996) 9.

[74] Ibid, 11.

[75] Ibid.

[76] Ibid, 11–12.

[77] Ibid, 12.

[78] For other examples, see *Prosecutor v Charles Ghankay Taylor*, SCSL, Trial Chamber II, SCSL-03-1-T (Decision on the Defense Motion for the Disclosure of the Identity of a Confidential 'Source' Raised during the Cross-Examination of TF1-355, 6 March 2009) paras 25, 33, 35 (considering policy objectives of the privilege); *Prosecutor v Blagoje Simic et al*, ICTY, Trial Chamber, IT-95-9-PT (Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999) paras 46–75 (considering policy objectives of the international community relating to the activities of the International Committee of the Red Cross).

conflict';[79] (ii) the policy objectives of the international community expressed in the Universal Declaration of Human Rights—Article 19 of which protects the right to freely communicate and receive information—and decisions of the European Court of Human Rights;[80] and (iii) the recognition of the privilege by certain domestic jurisdictions.[81] The Appeals Chamber also considered the impact of the privilege on accurate fact-finding, and, similarly to the US Supreme Court in *Jaffee v Redmond*, concluded that the recognition of the privilege did not necessarily result in less information being available to the court because 'if war correspondents were to be perceived as potential witnesses for the prosecution, they could have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones.'[82]

Though still the minority, some investor-state tribunals have started to adopt an approach similar to that proposed above, taking into account, at least to some extent, the policy rationale for the proposed privilege and a sample of domestic laws with a view to determining whether the privilege is recognized by the international community. This was the case in *Vito G Gallo v Canada* and *St Marys VCNA v Canada*. In *Vito G Gallo*, the tribunal examined the policy objectives behind the attorney-client privilege, including the situations in which waiver of such privilege would be justified, and considered the recognition of the privilege by most jurisdictions as a relevant factor—though as the tribunal admitted, in answering specific questions it focused more on Canadian law.[83] Similarly, in *St Marys VCNA*, the special arbitrator for questions of privilege made reference to the policy objectives behind the attorney-client privilege and the fact that those policy objectives have been recognized 'in the domestic law of many jurisdictions'.[84] Although this type of decisions are still not the norm in investor-state dispute resolution, they indicate that at least some tribunals are aware of the importance of creating an international law of privileges based on objective considerations.

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[79] *Prosecutor v Radoslav Brdjanin*, ICTY, Appeals Chamber, IT-99-36-AR73.9 (Decision on Interlocutory Appeal, 11 December 2002) para 36.

[80] Ibid, paras 35 & 37.

[81] Ibid, paras 35 & 41.

[82] Ibid, para 43.

[83] *Vito G Gallo v Canada*, NAFTA (Procedural Order No 3, 8 April 2009) paras 41, 46-7, 49; *Vito G Gallo v Canada*, NAFTA (Procedural Order No 4, 21 December 2009) paras 42-5.

[84] *St Marys VCNA v Government of Canada*, Report on Inadvertent Disclosure of Privileged Documents by James Spigelman, above n 70, 4.

4.2 Whose social policy?

In seeking to determine the policies which a proposed rule of privilege would promote, international tribunals should not focus on the interests of a particular country but rather on the interests of the international community. For this purpose, the interests of the international community may be classified into two different categories: (i) those which are specific to the international community as an entity separate from the individual states which compose it; and (ii) those which by virtue of being widely pursued by the members of the international community are elevated to the level of community interests.

For illustrative purposes, it is worth noting that the WTO agreements contain two examples of privileges pursuing policies specific to the international community. First, the Trade Policy Review Mechanism (*TPRM*)[85] explicitly precludes WTO members from introducing into evidence in dispute settlement proceedings information produced specifically for the TPRM, which includes reports submitted by the reviewed member and the WTO Secretariat, and the minutes of the meetings of the Trade Policy Review Body.[86] The reason for not permitting WTO members to introduce such information into evidence is to encourage a dialogue among members on their policies and practices which allows them to become acquainted with each other's policies and practices, and to promote voluntary compliance with the WTO agreements.[87]

Second, Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (*DSU*),[88] which establishes a process of consultations to be undertaken by the disputing parties before submission of the dispute to a WTO panel, provides that consultations 'shall be confidential, and without prejudice to the rights of any Member in any further proceedings.'[89] Accordingly,

[85] WTO Trade Policy Review Mechanism, <http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm> [accessed 22 August 2014].

[86] According to paragraph A(i) of the TPRM, the review mechanism is not 'intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures.' In this regard, see Panel, *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/R (14 April 1999) para 9.274.

[87] The stated objective of the TPRM 'is to contribute to improved adherence by all Members to rules, disciplines and commitments' made under the WTO agreements while allowing 'collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system'. The TPRM essentially allows for peer review of a member's trade policies and practices based on reports prepared by the reviewed member and the WTO Secretariat.

[88] WTO Dispute Settlement Understanding, 15 April 1994, 1869 UNTS 401.

[89] DSU Article 4.6.

information exchanged during consultations, including settlement proposals and related documents are not admissible in WTO panel proceedings.[90] The policy objective behind this privilege is to encourage WTO Members to talk to each other in a meaningful way with a view to reaching an amicable solution to their dispute before they initiate the formal panel process. The importance of this objective is made clear in the first paragraph of Article 4, which provides that 'Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.' If settlement proposals and related materials could be submitted into evidence, WTO Members might be discouraged from fully engaging in a dialogue with a view to resolving their disputes amicably. Moreover, admitting such proposals into evidence may not necessarily promote the accurate establishment of the facts in that parties may be willing during consultations to compromise on certain issues to reach an agreement.

Examples of possible international rules of privilege reflecting social policies which are widely pursued by the members of the international community would include some form of attorney-client privilege, settlement (or consultations) privilege,[91] and national security privilege.

The widespread acceptance of the policies pursued by the national security privilege is made clear in the WTO agreements. Article XXI of the General Agreement on Tariffs and Trade (*GATT*)[92] and Article XIV*bis* of the General Agreement on Trade in Services (*GATS*)[93] provide that nothing in those agreements shall be construed to require any WTO member 'to furnish any information the disclosure of which it considers contrary to its essential security interests'. Along these lines, Reisman notes that requiring states to disclose documents which would endanger themselves would likely drive states away from international adjudication.[94] According to him, concerns regarding the disclosure of documents which might weaken intelligence systems and jeopardize individuals 'must be accepted as valid exclusive interests, recognized by the public order of the most compre-

[90] In this regard, see Panel, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WTO Doc WT/DS24/R (11 August 1996) para 7.27.

[91] See Berger, above n 15, 173, stating that 'there is a transnational privilege principle with respect to written or oral statements made in good faith by the parties to an arbitration during previous settlement negotiations between them'.

[92] General Agreement on Tariffs and Trade, 1 January 1948, 55 UNTS 194.

[93] General Agreement on Trade in Services, 15 April 1994, 1896 UNTS 183.

[94] W M Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971) 601–2.

hensive international community'.[95]

4.3 Accurate fact-finding

Accuracy is considered a—if not the—major objective of adjudication.[96] In the absence of an accurate determination of the facts, the law cannot be applied properly; such improper application of the law will in turn prevent the attainment of the goals pursued by the substantive law. Moreover, as law and economics scholars have explained, the accurate determination of the facts is important to the efficacy of the law in imparting efficient incentives for its observance, that is, accuracy is important for the legal system's optimization of deterrence.[97] This is explained by the fact that false negatives make committing the harmful act more attractive, while false positives reduce the incentives to comply with the law by subjecting wrongdoers and those who comply with the law to the same penalties.

In addition to its role in securing the social benefits noted above, accuracy is also crucial to the fairness of a decision, and fairness on its turn is important to encourage compliance by the losing party. This aspect is particularly important in public international law adjudication given that the system relies heavily on voluntary compliance.

Accurate outcomes are also essential to inspire confidence in international adjudication on the part of the international community and the public at large. International tribunals are constantly in the spotlight and inaccurate decisions may destroy public support for their mandate. In this regard, the ICJ was heavily criticized for its decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[98] in which the court refused to compel the production of certain evidence which was crucial to the accurate determination of the facts at issue.[99]

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[95] Ibid.

[96] See, for example, J Zekoll, 'Comparative Civil Procedure', in M Reimann & R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 1327, 1355; R S Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-Finding: Their Justified Divergence in Some Particular Cases' (1999) 18 *L & Phil* 497, 497–8; L B Solum, 'Procedural Justice' (2004) 78 *S Ca LR* 181, 184–5, 192, 252, 306.

[97] See, for example, L Kaplow, 'The Value of Accuracy in Adjudication: an Economic Analysis' (1994) 23(1) *JLS* 307, 348; R A Posner, 'An Economic Approach to the Law of Evidence' (1999) 51 *Stan LR* 1477, 1483–4; A Stein, *Foundations of Evidence Law* (2005) 144, 148.

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

[99] For these criticisms see R J Goldstone & R J Hamilton, *'Bosnia v Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for

In *Bosnian Genocide*, the ICJ was presented with the questions of whether the atrocities committed in Bosnia and Herzegovina (hereinafter 'Bosnia') after the dissolution of the former Yugoslavia constituted genocide and whether Serbia could be held responsible for it.[100] The critical issue with respect to the latter question was whether the acts of the Army of *Republika Srpska* (*VRS*) at Srebrenica could be attributed to Serbia. The answer to this question depended on the extent of the control exercised by Yugoslavia over the VRS. In order to prove this issue, Bosnia requested unredacted versions of documents from meetings of Yugoslavia's Supreme Defence Council, which Bosnia argued would show that Yugoslavia's armed forces had financed the operations of the VRS. Serbia refused to provide the documents on the grounds of its national security interests and the ICJ declined to order the production of the documents even though the same documents had been produced in a different proceeding before the ICTY. The Court then went on to rule that not enough evidence had been presented to it to allow the Court to conclude that Serbia had effective control over the VRS. Critics of the Court have argued that the requested documents went directly to that question and that by refusing to order their production the Court undermined the legitimacy of its decision.[101]

Finally, another reason for pursuing accurate fact-finding in public international law adjudication is that '[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 the facts.'[102]

Accordingly, in considering the creation and the scope of a privilege, international tribunals must carefully assess the impact which the privilege would have on the accurate determination of material facts which fall under their mandate to adjudicate. In this regard, international tribunals should take into account—as the US Supreme Court in *Jaffee v Redmond* and the ICTY in *Brdjanin*

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the Former Yugoslavia' (2008) 21 *LJIL* 95, 109-10; Riddell & Plant, above n 8, 216; J E Alvarez, 'Burdens of Proof' (2007) 23(2) *ASIL Newsletter*.

[100] Serbia is the successor state to Yugoslavia.

[101] See Goldstone & Hamilton, above n 99, 109–10; Riddell & Plant, above n 8, 216; Alvarez, above n 37. Goldstone and Hamilton specifically noted (at 110): '[T]he perception of unfairness generated by the Court's refusal even to ask for the documents is a sad legacy to leave following 14 years of litigation […] At its best, an international judicial process […] has the potential to lay contested issues to rest, thereby allowing those affected to move into a phase of healing and more stable form of coexistence, if not complete reconciliation. By refusing, without any plausible justification, to request unredacted versions of the documents, the Court undermined its potential to play this much needed role in the region'.

[102] Sandifer, above n 71, 5.

case did—the likelihood that in the absence of the privilege the evidence at issue would have never come into being.[103] They may also seek to reconcile the interest in accurate fact-finding with the interest in protecting certain information by creating qualified privileges. This issue in discussed in turn.

4.4 Absolute versus qualified privileges

In crafting rules of privilege, international tribunals may consider whether the interest in accurate fact-finding and in pursuing the policy motivating the creation of the privilege could both be served at the same time through the creation of a qualified privilege. While 'an absolute privilege allows the holder to refuse to testify or to submit evidence under any circumstances, […] a qualified privilege can be overcome under certain conditions, such as when a showing is made that the evidence is necessary for a fair determination'.[104] In other words, qualified privileges involve a balancing of interests—i.e. the public interest in disclosure versus the public interest in protecting the information—on a case-by-case basis. This also means that an assessment is made in each case about: (i) how important for the resolution of the dispute is the issue which the evidence is intended to prove; and (ii) how probative of that issue is the evidence.

Qualified privileges are particularly well suited for situations where the protection of information from disclosure is unrelated to the objective of encouraging the full, free, and frank communication necessary for the achievement of an objective which society considers worthy of protection—e.g. the provision of a professional service. For this category of privileges, the possibility that discretion might be exercised against the privilege may eviscerate its effectiveness because people might choose not to communicate if the protection of the communication is uncertain.[105]

It is a fact, however, that protection of even this type of communications is not always absolute.[106] Privileges intended to pursue other objectives such as

[103] See *Jaffee v Redmond,* above n 73, 11–12; *Prosecutor v Radoslav Brdjanin*, Decision on Interlocutory Appeal, above n 79, para 43.

[104] Mosk & Ginsburg, above n 1, 346.

[105] See *Jaffee v Redmond,* above n 73, 17-8 (where the U.S. Supreme Court noted in the context of the psychotherapist privilege that '[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.')

[106] See, for instance, *In Re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 1001 (DC Cir, 2005) (where the Court of Appeals for the DC Circuit noted in the context of the journalist's privilege that 'the clash of fundamental interests at stake when the government seeks discovery of a

protection of privacy and sensitive information whose public disclosure may be damaging can more easily be qualified, because limited disclosure in adjudicatory proceedings does not necessarily undermine the purpose of the privilege. In fact, this has been recognized by some investor-state tribunals which have found that information falling within deliberative and policy making processes at high levels of government may be protected from production, but only in cases in which the interest in having the information disclosed is not stronger.[107]

Importantly, in deciding in a particular case whether information protected by a qualified privilege should be produced, adjudicators may consider the sensitiveness of the information, the damage which public disclosure would cause, and the likelihood that protective measures restricting access to the information would be effective. If the national security privilege is qualified, for instance, adjudicators may conclude that when the information sought relates to a current national security issue, the risk that the information might be leaked even with a protective order and the damage that the leak would cause would be so significant that the information could not be disclosed. However, when the information sought relates to an issue which is no longer current—as was the case in *Bosnian Genocide*—the incentives to leak the information and the likelihood that a protective order would be effective would weigh in favor of production. Notably, as pointed out above, the information requested by Bosnia in *Bosnian Genocide* was produced in a proceeding before the ICTY—where the tribunal issued a protective order—and there are no reports that the information has been leaked.[108]

In short, the creation of a distinction between absolute and qualified privileges may be a useful tool for international tribunals in reconciling the interest in pursuing social policies through the protection of certain information from disclosure with the interest in accurate fact-finding. Other mechanisms may be available as well. Ultimately, what is important is that international tribunals be active in searching for and implementing rules which take into account their specific mandates and the environment in which they operate.

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reporter's sources precludes a categorical approach'.) According to Mosk & Ginsburg, most privileges in English law are qualified, including the medical privilege and the journalists' privilege. Mosk & Ginsburg, above n 1, 347.

[107] See *United Parcel Service of America Inc v Canada*, NAFTA (Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege, 8 October 2004) paras 11–12; *William Ralph Clayton et al v Canada*, NAFTA (Procedural Order No 13, 11 July 2012) para 22.

[108] Goldstone & Hamilton, above n 99, 108, 110.

5 Concluding Remarks

This article set out to answer the question of how international tribunals should decide claims of privilege presented to them. It noted that international tribunals could follow either one of two approaches: (i) a choice of law approach, by which the law of a domestic jurisdiction is selected and applied; and (ii) an approach which would lead to the development of international rules of privilege. The former has been the preferred approach in international commercial arbitration. After reviewing several potential choice of law rules, this article concluded that none of those rules are well suited to public international law adjudication. The main criticism to the choice of law approach in general is that it disregards the fact that domestic rules of privilege might not be the most appropriate for public international law adjudication.

In light of this, it was argued that international tribunals should decide claims of privilege on the basis of international rules. While such rules are not well established yet, the task of developing them is not impossible or outside the competence of international tribunals. In fact, it is important that international tribunals do not shy away from that task because by leaving questions unanswered they expose themselves to criticism and risk compromising their legitimacy.

The path suggested in this article would require international tribunals to openly consider the policy implications of a proposed privilege, including balancing the social policies which the privilege would promote against the interest in accurate fact-finding. This would result in rules that reflect the specific mandate and circumstances under which international tribunals operate and would thus contribute to the effectiveness and legitimacy of public international law adjudication. International professional and governmental organizations such as the IBA, ILA, and UNCITRAL, to name a few, could also help out by conducting much the same analysis and presenting the results in the form of privilege guidelines, which may then be adopted or used as a reference by international tribunals.

DOI: 10.7574/cjicl.03.03.231
Cambridge Journal of International and Comparative Law **(3)**3: 696–718 (2014)

THE COURT OF JUSTICE OF THE EUROPEAN UNION: INTERNATIONAL OR DOMESTIC COURT?

Jed Odermatt[*]

Abstract

This article discusses how the Court of Justice of the European Union (*CJEU*) deals with international law issues. While the EU and the Court itself are often presented as being 'friendly' towards international law, recent cases have shown a trend towards a more guarded approach by the Court. The article first examines recent literature on the CJEU's relationship with international law which demonstrates an oscillation between 'openness' towards international law and an approach that emphasises the autonomy of the EU legal order. It then discusses what rules exist to guide the Court in determining its relationship with international law. To what extent do the EU Treaties, the legal traditions of the Member States or international law itself determine how the CJEU should deal with international law issues? The next part examines how the CJEU has dealt with international law in practice. The CJEU has progressively developed tools to limit the effect of international law, as it attempts to strike a balance between respect for international law and the need to safeguard the integrity of the EU legal order. It discusses some recent cases where the CJEU dealt with key international law issues in order to demonstrate how this relationship is shaped in practice. The final part seeks to understand why the Court seems to oscillate between an open and a closed approach to international law. It is posited that this can partly be explained by whether the Court is acting in its capacity as an international or a domestic court.

Keywords

Court of Justice of the European Union, International Law, European Law, EU Legal Order, International Court, Domestic Court, *Kadi*, *Mox Plant*, *Air Transport Association of America*, *Brita*, *Hungary v Slovak Republic*, *Diakité*

1 Introduction

> If the EU perceives of itself as a uniquely internationally engaged entity, and as a political system founded on the idea of transnational legal and political cooperation, we would be inclined to expect that its Court of Justice would reflect something of this internationalist orientation too.[1]

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[1] G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht JECL* 168, 183.

De Búrca alludes to a supposed paradox that underlies the EU's relationship with international law. On the one hand, the EU founding treaties state that the EU shall contribute to the 'strict observance and the development of international law' and the EU has for decades presented itself as a good global citizen which seeks to respect international law. On the other hand, recent case law of the Court of Justice of the European Union (*CJEU* or *Court*) has often stressed the autonomy of the EU legal order, demonstrating what may be considered to be a less 'friendly' attitude towards international law. The purpose of this contribution is to further understand this apparent paradox.

The first part briefly examines recent literature that has described the CJEU's relationship with international law. It then discusses what rules exist to guide the Court in determining its relationship with international law. To what extent do the EU Treaties, the legal traditions of the Member States or international law itself determine how the CJEU should deal with international law issues? The next part examines how the CJEU has dealt with international law in practice. The CJEU has progressively developed tools to limit the effect of international law, as it attempts to strike a balance between respect for international law and the need to safeguard the integrity of the EU legal order. It discusses some recent cases where the CJEU dealt with key international law issues in order to demonstrate how this relationship is shaped in practice. The final part tries to understand why the Court seems to oscillate between an open and a closed approach to international law. It is posited that this can partly be explained by whether the Court is acting in its capacity as an international or a domestic court.

1.1 Oscillation between 'Open' and 'Closed'

There is an ever-expanding literature focusing on the EU's relationship with international law. This tells strikingly different stories about the CJEU's attitude. Whereas some scholars describe the EU legal order and the CJEU as '*völkerrechtsfreundlich*',[2] others view the Court's attitude, particularly since the *Kadi*[3] judgment, as one that is much less open to international law. The dominant view is that the CJEU is generally open to international law but retains the prerogative to determine how and under what circumstances international law has an influence

[2] E Cannizzaro, 'Neo-monism of the European Legal Order', in E Cannizzaro, P Palchetti & R A Wessel (eds), *International Law as Law of the European Union* (2011) 57.

[3] Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi & Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

in the EU legal order. In a recent book examining the relationship between the EU and international law the editors summarise the position:

> Although openness to international law is the prevalent vision, whether international law should function in the EU internally depends on the blessing of the Union, which can also be withheld, should it contradict the EU's policy, objectives, rationale or principles.[4]

Some writers have pointed out that the Court has generally taken an 'international-law-friendly approach',[5] asserting that the CJEU's case law is 'particularly friendly towards international law'.[6] Kaddous writes that '[i]n recent years the Court has taken a very open approach to the effects of international agreements within the EU legal order'.[7] Regarding its approach to treaties, Mendez argues that the CJEU has taken a 'maximalist' approach.[8] Similarly, Petersen contrasts the CJEU's approach to international law with the 'sovereignty paradigm' of the US Supreme Court, arguing that the CJEU 'primarily adopts an internationalist standpoint'.[9] Regarding the reception of international law into the EU legal order, Martines states that the EU order 'appears rather permeable to international law provisions'.[10]

Recent scholarly literature, however, has pointed the CJEU's 'judicial recalcitrance'[11] towards incorporating international law norms. Klabbers, for example,

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[4] D Kochenov & F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (2014) 5.

[5] P J Kuijper, 'Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law', in J Wouters, A Nollkaemper & E De Wet (eds), *The Europeanisation of International Law* (2008) 29.

[6] R Uerpmann-Wittzack, 'The Constitutional Role of International Law', in A Von Bogdndy & J Bast (eds), *Principles of European Constitutional Law* (2nd edn, 2010) 138, 143.

[7] C Kaddous, 'Effects of International Agreements in the EU Legal Order', in M Cremona & B de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (2008) 311.

[8] M Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 *EJIL* 83, 88.

[9] N Petersen, 'The Reception of International Law by Constitutional Courts through the Prism of Legitimacy'(2012) 72 *ZaöRV* 223, 239.

[10] F Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25 *EJIL* 129, 135.

[11] F Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation', in E Cannizzaro, P Palchetti & R A Wessel (eds), *International Law as Law of the European Union* (2011) 395.

posits that the CJEU 'is highly reluctant to give any effect to international law'.[12] He challenges the assumption of many scholars that the EU is 'friendly' towards international law:

> This position has no doubt contributed to the image of the EU as an actor that is friendly disposed towards international law, but the image is deceptive: the EU is friendly disposed towards EU law, and while it may have been fashionable to regard EU law as an emanation of international law, this is no longer habitually done. The fact that EU law prescribes monism with respect to its own domestic effect is understandable and has in all likelihood contributed greatly to the longevity and success of the EU, but is not based on a particularly friendly attitude towards international law.[13]

The CJEU's relationship with international law is sometimes discussed in terms of adopting a monist or dualist approach: '[d]epending on its perspective—and not on a different standpoint of the observer—the ECJ applies a monistic doctrine relating to its Member States and a dualistic doctrine relating to international law, two completely diverging doctrines'.[14]

It is often stated that the CJEU's approach to international law is a 'monist' one.[15] However, as Eckes argues, '[i]n recent landmark cases such as *Kadi* or *Intertanko*, the Court of Justice's approach to international law appears to be more "dualist" in that it restricts the effects of international law within the European legal order'.[16] De Búrca also argued that in *Kadi* the CJEU adopted 'a sharply dualist tone in its approach to the international legal order and to the relationship between EC law and international law'.[17]

The Court's approach to international law, according to the literature, seems to oscillate between 'open' and 'closed', 'friendly' and 'unfriendly'. Both

[12] J Klabbers, *The European Union in International Law* (2012) 77.

[13] Ibid, 71.

[14] L Kirchmair, 'The "Janus Face" of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law' (2012) 4 *Goettingen JIL* 677, 679.

[15] K Lenaerts, 'Droit International et Monism de l'Ordre Juridique de l'Union' (2010) *Revue de la Faculté de Droit de l'Université de Liège* 505.

[16] C Eckes, 'International Law as Law of the EU: The Role of the ECJ', in E Cannizzaro, P Palchetti & R A Wessel (eds), *International Law as Law of the European Union* (2011).

[17] G de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2009) 51 *Harvard ILJ* 1, 2.

international law and EU law scholars have noted that the CJEU's approach to international law seems to have shifted over time. It is perhaps an understatement to say that '[t]he case law of the ECJ on the effect of decisions of international authority within the EU legal system is not entirely homogenous'.[18] What can explain this? The problem with terms like 'openness' and 'friendliness' to describe the CJEU's approach to international law is that they tend to obscure what is in fact a much more complex relationship. It may be better to understand it as multiple relationships. At times, the Court's approach is 'closed' or 'dualist' because it is operating as a domestic constitutional court, seeking to find a balance between respect for international law and the need to safeguard the autonomy of the EU legal order. In other instances, the EU is much more open to international law because it employs international law as a tool to resolve legal issues, much more like an international court.

Allain notes that '[f]ew would care to characterise the European Court of Justice as an international court'.[19] This is because, while the CJEU is an 'international' court in the sense that it is established by Member States by an international treaty, the Court fulfils a role that is much closer to that of a national/federal constitutional court. In this contribution, the term 'international' or 'domestic' are used to describe the role that the Court plays in a given case, rather than the nature of the Court as such. When it acts as an international court, the CJEU interprets and applies international law to resolve disputes. It acts as a domestic (constitutional) court when it determines how international law can have effect in the EU legal order and the extent to which international law may be used as a yardstick to judge the validity of EU acts. It is argued that the Court is much more open to international law when it fulfils the former role and more guarded when it fulfils the latter. The purpose of this contribution is to go further than the one-dimensional narrative of international law friendliness towards developing an understanding of the multiple relationships that exist. How does the Court's role as an international or domestic court shape its approach to international law?

[18] Petersen, above n 9, 248.

[19] J Allain, 'The European Court of Justice is an International Court' (1999) 68 *Nordic JIL* 249.

2 Developing the CJEU's Approach to International Law Issues

It is generally accepted that the CJEU is free to determine how it deals with international law. This is in line with the understanding that on the question of how domestic legal orders give effect to international legal norms, international law is agnostic. The constitutional systems of states may require international law to be transposed into domestic legislation before it is given effect or they may apply international law directly. Similarly, the CJEU is still in the process of determining how, and under what conditions, international law should be given effect within the EU legal order. In determining the contours of this relationship the CJEU may be guided by the EU Treaties, the legal systems of the Member States and by international law itself.

2.1 The EU Treaties and International Law

Klabbers notes that 'the TEU (nor any of the other relevant foundational treaties) says nothing whatsoever about the effect of international law within the "internal" legal order of the EU'.[20] While it is true that the EU Treaties do not contain specific clauses specifying how international law is to be dealt with, the Treaties are not entirely silent on the issue of international law and thus can be used as a starting point for the Court.

The EU Treaties demonstrate a commitment to the respect for international law and multilateralism. Article 3(5) TEU states that the Union 'shall contribute […] to the strict observance and the development of international law'. The Court has interpreted this to mean that 'when it adopts an act, it is bound to observe international law in its entirety, including customary international law'.[21] Article 21(1) TEU provides that the Union's 'action on the international scene' is to be guided by numerous principles, including the 'respect for the principles of the United Nations Charter and international law'.[22] Respect for international law is referred to as one of the EU principles that 'inspired [the Union's] own creation'[23] on the same level as principles such as democracy, the rule of law and

[20] Klabbers, above n 12, 72.

[21] Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-1133, para 101 (*ATAA*).

[22] *Consolidated Version of the Treaty on European Union* [2012] OJ C 326/13 (*TEU*), Art 21(1); Case C-366/10, *ATAA* [2011] ECR I-1133, Opinion of Advocate General Kokott, para 43.

[23] TEU Art 21(1).

human rights and fundamental freedoms. It also states that the EU must 'promote multilateral solutions to common problems, in particular in the framework of the United Nations' and 'promote an international system based on stronger multilateral cooperation and good global governance'.[24] One of the goals of the EU's external action is to 'consolidate and support democracy, the rule of law, human rights and the *principles of international law*'.[25] This applies not only to 'the Union's external action' but also to 'the external aspects of its other policies'.[26]

It is evident therefore that the respect for international law, particularly with regard to the UN and the multilateral system of governance, is given a prominent place within the Treaties. One could argue, however, that these statements are more of a political nature to guide the EU's external action rather than its constitutional relationship with international law. However, it is submitted that the respect for international law as enshrined in the EU Treaties, can have an effect on the Court's approach to international law issues. The Court should attempt, as far as it is possible, to avoid divergences between the approach of the Court and the other EU organs.[27] It can view the respect for international law not as merely a foreign policy goal, but also as a constitutional principle that can be used to guide the CJEU. Such an overarching approach, founded in EU constitutional law, may help the Court develop a more consistent and principled approach when dealing with international law questions.

2.2 International Law and the EU Legal Order

In determining its relationship with international law, the Court can be guided by the EU Treaties. But can the CJEU also be guided by *general international law*? It is accepted that the CJEU can determine its own relationship with international law because it is a Court within a domestic legal order, one that applies and interprets EU law in a similar way to other domestic courts. Moreover, as noted above international law does not dictate the precise method by which it is to be given effect within the legal orders of its subjects. As Denza states:

> International law does not itself prescribe how it should be applied or enforced at the national level. It asserts its own primacy over

[24] TEU Art 21(1) second para, 21(2)(f).

[25] TEU Art 21(2)(b) (emphasis added).

[26] TEU Art 21(3).

[27] See J Wouters, J Odermatt & T Ramopoulos, 'Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law', in M Cremona & A Thies, *The European Court of Justice and External Relations: Constitutional Challenges* (2014).

> national laws, but without invalidating those laws or intruding into national legal systems, requiring a result rather than a method of implementation. National constitutions are therefore free to choose how they give effect to treaties and to customary international law.[28]

Yet, the CJEU not only functions as a domestic court, but also as an international one. It is the judicial organ of a regional organisation established by treaties according to international law. This way the CJEU may decide to develop an approach to international law that recognises and acknowledges the fact that it is an international legal body. This approach does not contradict the case law, beginning with *Van Gend en Loos*,[29] which asserts that international law is not determinative in applying and interpreting the EU Treaties, since EU Member States have developed 'a new legal order of international law'.[30] According to this approach, the CJEU would still be capable of determining how international law is given effect in the EU legal order. However, when choosing between adopting a sovereigntist or an internationalist approach to an issue, the EU's nature as an international organisation should lead to adopting the latter. This is because the CJEU is more than a domestic court and its judgments have a wider effect on the development of international law generally. International law scholarship views the CJEU as an influential judicial body in the development of international law:

> Clearly decisions of judicial organs, such as the International Court of Justice and the Court of Justice of the European Union, contribute to the development of the law of treaties including principles of interpretation as well as general international law. The specialized function of such bodies may naturally limit their contribution to the latter.[31]

Such an approach seems to be in line with the EU founding treaties, which proclaim the EU to be an international organisation founded on principles including the respect for international law. It would also help remove contradictions between the EU's internationalist rhetoric, which promotes and embraces international law, and its more sovereigntist jurisprudence, which sometimes

[28] E Denza, 'The Relationship between International and National Law', in M Evans (ed) *International Law* (3rd edn, 2010) 411.

[29] Case C-26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (*Van Gend en Loos*).

[30] Ibid, para 12.

[31] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012) 194.

views international law as a threat to the integrity and autonomy of the EU legal order. The Court should see itself as something more than a domestic court, i.e. also one that contributes to the development of international law.

3 International Law before the CJEU: Multiple Approaches

The previous section argued that the Court is free to decide its relationship with international law but that it should be guided by the EU Treaties and by its nature as an international court. The CJEU is very much still in a process of shaping the contours of its relationship with international law. As the EU becomes ever more active on the international stage, the interactions between the EU and international legal orders have become more common and more complex. There is a tendency, however, for international lawyers to attach significance to landmark cases such as *Kadi* and *Mox Plant* and to view the CJEU's sovereigntist approach as a threat to the universal nature of the international legal order. However, it is argued that these cases are not broadly indicative of an approach that is developing in the case law.

One of the reasons why a one-dimensional narrative that describes the 'openness' of the Court to international law is inadequate is that the Court confronts international law issues in a variety of circumstances. Its approach to international law issues depends often on the function or role that the Court is playing. Much of the literature on the CJEU's relationship with international law examines the issue of how international law is given direct effect within the EU legal order. But before the Court can determine what effect to give to international law principles, it first must determine (i) whether the rule invoked is indeed a source of international law, and (ii) whether it is binding upon the Union.

On the first question, the test is usually straightforward since in many cases the rule being invoked is enshrined in a treaty. However, the issue is more complex when rules of customary international law are being invoked. The Court has given little guidance regarding how it determines the existence of a customary rule. In *Hungary v Slovakia*, the Court relied in part on rules of customary international law but did not elaborate on how it identifies these rules.[32] In *ATAA*, the Court gives a little more insight. It noted, for example, that the customary law principles being relied upon are enshrined in Article 1

[32] Case C-364/10, *Hungary v Slovak Republic* [2012] nyr, para 46 (*Hungary v Slovakia*): '[O]n the basis

of the Chicago Convention,[33] Article 2 of the 1958 Geneva Convention on the High Seas,[34] and the United Nations Convention on the Law of the Sea,[35] and it referred also to the jurisprudence of the International Court of Justice and the Permanent Court of International Justice.[36]

The second issue is whether the norm invoked is binding upon the Union. Again, in cases of treaties to which the EU is a party, the answer is generally straightforward. In some cases, the CJEU may be asked to apply a treaty to which the EU is not a party but all the EU Member States are. The Court has found that the treaty obligations of the Member State can be transferred to the EU via the theory of 'functional succession'. However, the CJEU has been highly reluctant to find that such a succession has taken place, limiting it to instances where there has been a full transfer of powers to the EU level.[37] In other cases, the principle invoked may not be binding upon the Union but may nevertheless represent international 'soft law'. The Court may, for example, invoke a norm that is developed at the international level but is not strictly binding. It has done so regarding decisions of international bodies which, although not having binding legal effect, may nevertheless be persuasive in the Court's reasoning.[38] There is a proliferation of international norms including guidelines, standards, best practices, and decisions of international bodies. The Court has not yet developed a consistent approach in deciding what effect to give these non-binding instruments in the EU legal order.

In many cases the Court will determine whether a rule of international law that is binding upon the Union should be given legal effect in the EU legal order. Much of the literature examining the CJEU's approach to international law relates to this very issue. The issue of direct effect:

> goes to the heart of the constitutional architecture of the EU where a balance is to be found between openness to international law, legal

of customary rules of general international law […] the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities'.

[33] Case C-366/10, *ATAA* [2011] ECR I-1133, para 104.

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] See J Odermatt, 'Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change' (2013) 20 *Columbia JEL* 143.

[38] See J Wouters & J Odermatt, 'Norms Emanating from International Bodies and Their Role in the Legal Order of the European Union', in R A Wessel & S Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (2012) 47.

> certainty, and compliance with international obligations assumed by the EU, and the integrity of the constitutional principles which define its identity.[39]

Although the Court has determined that international law, including both treaty and customary international law,[40] is binding upon the Union from the moment it enters into force,[41] it has established certain rules to determine the circumstances under which rules of international law may be given effect. The Court acknowledges that international law applies to the EU but it is much more restrictive when it comes to actually giving it legal effect in specific cases. In cases where international law is used to challenge the validity of EU legislation, for example, the Court has developed strict criteria to determine whether international law may be used as a basis for review. The Court must determine whether a treaty is directly applicable and directly effective. It first looks at the 'nature and broad logic' of the treaty 'in particular [...] its aim, preamble and terms'[42] to determine whether it precludes it from being used as a standard of review. It then turns to whether the norm invoked is 'unconditional and sufficiently precise' in order for it be used to challenge the validity of the EU act.[43]

The Court has a well-developed line of case law dealing with the direct effect of international treaties in the EU legal order.[44] It has also begun to develop an approach towards the direct effect of customary international law.[45] Yet, the Court's relationship with international law goes beyond direct effect. For instance, the Court has turned to international law as a tool in treaty interpretation. It may, for instance, employ principles of the 1969 Vienna Convention on the Law of Treaties (*VCLT*) or look towards international law instruments in order to find the meaning of a certain term. When using it as a tool, the Court seems to be much more willing to deal with international law.

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[39] Martines, above n 10, 131–2.

[40] Case C-162/96, *A Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655, para 52 (*Racke*).

[41] Case C 533/08, *TNT Express Nederland BV v AXA Versicherung* AG [2010] ECR I-4107, para 60.

[42] Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and others v Secretary of State for Transport* [2008] ECR I-4057, para 54 (*Intertanko*).

[43] Case C-366/10, *ATAA* [2011] ECR I-1133, para 74.

[44] K Lenaerts, 'Direct Applicability and Direct Effect of International Law in the EU Legal Order', in I Govaere, E Lannon, P Van Elsuwege & S Adam (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (2014) 45.

[45] Case C-366/10, *ATAA* [2011] ECR I-1133.

Even where a treaty is not binding on the EU or is found not to have direct effect, the Court has noted that it may nevertheless be bound to interpret EU law 'in the light of' international law. The Court has acknowledged the principle of 'consistent interpretation', which stems in part from the EU's duty to respect international agreements under Article 216(2) TFEU. It has been suggested that the application of this principle would be 'a useful means for the removal of divergences between two or more norms without resorting to the modification of those norms through the legislative process'.[46] The precise scope of this duty remains unclear, and there are only few instances of the Court applying the doctrine of consistent interpretation in practice. Moreover, although the CJEU has employed international law as a tool for interpretation, the CJEU retains the prerogative to give an autonomous, 'European' meaning to a certain term.

The CJEU's relationship with international law therefore involves much more than the issue of direct effect. Focusing on this issue may give an unbalanced view of the Court's approach since it is in this field that the Court applies the most 'sovereigntist' approach. In other situations, the Court has readily invoked international law norms as part of its reasoning. The next section turns to some recent cases where the Court has dealt with international law issues.

3.1 Air Transport Association of America (ATAA)

The case of *Air Transport Association of America* (*ATAA*) is helpful in demonstrating the CJEU's relationship within international law. It is not a ground-breaking case in terms of establishing new legal rules, but it does go a long way to clarify certain concepts regarding the way international law is dealt with by the CJEU. The case involves a challenge to a 2008 Directive that applied the EU's emission trading scheme (*ETS*) to aviation.[47] Under the scheme, non-EU airlines would be subject to the EU's carbon trading scheme if they landed in or took off from an airport in the territory of an EU Member State. The Directive was challenged on the basis that it violated numerous international law principles established under

[46] A Alì, 'Some Reflections on the Principle of Consistent Interpretation Through the Case Law of the European Court of Justice International Courts and the Development of International Law', in N Boschiero, T Scovazzi, C Pitea & C Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (2013) 882.

[47] *Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 Amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading within the Community* [2008] OJ 2009 L 8/3.

the Chicago Convention,[48] the Open Skies Agreement,[49] the Kyoto Protocol,[50] as well as rules of customary international law. The ETS was established, in part, to implement the EU's obligations under the Kyoto Protocol in order to 'promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'.[51] However, it was argued that the ETS applied 'extra-territorially' since it applied to the entire flight, not only to the part over EU airspace. It was also challenged on the basis of being a 'unilateral' measure, since the EU had taken the step without similar market-based mechanisms established at the international level, such as through ICAO. The third main argument was that the Directive breached international agreements liberalising the aviation industry, since it constituted a tax or charge on airlines.

The Court examined these issues in a methodical fashion, observing each international agreement in turn to see whether it was binding upon the Union and whether it could be used as a basis of review of EU acts. Regarding the Chicago Convention, the Court found that it was not binding upon the Union since the EU was not a party to the Convention, although all EU Member States were. The Court refused to apply the principle of functional succession to the convention since it could not be established that 'a *full transfer* of the powers previously exercised by the Member States to the Community'[52] had been established. Both the Kyoto Protocol and the Open Skies Agreement were found to be binding upon the Union.

In line with its case law on direct effect, the Court examined whether the 'nature and the broad logic' of the treaties in question precluded them from being used to challenge EU legislation. In addition, the Court examined whether the specific provisions of these treaties 'appear, as regards their content, to be unconditional and sufficiently precise so as to confer on persons subject to European Union law the right to rely thereon in legal proceedings in order to contest the legality of an act of European Union law'.[53] With regard to the Kyoto Protocol, the Court found that it could not be considered as unconditional

[48] Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295 (*Chicago Convention*).

[49] US–EU Air Transport Agreement, 30 April 2007, 46 ILM 470.

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

[51] *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC* [2003] OJ 2003 L 275/32.

[52] Case C-308/06, *Intertanko* [2008] ECR I-4057, para 49 (emphasis added).

[53] Case C-366/10, *ATAA* [2011] ECR I-1133, para 74.

and sufficiently precise so as to confer on individuals the right to rely on it in order to contest the validity of the ETS Directive. This was due to the fact that Kyoto allows for 'a certain degree of flexibility in the implementation of their commitments'.[54] Regarding the Open Skies agreement, the Court found that the nature and broad logic of the agreement did not preclude it from being used to assess the validity of the contested Directive.[55] It then turned to the language of the agreement to determine whether the provisions were 'unconditional and sufficiently precise' so as to allow for review.

The Court applies a different approach, however, where customary international law is concerned. In the case at hand, it stated that a principle of customary international law may be relied upon 'in so far as […] those principles are capable of calling into question the competence of the European Union to adopt that act'.[56] The second part of the test is that the EU act 'is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard'.[57] The Court found that, while the principles of customary international law create obligations between States, in the present case the principles can also be relied upon by individuals to examine the validity of the Directive.[58] However, the Court limits its judicial review to the question whether 'in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles'.[59] The Court therefore applies a substantially different test regarding direct effect depending on whether customary law or treaty law is invoked. This is because, according to the CJEU, customary international law 'does not have the same degree of precision as a provision of an international agreement'.[60]

The Court deals with international law in a straightforward, even rigid manner. The effect of the case is that despite its apparent openness towards international law, the CJEU applies rather restrictive rules to determine whether international law may be used to challenge EU legislation. The case received criticism, especially from air and space lawyers from outside the EU. It was

[54] Ibid, para 75.
[55] Ibid, paras 79–84.
[56] Ibid, para 107. The Court cited the following case law supporting this test: Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others v Commission* [1988] ECR 5193, paras 14–8; Case C-405/92 *Mondiet* [1993] ECR I-6133, paras 11–6.
[57] Case C-366/10, *ATAA* [2011] ECR I-1133, para 107.
[58] Ibid, para 109.
[59] Ibid, para 110.
[60] Ibid.

described as an example of the 'growing isolationism of the Court's case law'.[61] Parts of the judgment have been described as 'rather short and cryptic'[62] using 'fragile reasoning'[63] without a thorough engagement with the international legal issues at play. With regard to the non-applicability of the Chicago Convention, some commentators found it perplexing that 'the EU's highest court felt at liberty to discard international aviation law's foundational treaty as irrelevant to the most vexed international aviation dispute in recent memory'.[64] It also shows that the CJEU is not open to direct effect of international treaties unless they involve rights capable of being relied upon by individuals. In effect, this reduces direct effect of international agreements to trade agreements, association agreements, as well as partnership and cooperation agreements entered into by the Union. It precludes a range of multilateral agreements from being used as a standard of review since they are usually couched in broad terms giving the parties greater room to implement the agreement.

The *ATAA* case demonstrates the CJEU's more rigid approach to international law. It begins in an international law-friendly tone: 'Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety'.[65] However, it progressively developed rules that limit the circumstances where international law may be given effect. Moreover, although the Court is open in principle to interpreting EU law 'in the light of' international law, in this case the Court did not endeavour to apply the principle of consistent interpretation. It is a prime example of the CJEU in its role as a domestic court, limiting the effect of international law when it is used to challenge EU acts.

[61] B Mayer, 'Case C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change' (2012) 49 CMLR 1135.

[62] E Denza, 'International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case' (2102) 7 *European LR* 323.

[63] Mayer, above n 61, 1139.

[64] B F Havel & J Q Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme' (2012) 37 *Air & Space L* 10.

[65] Case C-366/10, *ATAA* [2011] ECR I-1133, para 101.

3.2 *Brita*

The *Brita* case has been presented as a case where the CJEU adopted a more international law friendly attitude.[66] Brita, a German company, imported drink makers for sparkling water, accessories and syrups, from an Israeli supplier, Soda Club Ltd. The German authorities refused to give preferential treatment to Brita on the grounds that it could not be established conclusively that the imported goods fell within the scope of the EC–Israel Association Agreement. This is because Brita had stated that the goods' country of origin was Israel, although they were manufactured in Mishor Adumin in the West Bank, East of Jerusalem. The question was whether the goods should have been given preferential treatment in any event, since they would have fallen under the EC–Israel Association Agreement or EC–PLO Association Agreement.

The Court made use of rules laid down in the 1969 Vienna Convention on the Law of Treaties to the extent that they represent customary international law, which is binding on the European Union. The CJEU held that 'the rules laid down in the Vienna Convention apply to an agreement concluded between a state and an international organisation […] in so far as the rules are an expression of general international customary law'.[67] One of these rules that the Court sought recourse to was the general international law principle of the relative effect of treaties, according to which treaties do not impose any obligations or confer any rights on third states (*pacta tertiis nec nocent nec prosunt*). The Court therefore interpreted Article 83 of the EC–Israel Association Agreement, which defines the territorial scope of that agreement, in a manner that is consistent with that principle of international law. The CJEU considered that if it were to interpret Article 83 in a way that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank, this would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the EC–PLO Protocol. Such an interpretation, the Court found, would create an obligation for a third party without its consent, and would thus be contrary to the *pacta tertiis nec nocent nec prosunt* principle.

The case can be seen as another example of the CJEU applying international law, as Klabbers states, 'in ways which are all but unrecognizable to the international lawyer'.[68] Klabbers was referring in that instance to the way in which the

[66] C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289, para 41 (*Brita*).
[67] C-386/08, *Brita* [2010] ECR I-1289, para 41.
[68] Klabbers, above n 12, 72.

CJEU applied the *rebus sic stantibus* rule in the *Racke* case.[69] Similarly in *Brita*, the CJEU applied the *pacta tertiis nec nocent nec prosunt* principle in order to interpret the treaty, arguably in a way that would be peculiar to some international lawyers. Although the Court had employed the 1969 VCLT in previous case law, this had involved Article 31 thereof which are the rules pertaining to the general rules of treaty interpretation.[70] Article 34 VCLT, however, is not a rule of treaty interpretation but a principle that a treaty does not create either obligations or rights for a third State without its consent. Hence, although the CJEU applied international law in this case, it arguably did so in a somewhat novel way.

Moreover, the case is silent on the wider international law context of the case. The Opinion of the Advocate General makes references to the wider context of the Israel–Palestine dispute, including references to United Nations Security Council Resolution 242,[71] which calls upon Israel to withdraw from the occupied territories. The judgment, however, makes little reference to the wider context of the dispute. The Court is able to avoid discussion of this wider context, however, by treating the case very much similar to a standard customs cooperation case. Yet, the case is more than a straightforward customs case and the Court is faced with delicate issues of international law. While the case may be presented as one where the Court shows an open attitude to international law, it is in reality one where the CJEU has made use of international law as a tool in its reasoning. International law was not being used to challenge an act of the EU but to help resolve a dispute involving EU law.

3.3 Hungary v Slovakia

The recent *Hungary v Slovakia*[72] case can be seen as an example of the Court acting as more of an 'international court'. The case relates to a diplomatic incident between Hungary and Slovakia in which the President of Hungary, Mr László Sólyom was scheduled to go to the Slovak town of Komárno in order to inaugurate a statue of Saint Stephen, the founder and first king of Hungary. Slovakian authorities refused to allow entry of the Hungarian President, considering the visit to be a provocation. Hungarian authorities argued that the measure that had prohibited Mr Sólyom from entering Slovak territory

[69] Case C-162/96, *Racke* [1998] ECR I-3655.

[70] See P J Kuijper, 'Case C-386/08, Brita GmbH v Hauptzollamt Hamburg-Hafen Judgment of the European Court of Justice of 25 February 2010' (2010) 37 *Legal Issues of Economic Integration* 241.

[71] SC Res 242, 22 November 1967.

[72] Case C-364/10, *Hungary v Slovak Republic* [2012] nyr.

was in breach of EU law. Hungary instituted proceedings against Slovakia under the procedure in Art 259 TFEU.[73] This was only the fourth time a Member State had made use of this procedure.

The Court held that as a Hungarian national Mr Sólyom enjoys European citizenship and the rights associated with it including the right to move and reside freely within the territory of the Member States as set out in Art 21 TFEU.[74] However, the status of a Head of State in international law constitutes a limitation on the application of the Union's right of free movement. It found that EU law does not oblige Slovakia to grant access to its territory to the President of Hungary. In doing so, it examined principles of customary international relating to visits by Heads of State.

In deciding how to resolve the diplomatic row, the Court had a number of options. The first option would be to stress the primacy of EU law and to find that the incident can be solved with reference solely to the EU law of free movement of persons. The other option was to find that EU law does not apply in this case and therefore look to the application of international law, especially the international law of diplomatic relations. In effect, the second option would mean the restriction of certain rights of EU nationals, in this case the President of Hungary, based on international law. Rather, the CJEU sought to follow a third option, to interpret relevant EU law 'in the light of' international law.

The case can be seen as another example of the CJEU being 'open' to international law. However, the way in which the Court engages with international law questions is again novel. While it referred to customary international law regarding the status of Heads of State, it did not go on to identify what the content of these rules actually were. Interestingly, the Court did not look towards the case law of other regional or international courts that had faced similar issues, such as the ICJ's judgment in the *Arrest Warrant* case.[75] The Court employs international law, but in a way that many international lawyers may find puzzling.

The case has also been presented as a move away from the strictly 'dualist' reasoning that underpinned the *Kadi* judgment: 'While the scope of *Hungary*

[73] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C 326/47 (*TFEU*) Art 259: 'A Member State which considers that another Member State has failed to fulfill an obligation under the Treaties may bring the matter before the Court of Justice of the European Union'.

[74] TFEU Art 21: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

[75] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Reports 2002 p 3.

is unclear and the case may prove to be a context specific exception to the ECJ's otherwise dualist approach, it might instead suggest a broader role for international law within the EU than it had previously been thought'.[76] One could imagine the Court employing *Kadi* style reasoning to assert the primacy of rules of free movement in the same way it stressed the primacy of fundamental rights. Rather, the Court's judgment should be seen as an astute attempt to avoid a clash between EU and international law as in *Kadi.* It continued to assert the fundamental character of citizenship in EU law but interpreted it with reference to applicable customary international law. One analysis of the judgment states that '[a]s the European Union is also part of the greater international community, the CJEU recognised the precedence of international law over EU law, because international law is considered as part of the legal order of the EU and therefore is binding for all institutions'.[77] But the Court did not really find that international law *takes precedence* over EU law, or that EU law did not apply to the situation. The Court asserted that EU law continues to apply but it should be read in the light of applicable international law rules. Again, international law is not being used to challenge an EU act but is used by the Court to resolve a dispute between EU Member States.

3.4 *Diakité*

To what extent should the CJEU interpret EU legislation in conformity with international law? This was one of the questions that was examined in the recent *Diakité* case.[78] The key question in this case was whether the definition of 'internal armed conflict' is to be based on the criteria established by international humanitarian law or whether it can be given a separate, autonomous meaning for the purposes of European law. Specifically, the Court was asked to interpret the term 'internal armed conflict' used in Article 15(c) of Directive 2004/83/EC, which sets out minimum standards for granting refugee status or subsidiary protection status.[79] The referring Court, the Belgian *Conseil d'État*, asked whether

[76] 'Case C-364/10, Hungary v Slovak Republic, 2012 ECJ EUR-Lex LEXIS' (2013) 126 *Harvard LR* 2425, 2430.

[77] M Filippin 'A Change for Future Intra-European Diplomatic Relations? Case C-364/10 Hungary v Slovakia, Judgment of 16 October 2012, not yet reported' (2013) 20 *Maastricht JECL* 120, 126.

[78] Case C-285/12, *Aboubacar Diakité v Commissaire Général aux Réfugiés et aux Apatrides* [2014] nyr (*Diakité*).

[79] *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* [2004] OJ L 304/12.

the terms should be defined according to international humanitarian law, in particular with reference to Common Article 3 of the four Geneva Conventions of 12 August 1949.

In his Opinion,[80] Advocate General Mengozzi referred to Article 3(5) TEU, which states that the EU shall contribute to the 'strict observance and the development of international law strict observance and the development of international law'.[81] Based on this article, as well as relevant case law, it was noted that EU measures should be interpreted in the light of relevant rules of international law. This includes not only treaties binding upon the Union, but also customary international law. However, he noted that the term 'internal armed conflict' in the Directive is used for a different purpose than that of 'non-international armed conflict' in IHL. The Court followed this reasoning, stating that the terms relate to two different fields of law, both of which have different aims and involve different protection regimes.[82]

Since the Directive itself does not define the term 'internal armed conflict', the Court interpreted the term according to its usual meaning in everyday language, taking into account the purposes of the legislation.[83] The Court then defined the term 'internal armed conflict' as 'a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other'.[84] Under international humanitarian law, specifically Common Article 3, for hostilities to be considered as 'a conflict of a non-international character' they must meet specific criteria. The hostilities must have reached a certain threshold of intensity, setting them apart from isolated and sporadic acts of violence or banditry, and the hostilities must involve non-governmental forces that have some kind of organised command structure. The Court therefore established a much broader definition of the term for the purposes of EU law. The Court justifies the separate definitions on the basis that international humanitarian law and the relevant EU Directive were designed for different purposes and spheres of application.

This can be viewed as the CJEU finding an autonomous, 'European' meaning to a term that is already defined by international law, and an example of the 'fragmentation' of international law. In this way, it is reminiscent of the divergence between the International Court of Justice and the Appeals Chamber

[80] Case C-285/12, *Diakité* [2014] nyr, Opinion of Advocate General Mengozzi.
[81] TEU Art 3(5).
[82] Case C-285/12, *Diakité* [2014] nyr, para 24.
[83] Ibid, para 27.
[84] Ibid, para 28.

of the International Criminal Tribunal for the former Yugoslavia concerning the test to determine the nature of an armed conflict. The ICTY Appeals Chamber in applying an 'overall control' test, seemed to deviate from the 'effective control' test applied by the ICJ in the *Nicaragua* judgment.[85] However, this apparent divergence can be explained by the fact that the ICJ and ICTY Appeals Chamber were applying these tests in different legal contexts. In *Tadic*, the Appeals Chamber was determining whether or not an armed conflict exists for the purpose of determining whether the grave breaches system would apply.[86] In *Nicaragua*, however, the ICJ was primarily concerned with the topic of state responsibility, not individual criminal law. In the *Bosnia Genocide* case, the ICJ rejected the notion that a single test had to apply to both bodies of law:

> [T]he degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[87]

Likewise, the definition of internal armed conflict for the purposes of EU legislation can require a lower level of intensity and organisation of armed groups than that required by IHL.

Although the CJEU applied a different definition in this case, its approach in *Diakité* is not antagonistic towards international law. The situation would be different, however, if the EU Directive had intended to implement an international legal obligation. In such a case, it is likely that the Court would be more inclined to apply the definition used at the international level. However, this stems from an obligation under EU law, especially Article 3(5) TEU and not out of respect for international law *per se*.

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[85] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v US)*, ICJ Reports 1986 p 14, 65.

[86] *Prosecutor v Dusko Tadić (aka 'Dule')*, Appeals Chamber, Case No IT-94-1-A, 1999, 1.

[87] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Reports 2007 p 43, 210.

4 Conclusion: International or Domestic Court?

The case of *Van Gend en Loos* is often cited as the point where the Court marked the beginning of its liberation from international law when it declared that 'the Community constitutes a new legal order of international law'.[88] The story is that the EU, founded by international instruments, soon developed its own legal order and 'broke free' from international law: '[t]he European treaties have, of course, been concluded according to the rules of international law. But the legal order which was erected soon emancipated from its origins'.[89] While international law has little relevance in interpreting and applying the EU treaties, the EU very much remains bound by international law in its relationship with the outside world. The idea is that the EU legal order 'broken free' from international law is only one part of a much more complex reality. International law still applies to the EU as an international actor. The CJEU still employs international law in its judicial reasoning and seeks to apply EU law in the light of international law.

Much of the literature on the CJEU's relationship with international law has focused on the landmark *Kadi* judgment. The judgment was criticised by many international lawyers, who argued that it was an example of the CJEU turning towards a more 'dualist' approach:

> The ECJ's reasoning was robustly dualist, emphasizing repeatedly the separateness and autonomy of the EC from other legal systems and from the international legal order more generally, and the priority to be given to the EC's own fundamental rules. A related and significant feature was the lack of direct engagement by the Court with the nature and significance of the international rules at issue in the case, or with other relevant sources of international law.[90]

It is true that the judgment seems to lack a thorough engagement with international law issues. The Charter of the United Nations is viewed as nothing more than a mere international agreement, and the Court did not fully discuss the application of Art 109 of the Charter, which sets out the supremacy of

[88] Case C-26/62, *Van Gend en Loos* [1963] ECR 1.

[89] K-M Meessen, 'The Application of Public International Law Within Community Law' (1976) 13 *CMLR* 485, 485.

[90] G de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard ILJ* 1, 23.

Charter obligations in the event of conflict.[91] This one case, however, cannot be considered representative of the CJEU's approach towards international law in general. It is a rather extreme case where the CJEU acted 'as any other "constitutional court of a municipal legal order"'.[92] The case has been discussed in depth elsewhere from numerous angles. The point to be made here is that in *Kadi* the Court felt the need to safeguard its autonomy from the international legal order, something that was all the more important since it involved fundamental human rights norms enshrined in EU primary law. In doing so, the Court was not placing EU law above international law, nor was it asserting the separateness of the EU legal order from international law. By focusing on this case, international lawyers may view the CJEU adopting a sovereignist approach, one which poses a serious challenge to the integrity of the international legal order and the UN system.

Yet, there are still instances where the Court's approach is that of an international court, one which is open to international law influences in resolving legal disputes. Recent cases such as *Diakité* or *Hungary v Slovakia* are examples of the Court playing this role. The Court is after all a court of a regional international organisation and its judgments are highly influential in the development of international law. Some may assume that this means that the Court should be more open towards international law since international law is in the DNA of the EU. Yet, the Court's approach can be viewed as an outcome of the constitutionalisation of both the EU and the international legal orders. The Court is still trying to find a balance between protecting the autonomy of its own legal order and the openness towards international law that is enshrined in the EU Treaties. Rather than view the CJEU's approach to international law as 'open' or 'closed', it should be understood as involving multiple relationships depending on the way in which international law norms come before the Court.

[91] Charter of the United Nations, Art 109 (*UN Charter*): 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

[92] V Fikfak, '*Kadi* and the Role of the Court of Justice of the European Union in the International Legal Order' (2013) 15 *CYELS* 21.

DOI: 10.7574/cjicl.03.03.234
Cambridge Journal of International and Comparative Law **(3)**3: 719–746 (2014)

UNIVERSALITY AND COSMOPOLITANISM: SOME INSIGHTS FROM THE WORLD OF MORAL DAMAGE

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Abstract

This article examines the invocation and application of universal principles regarding reparation for moral damage across three different 'sub-systems' of international law: international human rights law, international criminal law and international investment law. The extensive invocation of certain principles drawn from a state-to-state context, including in scenarios implicating non-state actors, suggests a degree of universality.

Yet, this conclusion is challenged by the variety of approaches taken by bodies constituted under and applying different international law specialisms. The context and mandate of the body in question, as well as the exigencies of particular situations, affect the extent to which universal principles are followed in practice. The considerations underlying the form and standard of reparation, and the ultimate outcome, for example, serve to demonstrate some of the tensions between universality and cosmopolitanism.

There is a growing focus on reparation as a modality and mechanism of justice. The effectiveness of reparation in this role is tied to the extent to which it responds to claimants/petitioners/victims' needs. While universality may play a role in inter alia promoting certainty and conserving resources across a varied international law landscape, a strict approach may undermine the responsiveness of reparation as a measure of justice in different sub-systems and thus of the value of a more cosmopolitan world that opens up avenues for redress for a variety of identities.

Keywords

State responsibility, reparation, international criminal law, international human rights law, international investment law, moral damage

1 Introduction

As phenomena that drive and reflect the shifting landscape of international law, universality and cosmopolitanism[1] are often seen as mutually-reinforcing in

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[1] As defined for the purposes of the conference: http://cjicl.org.uk/conference-registration/ [accessed 6 November 2014].

'stepping away from the state'. However, this contribution notes that they may also act in tension.

Universality conceives of principles as applicable across different 'sub-systems' of international law—'sub-systems' that promote cosmopolitanism. Principles require flexibility and adaptability if they are to be applied to a variety of 'clients', by a multitude of dispute resolution bodies, and, at times, through the spectrum of different philosophies, i.e. if they are to be applied within the current international law framework that reflects and facilitates a more cosmopolitan landscape. However, even where they exhibit flexibility, universal principles may not always be appropriate in the circumstances or pertinent to the challenges faced by a specific sub-system.

There is a growing focus on reparation as a modality and mechanism of justice.[2] A large number of instruments regarding reparation, remedy and redress have been adopted at the international level over the last two decades, many relating to specific sub-sets of international law or particular groups of victims. The 2001 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Act (*ILC Articles*),[3] on the other hand, codify widely-accepted 'secondary rules' of international law.[4] This incorporates the legal consequences that flow from the breach of an international obligation, and thus principles regarding reparation. While these principles have been drawn largely from a state-to-state context, they are invoked in the conceptualisation and realisation of reparation across different 'branches' of international law, including in scenarios implicating non-state actors—a picture suggesting a degree of universality.

However, the principles codified in the ILC Articles are to be applied subject to any applicable *lex specialis*; they can be excluded within a sub-system or in a specific dispute.[5] Their universality thus arises from their position as default or 'residual' rules.[6] Any claim to universality will depend upon the frequency of invocation and the extent to which principles relied upon within each sub-system are based upon these norms. The general nature of the principles codified

[2] With the caveat that 'justice' has been ascribed many different meanings and some more restrictive definitions may not view reparation as a form of 'justice'.

[3] The ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Ybk* 2001/II(2), 26.

[4] Commentary to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Ybk* 2001/II(2), 31, para 1 (*ILC Articles Commentary*).

[5] ILC Articles, Art 55.

[6] ILC Articles Commentary, Art 55, para 2.

in the ILC Articles, along with the fact that many primary norms are created without specifying the consequences of breach, suggests these principles will be invoked frequently. However, a change in practice as a result of particularised principles within a 'sub-system' would challenge this position and potentially, in turn, contribute to an erosion of the possible contexts in which customary status may be claimed.

This paper examines aspects of the interaction between universality and cosmopolitanism, from the perspective of reparation for non-pecuniary damage (or moral damage). Focusing on the application of customary principles relating to reparation across three 'sub-systems'—international human rights law, international criminal law and international investment law—this paper examines the challenges posed to and questions raised by universal application. These challenges may, however, play an important role in promoting cosmopolitanism, as both an institutional and a moral imperative. If reparation is to form a measure of justice, its effectiveness is tied to the extent to which it responds to claimants/petitioners/victims' needs. Strict universality may therefore undermine the value of a cosmopolitan world that opens up avenues for redress for a variety of identities.

A note on terminology: with the increasing focus on reparation, the term has taken on different connotations in a variety of contexts. Reparation is generally afforded a broad definition and this paper will do the same, using the term in the manner referred to in the ILC Articles, as referring to various acts, goods or other manifestations employed to repair a victim of an internationally wrongful act.[7] The term moral damage is also employed to describe different concepts, including across national legal systems. What qualifies as non-material or non-pecuniary damage is not always clear and this feeds into the discussion of how different tribunals conceive reparation in light of their respective mandates. The same harm may have pecuniary and non-pecuniary aspects, for example, disruption of education or damage to reputation.

2 The starting point

The starting point is the principle common to all branches of international law discussed in this paper: that breaches of international law have consequences. As famously articulated by the Permanent Court of Justice (*PCIJ*) in the *Chorzów Factory* ('a passage [...] which has been cited and applied on many occasions')[8]: '[i]t

[7] ILC Articles Commentary, Art 34, paras 1–2 and 6.

[8] ILC Articles Commentary, Art 31, para 1.

is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.[9] This customary principle is foundational to upholding the rule and value of international law.

The PCIJ emphasised that, not only this principle, but, by definition, a standard, is inherent within the notion of illegality, and specified the forms of reparation that may be suitable to reach this standard. Conceiving of reparation as a corollary of an illegal act underpins the increasing importance assigned to reparation as a form of justice:

The essential principle contained in the actual notion of an illegal act [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[10]

The availability of reparation for moral damage has long been recognised in international law. The 1924 *Opinion in the Lusitania Cases* (*Lusitania*),[11] issued five years before the *Chorzów Factory* judgment, was one of the earliest international law decisions to address the issue. The Umpire stated that non-material damages are 'very real, and the mere fact that they are difficult to measure or estimate by money standards makes them no less real and affords no reason why the injured person should not be compensated'.[12] He defined in broad terms the scope of harm for which moral damages could be awarded as, so long as the harm was 'real and actual, rather than purely sentimental and vague':[13]

> That one injured is, under the rules of international law, entitled to be compensated for an injury resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt [...][14]

[9] *Case concerning the Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (Jurisdiction)* (1927) PCIJ Ser A No 9, 21 (*Chorzów Factory*).
[10] Ibid, 47.
[11] *Opinion in the Lusitania Cases* (1924) 7 RIAA 32.
[12] Ibid, 40.
[13] Ibid, 37.
[14] Ibid, 40.

Further, following the Umpire's examination of national legal systems and 'reparation by equivalent', he noted: '[s]peaking generally, that remedy must be commensurate with the injury received', i.e., assessed on an objective basis'.[15]

These principles are echoed in the ILC Articles. Article 31 emphasises that a state has a duty to make full reparation for material or moral damage caused by the internationally wrongful act of that state, where moral damage 'includes such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life'.[16] The ILC Articles envisage full reparation as encompassing three modalities and prescribe a hierarchy among them: compensation is available where restitution is not possible or disproportionate and where damage is 'financially assessable'; and satisfaction is available where restitution and compensation cannot reach the standard prescribed by international law to 'wipe out the consequences' of the illegal act—it is an extraordinary or residual form.[17] The ILC Articles recognise that a combination of two or all forms of reparation may be required to meet the standard that they prescribe.[18] In line with their general nature, they thus envisage a degree of flexibility depending upon the nature and scope of the damage.

The Commentary to the ILC Articles provides some guidance regarding the standing of moral damage in this analysis. While noting that 'material and moral damage resulting from an internationally wrongful act will normally be financially assessable'[19] and thus appurtenant to compensation, the Commentary distinguishes between non-pecuniary damage to a state and that 'associated with actual damage to property or persons'.[20] The latter appears to encompass the types of harm discussed by the Umpire in *Lusitania*. The former may be an 'affront' or damage a state's honour and dignity, often an injury of 'symbolic character' resulting from the mere fact of the breach and difficult to value in monetary terms. Moral damage caused to a state is, according to the ILC Articles, more suited to a remedy of satisfaction, which, in itself, may take the form of a monetary payment.[21] Unlike compensation, however, there is no requirement that such payment be commensurate with the loss. The function of such a

[15] Ibid, 35.
[16] ILC Articles Commentary, Art 31, para 5.
[17] ILC Articles, Arts 34–7.
[18] ILC Articles, Arts 34–7.
[19] ILC Articles Commentary, Art 37, para 3.
[20] Ibid, Art 36, para 1.
[21] Ibid, Art 37, para 3.

payment is distinct.

This guidance has led to questions about the clarity of the position of compensation for non-economic injury within the framework created by Articles 34 to 37.[22] However, as explained above, the framework created by the articles seeks to sub-divide a broader category in light of the different forms of harm that are termed moral damage. Compensation is envisaged as being employed in a mechanical, objective fashion and thus is inappropriate as a remedy for consequences unsuited to quantification (rather than one that is difficult to quantify, as per *Lustania*). The injury suffered as a result of the *fact of a breach* is not necessarily speculative, but can be unquantifiable in numerical terms. An analogy can be drawn with injury suffered in a human rights context, where violations of a victim's rights can send an implicit message about a victim's value, dignity and place in the community, regardless of other consequences flowing from the breach. The distinction set out in the ILC Articles may thus prove valuable across different sub-systems.

The principles codified in the ILC Articles discussed above, as a reflection of customary international law, therefore exhibit flexibility and a recognition that: (i) the nature and scope of injury, and (ii) the subject or rights-holder in question will affect the contours and substance of the reparation that is appropriate. The flexibility exhibited in the ILC Articles is a gesture towards universality and an aspiration that the principles will find utility in the many contexts in which they could be employed.

3 An increasingly cosmopolitan framework

Traditional norms regarding reparation reflect a system in which international wrongs were conceptualised within a state-to-state framework. Although an individual could be directly harmed by another state, only a state had the right to espouse a claim in respect of this wrong on the international plane: '*[q]uiconque maltraite un citoyen offense indirectement l'état qui doit protéger ce citoyen*'.[23] With the codification of customary international law of armed conflicts, for example, a state could be held responsible for physical harm to protected combatants or civilians or damage to civilian property, but only the state of nationality could

[22] See discussion in M Parish, A Newlson and C Rosenberg, 'Awarding Moral Damages to Respondent States in Investment Arbitration' (2011) 29(1) *Berkeley JIL* 225, 229.

[23] E de Vattel quoted in M Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *HRLR* 203, 212.

request reparation. Between 1794 and 1970, claims regarding the treatment of aliens made up 261 out of 435 claims procedures established, often focusing on harm caused to individuals during a civil war.[24] Customary international law rules on reparation developed in this context: the state was the victim, either in itself, or as the espouser of the claim of its national.

The proliferation of *inter alia* international investment treaty tribunals, human rights bodies and courts, international fact-finding bodies, international criminal tribunals and other transitional justice mechanisms established within an international framework has changed the way in which justice is accessed at an international level. However, this change is not universal and the position can be overstated: there are still many natural and legal entities that do not have access to specialised tribunals to claim reparation for breaches of international rights. The European Court of Human Rights (*ECtHR*) is the only regional human rights court that allows petitions directly from individuals. The fora available for different entities to claim for breaches of international humanitarian law are limited. Investment treaty protection is dependent upon an applicable treaty, including qualification under that treaty, and sufficient funds to pursue arbitration (although the proliferation of third party funders may affect the weight of this factor).

Although the ILC Articles are framed in terms of international obligations of states *vis-a-vis* other states, the ILC Articles Commentary on Article 33 acknowledges the varied nature of the legal order that the principles target. It notes that, even though the international obligation that forms the subject of the breach, and thus the obligation to make reparation, is owed to another state, the holders of the relevant rights may have a different identity. The breach of a human rights treaty, for example, wrongs the other state parties, but the ultimate rights holder and object of the breach is an individual. The ILC Articles Commentary refers to the International Court of Justice (*ICJ*)'s recognition in *La Grand* of individual rights under international law.[25] This position was also touched on by the ICJ in *Diallo*, a claim brought in the exercise of diplomatic protection by Guinea against the Democratic Republic of Congo (*DRC*), in which the ICJ found that the DRC had breached *inter alia* the International Covenant on Civil and Political Rights (*ICCPR*) and the African Charter on Human and Peoples' Rights. The ICJ recalled that 'the sum awarded to Guinea in the exercise of diplomatic

[24] M Stuyt, *Survey of International Arbitrations 1794–1970* (1939) quoted in C McCarthy, *Reparations and Victim Support in the International Criminal Court* (2014) 12.

[25] ILC Articles Commentary, Art 33, para 3. See *La Grand (Germany v US)*, ICJ Reports 2001 p 466.

protection of Mr Diallo is intended to provide reparation for the latter's injury'.[26]

Similarly, the Ethiopia–Eritrea Arbitration Commission noted its confidence that 'funds received in respect of their claims will be used to provide relief to their civilian populations injured in the war'.[27] However, these funds were limited, especially when compared to the length of the war and multitude of victims.[28] The victims were dependent upon the states distributing the compensation received. The application of principles regarding reparation within a state-to-state context and thus reliance thus potentially limited the scope of relief available to many of the individual victims and did not specifically address the needs of the ultimate objects of the breach.

Arguments that the principles set out in the ILC Articles apply only to inter-state relations have been rejected.[29] Materials on the ILC Articles charting their application contain multiple references to bodies concerned with disputes that involve participants other than states, particularly human rights bodies and investment treaty tribunals. The ILC Articles thus acknowledge the wide range of contexts in which their claim to universality will be tested. Practice shows that the institutional framework in which reparation is considered affects the application of these principles and the priority and feasibility assigned to various forms of reparation. There can be key differences at the point of implementation, posing another layer of challenges to claims of universality.

4 International human rights

As discussed above, international human rights law is based upon a different structure to that in which international law principles have traditionally found application. Firstly, the obligations are not of a bilateral nature but are owed

[26] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Compensation, ICJ Reports 2012 pp 324, 344 (*Diallo*).

[27] See e.g. *Eritrea–Ethiopia Claims Commission: Final Award (Eritrea's Damages Claim)* (2009) 26 RIAA 505.

[28] The arbitration effectively resulted in net damages to Ethiopia of just over USD 13 million, and USD 2 million to Eritrea for individual claimants. D Hollis, 'Eritrea-Ethiopia Claims Commission Awards Final Damages' (*Opinio Juris*, 19 August 2009) <http://opiniojuris.org/2009/08/19/eritrea-ethiopia-claims-commission-awards-final-damages/> [accessed 1 August 2014].

[29] See e.g., T van Boven, Introductory Note to 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (*United Nations*, 2010) para 2(a), <http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> [accessed 1 August 2014].

erga omnes—the other parties to human rights treaties are all wronged upon breach.[30] Secondly, as discussed above, and as recognised by the ECtHR in its recent decision in *Cyprus v Turkey* in the context of an inter-state claim,[31] the ultimate object of a breach, and the primary victim, is an individual.

It is in this framework that jurisprudence on remedies for non-pecuniary injury has recently developed: with the individual, and not the state, as the petitioner. There are multiple judicial/non-judicial bodies that now have the ability (subject to state consent) to receive applications from individuals in respect of different treaties, for example, the Human Rights Committee in respect of the ICCPR. However, few bodies have the power to issue opinions or judgments that are binding on states. Each body or court has developed its own jurisprudence or recommendations on reparations within the confines of its own jurisdiction. The powers of different regional courts in respect of reparation, for example, are moulded by the relevant *lex specialis* or constituting treaty. Yet all of them rely on the fundamental principle of international law as set out in the *Chorzów Factory* case, that a breach of international law entails consequences and a duty to make reparation.[32] Given the limited space, only ECtHR and Inter-American Court of Human Rights (*IACtHR*) jurisprudence is specifically referred to below; the latter in particular given that the IACtHR has developed 'perhaps the most comprehensive legal regime on reparations developed in the human rights field of international law'.[33]

The systematic characteristics of a human rights regime provide a rationale for departing from some of the reparations principles codified in the ILC Articles. First, the reparations ordered have a dual focus. A breach is conceived of

[30] See D Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005) 97–99.

[31] *Cyprus v Turkey (Just Satisfaction)* [2014] ECtHR App 25781/94, para 46. For a more detailed discussion of the importance and content of this judgment see, e.g., E MacKenzie, 'European Court of Human Rights Orders Turkey to Pay Cyprus EUR 90,000,000' (*ASIL Blog*, 15 May 2014) <http://www.asil.org/blogs/european-court-human-rights-orders-turkey-pay-cyprus-%E2%82%AC90000000-may-12-2014> [accessed 1 August 2014]; A Risini, 'Can't get no just satisfaction?' (*CJICL Online*, 23 May 2014) <http://cjicl.org.uk/2014/05/23/cant-get-just-satisfaction-cyprus-v-turkey-judgment-european-court-human-rights/> [accessed 1 August 2014]. See also F Kollmar & J M Hoffmann, 'Less Complaints, More Satisfaction: *Cyprus v Turkey*' (2014) 3 *CJICL* (in press).

[32] See e.g., UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 16.

[33] C Grossman (ed), 'Conference on Reparations in the Inter-American System: A Comparative Approach ' (2006-2007) 56 *American ULR* 1375, 1376.

as a violation of both individual rights and the legal order.[34] Remedies may therefore require structural changes, such as amending a system of laws or even the constitution of a state, state-wide training programmes or the creation of institutions.[35] The ECtHR emphasised this point by noting that, where the focus is on structural questions of 'public order', and not individual harm, certain available remedies are inappropriate.[36] Second, there are two dimensions to reparations in this context: they are both procedural and substantive in nature. The procedural dimension has a functional aspect: that without access to a forum, there is no hope for reparation; but, it may also have a substantive consequence, a dignifying effect, tied to recognition. Participation in shaping the remedy is often tied to the extent to which a remedy is satisfactory.

The ECtHR has the power 'if necessary' to award 'just satisfaction', under Article 41 of the European Convention on Human Rights (*ECHR*)[37] (an amended version of the original Article 50), unless the internal law of the breaching state allows for full reparation. Early in its existence, the ECtHR recognised that Article 50 was modelled on provisions of inter-state dispute settlement treaties and that it contemplated remedies based on principles of state responsibility, namely cessation of the breach and restitution. Where compliance with the latter was not forthcoming or not possible, compensation and satisfaction were available.[38] The ECtHR recently echoed this position, noting that Article 41 is derived from principles of public international law regarding state liability, including, upon breach, the obligation to make reparation in an adequate form as set out in the *Chorzów Factory* case.[39]

The ECtHR has been criticised for its narrow interpretation of Article 50 (subsequently Article 41), in many cases finding that the declaration of wrongfulness or breach contained in its judgement constituted sufficient reparation.[40] However, in certain cases of non-pecuniary injury, in light of the seriousness of the violation and the extent of harm caused, the ECtHR has decided that the findings in its judgment can only afford limited satisfaction for non-pecuniary injury and has also awarded monetary damages as part of affording just satisfaction—

[34] S G Ramirez in Grossman, above n 33, 1429, 1433.

[35] See e.g., *The Last Temptation of Christ (Olmedo Bustons et al) v Chile* (2001) IACtHR Ser C No 73, para 97ff, pursuant to which Chile modified its constitution to comply with the order of the IACtHR that looked to guarantee freedom of expression to all persons subject to its jurisdiction.

[36] *Cyprus v Turkey* (*Just Satisfaction),* paras 43–44.

[37] European Convention on Human Rights, 4 November 1950, 213 UNTS 222.

[38] Shelton, above n 30, 191–192.

[39] *Cyprus v Turkey (Just Satisfaction)*, above n 31, paras 40–1.

[40] Higgins, as quoted in Shelton, above n 30, 195.

valued on an equitable basis.[41] Such awards are designed to recognise the moral damage caused by breach of the ECHR and to reflect 'in the broadest terms' the severity of damage.[42] The ECtHR has also ordered specific measures of reparation under Article 13 ECHR, requiring a state to afford an effective remedy, entailing *inter alia* a thorough investigation and compensation.[43] The ECtHR thus looks to restitution at a state level, and, where this is not forthcoming has generally relied upon satisfaction as its remedy of choice for individuals.

Article 63(1) of the American Convention on Human Rights[44] affords the IACtHR a broader jurisdiction to award reparation than that enjoyed by the ECtHR. In the case of breach:

> [...] if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Similarly to the ECtHR, the IACtHR has alluded to the universality of the norm discussed above, stating that Article 63(1):

> [...] reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility. When an unlawful act occurs, which can be attributed to a State, this gives *rise* immediately to its international responsibility for violating the international norm, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.[45]

The IACtHR's directions and awards on reparations are detailed and comprehensive. The judgment in *Gelman*, brought on behalf of victims of torture and disappearances, provides one example. The IACtHR prescribed multiple measures

[41] See *Selmouni v France* (*Judgment)* [1999] ECtHR App 25803/94, para 123.

[42] *Cyprus v Turkey (Just Satisfaction)*, above n 31, para 56, (referring to *Varnava and Others v Turkey* [2009] ECtHR Apps 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 & 16073/90).

[43] See e.g. *Aksoy v Turkey (Judgment)* [1996] ECtHR App 21987/93, discussed in T van Boven, 'Reparations: a requirement of justice', in *Memoria del Seminario: El sistema interamericano de protección de los derechos humanos en el umbral del siglo* (1999) 659.

[44] American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

[45] *Serrano-Cruz Sisters v El Salvador (Merits, Reparations and Costs)* (2005) IACtHR Ser C No 118, para 134 (*Serrano-Cruz Sisters*).

that may be characterised as satisfaction, incorporating those aimed at a public acknowledgement of breach, including requesting that Uruguay publish the IACtHR's judgment and make a widely-disseminated public apology. The IACtHR also prescribed a factual investigation regarding the violations, prosecution and punishment 'as a form of reparation of the victims [sic] right to the truth', as well as various other reforms, including that human rights training be instituted for the judiciary. In addition, the IACtHR awarded pecuniary and moral damages.[46]

The framework of analysis envisaged by the ILC Articles regarding the standard and forms of reparation is not always appropriate in the context of human rights abuses. As envisaged by the ILC Articles Commentary, restitution as a form of reparation for non-pecuniary injury may be impossible by virtue of legal encumbrances or circumstances preventing a return to the pre-breach position.[47] However, in a human rights context, there are other considerations that may make restitution inappropriate, and raise questions as to its primacy as a form of reparation. The *status quo ante* is often unachievable, particularly in the face of non-pecuniary damage. In *Serrano-Cruz Sisters*, in which victims had been disappeared, the IACtHR noted that full restitution was impossible.[48] The purposes of rape, for example, have been compared to those of torture, as including humiliation, degradation and destruction of the person (sense of self).[49] Relying on legal measures to 'full[y]' repair such consequences is questionable. Further, to suggest that the experience can be 'wiped out' by a legal remedy may, for some victims, constitute evidence that the gravity of their plight is not being taken seriously and thus detract from the reparative effect of recognising the breach.

Depending upon the definition and nature of the violation under consideration, the pre-breach situation may be one in which the victim was subject to other human rights abuses, for example discrimination and marginalisation. Restoration of the *status quo ante* is thus an unsatisfactory order for a human rights court to make. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (*Nairobi Declaration*) articulates this concern:

> [R]eparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that

[46] *Caso Gelman v Uruguay (Merits and Reparations)* (2011) IACtHR Ser C No 221, paras 259–96.
[47] ILC Articles Commentary, Art 34, paras 4 and 9.
[48] *Serrano-Cruz Sisters*, above n 45, para 135.
[49] *Prosecutor v Jean-Paul Akayesu,* ICTR-96–4–T (Judgment, 2 September 1998) para 597.

> shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights pre-date the conflict situation.[50]

In this context, the IACtHR has developed the concept of transformative reparations. Where violations occur in a situation of structural discrimination, restoration of the *status quo ante* is not adequate reparation. Reparations should aim to transform the pre-existing situation.[51]

Given the potential disconnect between restoration of the *status quo ante* and concepts of reparation, rehabilitation has become an important form of reparation for many manifestations of non-pecuniary damage. Rehabilitation aims to restore the physical and mental integrity of the victim. In essence, it consists of providing victims with the necessary material, medical, psychological and social assistance and support.[52] It is specifically mentioned in Article 14 of the Convention against Torture,[53] as follows:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.

Tribunals may choose to award the cost of such support, or to simply require that rehabilitation be provided.[54]

Compensation has played an important role in remedying non-pecuniary injury, as noted in *Gelman*. It also forms an aspect of the IACtHR's concept of *proyecto de vida* (life plan) articulated in *Loayza Tamayo v Peru*, which alludes to 'personal fulfilment' of the person.[55] However, similar concerns to those

[50] Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (19–21 March 2007) para 3, <http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf> [accessed 1 August 2014].

[51] C Sandoval, 'The Inter-American System of Human Rights and Approach', in S Sheeran & N Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013) 427, 439.

[52] 'Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation' (*REDRESS*, March 2006) 36 <http://www.redress.org/downloads/publications/Reparation%20Principles.pdf> [accessed 1 August 2014].

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

[54] Shelton, above n 30, 275–6.

[55] *Loayza Tamayo v Peru (Reparations and Costs)* (1998) IACtHR Ser C No 42.

discussed in respect of restitution apply to compensation as a remedy. Pablo de Greiff highlights that those who intentionally harm others pursue strategies of 'dehumanisation', pointing to certain assumptions about the agency of those harmed.[56] Monetary compensation cannot rehumanise.[57] The mothers of one of the men that had been killed in a massacre considered in the *El Amparo case* emphasised: '[m]y son was not a cow, I don't want money, what is I want is justice'.[58] This is a sentiment often heard in transitional justice contexts: money without truth and reform is blood-money.[59] Further, where abuses occur on a large scale, compensation commensurate with the loss may be rendered impossible by insufficient resources, and distributing limited compensation awards (in number or amount) may exacerbate tensions and increase marginalisation.

In light of the challenges associated with restitution and compensation, satisfaction—a traditionally exceptional and residual form of reparation—may play an important role. Satisfaction can take multiple forms, for example, symbolic reparations (such as memorials), or as per ECtHR jurisprudence (echoing the ILC Articles Commentary), a declaration of wrongfulness or a judgment. The 'truth' behind the violations is an important form of satisfaction, and, as noted in *Gelman*, a right in itself.[60] The recognition and acknowledgement inherent in measures of satisfaction can play an important role in helping to rebuild dignity. Chile's Supreme Decree No 355 establishing the 1990 Truth Commission stated:

> [O]nly the knowledge of the truth will restore the dignity of the victims in the public mind, allow their relatives and mourners to honour them fittingly, and in some measure make it possible to make amends for the damage done.[61]

The hierarchy of modalities of reparation in the framework envisaged by the ILC Articles did not make its way into the United Nations Basic Principles

[56] P de Greiff, 'Theorizing transitional justice', in M Williams, R Nagy and J Elster (ed), *Transitional Justice: Nomos LI* (2012) 42.

[57] See e.g. A Reiner, 'Children and Reparations', in Grossman, above n 33, 1439.

[58] *Case of El Amparo v Venezuela* (1995) IACtHR Ser C No 19, referred to by V Krsticevic, in Grossman, above n 33, 1418, 1419.

[59] P de Greiff, 'Justice and Reparations', in P de Greiff (ed) *The Handbook of Reparations* (2006), 13.

[60] Gelman, above n 45, para 259.

[61] Supreme Decree No 355 25 April 1990 (Chile), preamble, para 3, see 'Report of the Chilean National Commission on Truth and Reconciliation', *United States Institute of Peace*, 2002, 24, <http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf> [accessed 1 August 2014].

and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[62] (*Basic Principles*), which were 'adopted and proclaimed' by the United Nations General Assembly in 2005. The Basic Principles are not in themselves binding on states, but they identify 'mechanisms, modalities, procedures, methods' to operationalise *existing* obligations in respect of redress and reparation. The Basic Principles 'seek to rationalise through a consistent approach the means and methods by which victim's rights can be addressed'.[63] With the caveat that the Basic Principles relate to 'gross' and 'serious' violations only, they thus provide an interesting point of departure in a study of 'universality' as a consolidated point of reference for norms employed across a field with various bodies that have different jurisdictions and powers in respect of reparations.

The Basic Principles categorise reparation into five different forms, which are not subject to a specific hierarchy: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. No specific formula is prescribed and a degree of flexibility is therefore retained, thus recognising (as per the ILC Articles) that multiple modalities may be required to remedy a breach. Further, reparation is to be 'adequate' and 'effective'; 'proportional' to the gravity of the violation and the harm, rather than relying on the classic international law standard requiring states to 'wipe out all the consequences' of the breach.[64] As noted above, particularly in the case of serious or gross violations, the latter standard is aspirational.

Where harm has been suffered on a community-wide or group basis, collective reparations schemes can prove more meaningful and ultimately more effective than individual reparations. Individual reparations payments may, for example, undermine community harmony in contexts where the latter was key to recovery and reconciliation.[65] Recognition of this fact is another point of departure between human rights jurisprudence and general international law; the concept of collective reparations is much better developed in the former.

[62] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147 (16 December 2005) Annex.

[63] Bassiouni, above n 23, 251.

[64] ILC Articles Commentary, Art 31, para 3.

[65] L Magarrell, 'Reparations in Theory and Practice' (*International Center for Transitional Justice*, 2007) 6, <https://www.ictj.org//sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf> [accessed 1 August 2014], regarding indigenous communities in Chile.

However, the Ethiopia-Eritrea Commission, in its discussion of damage to Barentu town, has been seen as affording limited acknowledgement to the existence of a requirement to make reparation for communal harm.[66] The ECtHR has not acknowledged harm suffered on a collective basis; but the IACtHR has done so, although still envisaging the individuals within the group, rather than the group as such, as the victim(s). In *Plan de Sánchez Massacre v Guatemala*, the IACtHR recognised the 'collective nature of the damage produced' and awarded collective reparations 'as an important component of the individual reparation [...]'.[67] Whether victims are conceived of as individuals or the group, a community or a region as a whole, transitional justice reparations schemes for breaches of human rights have often relied on collective reparations. The Moroccan *L'Instance Equité et Reconciliation*, for example, defined, not only individuals, but also communities or regions as victims and therefore potential beneficiaries of reparations. On this basis, they recommended collective reparations as one of the measures to be implemented by a future reparations scheme. The Moroccan community reparations program targets different regions, and includes both symbolic reparations and development projects.[68]

Unlike in most traditional international law situations, the Basic Principles make clear that the identity of the perpetrator does not affect the right to reparation, therefore all victims, including those of violations committed by non-state actors, should be incorporated in any state reparations program. In this (indirect) sense, the international law principles underlying the Basic Principles are applied to breaches by non-state actors. It is also an extension of the famous *Velásquez-Rodriguez* principle, that a state has a due diligence obligation to prevent, investigate and prosecute, compensate a breach, even where committed by a private actor.[69]

5 International criminal law

Historically, questions of victim redress have not fallen within the ambit of international criminal justice processes. Rather, any available redress was found within a national context or that of international state responsibility, where the

[66] See McCarthy, above n 24, 124.

[67] *Plan de Sanchez Massacre v Guatemala (Merits)* (2004) IACtHR Ser C No 105, paras 86 & 93.

[68] 'The Rabat Report—The Concept and Challenges of Community Reparations' (*International Centre for Transitional Justice*, 12–14 February 2009) 26–31, <http://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf> [accessed 1 August 2014].

[69] *Velasquez Rodriguez Case (Judgment)* (1988) IACtHR Ser C No 4, para 172.

latter does not distinguish between civil and criminal liability. The Rome Statute recognises the rights of victims of international crimes to seek reparation and provides a mechanism for them to do so.[70] This represents a shift in approach even since 1993/1994. Although the Security Council Resolutions establishing the International Criminal Tribunal for Rwanda (*ICTR*) and International Criminal Tribunal for the former Yugoslavia (*ICTY*) noted the belief that establishing an international tribunal for prosecution of perpetrators of international crimes would 'contribute to ensuring that such violations are halted and effectively redressed',[71] the Rules of Procedure and Evidence (*RPE*) envisaged that victims would seek reparations themselves before national courts.[72] Restitution was the only form of reparation mentioned in the statutes of these tribunals and this focused on material damage (the return of property and proceeds) rather than non-pecuniary damage. Even then, commentators note that the tribunals have been reluctant to use these powers.[73] In 2000, the ICTY judges recommended that an international compensation commission be set up for victims, noting that 'reconciliation' and 'the restoration of peace' in the former Yugoslavia required that victims be compensated for their injuries.[74]

The Rome Statute recognises victims as stakeholders in criminal proceedings and outcomes. The Trial Chamber in *Lubanga* proclaimed '[t]he Chamber accepts that the right to reparations is a well-established and basic human right [...]'.[75] Given that the International Criminal Court (*ICC*) must interpret and apply the applicable law consistently with internationally recognised human rights, and in light of the discussion above, the Trial Chamber thus invoked in an international criminal law context the general principle laid out in the *Chorzów Factory* case, that a breach of international law entails consequences *vis-à-vis* the direct (and in this case, indirect) victim(s). It laid the foundation for a potentially significant role for the ICC in 'repairing' victims of crimes within its jurisdiction. Further, as per traditional principles, the Rome Statute distinguishes the role of

[70] Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Art 75; Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3 (Part II-A) (9 September 2002) Arts 94–9.

[71] See e.g. SC Res 995 (8 November 1994) preamble.

[72] See e.g. International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, 29 June 1995, U.N. Doc. ITR/3/REV.1, Rules 105 and 106.

[73] See e.g. C Evans, *Reparations for Victims in International Criminal Law* (2012).

[74] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2000/1063 (3 November 2000) 1.

[75] *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 (Decision establishing the principles and procedures to be applied to reparations, 7 August 2012), para 185 (*Lubanga*).

penalty provisions and reparation provisions. Therefore reparations under the Rome Statute are concerned with redressing harm, rather than 'punishment and exemplification'.[76]

Article 75 of the Rome Statute empowers the ICC to make a reparations award against the convicted person and/or 'where appropriate' through the Trust Fund for Victims (*TFV*). This suggests that the groundwork is being laid for recognition of collective responsibility to acknowledge and alleviate victims' suffering. The TFV may also use resources collected from sources other than 'those collected from awards for reparations, fines and forfeitures' to provide support to those who have suffered 'physical, psychological and/or material harm' as a result of crimes within the jurisdiction of the ICC, regardless of a conviction.[77] The TFV estimates that about 42,300 people are currently benefiting from its general assistance.[78] There is a distinction, however, between projects implemented as reparation, and those conceived of as general (humanitarian or development) assistance. Reparations are a response to violations and tied to an acknowledgment of wrongdoing.[79]

Article 75 charges the ICC with assessing the scope and nature of harm suffered by victims and developing reparations principles and procedures. The Trial Chamber in *Lubanga* was the first to develop such principles. The Trial Chamber[80] noted that, in addition to the Rome Statute, the elements of crimes and the ICC Rules of Procedure and Evidence (*RPE*), it was to consider, where appropriate, 'the applicable treaties and the principles and rules of international law [...]' and general principles, and that the implementation of reparations 'must be consistent with internationally recognised human rights [...]'.[81]

In formulating principles, the Trial Chamber relied heavily on human rights jurisprudence and repeatedly cited the Basic Principles. It also invoked human rights reports and various non-binding instruments touching upon reparation and redress, including the Nairobi Declaration cited above. This represents a

[76] See McCarthy, above n 24, 84.

[77] Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3 (3 December 2005) paras 47–8.

[78] See <http://www.trustfundforvictims.org/projects> [accessed 13 April 2014].

[79] See, e.g., United Nations Entity for Gender Equality and the Empowerment of Women, *Reparations, Development and Gender* (2012) 5, <http://www.unwomen.org/media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06a-Development-Gender.pdf> [accessed 14 October 2014].

[80] *Lubanga*, above n 75, paras 182–4.

[81] Rome Statute, Art 21.

nod towards universality, as principles from one branch of international law are incorporated into another.

The concerns set out above regarding applying the standards and hierarchy of different forms of reparation from traditional international law in a human rights context thus form potential considerations in an international criminal law setting—to a greater or lesser extent in light of the institutional and circumstantial context. The Trial Chamber in *Lubanga* alluded to many of these concerns in setting out its principles.

Full reparation will in many cases remain aspirational: much of the damage caused by such crimes cannot be wiped out. The Trial Chamber rather confirmed the appropriate standard as that set out in the Basic Principles—that reparations be 'appropriate, adequate and prompt' and proportionate to the harm, injury, loss and damage as established by the ICC.[82] With respect to resources, the burden of repair is usually beyond what a state could manage under normal circumstances, and building a full picture of the identity of victims and the details and extent of harm suffered was beyond the ICC's resources or capacity. In its submission, the TFV noted that costly reparations proceedings could not be justified in light of limited available funds.[83] The Trial Chamber noted the 'uncertainty' of the number of victims of Lubanga's crimes, 'save that a considerable number of people were affected'.[84] The United Nations Children's Fund (*UNICEF*) noted that marginalised victims in Ituri were unlikely to have applied for reparations, whether due to insufficient resources, or a wish to avoid further stigma and discrimination by identifying themselves.[85]

Restitution as a blanket strategy is often ill-suited to the situation of victims of international criminal law violations, particularly where non-pecuniary injury has resulted. The potentially problematic nature of restoring a victim to the pre-breach situation would appear to answer any questions as to whether restitution should be accorded primacy because it is cited first in Article 75. The Trial Chamber stated that restitution would 'often be *unachievable* for victims of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities'.[86] The Trial Chamber also stated its intention to 'avoid replicating discriminatory practices or structures that

[82] *Lubanga*, above n 75, paras 242–3.
[83] Ibid, para 121.
[84] Ibid, para 219.
[85] Ibid, para 38.
[86] Ibid, para 223 (emphasis added).

pre-dated the commission of the crimes' in the implementation of reparations.[87] Those involved with child protection note that there is an increased likelihood that marginalised children will be recruited as child soldiers.[88] While restitution may be more appropriate in terms of, for example, pecuniary loss in the form of specific assets, it is questionable to afford it primacy as part of an analytical framework for the purposes of international criminal law.

In respect of compensation, the Trial Chamber's position partially reflected that in the ILC Articles, and relied directly on the Basic Principles. Compensation should be *considered* where economic harm was 'sufficiently quantifiable', it was 'feasible' given resources and it would be 'appropriate and proportionate'. The type of harm potentially apposite for an award of compensation was defined widely, in accordance with 'internationally recognised human rights law', and included material and moral damage. The logistical difficulties and resource shortages discussed above are equally applicable to the feasibility of 'assessing' and paying for compensation awards, especially given the number of potential victims. As with restitution, the Trial Chamber noted that compensation would be 'considered'—thus affording the discretion to refuse compensation even where harm was financially assessable. Further, it must be appropriate: as noted above, compensation could reinforce prior discriminatory practices.[89]

Article 75 refers to rehabilitation, but makes no mention of satisfaction. The Trial Chamber followed this practice—perhaps as recognition of the need for specific remedial measures that are not covered by restitution or compensation, as well as the fact that a public, reasoned guilty verdict (a form of satisfaction) must, in this framework, have already been issued in order for a victim to qualify for reparation. However, the Trial Chamber confirmed that the forms of reparation listed in Article 75 were not exhaustive and it suggested a number of other measures that qualify as satisfaction and guarantees of non-repetition, including an apology, raising society's awareness of the crimes committed and measures aimed at preventing future conflict.[90] The Trial Chamber also discussed wide dissemination of the conviction in the case, in terms suggesting it

[87] Ibid, para 192.

[88] See e.g. Y Keairns, 'The Voices of Girl Soldiers: Summary' (*Quaker United Nations Office*, 2002) 2–3, <http://www.quno.org/sites/default/files/resources/The%20voices%20of%20girl%20child%20soldiers_PHILIPPINES.pdf> [accessed 6 November 2014].

[89] *Lubanga,* above n 75, paras 226–31.

[90] Ibid, paras 239–41.

could qualify as satisfaction and a guarantee of non-repetition.[91]

Rehabilitation in this context was to include the provision of medical services and measures to 'facilitate reintegration into society'. Further echoing the IACtHR's jurisprudence on this point, the Trial Chamber referred to the potential 'transformative objectives' of rehabilitation programmes and noted that symbolic reparations could also assist.[92] By reference to CEDAW and the Nairobi Declaration, the Trial Chamber also accepted that it could prioritise amongst victims, on the basis of vulnerability or urgency of need (medical assistance, care for trauma, etc.) thus apparently affording rehabilitation measures a position of priority in such circumstances.[93] Although alien to many situations from which the principles underlying the ILC Articles are drawn, the question of prioritising is one facing many bodies that are mandated to deal with non-pecuniary damage to a multitude of victims.

RPE 97 gives the Trial Chamber the option of granting reparation on an individual or collective basis, or both. Like the IACtHR, the Trial Chamber in *Lubanga* did not conceptualise the group itself as a victim, rather that reparations could be awarded to individual victims or 'groups of victims'.[94] In light of, *inter alia*, the number of victims, including unidentified victims, and limited resources, the Trial Chamber provided for collective reparations. It emphasised that, wherever possible, reparations should promote reconciliation. It took note of submissions, such as that of the TFV, that individual reparations may undermine the reconciliation process, but that collective reparations may 'foster reconciliation and build trust'. The TFV was concerned that 'community discontent' could lead to victims declining reparations awards.[95] Further, the ICC looks to prosecute a small number of perpetrators responsible for the most serious crimes (hence the emphasis on complementarity), and thus multiple victims in the scenarios before the ICC will not find 'justice' on the international plane in the sense that the perpetrator of their crimes will not be tried. To exclude them from a reparations award would risk further unbalancing the narrative of the situation written by the judgment and the potential for reconciliation. Collective reparations can help to redress the imbalance and facilitate consistent application of principles across groups of victims.

The procedural aspect of reparation discussed above in relation to human

[91] Ibid, para 238.
[92] Ibid, paras 232–6.
[93] Ibid, para 200.
[94] Ibid, para 217.
[95] Ibid, paras 44, 57 and 63.

rights law was also emphasised in the *Lubanga* decision. The Chamber envisaged a consultative phase, allowing all 'victims that may ultimately benefit' to 'express their views and concerns'.[96] Where resources are limited, victims themselves are often best-placed to determine the priorities for allocation. Further, participation engenders a sense of ownership and assists in managing expectations. This rationale mirrors the submission of the TFV that outreach and communication were 'essential to ensure that any reparations award "lives up to its fullest symbolic potential"'.[97]

6 Investment treaty arbitration

Reparation for non-pecuniary damage is rarely pleaded in investment treaty arbitration and is even more rarely awarded. In 2008, the tribunal in *Desert Line Projects v Yemen* (*Desert Line*) became the second-ever International Centre for Settlement of International Disputes (*ICSID*) tribunal to award moral damages, i.e. compensation for non-pecuniary damage.[98] Although not denying their ability to award compensation for non-pecuniary damage, investment treaty tribunals faced with a request for moral damages have exhibited a general reluctance to do so. This section examines the invocation of the principles discussed above and how those standards have been moulded and applied in the investment treaty context.

In 1980, the tribunal in *Benvenuti & Bonfant v Congo* became the first ICSID tribunal to award moral damages, in this case approximately two per cent of the amount requested at around USD25,000.[99] Even though the tribunal decided that the claimants had submitted insufficient evidence of their alleged *préjudice moral,* the tribunal awarded moral damages on an equitable basis as the illegal actions of the Congolese government had 'certainly disturbed' the claimants' activities.[100] However, the tribunal was not constituted under an investment treaty. The tribunal awarded moral damages under Congolese law (which it deemed identical to French law in all material respects) and acting *ex aequo et bono*, pursuant to the agreement of the parties.[101] As a result, although the award has been invoked to support the premise that moral damages are available

[96] Ibid, para 268.
[97] Ibid, para 31.
[98] *Desert Line Projects LLC v Yemen*, ICSID Case No ARB/05/17 (Award, 6 February 2008) para 291.
[99] *Benvenuti & Bonfant v Congo,* Award (1980) 21 ILM 740, para 4.96.
[100] Ibid.
[101] Ibid, paras 4.2–4.3.

in investment treaty arbitration, the discussion of the tribunal has not been frequently relied upon as guidance by subsequent tribunals constituted under treaties and faced with moral damages claims.

The award in *Desert Line*, on the other hand, has proved more influential. Desert Line brought a claim for breach of the Oman-Yemen bilateral investment treaty (*BIT*), alleging that Yemen had failed to respect a domestic arbitral award in Desert Line's favour and subsequently adopted various measures to pressure Desert Line to enter into a settlement agreement. These measures included harassment, arrest and intimidation of Desert Line's employees by Yemen and armed tribes. Desert Line claimed moral damages for the resulting stress and anxiety suffered by its executives and for damage to its credit, reputation and prestige.[102]

The tribunal found a breach of the treaty and reaffirmed the proposition set out above that, where caused by the unlawful act of a state, moral damages are available for breach of an international obligation. It noted that moral damages were generally available in most legal systems and concluded that 'there was no reason to exclude' moral damages in the context of investment treaty arbitration, with the following qualification:

> Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, *in exceptional circumstances,* ask for compensation for moral damages.[103]

The tribunal did not clarify whether 'exceptional circumstances' was a reference to the characteristics of the system or an element of the standard to be applied to the award of moral damages. The context of the tribunal's comments would suggest the former, given the protections and breaches envisaged and the players involved. The focus on an economic commodity is likely to mitigate against a proliferation of moral damages awards. Many claimants are legal persons and there is a limited range of non-pecuniary damage that a legal person can suffer, for example, damage to reputation.[104] The latter will often be compensated as part of an award for pecuniary loss. Further, as noted by the Umpire in *Lusitania,* substantiating non-pecuniary injury can be difficult,[105] and

[102] *Desert Line*, above n 98, para 286.
[103] Ibid, para 289 (emphasis added).
[104] Ibid.
[105] *Lusitania*, above n 11, 40.

proving causation may be particularly difficult when the claim is for breach of an investment protection.

The *Desert Line* tribunal concluded that the breach had been 'malicious' and 'constitutive of a fault-based liability' and that, consequently, Yemen was liable for material and moral damage flowing from the breach. The tribunal did not, however, envisage punitive damages, but quantified damages based on the harm suffered (on an objective basis), thus in line with the principles set out in *Lusitania* and the ILC Articles. The tribunal inferred that a causative link in respect of moral or material damage may be easier to establish in the presence of aggravating circumstances.[106]

Subsequent tribunals have interpreted 'exceptional circumstances' as applying to the standard for the award of moral damages, requiring either egregious conduct on the part of the state or referring to the nature or extent of harm suffered. The (limited and *obiter*) comments of the tribunal in *Siag* are an example of the former. The *Siag* tribunal referred to the *Chorzów Factory* case, noting that reparation was compensatory only, but, by reference to *Desert Line,* seemingly equated the standard for moral and punitive damages as being 'fault-based' when it stated: 'it appears that the recovery of punitive or moral damages is reserved for extreme cases of egregious behaviour'.[107]

The tribunal in *Lemire* confirmed that moral damages are available in investment treaty arbitration and could compensate a wide scope of injury. However, following a review of the harm in question and the awards rendered in *Desert Line, Lusitania* and *Siag,* the *Lemire* tribunal concluded that moral damages were available in 'exceptional cases', where *inter alia* both cause and effect are grave or substantial'.[108] These guidelines appear to set a higher bar than that required by the ILC Articles. However, this may relate to the specific circumstances of the case and the tribunal's concern to avoid double counting. Given the 'significant amount' of compensation awarded in respect of pecuniary damages (based on a discounted cashflow model, which would factor in reputational harm), the tribunal concluded that only 'extraordinary' harm would satisfy a 'separate and additional' award of moral damages.[109]

Tribunals presiding over cases in which respondent states have claimed moral

[106] *Desert Line*, above n 98, para 290.

[107] *Waguih Elie George Siag & Clorinda Vecchi v Egypt,* ICSID Case No ARB/05/15 (Award, 1 June 2009) paras 544–6.

[108] *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18 (Award, 28 March 2011) para 333 (*Lemire*).

[109] Ibid, paras 333–45.

damages have reached similar conclusions regarding the standard for awarding moral damages. As per the ILC Articles, tribunals faced with claims by states have available to them another reparative formula—that of satisfaction for an 'affront or injury caused by a violation of rights not associated with actual damage to property or persons'.[110] In practice, like human rights bodies, investment treaty tribunals have also applied this standard in favour of and against non-state actors.

The tribunals in *Europe Cement* and *Cementownia* declined jurisdiction over claims against Turkey, noting an 'abuse of process' on the part of the claimants. Turkey requested moral damages for the reputational harm suffered. Although both tribunals noted the availability of moral damages in investment treaty arbitration, they found that 'exceptional circumstances such as physical duress' were required to justify compensation for non-pecuniary injury.[111]

The tribunals considered that the conclusions of their awards, as well as an award of costs (of USD4 million in *Europe Cement* (which was declared to have a deterrent as well as compensatory objective) and USD3.5 million in *Cementownia*) constituted sufficient satisfaction.[112] The tribunals implied that to award compensation for reputational damage would have constituted double counting. The choice of satisfaction as a remedy for reputational damage of a state echoes the conclusion set out in the ILC Articles that injury to the reputation or an 'affront' is more suited to satisfaction, another gesture towards the universality of the principles codified therein. However, commentators have noted that this approach does not take into account the financial consequences of an unmeritorious claim over the course of the proceedings (for example, a detrimental effect on the investment climate).[113]

Like human rights tribunals, investment treaty tribunals have also applied the logic behind satisfaction as a form of reparation to the claims of non-state actors. In *Victor Pey Casado and President Allende Foundation v Chile*, the tribunal found that the claimant had provided insufficient proof in respect of its moral damages claim, but that, in any case, *'le prononcé de la présente sentence [...] constitue en soi une satisfaction morale substantielle et suffisante'*.[114]

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[110] ILC Articles Commentary, Art 37, para 3.

[111] *Europe Cement Investment and Trade SA v Republic of Turkey*, ICSID Case No ARB(AF)/07/2 (Award, 13 August 2009) paras 174–5 and 181 (*Europe Cement*); *Cementownia 'Nowa Huta' SA v Republic of Turkey*, ICSID Case No ARB(AF)/06/2 (Award, 17 September 2009) paras 159 and 169 (*Cementownia*).

[112] *Europe Cement*, above n 111, paras 181 and 185; *Cementownia*, above n 111, paras 171-2.

[113] Parish, Newlson and Rosenberg, above n 22, 244.

[114] *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case No ARB/98/2 (Award, 8

As noted above, investment treaty tribunals thus face a series of challenges when presented with a claim for reparation for non-pecuniary damages. It is 'one of the best settled rules of the law of international responsibility of States' that 'no reparation for speculative or uncertain damages can be awarded'.[115] Yet substantiating moral damages and showing causation—'a logical link between'[116] cause and effect (breach of an economic protection and non-pecuniary damage)—may be particularly difficult, given the nature of the norm in question. This could be compared, for example, to the approach taken by the IACtHR of presuming mental pain and anguish where a serious violation has been inflicted upon the victim or family member of the victim.[117]

It is in this context that the emphasis of tribunals on 'exceptional circumstances' may be understood to counter insufficient proof of causation or damage, or to avoid double counting. However, even taking these considerations into account, tribunals have adopted standards that exhibit an apparent reluctance to award reparation for non-pecuniary damage, and particularly compensation. 'Exceptional circumstances' have seemingly become, in theory and practice, an additional limb of the test set out under customary international law norms in order to reflect these complexities as foreseen by tribunals.

7 Conclusions

The ILC Articles set out certain fundamental principles related to reparation for breach of international norms. The proposition that their application is limited to situations involving states exclusively has been rejected. The ILC Articles have been relied upon and invoked in many different sub-systems of international law and many different instruments. The Updated Set of Principles to Combat Impunity (*Impunity Principles*), for example, explicitly rely upon the customary principle as codified in Article 31 of the ILC Articles, that the breach of an international obligation gives rise to an obligation to make full reparation.[118] The claim of these principles to universality is strong and is bolstered by their general,

May 2008) paras 689 and 705.

[115] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt,* Award (1992) 32 ILM 933, para 189.

[116] *Lemire*, above n 108, para 157.

[117] E.g. *Maritza Urritia v Guatemala (Merits, Reparations and Costs)* (2003) IACtHR Ser C No 103, para 169.

[118] Diane Orentlicher, *Report of the Independent Expert to update the Set of Principles to Combat Impunity*, UN Doc E/CN.4/2005/102 (18 February 2005) 16 (fn 76–7).

flexible nature and application in situations where non-state actors may have to make reparation.

Yet, at the same time, different sub-systems have developed 'particularised principles to address ways in which the specific forms of harm relevant to their work should be redressed by the responsible party'.[119] This paper has only discussed three sub-systems. Yet this has been sufficient to show that the forms and modalities of reparation, the standard of reparation and the harm that may be remedied encompass examples of such particularised principles. The analytical framework established by the ILC Articles was not adopted by the Basic Principles. The primacy of restitution is one illustration of how that framework may be 'inappropriate' in the context of human rights abuses. The concept of transformative reparations was developed to counter the problematic assumption that adequate reparation could be afforded by restoring the *status quo ante.*

There are many tragic circumstances in which the number of victims, the gravity and nature of harm, or a combination of these elements, make 'wiping out the consequences' unattainable or unfeasible. Yet, this should not imply that the ability to repair should be a mandatory factor in the reparation standard. Nor does a wish to respond to the needs and situation of each victim imply that there should be no standardisation–reinventing the wheel in each case could undermine the system, detracting from certainty, requiring too many resources, etc. Instead, these considerations suggest that there might be space to adopt a different formulation of the standard and a flexible and less hierarchical approach to the forms of reparation available, and to acknowledge the potential importance of often less resource-intensive forms of satisfaction.

As noted above, the invocation of the same principles across different branches of law regularly produce different results, especially at the point of implementation, as illustrated by compensation for non-pecuniary damage. In some cases, this difference can be attributed in part to the nature of the primary norm in question. The damage flowing from stress and anxiety caused to Desert Line's executives, for example, as well as damage to the company's reputation, was valued on a lump sum basis by reference to the 'vastness' of the project, and resulted in USD1 million in moral damages.[120] Human rights courts, on the other hand, often quantify compensation on an 'equitable basis'.[121] In *Diallo*, the

[119] See McCarthy, above n 24, 132.
[120] *Desert Line*, above n 98, para 290.
[121] *Diallo*, ICJ Reports 2012 p 324.

ICJ stated '[q]uantification of compensation for non-material injury necessarily rests on equitable considerations'. It awarded Guinea USD85,000 in respect of the non-pecuniary damages suffered by Mr Diallo.[122] In his Declaration, Judge Greenwood noted that the sums awarded in respect of moral damages by 'other international courts and tribunals, especially the main human rights jurisdictions […] are usually quite small'. He referred to, for example, the IACtHR's compensation award of USD100,000 in *Gutiérrez-Soler v Colombia*[123] 'to a man who had been tortured into signing a false confession, persecuted for an offence he had not committed and separated from his family for so long that he lost all contact with his child for several years'.[124] One might also consider the ECtHR's award in *Mikheyev v Russia* of €120,000 compensation for non-pecuniary losses (loss of amenity). The applicant was paralysed as a result of severe torture at the hands of the police. The paralysis would affect his ability to work, to have children and to live without assistance.[125]

The *Diallo* judgment illustrates another development arising from and shaping the application of universal principles in a cosmopolitan structure. The ICJ, operating in a diplomatic protection context, surveyed the application of reparations principles in respect of human rights breaches across different sub-systems (namely arbitral tribunals and regional human rights courts) and drew upon the results in its findings. This enhances the claim to 'universality' of principles, based upon those codified in the ILC Articles, but that have been developed and particularised within a specific sub-system in respect of a type of protection and a particular subject. Given that access to international enforcement mechanisms is limited for many international law rights holders (as discussed above), this development may contribute to ensuring that reparation in a diplomatic protection context is responsive from the point of view of the ultimate rights holder. It also suggests a re-thinking of the interrelationship between universality and cosmopolitanism, as generalised principles may become particularised within a specific sub-system and then applied by fora across different 'branches' of international law based on a particular specialisation.

[122] Ibid, 391, 394 (Judge Greenwood, sep op).
[123] *Gutiérrez Soler v Colombia (Judgment)* (2005) ICtHR Ser C No 132.
[124] *Diallo*, ICJ Reports 2012 pp 324, 391, 394 (Judge Greenwood, sep op).
[125] *Mikheyev v Russia* [2006] ECtHR App 77617/01, para 163.

DOI: 10.7574/cjicl.03.03.224
Cambridge Journal of International and Comparative Law **(3)**3: 747–769 (2014)

A CARTOGRAPHY OF COSMOPOLITANISM: PARTICULARISING THE UNIVERSAL

Jason Rudall[*]

Abstract
The present assumed understandings of cosmopolitanism can lead legal scholars to misinterpret what is entailed by a given cosmopolitan claim and result in their talking at cross-purposes. This article is a call to refine what we mean by cosmopolitanism and to develop an understanding that is fit for purpose. It will attempt to categorise the major strands of cosmopolitan understanding, from institutional and political cosmopolitanism to moral and legal cosmopolitanism, amongst others. With the distinctions between these understandings of cosmopolitanism exposed, legal scholars may be better equipped to speak more precisely about the form of legal cosmopolitanism they are advocating or rejecting. Indeed, charting the topography and destination of these major strands may also serve to rebut the counter-narratives of the cosmopolitan critics, such as Koskenniemi, who suggest that cosmopolitanism can be used as a 'façade for particular interests'. Cosmopolitanism can no longer be all things to all people.

Keywords
Cosmopolitanism, philosophy of law, history

> But if thought corrupts language, language can also corrupt thought.[1]

1 Introduction

The above quotation is from George Orwell's 1946 essay entitled 'Politics and the English Language'. In that essay, Orwell criticised political language for its misdirection and vagueness, intended or otherwise. In particular, he highlighted the abuse of political words whereby they acquire 'several different meanings

[*] PhD Candidate, The Graduate Institute of International and Development Studies, Geneva. The choice of the term 'cartography' in the title of this contribution has been inspired by the metaphor utilised in J E Viñuales, 'On Legal Inquiry' in D Alland, V Chetail, O De Frouville, J E Viñuales (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy/Unité Et Diversité Du Droit International, Mélanges En L'Honneur Du Professeur Pierre-Marie Dupuy* (2013).

[1] G Orwell, 'Politics and the English Language' *Horizon* (April 1946).

which cannot be reconciled with one another'.[2] This article starts from a similar observation about the conceptualisation of cosmopolitanism in international legal scholarship, it challenges the adequacy of its definition and argues that it is thereby susceptible to abuse. Nevertheless, as Orwell said of political locution, 'the decadence of our language is probably curable'.[3] At least part of the cure for a lack of conceptual specificity, I argue, can be found in the development of a cartography aimed at identifying different strands of cosmopolitan thought and highlighting the nuances between these strands.

This article will first consider the need to clarify the concept of cosmopolitanism in international legal scholarship. Critically, the present 'one-size fits all' approach to cosmopolitanism can lead legal scholars to misinterpret what is entailed by a given cosmopolitan claim and result in their talking at cross purposes.[4] I make a call for greater definition in our cosmopolitan claims.

The second part of this article will attempt to categorise the major strands of cosmopolitan understanding, from weak and strong, to institutional, moral and cultural cosmopolitanism, amongst many other sub-categories. A catalogue of cosmopolitan strands will facilitate deeper analyses, the pursuance of clarity and consensus building around different iterations of cosmopolitanism in a legal context. Overall, cosmopolitanism can no longer be all things to all people.

2 The Need for Clarity

In general, the term cosmopolitanism has acquired an inflated corpus of meanings. Başak Çalı has observed that 'cosmopolitanism does not mean the same thing to every commentator'[5] and yet '[i]nternational lawyers do not spend time discussing the theoretical foundations of cosmopolitanism'.[6] In other disciplines, it has been acknowledged that use of the term cosmopolitanism can be something of a lowest common denominator. Indeed, Samuel Scheffler notes that 'disparate views have been advanced under the heading cosmopolitanism, and these views

[2] Ibid.

[3] Ibid.

[4] See, for example, how Robert Howse and Ruti Teitel critique Martti Koskenniemi's reading of Kant: R Howse & R Teitel, 'Does Humanity Law Require (or Imply) A Progressive Theory of History? (And Other Questions for Martti Koskenniemi)' (New York University Public Law and Legal Theory Working Paper No 422, 2013).

[5] B Çalı, 'On Legal Cosmopolitanism: Divergences in Political Theory and International Law' (2006) 19 *LJIL* 1149, 1150.

[6] Ibid, 1163.

share little more than an organizing conviction that any adequate political outlook for our time must in some way comprehend the world as a whole'[7] and, as Gillian Brock has pointed out, '[f]inding common ground among the many varieties of cosmopolitans (both historical and contemporary) is difficult'.[8] Similarly, and while uncovering the antinomies in cosmopolitan reason, Olivier Remaud articulates poignantly that:

> [c]osmopolitanism serves a variety of purposes, and its objects vary widely. They are usually apprehended through the epistemological interests of the beholder, as if through the ever-changing perspective of a kaleidoscope. When one compares and contrasts the different uses of the term, the colors merge into a chaotic image.[9]

Contemporary attempts at modifying or refining the terminology around cosmopolitanism are evident but they exist almost exclusively within the realms of political science and international relations theory.[10] The object of this article is to draw upon this refinement project, bringing to international legal discourse a greater variety of analytical tools for lawyers to have recourse to when they discuss cosmopolitanism. Presently, little legal literature defining cosmopolitanism[11] goes beyond a hat tip to the etymological source of the term,[12] perhaps a reference to Thomas Pogge's three-part constitution of the

[7] S Scheffler, 'Cosmopolitanism, justice and institutions' (*Daedalus*, Summer 2008) 68, 68.

[8] G Brock, 'Re-thinking the Cosmopolitanism versus Non-Cosmopolitanism Debate: An Introduction', in G Brock (ed), *Cosmopolitanism versus Non-Cosmopolitanism: Critiques, Defenses, Reconceptualisations* (2013) 1, 3.

[9] O Remaud, 'The Antinomies of Cosmopolitan Reason' (2014) 5 *Humanity* 73, 73.

[10] S Vertovec & R Cohen, 'Introduction: Conceiving Cosmopolitanism', in S Vertovec & R Cohen (eds), *Conceiving Cosmopolitanism* (2002) 1. For examples of an attempt in the field of international law, see Çalı, above n 5; T Redmond, *People, States and Hope: Cosmopolitanism and the Future of International Law* (2012); and R Pierik & W Werner, 'Cosmopolitanism in context: an introduction', in R Pierik & W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (2010) 1.

[11] See, for example, R Domingo, *The New Global Law* (2010); I Porras, 'Liberal Cosmopolitanism or Cosmopolitan Liberalism', in M Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (2012) 118; M Sellers, 'Parochialism, Cosmopolitanism, and Justice', in M Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (2012) 250; R Teitel, *Humanity's Law* (2011).

[12] Etymologically, 'cosmopolitan' derives from the Greek 'cosmos' meaning 'universal' and 'polity' literally meaning 'city' or more precisely today meaning a way of ordering society. *Kosmopolitês* is from the Greek word for 'citizen of the world': see P Kleingeld & E Brown, 'Cosmopolitanism', in E Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2013), <http://plato.stanford.edu/archives/fall2013/entries/cosmopolitanism/> [accessed 31 July 2014].

concept, i.e. (i) normative individualism; (ii) universality; and (iii) generality, or various abstract precepts that cosmopolitanism demands no local allegiance be put ahead of allegiance to a world-wide community of human beings.[13] Given its propagation in recent years, these reference-points now seem inadequate at best and damaging at worst for the concept of cosmopolitanism in international legal scholarship.

There appear to be two major problems. First the concept has achieved such a broad usage as to render it something of a cliché. It means everything and nothing at all, just as Orwell said of the word 'democracy'.[14] Indeed, Michael Blake recognises the generality in Pogge's three-part definition and suggests that on this basis 'we are all cosmopolitans now'![15] Blake points out that even those who tend to define themselves as opponents to cosmopolitanism would find it hard to disagree with each of Pogge's propositions.[16] To take a statist position, for example, this school would challenge that the rights of states to territorial integrity and non-intervention are founded on the rights of individuals living in a political community within a state. In particular, individuals within states are engaged in a process of social development and should not be interfered with.[17] Thus the individual plays a central role in statist reasoning. Blake highlights that Michael Walzer, who would identify as a 'non-cosmopolitan' and argues strongly in favour of territorial integrity and political sovereignty, and against external interference, nevertheless admits that the 'ultimate unit of moral account is the individual, and they are treated as morally equal in their equal right to be free to live inside a community, ruled by a state uniquely appropriate for that community and its character'.[18] As is becoming evident, the abovementioned definitions are not fit for purpose: they are simply too broad and abstract as to offer meaningful insight into cosmopolitan claims.

The second major problem is that there now exists a plurality of meanings around the concept of cosmopolitanism. Ileana Porras explains that cosmopolitanism has been '[v]ariously influenced by the accretion of meanings and asso-

[13] K A Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (2006) xv; N Feldman, 'Cosmopolitan Law' (2007) 116 *Yale LJ* 1022, 1027; M Nussbaum, 'Patriotism and Cosmopolitanism', in J Cohen (ed), *For Love of Country* (1996) 4; T Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48, 49: Vertovec & Cohen, above n 10, 2.

[14] Orwell, above n 1.

[15] M Blake, 'We are all cosmopolitans now', in G Brock (ed), *Cosmopolitanism versus Non-Cosmopolitanism* (2013) 35.

[16] Ibid, 39.

[17] S A Garrett, *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (1999) 26.

[18] Blake, above n 15, 41.

ciations [...] the term has acquired over the years since its coinage in fourth-century BCE Greece' and there is presently 'no single common understanding of cosmopolitanism, and consequently there is wide disagreement among the new cosmopolitanists as to its specific social, political, and legal implications'.[19] Porras goes on to highlight that the result of this plurality in meaning is that cosmopolitanism has been used to advocate for many different ends:

> from a radical form of global redistribution to alleviate poverty in the Third World to military intervention in non-liberal states. It has been used to account for the emergence of the so-called global civil society with its new forms of governance on the one hand, and to describe the unique character of the European Union's legal and institutional structures on the other.[20]

I submit that this is where the real controversy with cosmopolitanism lies. Without consensus on the end game, a cosmopolitan claim may raise more questions than it seeks to answer among both (moderate) cosmopolitans and non-cosmopolitans alike. As Michael Blake points out:

> A particular historical trajectory has led to [cosmopolitanism] being applied in the ways it has; the distinction between cosmopolitanism and its opposite, however, provides us with very little information that is relevant to current philosophical debates, and the use of the term distorts the landscape of our discussions. We would do better to retire it completely.[21]

If it is to be retired, the term cosmopolitanism must be replaced by terminology that is more dynamic, more suited to modern debate in international law. Given that, as Noah Feldman has said, cosmopolitanism is a 'difficult, contested, but nonetheless important concept',[22] it would appear that there exists a *prima facie* case for deconstructing the concept of cosmopolitanism to identify its various distinct strands.

In Başak Çalı's analysis, distinguishing among the conceptions of cosmopolitanism has three principal advantages.[23] First, doing so enables us to separate

[19] Porras, above n 11, 118 and 119.
[20] Ibid, 119.
[21] Blake, above n 15, 36.
[22] Feldman, above n 13, 1025.
[23] Çalı, above n 5, 1154.

those who support one or other of the strands. For example, we might be better equipped to distinguish between those that support moral claims but not institutional claims and those that support both moral and institutional claims. Moreover, it is important to recognise that a rejection of institutional claims does not necessarily imply a rejection of moral claims as well.[24] Indeed, we must be continually alert to Kok-Chor Tan's caveat that 'a defence of cosmopolitanism is not straightaway a defence of world statism'.[25] Tan sees critical value in making a distinction between different forms of cosmopolitanism—particularly as a moral idea and as an institutional claim—for the following reason:

> cosmopolitanism is commonly associated with a world state and thus often rejected on this basis. But, as a moral idea, cosmopolitanism is not necessarily committed to the notion of a world state and global citizenship; rather it is premised on an account of the equal moral status of individuals, and the kinds of reasons, consequently, that must be given to them for the global arrangement that we can expect them to share.[26]

Second, it is important to show that those who advocate for an institutional form of cosmopolitanism as well as moral cosmopolitanism, are committed to the propagation of global political institutions. Third, it can also reveal that those who support the proliferation of global political institutional structures are not necessarily advocates for moral cosmopolitanism.[27]

To these three advantages I would add a further three. First, once legal scholars are all talking the same language, it may be possible to make more progress on the concept of cosmopolitanism in legal discourse. With the distinctions between these understandings of cosmopolitanism exposed, legal scholars may be better equipped to speak more precisely about the form of legal cosmopolitanism they are advocating or rejecting.

Second, charting the topography and destination of the major strands may also serve to rebut the counter-narratives of cosmopolitan critics, such as Martti

[24] Ibid, citing S Caney, *Justice Beyond Borders: A Global Political Theory* (2005).
[25] K-C Tan, *Justice Without Borders* (2004), 10.
[26] Ibid.
[27] Çalı, above n 5. As to the latter advantage, Çalı explains that 'one may support global political reasons for other moral reasons, such as aggregated self-interest': ibid, 1154.

Koskenniemi, who suggest that cosmopolitanism can be used as a 'façade for particular interests'.[28]

Third, Ruth Buchanan and Sundya Pahuja recognise a 'frequent slippage between the exaltation of the cultural and aesthetic understandings of cosmopolitanism and understandings of it as a politically emancipatory strategy'[29] as well as an uncritical attitude to cosmopolitanism amongst international lawyers, owing to an assumption that they are already cosmopolitans. This article joins Trevor Redmond in his call that international lawyers should embrace cosmopolitanism but in doing so they must also engage more rigorously with theory, adopt a more reflexive attitude and avoid the assumption that 'due to the fact of its international nature, their work is the very embodiment of comsopolitanism in action'.[30]

Consequentially, as scholars we should now strive to specify what precisely is entailed by the particular cosmopolitan claim we make in our legal writings. The next part of this article begins to show the way.

3 A Cartography of Cosmopolitanism

In this exercise, given the vast array of cosmopolitan meanings, the biggest challenge is perhaps determining the most appropriate groupings. To this end, some guidance is available in other disciplines. For example, Charles Beitz, Thomas Pogge and Simon Caney have all distinguished between cosmopolitanism as an institutional claim and cosmopolitanism as a moral idea.[31] Going further, Gerald Delanty identifies four strands of cosmopolitanism: legal cosmopolitanism, political cosmopolitanism, cultural cosmopolitanism, and civic cosmopolitanism.[32] Drawing upon these categorisations, I submit that the most appropriate manifestations of cosmopolitanism can be grouped into a number of major categories, with several subcategories: (1) institutional cosmopolitanism; (2) moral

[28] M Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World' (2003) 35 *NYUJILP* 471, 486.

[29] R Buchanan & S Pahuja, 'Collaboration, Cosmopolitanism and Complicity' (2002) 71 *Nordic JIL* 297, 306.

[30] Redmond, above n 10, 253.

[31] C Beitz, 'Cosmopolitan Liberalism and the States System', in C Brown (ed), *Political Restructuring in Europe: Ethical Perspectives* (1994) 119, 124–5; C Beitz, 'International Liberalism and Distributive Justice: A Survey of Recent Thought' (1999) 51 *World Politics* 269, 287; T Pogge, 'Cosmopolitanism and Sovereignty', in C Brown (ed), *Political Restructuring in Europe: Ethical Perspectives* (1994) 85, 90; Pogge, above n 13, 49–50; Caney, above n 24, 5.

[32] G Delanty, *Citizenship in a Global Age* (2000).

cosmopolitanism; and (3) cosmopolitanism about culture.[33] The reasoning behind this choice is that such groupings, in my view, best distinguish between cosmopolitan claims that speak to the reform of global structures, that prescribe principles for behaviour or that encourage a certain mindset about our identity. These categories do not purport to be exhaustive, but simply aim to make inroads into a more detailed catalogue and to flag some of the practical differences in each conception of cosmopolitanism. Indeed, taking a different approach, other categorisations have been made along the lines of extreme, strong, moderate and weak or thick and thin cosmopolitanism.[34] Broadly speaking, these latter characterisations allow for us to view cosmopolitanism on certain spectra.[35] This distinction I intend to elaborate upon first since some of the terminology will help with the analysis when we return to the substantive categories in later sections.

3.1 Extreme, Strong, Moderate or Weak?

3.1.1 Strong or Extreme Cosmopolitanism

Strong cosmopolitanism demands that equal consideration is given to the claims of all humanity in the justification of moral principles and would attach no significance to moral relations formed within bounded communities.[36] All claims must ultimately be universal in their foundation.[37] As Garrett Wallace Brown

[33] For similar categorisations along these lines see: Redmond, above n 10, 171-182; Blake, above n 15, 38. Thomas Pogge also makes distinctions between (i) moral cosmopolitanism (all persons have a certain respect for one another); and (ii) legal cosmopolitanism (there exist universal rights and duties); T Pogge 'Cosmopolitanism', in R Goodin & P Pettit (eds), *A Companion to Contemporary Political Philosophy* (2007) 312. In an effort to identify the various uses of the term, Steven Vertovec and Robin Cohen identify the following six perspectives on cosmopolitanism: (i) a socio-cultural condition; (ii) a philosophy or world-view; (iii) a political project to build transnational institutions; (iv) a political project describing the variegated interests of political actors; (v) an attitude of disposition; (vi) a practice or competence; see Vertovec & Cohen, above n 10, 8–14.

[34] See, for example, S Scheffler, *Boundaries and Allegiances* (2001) 115–19; D Miller, 'The Limits of Cosmopolitan Justice', in D Mapel & T Nardin (eds), *International Society: Diverse Ethical Perspectives* (1998) 164, 166; D Miller, *Citizenship and National Identity* (2000) 174; K-C Tan, in G Brock & H Brighouse (eds), *The Political Philosophy of Cosmopolitanism* (2005) 164-79; Tan, above n 25, 11; D Held, 'Principles of Cosmopolitan Order', in G Brock & H Brighouse (eds), *The Political Philosophy of Cosmopolitanism* (2005) 16; G Brock, *Global Justice: A Cosmopolitan Account* (2009) 12–13.

[35] Redmond, above n 10, 178; G W Brown, *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution* (2009), 12.

[36] Redmond, above n 10, 178.

[37] Miller, above n 34, 166.

observes, there are few theorists who would associate themselves at the poles of either strong or weak cosmopolitanism but he points out that Charles T Taylor, 'who advocates a single world state with a strong overarching unifying liberal morality', represents an example of a strong form of cosmopolitanism.[38] Similarly, Trevor Redmond gives Martin Wight's concept of the 'brotherhood of mankind in which international politics will be assimilated to the condition of domestic politics'[39] as an example of thick cosmopolitanism. In more concrete terms, Kok-Chor Tan has submitted that strong cosmopolitanism results in a commitment to global distributive equality.[40]

It is also important to distinguish strong cosmopolitanism from extreme cosmopolitanism. The latter is concerned with relations between cosmopolitan and non-cosmopolitan principles, whereas strong cosmopolitanism refers to the strength of the cosmopolitan principle itself.[41] Extreme cosmopolitanism would hold 'cosmopolitan morality to be the sole and unifying source of value in the sense that all other moral commitments must be justified by reference to cosmopolitan principles or goals'.[42]

3.1.2 Weak or Moderate Cosmopolitanism

Weak cosmopolitanism captures those moral conceptions that are somehow limited in their cosmopolitan potency.[43] As such, within a weak conception of cosmopolitanism, there may exist 'moral principles that have less than a universal scope'[44] or a view that human beings can live according to a certain minimal standard before the principles of universality and generality must be strictly applied.[45] An example of weak cosmopolitanism is provided by the work of Chandran Kukathas, who advocates for a very minimal universalism among different groups.[46]

Similarly to the nuance between strong and extreme cosmopolitanism, we should make a distinction between weak cosmopolitanism and moderate cos-

[38] See Brown, above n 35, 26, citing C T Taylor, *Toward World Sovereignty* (2002).
[39] Redmond, above n 10, 177, citing M Wight, *International Theory* (1991) 45.
[40] Tan, above n 25.
[41] Ibid, 12
[42] Ibid, 11.
[43] Miller, above n 34, 166.
[44] Redmond, above n 10, 178.
[45] Tan, above n 25.
[46] See Brown, above n 35, 26, citing C Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (2003).

mopolitanism. As previously alluded to, the former—weak cosmopolitanism—indicates the potency of the cosmopolitan principle whereas the latter—moderate cosmopolitanism—describes the relationship with non-cosmopolitan principles.[47] Tan explains that moderate cosmopolitanism 'acknowledges the normative independence of certain special obligations, and does not insist that cosmopolitan values are the only fundamental values by reference to which all other values must be justified'.[48] Trevor Redmond provides David Held and Sharon Anderson-Gold as examples of theorists that adopt a moderate form of cosmopolitanism since their theory is concerned with political communities and states, but not solely concerned with them.[49]

Redmond makes an interesting observation about the distinctions between strong/weak and ambitious (extreme)/moderate cosmopolitanism drawn by Kok-Chor Tan:[50] whereas 'the former focuses upon justice concerns (or normative requirements' of cosmopolitanism), the latter is more concerned with moral and cultural claims (or the relationship between cosmopolitan requirements and other non-cosmopolitan commitments)'.[51]

With these initial distinctions as to degree and relativity drawn, the article turns to further dissect the concept of cosmopolitanism according to the three categories outlined earlier, namely (1) institutional cosmopolitanism; (2) moral cosmopolitanism; and (3) cosmopolitanism about culture.

3.2 Institutional Cosmopolitanism

Institutional cosmopolitanism is a broad term for a variety of approaches to cosmopolitanism that have in common an institutional claim in their call for reform of the global order. Charles Beitz perceives institutional cosmopolitanism as advocating that 'the world's political structure should be reshaped so that states and other political units are brought under the authority of supranational agencies'.[52] Michael Blake explains that this vision of cosmopolitanism 'includes those who argue that the cosmopolitan vision of world-citizenship demands the creation of global political institutions, which mirror to some degree the

[47] Tan, above n 25, 12.

[48] Ibid, 11–12.

[49] Redmond, above n 10, citing Held, above n 34; S Anderson-Gold, *Cosmopolitanism and Human Rights* (2001).

[50] Tan, above n 25, 12.

[51] Redmond, above n 10, 178.

[52] C Beitz, 'Cosmopolitan Liberalism and the State System', in C Brown (ed), *Political Restructuring in Europe: Ethical Perspectives* (1994) 119, 124.

political institutions of a domestic state'.[53] Alyssa Bernstein has observed that theorists who sketch conceptions of institutional cosmopolitanism often hold it in contradistinction to 'moral cosmopolitanism'.[54] Notwithstanding, while institutional cosmopolitan approaches call for a proliferation of superstate structures, they do not necessarily imply that an all-encompassing universal state is required.[55]

To elaborate upon the various types of institutional claims, I submit that it is necessary to further specify them in the following way.

3.2.1 Political Cosmopolitanism

Political cosmopolitanism involves an advocating for centralised global governance. As Garrett Wallace Brown describes: 'The political approach is generally concerned with the creation of supranational political organizations that can generate large-scale international consensus and democratic accountability'.[56] In fact, Simon Caney suggests that political cosmopolitanism demands political and legal institutions in the form of a world state or other framework that shares power and authority with local, state-level, international or global institutions.[57] Political cosmopolitanism can involve a legal aspect as well as an adherance to moral cosmopolitan principles, but its emphasis is very much on establishing stronger global governance and/or reforming global political institutions.[58]

As part of his global reform project, Jürgen Habermas advocates strongly for the cultivation of international institutions that propagate cosmopolitan rights and democracy.[59] Habermas agrees that human rights must exist—given their semantic substance—in an international legal cosmopolitan society. But:

> [f]or actionable rights to issue from the United Nations Declaration of Human Rights, it is not enough simply to have international courts; such [courts] will first be able to function adequately only

[53] Blake, above n 15, 38

[54] See A R Bernstein, 'Moral Cosmopolitanism', in D Chatterjee et al (eds), *Encyclopaedia of Global Justice*, vol 2 (2012) 711, 712.

[55] See P Capps, *Human Dignity and the Foundations of International Law* (2009) 274.

[56] Brown, above n 35, 12–13.

[57] Caney, above n 24.

[58] Brown, above n 35, 13.

[59] S Benhabib, 'Cosmopolitanism and Democracy: From Kant to Habermas' (*Fikrun wa Fann*, June 2012), <http://www.goethe.de/ges/phi/prj/ffs/the/a97/en9507770.htm> [accessed 28 November 2013].

> when the age of individual sovereign states has come to an end through a United Nations that *can not only pass, but also act upon and enforce its resolutions*.[60]

Despite the fact that Habermas' work is an example of strong institutional cosmopolitanism, Kwame Anthony Appiah points out that those who advocate for world government are few and far between.[61] It is perhaps one of the most controversial—if not *the* most controversial—proposals of the cosmopolitan movement. Appiah underlines a number of problems with the potential existence of a global state. First is the danger of its holding too much power, which is not checked or balanced. Second is the risk that such a structure would not be sensitive to local needs. Finally is the scarcity of institutional structures, from which we can all mutually learn, that would result.[62] Notwithstanding, Kwame Anthony Appiah does argue for a conception along the lines of political cosmopolitanism, although he inserts a crucial difference in that it 'prizes a variety of political arrangements, provided, of course, each state grants every individual what he or she deserves'. Consequently, Appiah is comfortable with retaining the state system on the proviso that we continue to discharge a special responsibility towards the life and justice of our compatriots but, importantly, we also make sure that other states are respecting the rights and needs of their own citizens.[63]

3.2.2 Economic Cosmopolitanism

Economic cosmopolitanism calls for the creation of a single global economic market and free trade.[64] According to David Held, economic cosmopolitanism is concered with ensuring fair economic conditions in respect of competition and cooperation between nations.[65] This strand of cosmopolitanism is more often defended among economists, such as Hayek and Friedman for example, than it is by philosophers, and the latter often blame international economic inequality on policies inspired by economic cosmpolitanism. Similarly, Gillian Brock has identified a powerful scepticism towards cosmopolitanism amongst

[60] J Habermas, 'Postscript to Between Facts and Norms', in M Deflem (ed), *Habermas, Modernity and Law* (1996) 135, 143 (emphasis added).
[61] See Appiah, above n 13, 163.
[62] Ibid.
[63] Ibid.
[64] Kleingeld & Brown, above n 12.
[65] See Held, above n 34.

anti-globalisation advocates, who believe it may simply lead to the propagation of capitalism.[66]

Arguing for reform of the present economic system, Thomas Pogge perceives that:

> [t]here is a shared institutional order that is shaped by the better-off and imposed on the worst-off. This institutional order is implicated in the reproduction of radical inequality in that there is a feasible institutional alternative under which so severe and extensive poverty would not persist.[67]

Pogge goes on to suggest that the better-off are causing harm to the worst-off in that they are supporting institutional structures that are distributively unjust, propagate inequality and can be changed. In addition to the existing global institutional order, Pogge is quick to point out that the internal policies and social institutions in poor countries are also to blame for world poverty. Nevertheless, Pogge argues that severe poverty can, to a large extent, be alleviated by global institutional reforms. One practical reform that can be said to be inspired by economic cosmopolitan thinking, which has been put forward by Pogge, is termed a 'global resources dividend'. Similar to the logic of John Locke's inalienable right to a share of global resources, the 'global resources dividend' would involve taking a small share of the value of any natural resources and using it for the benefit of those who would not otherwise benefit from them. Pogge explains that a global resources dividend of one percent of the global product could annually raise around USD320 billion, which is fifty-six times more than the amount all wealthy states combined are presently spending on basic social services in developing countries.[68]

3.2.3 Cosmopolitanism About Justice

Cosmopolitanism about justice is concerned with ensuring universal distributive justice across borders. It is opposed to communitarian and nationalist claims that princples of distributive justice can only be effectively implemented in cohesive social groups. Cosmopolitanism about justice demands that no social boundaries,

[66] Bernstein, above n 54, 713.

[67] T Pogge, 'A Cosmopolitan Perspective on the Global Economic Order', in G Brock & H Brighouse (eds), *The Political Philosophy of Cosmopolitanism* (2005) 92.

[68] Ibid, 105

such as nationality, restrict the scope of justice.[69] By virtue of belonging to humanity, all human beings owe obligations of justice to one another. It speaks to the global economic and political structures that allow for inequality and objects to impediments that restrict sufficient conceptions of justice. As Trevor Redmond points out, cosmopolitans about justice evaluate the justness of global basic structures.[70]

Going further than a concern for the structure of global institutions, Simon Caney observes that global principles of justice (civil, political or economic) apply to everyone in the world, ascribing entitlements to them all, but also responsibilities.[71] Consequently (and as will become more evident in later sections of this article), depending on the nature of the claim to cosmopolitanism about justice, this category could also fit within moral cosmopolitanism.

Interestingly, John Rawls' thesis that the principles of justice should be applied in bounded societies appears, at first sight, anathema to the concept of cosmopolitanism about justice since the principles of justice do not apply to the global population as a whole.[72] However, as Samuel Scheffler explains, 'Rawls's principles of distributive justice are universal in the sense that they apply to the basic structure of each society taken one at a time, but not in the sense that they apply to the global distribution of income and wealth as a whole'.[73] Indeed, Kok-Chor Tan perceives that the cosmopolitan idea of justice 'takes individuals to be entitled to equal moral consideration regardless of contingencies like their nationality or citizenship' and he argues that Rawlsian conceptions of justice—in particular the principle of difference—should be applied universally to achieve a just global distributive scheme. Extrapolating Rawls' theory to the universal, Tan advocates that 'the difference principle will not simply say that we maximise the situation of the worst off individuals within the context of our current system […] It will ask if we can envision an alternative global scheme that would maximise the well-being of the worst-off individual'.[74] In so doing, we might say that Tan has moved the conception of cosmopolitanism in Rawls' theory from a weak form to a stronger form.

[69] See Tan, above n 25; Scheffler, above n 34.
[70] Redmond, above n 10.
[71] Caney, above n 24.
[72] Scheffler, above n 7, 68.
[73] Ibid, 69.
[74] Tan, above n 25, 60.

3.2.4 (International) Legal Cosmopolitanism

Legal cosmopolitanism is a similar institutional call, and is committed to a concrete cosmopolitan institutional order based on law. Under this thinking, states are bound by international and cosmopolitan law, and in particular cosmopolitan legal obligations supersede state sovereignty. Legal cosmopolitans call for stronger international legal obligations under which states must follow clear rules of conduct and justify their sovereignty.[75]

Thomas Pogge argues that legal cosmopolitanism is concerned with conceptions and institutions of justice operating in an inclusive way, promoting human equality and taking into equal consideration the interests of all mankind.[76] In this way, there are overlaps with the concepts of political cosmopolitanism, cosmopolitanism about justice and moral cosmopolitanism. Indeed, Alyssa Bernstein observes that what Caney terms 'political cosmopolitanism' is, she says, termed 'institutional' cosmopolitanism by Beitz and 'legal cosmopolitanism' by Pogge.[77] This once again highlights the need to clarify the terminology used in this area, as well as to ensure that newly introduced terminology is used consistently.

For Başak Çalı, international legal cosmopolitanism (distinct from legal cosmopolitanism) is committed to the idea that a unified law is an indispensable constituent of a single community, which Çalı explains:

> is primarily a legal community, which is based on united, impartial, and independent law. Cosmopolitan international law takes the principles of impartiality and universality embedded in moral cosmopolitanism—incidentally also embedded in the ideal of law—as necessitating the creation of impartial and universal forms of law.[78]

Since international law lacks impartiality and universality, this strand of cosmopolitanism calls for a cosmopolitan constitutional structure and cosmopolitan constitutional principles form the cornerstone of the ideology, which all law must be subject to. As such, '[t]he princple of impartial treatment brings together a fur-

[75] Brown, above n 35, 12.
[76] Pogge, above n 33.
[77] Bernstein, above n 54, 716.
[78] Çalı, above n 5, 1156.

ther structural principle to create impartial and independent law and institutions with final coercive authority that can act on behalf of humanity'.[79]

In respect of international legal cosmopolitanism, Trevor Redmond perceives that its purpose is to shift the normative focus of international law on to individual welfare and the cultivation of international community pursuing united aims. Redmond's insight is that, '[i]n this way, international legal cosmopolitanism can be seen as what Linklater would term a praxeological method of reform aimed at realigning our systems of inclusion and exclusion towards a more cosmopolitan end'.[80]

Notwithstanding these elements and variegated foci of a legal or international cosmopolitan approach, this strand or these strands are not normally concerned with the creation of a world state, but rather advocate for a Kantian model of world order under which weakly sovereign states are regulated by cosmopolitan law that has as its centre of moral concern human welfare.[81] This is a point that has been misinterpreted by legal scholars.[82] Robert Howse and Ruti Teitel clarify that 'Kant explicitly distinguishes the notion of *Voelkerstaat* distinguishing it clearly from his own proposal for a federation of republican states (*Voelkerbund*)' and go on to observe that in his Second Definitive Article of *Perpetual Peace*, Kant wrote: '*Dies waere ein Voelkerbund, der aber gleichwohl kein Voelkerstaat sein muesste*', suggesting a good translation as: 'This would be a federation of peoples but this does not have to entail a world state'.[83]

In an effort to clarify the Kantian cosmopolitan project further, it is important to point out that Kant argued that states were obliged to express their political principles in three spheres: national (*ius civile*); international (*ius gentium*) and cosmopolitan (*ius cosmopoliticum*). For Kant, the *ius gentium* was a mechanism for ordering the relations between States to create the conditions necessary for peace, in particular by respecting each other's equality, liberty and sovereignty. This would also require solidarity among individuals in those States and among the States themselves, achieved by virtue of a separate cosmopolitan law.[84] Kant asserted that cosmopolitan law would be necessary to ensure perpetual peace in

[79] Ibid.
[80] Redmond, above n 10, 251.
[81] Ibid. See also A Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004) 6; F Tesón, *A Philosophy of International Law* (1998) 1, 57.
[82] See Robert Howse and Ruti Teitel's critique of Martti Koskenniemi: Howse & Teitel, above n 4.
[83] Ibid, 6.
[84] Domingo, above n 11, 28.

the world, which would transcend international law but would not supplant it.[85] This cosmopolitan law is linked to Kant's principle of hospitality and relies on all people having the right to travel and trade.[86] Finally, the promulgation of cosmopolitan law acts as an antidote to the state of nature that exists among the confederation of republican states proposed by Kant.

Utilising the conceptual tools developed in this article, we might be able to better understand the cosmopolitanism proffered by Kant. While much of Kant's work, such as the categorical imperative, concern behaviour (ethics) and therefore would most accurately be characterised as moral cosmopolitanism,[87] Kant's definitive articles are institutional in nature given that they advocate for systemic or structural reforms at the domestic and international levels. In particular, the Third Definitive Article argues that cosmopolitan law exists at the top of the hierarchy of legal systems and that the principle of hospitality be its fundamental constitutional principle. Indeed, Garrett Wallace Brown has noted that 'since Kant argued for a fairly formalised constitional structure of cosmopolitan law, any form of Kantian cosmopolitanism certainly has an institutional component' and that the institutional and legal components demand that 'minimal moral standards be recognised through the codfication of cosmopolitan law, which in return demands universal application and obligation'.[88] Moreover, under Brown's analysis, Kant's conception of cosmopolitanism is in certain respects

[85] Brown, above n 35, 7.

[86] Kant's Third Definitive Article of *Perpetual Peace* is constituted by the right of a stranger not to be treated with hostility when he arrives in a foreign land. It constitutes the precept of universal hospitality thus:

> All men are entitled to present themselves in the society of others by virtue of their right to communal possession of the earth's surface […] continents distant from each other can enter into peaceful mutual relations which may eventually be regulated by public laws, thus bringing the human race nearer and nearer to a cosmopolitan condition.

Kant justifies the precept on the following grounds:

> Peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*.

See I Kant, 'Perpetual Peace: A Philosophical Sketch', in H Reiss (ed), *Kant's Political Writings* (1991) 93, 107–8.

[87] Garrett Wallace Brown points out that 'the moral cosmopolitan component argues for a minimal and weak form of universal morality that respects the worth of human beings regardless of geographical location': Brown, above n 35, 14.

[88] Ibid.

weak in nature given that it is only committed to a minimal universal moral law and permits some locally derived moral principles.

Jürgen Habermas has perceived that the evolution of international law over the second half of the 20th century was tantamount to that which Kant predicted would occur as regards the evolution towards cosmopolitan law. As such, the present global order can be described as in a 'transitional stage between international and cosmopolitan law'.[89] Habermas in many respects seeks to strengthen the conception of cosmopolitanism proposed by Kant, in particular by suggesting that cosmopolitan law should not simply complement international or domestic law. Rather, he advocates that international law must be transformed into a global or cosmopolitan law of individuals. Arguing along the lines of Hobbes' *Leviathan*, Habermas supports a juridification of the state of nature among states, which he says can be achieved only through democratic global institutions. In Habermas' view, this will provide the catalyst for the democratic transformation of morality into a positive system of law with legal procedures of application and implementation.[90] As a result, and in contrast to Immanuel Kant, Habermas is in favour of a world government as the extension of democracy at the domestic level with human rights as its foundation.[91] Nevertheless, Habermas argues that 'any conceptualisation of a legal regulation of world politics must use individuals and states as the two categories of founding subjects of a world constitution as its starting point.'[92]

In sum, (international) legal cosmopolitanism refers to the principles that guide legal practice and the values inherent in the law.[93] Başak Çalı points out that the basis of this strand of cosmopolitanism is evident in the work of Kelsen, Lauterpact and Allott.[94] Despite that it can be concerned with values and principles, it may be distinguished from moral cosmopolitanism.

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[89] Redmond, above n 10.

[90] R Fine & W Smith, 'Jürgen Habermas's Theory of Cosmopolitanism' (2003) 10 *Constellations* 469, 480ff.

[91] J Bohman & W Rehg, 'Jürgen Habermas', in E N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (2011), <http://plato.stanford.edu/archives/win2011/entries/habermas/> [accessed 31 July 2014].

[92] J Habermas, 'The Constitutionalization of International Law and the Legitimacy Problems of a Constitution for a World Society' (2008) 15 *Constellations* 444, 449.

[93] See Çalı, above n 5.

[94] Ibid, citing H Kelsen (R W Tucker, ed), *Principles of International Law* (2nd edn, 1966); H Lauterpacht, *The Function of Law in the International Community* (1933); P Allott, *Eunomia: A New Order for A New World* (1990).

3.3 Moral Cosmopolitanism

In contrast to institutional cosmopolitanism, the focus of moral cosmopolitanism is not a call for the proliferation of institutional structures but rather it speaks to the moral basis of world organisation.[95] This approach identifies cosmopolitanism as a set of moral commitments that influence and justify the policies and institutions we may place on individuals.[96] As a result, for example, 'the moral theorist does not necessarily feel constrained by a commitment to constitutional structure, as the view about right actions are held regardless of the structure itself' and '[s]ome forms of moral cosmopolitanism, therefore, can be compatible with a range of institutional arrangements, such as the state system, multilevel forms of governance, and the world-state'.[97] Indeed, it is important to recognise that a commitment to moral cosmopolitanism does not necessarily entail a denial of support for the state system.

Moral cosmopolitans will focus on what the outcome of a given institutional structure might be. However, while it does not make a direct institutional claim, moral cosmopolitanism can lead to political or institutional cosmopolitanism. Nevertheless, Alyssa Bernstein points out that it is usually distinguished from 'cosmopolitanism about institutions', 'political', 'cultural', and 'economic' cosmopolitanism, as well as 'legal' and 'social justice' cosmopolitanism.[98]

This category of cosmopolitan philosophy can also be concerned with a moral commitment to help others who are in need[99] and it is an agent-centred theory aimed at guiding personal ethics.[100] As such, in order to behave in a morally cosmopolitan way, one must ask 'what should one do to act justly?'[101] Charles Beitz and Kwame Anthony Appiah both suggest that the application of moral cosmopolitanism means that in making choices about policies or institutions,

[95] C Beitz, 'International Liberalism and Distributive Justice' (1999) 51 *World Politics* 269; T Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 49.

[96] Tan, above n 25, 10.

[97] Çalı, above n 5, 1154.

[98] Bernstein, above n 54, 711. See also C Beitz, *Political Theory and International Relations* (revised edn, 1999); Kleingeld & Brown, above n 12; Pogge, above n 33.

[99] Kleingeld & Brown, above n 12, explain that 'moral philosophers and moralists in the wake of eighteenth-century cosmopolitanisms have insisted that we human beings have a duty to aid fellow humans in need, regardless of their citizenship status' and that for some contemporary theorists, 'a genuinely cosmopolitan theory should address the needs and interests of human individuals directly—as world citizens—instead of indirectly, as state citizens, that is via their membership in particular states'.

[100] Redmond, above n 10.

[101] Çalı, above n 5, 1155.

cognisance should be had for the interests of all those who might be affected.[102]

As alluded to in the previous section, John Rawls has often been associated with some legal aspects of cosmopolitanism. The *Law of Peoples* attempts to set out a liberal conception of justice and fairness that is applicable to international norms, law and practice. This theory at least partly reflects a moral cosmopolitan framework applied to the international legal order given that it professes a duty incumbent upon peoples to assist other peoples living under unfavourable conditions which prevent their having a just or decent political and social regime. Notwithstanding, '[i]n cosmopolitan literature, Rawls figures both as hero and as villain'.[103] It is important to recognise that Rawls also envisages a central role for sovereignty and his eight principles even encompass a duty of non-intervention. This has led some cosmopolitans to argue that Rawls' theory limits the ethical obligations of peoples to state boundaries. Noting the limitation, Iris Marion Young pointed out: 'John Rawls assumes that the scope of those who have obligations of justice to one another in a single relatively closed society governed by a single constitution'.[104]

The principles developed by Rawls are certainly cosmopolitan in character but with our renewed tools for conceptualising cosmopolitanism, it is now possible to take the analysis of the type and degree of cosmopolitanism advanced by Rawls somewhat deeper. Indeed, we might term Rawls' ideas described above as resonating with a weak form of moral cosmopolitanism to the extent that they place duties on individuals to behave in a cosmopolitan way and are not committed to institutional reform. In addition, we might also say that Rawls' theory conforms to a moderate form of cosmopolitanism in that it maintains existing state-structures while obligations between individuals apply within closed communities.

To summarise its central elements, therefore, moral cosmopolitanism is concerned with how political units (e.g. individuals, states or institutions) act in a morally just manner,[105] and it is not necessarily incompatible with the state-system or committed to a world-state and global political institutions.[106]

[102] Bernstein, above n 54, 712; Beitz, above n 95, 287; Appiah, above n 13, 155ff.
[103] S Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (2010) 161.
[104] I M Young, *Responsibility for Justice* (2011) 135.
[105] Çalı, above n 5, 1155.
[106] Caney, above n 24, 5.

3.4 Cosmopolitanism About Culture

Cosmopolitanism about culture is a claim that no individual should depend on their membership of a particular cultural group defined by boundaries to secure their well-being, identity or freedom.[107] Kok-Chor Tan explains that cultural cosmopolitanism 'is a thesis about the irrelevance of membership in particular cultures for personal identity formation and individual autonomy'.[108] Some suggest that, by virtue of its evidence in the philosophy of Diogenes, cultural cosmopolitanism is one of the most ancient forms of cosmopolitan thought.[109] Indeed the logic of cultural cosmopolitanism resonates closely with the Stoic idea that it was possible to belong to more than one culture at the same time: '[t]he Stoics developed this thought by emphasising that we inhabit two worlds—one which is local and assigned to us by birth and another which is "truly great and truly common"'.[110] In contemporary thinking around cultural cosmopolitanism this emphasis remains in that the concept seeks to underline the interconnectivity of individuals as well as the transient nature of culture, which both imply that it is possible to identify with several cultures at the same time.[111] Michael Blake helpfully summarises this view as focusing 'on the idea of the widening of horizons from the local to the global […] [W]e are, for the cultural cosmopolitan, free to develop our own unique ways of life, and we are free to adopt and alter materials from any particular culture in the task of doing so'.[112]

Taking a slightly different approach, Samuel Scheffler has drawn a link between cosmopolitanism about culture and cosmopolitanism about justice, arguing that, by the fact of our belonging to humankind, we can build cultural and justice relationships, irrespective of nationality.[113] Similarly, Trevor Redmond points out that our capacity to place ourselves in a broader community, which is inherent to the ideas of cosmopolitanism about culture, is also a feature of cosmopolitanism about justice.[114]

Importantly, cosmopolitanism about culture is not about homogenising our cultural difference; on the contrary it claims we should celebrate and learn from

[107] Scheffler, above n 103, 112.
[108] Tan, above n 25, 11.
[109] Brown, above n 35, 13.
[110] Held, above n 34, 10.
[111] Brown, above n 35, 13.
[112] Blake, above n 15, 38
[113] Scheffler, above n 34, 114; Redmond, above n 10, 171.
[114] Redmond, above n 10, 173.

our different cultural traditions.[115] We should not, however, see cultural differences as barriers to cultural exchange. For David Held, 'cultural cosmopolitanism means recognizing our increasing interconnectedness, developing mutual cultural understanding, and at the same time celebrating cultural differences',[116] and Trevor Redmond explains that 'those who advocate a cosmopolitan attitude towards culture and identity place their faith in the possibility of overcoming apparent divides and in augmenting their cultural lives through new and diverse experiences'.[117]

The engagement with, and celebration of, cultural difference is a key feature of Kwame Anthony Appiah's work *Cosmopolitanism: Ethics in a World of Strangers*. Making a strong argument against cultural patrimony, Appiah encourages us to think about cultures as relevant to all of humanity. For example, historical artefacts discovered in any given country should not *per se* be thought of as belonging outright to that country, but rather states should hold those artefacts in trust for the whole of humanity.[118] Indeed, this way of thinking is evident in the preamble of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, which states:

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world […][119]

Such logic appears to accurately capture the nature of cultures, in particular that they are always in flux and that, from different cultures, people possess an ability to create new identities.

Finally, it is important to highlight that some authors have applied the term 'cosmopolitanism about culture' to peoples' well-being, identity or capacity for effective agency.[120] Rather than adopting the term 'cosmopolitanism about

[115] Hall, 'Political Belonging in a World of Multiple Identities', in S Vertovec & R Cohen (eds), *Conceiving Cosmopolitanism: Theory, Context, and Practice* (2002) 25, 26. J Waldron, 'Minority Cultures and the Cosmopolitan Alternative' (1992) 25 *U Mich J L Reform* 751.

[116] S Dreef, 'Review: Cosmopolitanism: Ideals and Realities' (2011) 3 *Amsterdam L Forum* 105, 107, <http://amsterdamlawforum.org/article/viewFile/242/429> [accessed 31 July 2014].

[117] Redmond, above n 10, 171.

[118] Appiah, above n 13, 120.

[119] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240.

[120] Bernstein, above n 54, 713; Scheffler, above n 34.

culture', Caney has opted for 'cosmopolitanism about the good life' to embrace such broader considerations. He argues that 'cosmopolitanism about the good life' implies people must embrace the cultures of others, including their ideas, practices and values, and suggests that 'cosmopolitanism about culture' is a nebulous concept that confuses cosmopolitanism about values and ideals with cosmopolitanism about principles of justice and institutions.[121]

4 Conclusion

The starting point of this article was the observation that when legal scholars talk about cosmopolitanism, they tend to over-generalise. This is both unhelpful, as it has meant that we can no longer be sure what is meant by a given cosmopolitan claim, and results in (unnecessary) controversy about the concept, as misinterpretations with respect to the end-game of a cosmopolitan claim can occur. In response to this inadequate conceptualisation of cosmopolitanism in international legal scholarship, I make a call for clarity. Drawing together different conceptions from a variety of authors, and in particular reaching out to other disciplines for guidance, an effort towards refining the discussion on cosmopolitanism by sketching a typology of cosmopolitan categories has been made. Admittedly, these categories are interrelated, fluid and overlapping, but they nevertheless highlight the complexity of cosmopolitan thought. Most importantly, bringing into sharper focus the various distinctions between conceptions of cosmopolitanism will illustrate material differences in given cosmopolitan claims. It is hoped that this cartography can be elaborated upon in later work, but for the time being it may serve as a guide for those legal scholars attempting to navigate existing cosmopolitan territory as well as those charting new ground.

[121] Bernstein, above n 54, 713; S Caney, 'Cosmopolitanism', in D Bell (ed), *Ethics and World Politics* (2010) 146.

DOI: 10.7574/cjicl.03.03.230
Cambridge Journal of International and Comparative Law **(3)**1: 770–794 (2014)

CRACKING THE CITADEL WALLS: A FUNCTIONAL APPROACH TO COSMOPOLITAN PROPERTY MODELS WITHIN AND BEYOND NATIONAL PROPERTY REGIMES

Caterina Sganga[*]

Abstract

Due to its strong connection with sovereignty, territoriality and socio-economic policies, property law is traditionally considered part of the closed citadel of national law. This axiom is reinforced by private international law, where the mandatory principle of *lex rei sitae* acts as a barrier against the cross-fertilization of national property systems. No international treaty has ever touched the field directly; even in Europe, in spite of the interference of EU acts on national property laws, the Lisbon Treaty leaves property in the exclusive competence of Member States. It is not by accident that the majority of comparative law scholars approach the subject with a state-centric perspective, often emphasising the unbridgeable divide between different property traditions.

Today the citadel is under multilateral attack. Bilateral investment treaties (*BITs*) and other international agreements break long-lasting dogmas and extend the scope of property to cover not only intangible assets, but also contractual rights and expectations. 'Cosmopolitan' human rights courts use a *sui generis* comparative approach to develop a similar autonomous conceptualisation of subject matter, structure, and content of property rights, while the potential horizontal effects of their decisions nullify the traditional constitutional/private law property divide. Internet and private ordering push for the cross-border recognition of virtual or quasi-proprietary entitlements, questioning the fundamental separation between property and contract and the sanctity of the *numerus clausus* principle. No matter how vigorously legal formants have tried to reinforce the citadel walls, these cosmopolitan 'irritants' have already engendered several interpretative short-circuits, which a state-centric comparative analysis is unable to deconstruct and explain. To overcome the impasse, this paper advocates for the adoption of the functional method to verify the existence of a new global property model, sketch out its main characteristics, and help national legal systems embedding these new cosmopolitan elements, whether within or outside property law.

Keywords

Property law, cosmopolitanism, human rights, virtual property

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1 Introduction

No other area of private law has been more consistently defended against any historical attempt of supranational standardization or cross-border contamination than the law of property. Roman law knew the distinction between the *dominium* protected by the *ius civile*, applied only to Roman citizens, and the ownership (or *in bonis habere*) protected by the *ius gentium.*[1] The feudal system was characterized by highly fragmented, different ownership models, based on local customs, and tightly linked with the correspondent social and political structures.[2] When nation states emerged in continental Europe and wanted to assert territorial sovereignty, they introduced new, unified national property regimes.[3] Then, with the development of private international law, the aversion against cross-border contaminations led to the horizontal predominance of the rule of *lex rei sitae.*[4] Even recently, after the fall of the Berlin Wall and the dissolution of the Soviet Union, the new republics opted for a huge variety of property regimes, each of them mirroring the country's national and ideological identity.[5]

The main reason underlying the territorial nature of property rights and their traditional non-involvement in *lex mercatoria* can be historically pinpointed to the fact that, at least until the first half of the 20th century, wealth was mostly embedded in land, the immovable *par excellence.* However, this objective characteristic soon turned into a wilful localization, differentiation and impenetrability of property regimes by any sort of external influences. The roots of this 'property exceptionalism'[6] are manifold and intertwined. Ownership deals with the distribution and management of resources, thus it reflects the structure of economic activities and the ideological stances of local communities.[7] At the same

[1] For an analysis of the differences between these two systems of property law see A Borkowski & P D U Plessis, *Textbook on Roman Law* (3rd edn, 2005) 101, 157.

[2] See F Pollock & F W Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, 1899) 235; T F T Plucknett, *A Concise History of the Common Law* (5th edn, 1956) 506.

[3] The clearest example comes from France: see B Terrat, 'Du régime de la propriété dans le Code Civil', in J-L Halperin (ed), *Le Code Civil 1804–1904, Livre du centenaire* (1904) 329ff. See also K G C Reid, 'Vassals No More: Feudalism; Post-feudalism in Scotland' [2003] *European Review of Private Law* 282.

[4] See H Yntema, 'The Historic Basis of Private International Law' (1953) 2 *AJCL* 297, 305.

[5] As reported by Z Lerman, C Csaki & G Feder, *Agriculture in Transition: Land Policies and Evolving Farm Structures in Post-Soviet Countries* (2004) ch 3.

[6] As analyzed in greater detail by D Caruso, 'Private Law and Public Stakes in European Integration: The Case of Property' (2004) 10 *European LJ* 751, 755ff.

[7] From an economic standpoint see generally S Shavell, *Foundations of Economic Analysis of Law* (2008) ch 2.

time, property is equal to control, thus it is closely linked with sovereignty and the construction and regulation of social structures.[8] As a consequence, any modification in the social, cultural, economic, political and ideological traits of a community is reflected in changes of local property rules, and the reverse is equally true. This explains the turn from common property to enclosures when societies abandoned nomadic hunting in favour of stable agricultural economies. It clarifies why fragmented property interests were fundamental in creating and maintaining social and political order during the feudal era. It justifies the nation states' ban against feudal entitlements, in favour of a unitary concept of ownership and the crystallization of property regimes in rigid dogmas and mandatory rules, in order to reinforce the new centralized exercise of sovereignty.[9] More recently, these factors shed light on the reasons why property exceptionalism has re-emerged when the globalization of commerce and the advent of human rights treaties have posed the pressing need of transnational legal integration.[10]

The walls protecting the citadel of national property laws are thick and resilient. Some are spelled out in written rules and principles, while some others are hidden products of the centuries-long development of national property regimes. Provisions like the principle of *lex rei sitae* imposes the respect of the boundaries set by national property rules;[11] parallel to this, the *numerus clausus* principle excludes the possibility for party autonomy and for foreign titles to create new proprietary rights outside the catalogue provided by national laws, or to alter the structure and content of existing entitlements.[12] At the same time, hidden systemic factors make it difficult, or nearly impossible for national legal formants to engage in cross-border exchanges and to facilitate forms of bottom-up convergence. First, local property discourses have been historically influenced by language, concepts and structures of subjects like moral philosophy, economics, political theories, and jurisprudence.[13] Their different degrees of

[8] See the landmark contribution of M R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8.

[9] Similarly, in historical perspective, see U Mattei, *Basic Principles of Property Law. A Comparative Legal and Economic Introduction* (2000).

[10] As pointed out by Caruso, above n 6, 755ff.

[11] For an overview on national applications of the principle, see B Akkermans & E Ramaekers, 'Lex Rei Sitae In Perspective: National Development of a Common Rule?' (Maastricht European Private Law Institute Working Paper No 2012/14, 2012), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063494> [accessed 15 April 2014].

[12] On the issue see B Akkermans, *The Numerus Clausus Principle in European Property Law* (2008) 19-80.

[13] As very clearly explained by A Gambaro, 'Property Rights in Comparative Perspective: Why Property Is So Ancient and Durable' (2011) 26 *Tulane European and Civil Law Forum* 205.

impact on national models caused divergent doctrinal outputs and legislative results.[14] Second, national property regimes are constituted by a dense overlap of multidisciplinary and multilevel sources. Their interplay, which is often unfathomable from the outside, varies according to the institutional dynamics characterizing each legal system,[15] so much that apparently similar property rules may produce completely different operational results in different countries. In addition, most of these rules are conceived as mandatory in light of the *erga omnes* effects of real rights. As a consequence, courts approach the subject with a strictly deferential attitude, and are very rarely keen to provide creative interpretations, that would allow the legal system to evolve and internalize external interferences.

It is no wonder that comparative law has showed little or no interest towards the subject until recently. The great divides among legal traditions, the rigidity of property regimes, the huge diversity in terminology and basic structures, and the resistance against changes and circulation of legal models have made property law a much less fertile soil for comparative exercises than the law of contract and tort.[16] Fortunately, the trend seems to have changed from the beginning of this century, when several interesting contributions started engaging in interdisciplinary comparative studies, or used historical analysis to reveal the common roots of modern property regimes and to explain how their great semantic, conceptual and structural differences have developed and crystallized through the centuries.[17] And yet, notwithstanding their innovation, most of these studies concentrate on the divide between property models and on the impossibility or non-desirability of their convergence. This focus has thus made them of little to no practical use in understanding and tackling the growing movement towards cross-border standardization of property regimes.

The first sign of this phenomenon came from the progressive interference of EU law on national property models. In response to the several inconsistencies generated by the harmonization process and to the shortcomings of traditional comparative studies in understanding and explaining the phenomenon, European scholars have slowly modified their methodological and conceptual approach to the subject, as shown by the inclusion of property topics in the Draft

[14] Ibid, 215–23. See also S Van Erp, 'Comparative Property Law', in M Reimann & R Zimmerman (eds) *The Oxford Companion to Comparative Law* (2008) 1043.

[15] With a focus on land law, see A Lehavi, 'The Global Law of the Land' (2010) 81 *U Co LR* 425, 430–8.

[16] As emphasized by A Gambaro, 'Preface', in M E Sanchez Jordan & A Gambaro (eds), *Land Law in Comparative Perspective* (2002) vii.

[17] For a literature overview, see Van Erp, above n 14, at 1045–7.

Common Frame of Reference[18] (*DCFR*), or by the increasing number of 'common core' contributions in the field.[19]

However, the attacks against the thick walls of the citadel have recently gone far beyond a few mere instances of regional harmonization. Several signs suggest the emergence of a broader, global set of property concepts and principles, arising from the unprecedented growth in the interferences of supranational sources, both public and private, on national property systems. Confronted with the quest to internalize these new concepts in the dense web of national property rules, local legal formants have reacted inconsistently, showing the incapability to adapt old rules to new challenges. For the particular characteristics of national property regimes, these cosmopolitan incidents have in fact acted as Teubnerian legal irritants,[20] producing unexpected and controversial reactions.

A diachronic comparative analysis of property models may help to grasp the reasons why a legal system developed specific rules to deal with particular factual problems, but does not assist legal formants in discovering those common operational traits that are needed to make legal systems communicate and avoid counterproductive reactions *vis-à-vis* any attempt of supranational standardization. The main theoretical underpinning of this article is that the adoption of the functional method may help: (a) national legal systems in embedding, instead of merely rejecting or passively absorbing, these new cosmopolitan irritants, whether within or outside property law; and more theoretically, (b) scholars in verifying whether or not we are witnessing a convergence around the main pillars of a new, cosmopolitan property model.

Part II provides a concise and essential overview of what this paper assumes are three effective examples of cosmopolitan property models, two of them stemming from supranational public sources – the European Court of Human Rights (*ECtHR* or the *Strasbourg Court*) and international investment treaties/arbitration – and one created by cross-border, a-territorial private ordering, such as virtual property in the cyberspace. The varying focuses and characteristics of these three examples allow the analysis to touch upon several aspects of national property regimes, ranging from subject matters, structure and content of property rights

[18] Study Group on a European Civil Code and the Research Group on EC Private Law, *Draft Common Frame of Reference, Full Edition* (2009) Book VIII (Acquisition and loss of ownership of goods), Book IX (Proprietary security in movable assets), Book X (Trusts).

[19] Other forthcoming contributions focus on security rights in immovable property, transfer of immovable, time-limited interests in land.

[20] The reference goes to G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 11.

to some of the ground rules of property law, such as, e.g. the *numerus clausus* principle and the great separation between property and contract. Part III explains the reasons why the functional method best fits in the study of these global trends, and applies it to sketch out the main traits of the three models. This assists in verifying the eventual existence of a trend towards the creation of a general global property model, and to propose the use of the functional method to help national legal formants approach and internalize it without extreme 'irritations'.

2 Cosmopolitan irritants and national property models

2.1 Cosmopolitan courts and property models: the European Court of Human Rights

In 1959, the ECtHR was created to oversee the respect of the European Convention of Human Rights (*ECHR*) in 47 Member States. In light of the fact that individuals have the right to petition the ECtHR regardless of their citizenship (rights cosmopolitanism), that the Convention is an autonomous source of fundamental/human rights doctrines overlapping national or regional ones (constitutional pluralism), and that a 'decentralized sovereign'[21] enforces rights without pure internal hierarchy among courts, scholars define the ECHR as a cosmopolitan legal order, and the ECtHR as a cosmopolitan court.[22]

The right to property is protected by Article 1 of the First Protocol (*P1(1)*), which does not substantially depart from the correspondent provisions of several national Constitutions. However, due to the semantic choices, the inconsistencies in the translations and the unclear connection between the parts of the provision,[23] the Strasbourg Court plays a fundamental role in spelling out the main characteristics of the property model delineated by the Protocol and, most importantly, its relationship with national property regimes and traditions.

Although the ECtHR shows a relatively high deference towards the socio-economic policies and legislative decisions of Member States,[24] the property

[21] The definition is of M Smith, 'Rethinking Sovereignty, Rethinking Revolution' (2008) 36 *Phil & Pub Aff* 405, 408.

[22] See A Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism* 53.

[23] For a more detailed analysis see T Allen, *Property and the Human Rights Act 1998* (2005) 28–33.

[24] Ibid, 125–30.

model delineated by the Court is anything but a mere reflection of general principles and ground rules extracted from national property laws. On the contrary, in several occasions the ECtHR has specified its adherence to the autonomous meaning doctrine, and thus the rejection of any formalistic interpretation of the concept of 'possession' or 'property' that would limit their subject matters within the borders set by national laws. Entitlements may be defined proprietary even if they are not classified as such under domestic law.[25] In fact, the Court has never gone as far as to state the existence of vested rights when none were recognized at a national level, but its independent approach has relevantly broadened the range of subject matters of proprietary interests.[26] Aside from intangible goods, such as intellectual property, which were already included within the category of constitutional property in a number of national experiences,[27] the ECtHR extended the term 'possession' to cover business goodwill,[28] welfare benefits,[29] debts,[30] contractual rights over property,[31] virtual assets such as domain names,[32] final judgments, or even causes of action which may qualify as asset in light of their likelihood of success in court.[33] Moreover, in some cases the Court applied the protection of Article P1(1) to factual possessions based on contracts void under

[25] The most relevant precedent is *Gasus Dosier-Und Forderechnik GmbH v Netherlands* (1995) 20 EHRR 403.

[26] While this approach was already present in the ECHR's jurisprudence before *Gasus v Netherlands* (e.g. in *Marckx v Belgium* (1979) 2 EHRR 330; *Inze v Austria* (1988) 10 EHRR 394), the Court reiterated its validity and specified its content after the introduction of the autonomous meaning doctrine: see *Iatridis v Greece* (2000) 30 EHRR 97.

[27] The most significant example comes from Germany, where private law property is strictly corporeal, while Article 14 of the Basic Law (*Grundgesetz*) and constitutional property have a much broader reach. For an overview on characteristics and reasons of the phenomenon see G Alexander, 'Property as a Fundamental Constitutional Right? The German Example' (Cornell Law Faculty Working Papers No 4/2003, 2003) <http://scholarship.law.cornell.edu/clsops_papers/4> [accessed 15 April 2014].

[28] The protection of business goodwill is broad, and allows the granting of compensation in case of withdrawal of a commercial or professional licence, as in *Van Marle v Netherlands* (1986) 8 EHRR 483. The principle is confirmed by the opposite result reached in *Baquel v France* [2004] App Nos 71120/01 (3 February 2004).

[29] See *Pine Valley Development v Ireland* (1992) 14 EHRR 319; *Stretch v United Kingdom* (2004) 38 EHRR 12.

[30] See e.g. *Stran Greek Refineries v Greece* (1995) 19 EHRR 293.

[31] As in *Gasus v Netherlands*, above n 25.

[32] Albeit only in a decision on the question of inadmissibility: *Paeffgen GmbH v Germany* [2007] ECtHR App Nos 25379/04, 21688/05, 21722/05, 21770/05 (18 September 2007).

[33] The first and most cited precedent is *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301. For a critical overview of the relevant case law see Allen, above n 23, 50–7.

national law,[34] or on *ultra vires* representations by public authorities.[35] Although the ECtHR declares that it is following a comparative (?) approach in the definition of the scope of Article P1(1), the category goes far beyond the largest boundaries set by national regimes. In addition, the lack of a common core of constitutional property doctrines that can be used as a broadly accepted standard makes the property model delineated by the Court not only destined to operate as autonomous regime, but to have as a diversified impact on national property systems as diverse their internal institutional dynamics are.

In regards to the conceptualization of content and structure of property entitlements, the ECtHR's case law presents relatively autonomous traits, albeit not as visibly as in the area of the expansion of their objective scope. As to the content, the particular distinction that Article P1(1) operates among the different types of state interferences sketches out a model that is not always in line with the variety of positions traditionally adopted by Member States. In fact, while the second and third sentences of the provision refer to the commonly accepted doctrines of *de jure* and *de facto* expropriation and control over the use of property, and the Court's application does not diverge substantially from national practices,[36] the first sentence points to any interferences against the 'peaceful enjoyment of possession', and has been used as a broad residual clause[37]. The breadth of the rule has allowed the Court to grant protection to holders of limited rights, such as leasehold,[38] licenses[39] and other types of contractual rights, but also to censor interventions against a single stick of the bundle of rights constituting ownership,[40] thus adhering to the theory of 'conceptual severance',[41] according to which every right of the bundle is itself property and deserves compensation if taken away. Although the Court classifies

[34] See *Beyeler v Italy* (2001) 33 EHRR 52; *Kotterls & Schittily v Austria* (2003) 37 EHRR CD205.

[35] See e.g. *Stretch v United Kingdom* (2004) 38 EHRR 12.

[36] Although in the case of the third sentence the ECHR has read the provision in an extensive manner: see e.g. *Chassagnou v France* (2000) 29 EHRR 615 (on restrictions on the right of possession); *Marckx v Belgium* (1979) 2 EHRR 330 (on restrictions on the right of disposition).

[37] The first decision spelling out the tripartite structure of Article P1(1) is *Sporrong & Lonnroth v Sweden* [1986] ECtHR App No 11189/84 (11 December 1986).

[38] See e.g. *Iatridis v Greece* (2000) 30 EHRR 301.

[39] See above n 28.

[40] *Frascino v Italy* [2003] ECtHR App No 35227/97 (11 December 2003), where the Court included the *jus aedificandi* in the bundle of rights constituting ownership, despite of the opposite view of Italy and other Member States, and compensated its impairment.

[41] The term is used by M J Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia LR* 1667, 1676, to describe the position taken in R A Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 75.

as expropriation only the formal or substantial taking of the full bundle, the protection of each 'stick' allows for the creation of an internal hierarchy among proprietary prerogatives. This has obviously a strong impact on how the content of property rights is conceptualized and understood, both within and beyond the borders of constitutional property and its protection *vis-à-vis* the public power.

On the side of structure, the position adopted by the Court, if compared to the models followed by Member States, is of a hybrid nature, where the impact of the interference is sometimes defined in terms of social function of property or, more often, in terms of economic loss.[42] Such an approach is particularly visible in the application of the fair balance and proportionality test, where the ECtHR weights the goal of the regulation against the nature of the intervention, and the availability of less invasive, drastic means to achieve the same goal. Here, the analysis focuses mostly on the economic losses suffered by the victim, measured in an objective way.[43] Although some relevance is given to the type of asset involved, so that commercial property is less protected than an asset or right more connected to individual autonomy and dignity,[44] the concept of social function typical of several Member States' constitutional traditions does not find its way in Strasbourg.[45] Once the Court finds that the measure is in pursuant of public interest and that rationality and legality principles are satisfied, the social function concept exhausts its role and leaves the floor to the analysis of the economic impact of the measure. While the concept in itself is not new for the majority of national constitutional property doctrines, the greater emphasis put by the ECtHR on the economic aspects of property may ultimately reduce the balancing test to a calculation exercise, contributes very little to the identification of the 'core' of the right, and does not offer a clear picture on the eventual interplay between private prerogatives and social obligations.

[42] So that there is often no violation of Article P1(1) found in absence of economic loss: see e.g. *Pitkanen v Finland* [2003] ECtHR App No 30507/96 (4 March 2003).

[43] Yet, there are cases where the Court stated that subjective factors might deserve consideration, as in *Lallement v France* [2002] ECtHR App No 46044/99 (11 April 2002).

[44] The Court specifies it clearly in *Gasus v Netherland*, above n 25, and in *Back v Finland* [2004] ECtHR App No 37598/97 (20 July 2004).

[45] See A Riza Coban, *Protection of Property Rights Within the European Convention on Human Rights* (2004) 72.

2.2 When property meets international arbitration: BITs and beyond

What makes international investment law responsible for the creation of a new, cosmopolitan property model detached in its creation and development from national sovereignty is, first of all, its focus. Its main sources are bilateral investment treaties (*BITs*) stipulated under the ICSID system, joined by a number of other international agreements which pursue the same aim, and are regulated and enforced under a variety of arbitration mechanisms. The goal of BITs, and the reasons underlying the creation and success of this institutional solution, is the reduction of uncertainty for foreign investors about the destiny of their assets and entitlements.[46] The protection of foreign investments against interferences from the host state finds its closer correspondence in the concept of expropriation, and thus carries with it the use of a specific property discourse.[47] This model, however, is everything but state-centric. The definitions and ground rules contained in BITs do not necessarily match with those of the laws of the countries involved and, at the same time, a state is usually party to several different BITs, each of them potentially using a different language.[48] The recourse to arbitration as forum for the resolution of disputes detaches even more significantly the subject from the state, and thus from a localized interpretation and application of property doctrines.[49] To complete the picture, the 'fair and equitable treatment' principle, which constitutes one of the most common clauses in international investment treaties, has often been interpreted as a provision introducing a sort of *lex specialis* for aliens, independent from, and if necessary more protective towards investors than, the national standards of the host state.[50]

Such a fragmentation may suggest the impossibility of identifying global trends.[51] Yet, at least in the field of BITs, the recent practice shows a move

[46] As also A Lehavi, 'BITs and Pieces of Property' (2011) 36 *Yale JIL* 115, 128. For a broader overview see K J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 *UC Davis JILP* 17.

[47] Similarly, see Lehavi, above n 46, 128.

[48] See the data reported by UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (2007) 3–6.

[49] See Y Dezalay & B G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of Transnational Legal Order* (1996) 31–114.

[50] The phenomenon is well described by UNCTAD, above n 48, 50–1.

[51] The issue is part of a broader debate on the fragmentation of sources in international law: see e.g. the report of the International Law Commission Study Group, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 (13 April 2006).

towards standardization, with leading capital-exporting states developing their own model treaties, and other states using them as point of reference to follow suit.[52] Parallel to this, years of arbitral interpretation are slowly leading to the creation of shared principles of international customary law. It is true that, besides BITs, the high number of institutions in charge of enforcing the protection of foreign investments, each belonging to a different regime characterized by specific aims and institutional dynamics, constitutes a serious obstacle to the creation of a common, consistent model. Despite this, the practice shows the existence of a set of shared definitions and principles that may well be considered the core of this new global, investment-oriented property model.

Exactly as in the case of the ECHR and the subsequent ECtHR's case law, the notion of investment provided by international treaties—i.e. the subject matter of their 'proprietary' protection—is much broader than the objective scope of property in most of the legal systems involved, and especially those belonging to the civil law family.

Most BITs use open-ended definitions, covering any asset that is owned or controlled by a foreign investor in the host State, and provide an illustrative list of assets ranging from common movable and immovable property, intellectual property, business concessions, and interests in companies to claims and contractual rights having financial value.[53] Arbitral tribunals have extended the notion of investments to cover loans, promissory notes, construction contracts, setting up of firms and public concessions agreements,[54] and have consistently referred to investors' rights as property rights.[55] Although arbitrators tend to give ample weight to the intention of State parties, a set of cases have developed objective, functional criteria to define more clearly the borders of the category. *Fedax NV v Venezuela*[56] and *Salini Costruttori SpA and Italstrade SpA v Morocco*[57] describe the basic features of an investment, to be evaluated globally, as duration of the performance, regularity of profit and return, assumption of risk, substantial commitment and significance for the development of the host state. Applying the same functional criteria, other tribunals have limited investors' claims by excluding the

[52] The trend is recently described by A Newcombe, 'Developments in IAA Treaty Making', in A De Mestral & C Levesque (eds), *Improving International Investment Agreements* (2013) 15.

[53] See UNCTAD, above n 48, at 22.

[54] Ibid, 66.

[55] See e.g. *Southern Pacific Properties (Middle East) Ltd v Egypt*, ICSID Case No ARB/84/3 (Award, 20 May 1992) para 167; *Plama Consortium Ltd v Bulgaria*, ICSID Case No ARB/03/24 (Decision on Jurisdiction, 8 February 2005) para 128.

[56] ICSID Case No ARB/96/3 (Decision on Jurisdiction, 11 July 1998).

[57] ICSID Case No ARB/00/4 (Decision on Jurisdiction, 31 July 2001).

applicability of the notion of investment to, for example, contingent liability like bank guarantees.[58] All in all, the category covers all the positive assets of a patrimony, if persistent in time and having an economic value, since no formal distinction is made between proprietary and contractual rights. The approach follows the same path traced by the ECtHR, with a possibly looser connection to national property laws and their definitions.

International investment law has also an impact on the traditional dogmatic conceptualizations of content and structure of property rights, through its doctrine of direct and indirect expropriation. Although the many arbitral venues and treaties regulating the issue show a great variety of approaches, it is possible to spot common trends, most of them already belonging to customary international law.[59] The power of states to enact regulations in the public interest, for example, is generally bound to the respect of the principles of legality and non-discrimination. Governments and private parties may agree on the border between ordinary regulation and indirect expropriation and set specific rules for compensation, while in case of doubt arbitrators must depart from national doctrines and rely only on the intention of the parties and international law standards.[60] To distinguish indirect expropriation from non-compensable types of regulation, arbitral tribunals have developed a stable set of criteria, where the key element is the impact of the regulatory measure on the investment, that should entail a permanent[61] and substantial[62] deprivation of power and control over a formally vested right, as much as to make the asset or investment economically useless.[63] While a mere reduction of profits is not enough to lament an excessive and compensable interference, the focus on the economic value of the proprietary interest represents a distinctive characteristic of the model[64] that brings it closer to the US doctrine of regulatory taking than, for example, to the approach of the ECtHR. A similarity with the case law of the Strasbourg Court

[58] *Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11 (Decision on Jurisdiction, 6 August 2004).

[59] See S R Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 103 *AJIL* 475, 490.

[60] For a broader analysis see J Paulsson, *Denial of Justice in International Law* (2005) 789ff.

[61] *S D Myers v Canada*, UNCITRAL/NAFTA (Partial Award, 13 November 2000) paras 287–8

[62] *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1 (Award, 12 December 2002) para 103; *Pope & Talbot v Canada*, UNCITRAL/NAFTA (Interim Award, 26 June 2000) para 102.

[63] For more details on the development of the criteria see L Y Fortier & S L Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or *Caveat Investor*' (2004) 19 *ICSID Rev—FILJ* 293, 300–12.

[64] See UNCTAD, above n 48, 59.

can be found, instead, in the emphasis put on the purpose and proportionality of the public benefit with the harm caused to the investor.[65]

The vagueness of the factors, coupled with the lack of hierarchy and coordination among tribunals, are undoubtedly conductive to the production of contradictory results, while the different regimes and institutional goals inspiring treaties and correspondent tribunals make it impossible to operate a *reductio ad unum* of the precedents. However, academic studies comparing decisions adopted in different venues show a much more consistent scenario.[66] Examples come from the Iran–US Claims Tribunal, that presents a case law coherent with customary international law principles,[67] and from arbitral tribunals operating under NAFTA Chapter 11, which adhere to a three-prong test that focuses, as usual, on the impact on the investment, the investor's legitimate expectation and the context of the measure. The level of interference should be sufficiently restrictive to substantially deprive the owner of his ability to use, enjoy or dispose of the asset;[68] parallel to this, the protection extends beyond traditional ownership, up to covering the reliance on specific governmental commitments;[69] here as well, proportionality, legality, non-discrimination and good faith are the main criteria used in the balance.[70] Attempts to broaden the definition of indirect expropriation to reach, like in *Metalclad v Mexico,*[71] any covert or incidental interference able to impact on the reasonably expected economic benefit of the investment, have been (partially) set aside,[72] rejected by following awards,[73] and then severely limited by the trilateral intergovernmental Federal Trade Commission in 2001[74] that required adherence to the minimum standard provided by customary law.

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[65] The most relevant example is *Técnicas Medioambientales Tecmed v Mexico,* ICSID Case No ARB(AF)/00/2 (Award, 2003).

[66] See e.g. Ratner, above n 59, 26ff, who proposes a unifying approach to precedents based on the institutional regimes of which they are products.

[67] For a full review of the most relevant cases see C N Brower & J D Brueschke, *The Iran–United States Claims Tribunal* (1998) 369–471.

[68] *Pope & Talbot v Canada*, above n 62, paras 102–3.

[69] *S D Myers v Canada*, above n 61, at 1440.

[70] *Fireman's Fund Insurance Co v Mexico*, UNCITRAL/NAFTA (Award, 17 July 2006) para 176.

[71] *Metalclad Corporation v Mexico*, ICSID Case No ARB(AF)/97/1 (Award, 2000).

[72] *Mexico v Metalclad Corporation* [2001] BCSC 664, paras 77–105 (Canada).

[73] See e.g. *Waste Management Inc v United Mexican States*, UNCITRAL/NAFTA (Award, 30 April 2004) para 50.

[74] NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions (2001) §B, <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> [accessed 15 April 2014].

Although it is not as clear as in the ECtHR's case law, here the content of the right is also defined in accordance with the conceptual severance theory, where each stick of the bundle of rights is considered independently, even if expropriation requires the complete nullification of the economic return of the investment. As to the structure, despite the recent push towards the development of a global public interest theory and the introduction of a proportionality test similar to the one used in Strasbourg,[75] the inspiration of the international investment protection regime reduces *per se* the emphasis put on the social function of property rights, and justifies a strict economic reading of investments as values demanding specific supranational guarantees and protection. This creates, obviously, a substantial divide between international investment-oriented and many national property models, which is facilitated by the interpretation of international investment protection as *lex specialis*, thus requiring arbitral tribunals to confer to foreign investors, if necessary, a higher level of protection than the one attributed to nationals of the host state. Albeit inherently discriminatory, this is the reason why the international investment property model can be considered cosmopolitan, and destined to develop and stay.

2.3 Virtual property: how private ordering may create a new Internet property model

The creation of property models has been historically reserved to the public power. Today, however, the a-territorial semi-anarchy of the cyberspace is forcing legal formants to face the existence of new entitlements that are generated by private parties according to their needs, often outside the boxes of national dogmatic categories. Their close resemblance to property rights has already created interpretative troubles, and produced controversial output in courtrooms.

The debate over virtual property is seemingly the most eloquent example of what scholars belonging to different legal systems and disciplines defined as the great divide separating the scientific notion of ownership from the layman conceptualization of proprietary interests.[76] One of the most interesting examples is represented by Internet virtual platforms, where people perform actions that are of fantasy, or mirror real life experiences. In Second Life, for

[75] On the global public interest theory see A Kulick, *Global Public Interest Theory in International Investment Law* (2012) 77–154

[76] Such a divide is one of the key arguments of B Ackemann, *Private Property and the Constitution* (1977) 23ff. See also J M Moringiello, 'What Virtual Worlds Can Do for Property Law' (2010) 62 *Fla LR* 159.

example, registered users interact through their online alter-egos (avatars) in a perfectly realistic world. They build up friendly ties and social connections, launch businesses, trade in real estates, buy or build houses, shop for accessories, dresses, and vehicles. To do so, they use an official currency called Linden Dollars, which is sold and exchanged in an official marketplace.

In *Bragg v Linden Research,*[77] the plaintiff, a Pennsylvanian lawyer, sued the owner of Second Life for having shut down his avatar and 'confiscated' all the lands, assets and Linden Dollars he owned. In line with Second Life's Terms of Service, Bragg's account was terminated as he took illicit advantage of an exploit in the system to acquire for cheap money some land parcels not yet released by Linden Research. The plaintiff claimed that he held proprietary interests over his Second Life assets, thus he had been victim of a tort of conversion due to Linden's unlawful interference. The defendant rebutted, submitting that the Terms of Service merely license the use of Linden's software and do not create any property right. The case ended up in a settlement, but the arguments raised by the two parties give a clear sense of the nature of the debate and the relevance of the property discourse. Few months later, in *Eros LLC v Simon*[78] two successful Second Life traders, engaged in the development and trading of adult-themed items, clothing, furniture and other accessories for avatars, sued another 'entrepreneur', Simon, for having unlawfully copied and sold their materials to other users. They won without great controversy, but on the much plainer and more accepted cause of action of trademark and copyright infringement.

The US rejection against the conceptualization of virtual property entitlements beyond intellectual property rights is only one of the approaches followed worldwide. In China, a number of landmark decisions, both civil and criminal, have recognized and protected the ownership of virtual assets via property law.[79] Taiwan and South Korea are following the same path through *ad hoc* legislations, while their courts have been actively protecting online property rights by adapting old rules to the new context.[80] In 2012, the Dutch Supreme Court (*Hoge Raad*) defined and sanctioned as theft the illicit subtraction of items used in online videogames,[81] arguing that the rights over virtual objects may be defined as proprietary since the goods have an objective value depending on the time and

[77] 487 F Supp 2d 593 (ED Penn, 2007).
[78] Case No 1:07-cv-04447-SLT-JMA (EDNY, 24 October 2007).
[79] Reported and commented by J Fairfield, 'Virtual Property' (2005) 85 *Boston ULR* 1047, 1084–5.
[80] Ibid 1087-1089
[81] HR 30 January 2012, ROW 2012/259.

effort invested in gathering them, and they remain under the exclusive control of their owner. The court's reasoning echoed the arguments used for electricity theft, where the intangibility of the good—as well as, here, their quality as data or information—does not play any role in defining the nature of the rights insisting on it.

Similar controversies affect the area of domain names, which are acquired—exactly as access to virtual platforms—through license contracts. The license attributes the exclusive right, limited in time and scope, to use the selected name and to have it associated with a specific IP address. Such conditional contractual right, however, can be freely transferred, has a definite market value, prevents others from using the same name, and can fall into a bankruptcy estate. Although it possesses the functional characteristics that made the *Hoge Raad* find for the existence of a property right, legal formants tend to assimilate it as much as possible to intellectual property, and to deny any formal recognition—beyond that of contractual rights—if such assimilation proves to be impossible.[82] In this sense, domain names share the same destiny of other virtual entitlements. Still, the struggle remains when their classification in proprietary terms is relevant—as it often happens—for the production of certain legal effects, such as the possibility for creditors to garnish them. Judicial solutions are anything but consistent. In some instances courts have defined domain names as mere products of a contract for service;[83] in others, they have found in favour of the applicability of the tort of conversion, since domain names are 'merged in a document' exactly as a debt is in a promissory note.[84] Similar decisions can be seen in Australia as well.[85] Meanwhile, in Canada, domain names are considered personal property for the purpose of applying specific jurisdiction rules.[86] The situation is obviously more complicated in civil law countries, where the category of property rights is entrenched and exclusive rights may be labelled as such only through legislative definition.

Because of their close resemblance to intellectual property rights, domain names have created less classificatory problems than other virtual assets. How-

[82] In the US, courts have recognized the property of a domain name only if it was eligible for trademark protection, and a mere contractual right if it was constituted by generic terms: see *Dorer v Arel*, 60 F Supp 2d 558 (ED Va, 1999); cf more recently, *In re Alexandria Surveys Int'l*, LLC, 13-CV-00891 (ED Va, 7 November 2013).

[83] *Network Solutions Inc v Umbro International Inc et al*, 529 SE 2d 80 (2000).

[84] *Kremen v Cohen,* 337 F 3d 1024 (9th Cir, 2003).

[85] *Hoath v Connect Internet Services Pty Ltd* [2006] NSWSC 158.

[86] As in the recent *Mold.ca Inc v Moldservices.ca Inc*, Ontario SCJ, CV-13-480391 (30 December 2013).

ever, the definition of their legal nature has also been subject to concerns, and has witnessed the periodical use of contractual arguments against their propertisation. Such a transversal, cross-border and cross-systemic aversion may indicate the incompatibility of virtual property with basic principles shared by the majority of property traditions. In fact, the existence of property entitlements over virtual objects would contradict both the *numerus clausus* principle and the great dogmatic separation between proprietary and contractual rights. In both civil and common law jurisdictions, legal formants agree on the fact that property rights should be standardized in numbers and content by law. The reasons underlying the choice are different, and range from the pure economic prevention of information and transaction costs to the protection of third parties, since property rights are by definition producing *erga omnes* (real) effects.[87] This latter characteristic distinguishes proprietary rights from contractual rights, which produce effects only between parties, and thus need less top-down standardization and may leave more freedom and flexibility for private regulation.

Domain names, Second Life assets, email accounts, and cloud storage spaces are created by private companies and are based on software programs. Users obtain access to these resources on the basis of contracts that usually come in the form of license agreements, preferred by intellectual property owners as they help to avoid the conveyance of possession and the consequences attached by law to a normal sale, such as the principle of exhaustion. Regardless of the aim, licenses usually transfer exclusive rights that in the real world would be considered as proprietary interests. In the virtual world, however, the intangible nature of their subject matters present characteristics that makes it more difficult to draw effective analogies and to swiftly apply rules that are conceptualized for material goods. To help bridge the gap, some scholars have proposed to define the boundaries of virtual property by identifying specific functional features such as rivalry, persistence, and interconnectivity. The rationale inspiring the filtering attributes lies in the fact that, by mirroring the characteristics of real-world objects of ownership, they may help to identify those virtual resources that are apt and should be treated, for the sake of the internal coherence of any property regime, as subject matters of property rights.

This approach has the merit of emphasizing how much virtual property shares the same destiny that other assets and entitlements, such as timeshare

[87] For a common law perspective see H Hansmann & R. Kraakman, 'Property, Contract and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights' (2002) 31 *J Leg Stud* S373; T W Merrill & H E Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale LJ* 1.

ownership or dematerialized securities, faced in the last century. It was the adoption of a less dogmatic, more factual-oriented and functional approach to the problem that helped to envisage their proper categorization and eased the communication between legal systems. Today, the same functional approach has led the Court of Justice of the European Union to rule that the principle of exhaustion also applies to software license agreements, in so far that the characteristics of the transaction suggests that the object of the transfer was ownership and not mere use rights.[88] The same rationale inspires the Uniform Commercial Code, which demands the functional reclassification of leases as secured sales or security interests,[89] or the definition of a reservation of title in terms of security interest,[90] if such reclassification is required to better reflect the economic elements of the deal. Although this type of 'reality check' is not common in the field of licenses, some courts have already focused on the payment schedule and the duration of the possessory interests transferred with the contracts in order to re-label them as sales,[91] thus implicitly accepting the classification of the rights so conveyed in terms of ownership.

The analysis of the entitlements on virtual goods such as avatars, lands and other commodities generated and exchanged over online platforms presents further layers of complications, for they are contingent by-products of a licensed software program. Intellectual property laws and Terms of Service may provide guidance in deciding on the attribution of exclusive rights over users' creations. Yet, the problem of defining users' and providers' rights and obligations over non-IP assets remains. While leaving the solution to private ordering is a feasible policy option, it will still not help in tackling the risk of inconsistent court decisions, and the 'irritation' of national property regimes that may be generated by the cross-border circulation of enforceable judgments.

Although these three models are very different in focus and characteristics, they all share the redefinition at the supranational, cosmopolitan level of the most basic elements of property regimes, such as subject matter, content and structure of property rights, and some of their ground principles and rules. Their 'irritating' impacts on national legal systems have confronted scholars

[88] Case C-128/11, *UsedSoft GmbH v Oracle International Corp* [2012] OJ C 287/16, 22.9.2012. For a comment see D Van Engelen, *'UsedSoft v Oracle*: the ECJ Quietly Reveals a New European Property Right in "Bits & Bytes"' (2012) 1 *European Property LJ* 317.

[89] UCC §§1-203(b)(1)–(4).

[90] UCC §2-401.

[91] See e.g. *In re DAK Industries Inc*, 66 F 3d 1091 (9th Cir, 1995); *UMG Recordings Inc v Augusto*, 558 F Supp 2d 1055 (CD Cal, 2008).

with much more conflicting outputs and greater interpretative problems than those engendered by regional harmonization processes. However, not enough attention has been devoted to the approach comparative lawyers should adopt in order to deconstruct, and thus understand the characteristics of these new models, and to help national legal systems deal with them at best. The next pages will attempt to set the foundations of future research along these lines.

3 Towards a New Global Property Model?

When Zweigert and Kotz proposed their *praesumptio similitudinis* as a tool to discover hidden similarities in apparently different legal solutions,[92] comparative lawyers found the functional method useful to support the harmonization projects and the quest of legal systems to achieve better interactions and mutual understanding.[93] However, it did not take long for the method to be targeted by several strains of critiques that underlined its extreme positivism, its complete disregard towards the complexity of law, and the way that its pre-set aims influenced its results.[94] In fact, these limitations emerged strongly in comparative property law. The original version of functionalism could never find its way in the field, for its goals of forcing the finding of similarities are fully incompatible with the great complexity and divergences of property regimes. Yet, it would be unfair to hastily discard its usefulness without trying to understand, beforehand, the reasons underlying its failure.

The decision of which method to adopt and how to implement it strictly depends on the goals of the investigation. In fact, functionalism may be applied in a variety of ways according to the functions it is meant to perform.[95] For example, epistemological functionalism comes into play when scholars need to analyse legal phenomena while being shielded from the influence of national path dependence. This may happen when the aim is to make legal systems communicate with one another, or to assess the real need for harmonization. To pursue these goals, the method focuses on the practical functions and effects of

[92] K Zweigert & H Kotz, *An Introduction to Comparative Law* (1998) 32–47.

[93] See C Godt, 'The Functional Comparative Method in European Property Law' (2013) 2 *European Property LJ* 73, 74.

[94] Broadly reported by R Michaels, 'The Functionalist Method of Comparative Law', in Reimann & Zimmermann, above n 14, 339.

[95] See, *inter alia*, J Smits, 'Taking Functionalism Seriously: On the Bright Future of a Contested Method' (2011) 18 *MJECL* 554; see also M Graziadei, 'The Functionalist Heritage', in P Legrand & R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 100

legal institutions, and searches for functional equivalents across national regimes. By disregarding formalism and dogmatic classifications, the approach helps in overcoming apparent divergences and fosters intercommunication.[96] However, in order to do so, it purposefully ignores other elements of complexity, and simplifies as much as possible the analytical framework on which it operates.

If the aim is to compare national property regimes, functionalism is indeed of no value. It does not explain the reasons of the great divide among traditions as much as a historical comparison can do, nor does it unveil the hidden systemic factors that hinder legal systems from engaging in cross-border exchanges, such as the overlap of multidisciplinary and multilevel sources or the influence of non-legal subjects on property rules. Due to its lack of sensitiveness towards complexity, the method is not really able to assist legal formants in internalizing contributions coming from other national regimes.

Yet, with all its inner limitations, functionalism may still be one of the most adequate methods to analyse cosmopolitan property law. Scholars have already proposed the use of the method to perform a systematizing function.[97] The discovery of functional equivalents may lead to the unveiling of common, implied patterns that may be used to construe an analytical supra-system that is detached from formalistic or dogmatic schemes. This fits in well with the aim of investigating the existence of an independent, supranational property model, which does not follow—at least at a first glance—the logic, categories and institutional dynamics of national property regimes. At the same time, the focus of the method on common functions and effects helps to find a communicative path between the new model and national laws, which may overcome the difficulties posed by the complexity of property regimes, the path dependence of local legal formants and the obstacles posed by private international law. The validity of such an approach may be clearly verified when applying the method to the common traits shared by our three cosmopolitan property models.

The first significant characteristic the three models have in common is the nature of the subject matter of proprietary rights, which goes beyond tangibility and includes any positive asset of a patrimony. In fact, the focus and filter lay on the objective economic value of the good, and not on its nature. Each of them includes contractual rights, thus breaking the traditional, national contract-property divide, and stretches up to cover expectations or, similarly,

[96] Michaels, above n 94, 364–71.

[97] M Rheinstein, 'Teaching Comparative Law' (1937–1938) 5 *U Chi LR* 615, followed by Zweigert & Kotz, above n 92, 44–6.

entitlements over virtual objects that do not perfectly fit in the category of absolute rights.

In addition, the ECtHR and international investment arbitration models share a particular approach to the content of property that leans towards a Hohfeldean,[98] common law conceptual severance of the entitlement in a bundle of separated rights. Nothing similar emerges so clearly in the virtual property model. Yet, the different types of contracts creating digital objects and prerogatives are implicitly inspired by the idea of fragmented, tailor-made exclusive rights. Fragmentation may be considered one of the minimum common denominators of the three models.

The coexistence of rights and obligations in the structure of property and, consequently, its inherently limited nature is reflected in ECtHR's case law. The concept is not fully embedded in the property model delineated by international investment arbitration, but it is recently emerging behind the use of the proportionality test developed by the Strasbourg Court and the development of a global public interest theory. Due to the contractual nature of the rights, on the side of virtual property none of the entitlements may be defined as a fully-fledged property right, although their internal limitations are private and horizontal, and thus of a different nature than those proposed by the other two models. Again, limited property rights are another minimum common denominator.

The three models also share the aversion towards the traditional divide between property and contract law. They challenge the *numerus clausus* principle from its roots, and opt for a more pragmatic approach to the transparency needed when rights produce third party effects, balanced with the need for flexibility. More generally, their approach interferes substantially with the private/public divide characterizing national property regimes. And the list may continue.

However, the common cosmopolitan reach and the number of significant shared traits do not tell us whether this convergence is effectively leading towards the creation of a global property model. Something else is required.

To deserve the rank of institution, the legal category should perform specific functions in response to particular needs, or be in pursuance of specific goals.[99]

[98] Further: W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale LJ* 710.

[99] The definition is borrowed from the new institutionalism of D North, 'Institutions' (1991) 5 *J Economic Perspectives* 97. On its application in comparative law, see A Bakardjieva Engelbrekt, 'Toward an Institutional Approach to Comparative Economic Law', in A Bakardjieva Engelbrekt & J Nergelius (eds), *New Directions in Comparative Law* (2009) 213, 234.

To be global, it should do it consistently across its various manifestations. To be new, these functions should be *sui generis*, or at the very least be partially distinct from those performed by national property rights. The question on whether or not this sum of shared traits meets these requirements, and may thus constitute the model of a new global property regime cannot be properly answered by means of traditional exegetic techniques, but the systematizing role of the functional method may offer some relatively solid analytical tools.

In fact, if observed through the lens of functionalism, the approach the three models have towards the subject matter, content and structure of property rights appears to be inspired by specific goals (institution), which are both global and different—at least partially—from those traditionally pursued at the national level.

The expansion of the subject matter suggests that the property sketched by the three models has moved beyond the mere role of right attributed for the distribution, control and management of resources that characterizes national property regimes.[100] They have all converged on a right institutionalized to protect investments and reliance, as well as to maintain the *status quo*. This justifies the extension of its scope to cover, for example, contractual rights, expectations, causes of action, and so forth. Although the ECtHR also includes the protection of human rights finalities of property rights, the common function delineated by the three cosmopolitan models still emerges clearly, and attributes to property tasks that national legal systems have traditionally 'distributed' otherwise.[101] The same function also inspires the option for conceptual severance and fragmented content, where each stick of the bundle of rights composing property is considered separately. This approach favours flexibility and differentiation, but most relevantly, it allows for the attribution of separate objective values to each stick. The operation is of fundamental relevance for property to maintain its role of guardian of investments in the new economy of intangibles. However, at the same time, it represents a clear departure from the unitary ownership model that is typical of modern national property regimes, which has long performed the post-feudal function of protection of individual freedom. The emphasis on the economic aspects of property, and the functions

[100] Above n 7.

[101] The metamorphosis, already visible at a national level, is commented on by R Libchaber, 'La Recodification du Droit des Biens' in J Carbonnier, J-L Halperin, C Jacques & F Ewald (eds), *Le Code Civil 1804–2004, Livre du bicentenaire* (2004) 295, in a proposal for a revision of property law in France. See also K J Vandevelde, 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' (1980) 29 *Buffalo LR* 325, 329.

why property is protected and regulated in the new global model are also at the root of the change in the approach to the structure of the right. They justify the general disregard of the linkage between property and the dignity and autonomy of the individual, and explain the partial or complete dismissal of the concept of social function.

The variations in ground rules and principles are also dependent on the mutated functions of property rights (institution). They are shared among the three models (global), and cause a departure from national regimes (new).

Among all, the abandonment of a clear distinction between property and contract is highly indicative and meaningful. The clear-cut separation ceases to make sense once the dogmatic approach to property is substituted by the much more useful and pragmatic reading of property rules inspired by classical economic models. Contract and property become the two extremes on a spectrum where the variety of hybrid situations is and should be broad in order to accommodate a much larger range of needs.[102] In this context, the traditional *numerus clausus* principle also mutates its form, in response to the shift of the focus from the protection of third parties and the preservation of the citadel of national property to the reduction of information and transaction costs that may hamper investments and reliance if too high or too incalculable. The new functional equivalents of the principle can be found in the criteria created by arbitral tribunals to limit the category of investments, or by scholars and courts to circumscribe the range of virtual property assets.

These initial results seem already to be enough to suggest the convergence towards a unitary, global property model characterized by specific functions, which are approached and pursued in a different manner than in national property regimes. Such divergences may explain both the tendency of local legal formants to consider national and cosmopolitan property models as separated and independent, and the extreme reluctance of national courts to accept the existence of privately created property models in cyberspace.

In fact, it is undeniably hard for national property regimes to come to terms with cosmopolitan property notions. They do not only differ in terms of basic principles, ground rules and characteristics, but they also obey completely different institutional dynamics and goals, and are influenced by different factors than those impacting the development of national property laws. This

[102]The phenomenon, however, is already visible at a national level: see e.g. S Van Erp, 'Contract and Property: Distinct but not Separated' (2013) 2 *European Property LJ* 240. Further: C Von Bar & U Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (2004).

makes it impossible for the two systems to have a spontaneous dialogue, and it automatically leads to short-circuit, interpretative misunderstandings, and contradictory outputs.

The only valid solution to overcome the impasse is to adopt a method which can help to deconstruct both the characteristics of the global model and those of the receiving systems, and to make the two communicate with one another without substantially interfering with the structure and regular operation of the receiver. In this sense, the method of functional equivalents is undoubtedly the most suited for the goal. This applies both in case of direct effects of the global model on national legal systems, as in the case of the ECtHR, and in case of more mediated effects, as in the case of international investment arbitration. At the same time, functionalism may help in understanding and offering adequate protection to new assets such as virtual property in a more timely and effective fashion than in the past. To proceed via functional equivalents limits the effort of the receiving legal system to translate the external right in the local legal language and embed it according to its own categories and rules, thus minimizing its involvement and the 'irritations' of its traditional categories. The process, aside of its practical advantages, may also contribute to a better understanding of the regimes involved, opening new paths for the theoretical development of comparative property law *vis-à-vis* globalization.

4 Conclusions

In the last decades, the thick walls of the citadel of national property laws have been under multilateral attack. Apart from the push towards harmonization engendered by processes of economic integration, several supranational sources and institutions—both private and public—are developing property models that substantially depart from national property regimes, and challenge their basic dogmas. No matter how vigorously legal systems have tried to shield themselves, these cosmopolitan incursions have already created an interpretative short-circuit that a state-centric comparative analysis is unable to deconstruct and explain. On the contrary, the features of the functional method makes it fit best to the characteristics of these global regimes.

The study of three examples of supranational property models (ECtHR, international investment law, and virtual property) has shown the presence of some common evolutionary trends. The application of the functional method helps to confirm the existence of a new global property model and to

sketch its main characteristics. At the same time, it may assist national legal systems in coming to terms with the phenomenon, and in embedding these new cosmopolitan elements—whether within or outside property law.

DOI: 10.7574/cjicl.03.03.233
Cambridge Journal of International and Comparative Law **(3)**3: 795–824 (2014)

THE COSMOPOLITAN GOAL (IDEAL?) OF COMPARATIVE LAW: REASSESSING THE CORNELL COMMON CORE PROJECT

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Abstract

Comparatists do not ordinarily recognize the fact that the debates on comparative legal methodologies are always centered on how to understand other legal systems. Partial and parochial views contained in existing comparative studies reveal that comparativists should have a cosmopolitan goal, which means to avoid biases and partialities when they examines legal systems from their own perspectives. The Cornell Common Core Project, carried out in the 1960s at Cornell Law School, serves as an excellent example of how comparative legal studies could pursue the cosmopolitan goal. The factual method and the teamwork method employed by the Cornell Common Core Project are effective in preventing individual perspectives from distorting the images of legal systems under consideration. Nevertheless, the Project has shortfalls in its methodology, because the teamwork method incurs 'internal biases' and the leader of the Project, i.e., Rudolf Schlesinger, is an advocate for 'searching similarities'. The conception of cosmopolitanism also faces the danger of being misinterpreted into legal 'eschatology'. In spite of these limitations and danger, a new development in comparative legal methodology can be found to be currently in progress at Cornell Law School.

1 Introduction

In essence, debates on methodology in comparative law are always centered on how to understand different legal systems. Regardless of those heavily debated questions, such as whether comparative law should aim at searching for differences or similarities across various legal systems, or whether comparatists should apply local or global legal norms in their legal studies, what is really at stake is the problem of understanding. On the one hand, the focus of comparative law is constantly swinging between searching for similarities and differences.[1] On the other hand, comparatists at times advocate for 'localism'

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[1] See Rudolf B Schlesinger, 'The Past and Future of Comparative Law' (1995) 43 *AJCL* 477, 477–88; See also: Alan Watson, 'Legal Transplants and European Private Law' (2000) 4.4 *Electronic J of Comp L* VII <http://www.ejcl.org/ejcl/44/44-2.html> [accessed 9 March 2014].

as opposed to 'universalism' (or vice versa) in the analysis of comparative law.[2] Nevertheless, both questions revolve around the problem of understanding, i.e., to what extent can comparatists sufficiently comprehend another legal system and how. For example, Weber contended that understanding, or *verstehen*, was the proper way of studying social phenomena. He thinks that the essence of social inquiries is to understand the meanings that human beings attribute to their experiences, interactions and actions. Pierre Legrand incorporated the problem of understanding in his analysis on the nature of comparative legal scholarship. He writes, '[w]henever somebody sets out the advantages or utility of comparative law, one of those listed is that comparison gives you a different view of your own legal system and this leads to a better *understanding*'.[3]

The same holds true in other comparative studies. For example, according to Bendix, Suchman and Ossowski, 'comparative sociological studies represent an attempt to develop concepts and generalizations at a level between what is true of all societies and what is true of one society at one point in time and space'.[4] In *On The Logic of Comparative Social Inquiries*, Adam Przeworski and Henry Teune conclude that the goal of comparative social studies is to establish both 'idiographic' and 'nomothetic' approaches to social science.[5] Regardless of whether it is 'to develop concepts and generalisations', or to establish 'idiographic' and 'nomothetic' approaches to social science', the foremost problem underlying the same assertions is always one about *understanding*.

As understanding is so crucial for any comparative study, comparativists have made great efforts to develop methodologies they find most useful to further their understanding. For example, Pierre Legrand employs the anthropological term of 'thick understanding', and argues that comparatists, who want to study a foreign legal system, should strive to develop an understanding of that system at a thick and deep level, i.e. to make better sense 'of the whole'.[6] In *Comparatists and Sociology,* Roger Cotterrell explicates this conception. He writes:

> [C]ommunication or comparison demand what anthropologists call 'thick description'— rich, multilayered and detailed accounts of

[2] See e.g. Imre Zajtay, 'Aims and Methods of Comparative Law' (1974) 7 *Comp & Int'l LJ S Afr* 321, 323; John Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' (1981) 17 *Stanford JIL* 357, 387; Pierre Legrand, 'John Henry Merryman and Comparative Legal Studies: A Dialogue' (1999) 47 *AJCL* 3, 47.

[3] Ibid, 55 (emphasis added).

[4] A Przeworski & H Teune, *The Logic of Comparative Social Inquiries* (1970) 8–9.

[5] Ibid.

[6] Ibid, 40, 52.

> social experience to convey complexity of cultural difference, to identify points of empathy and thereby to provide some keys of entry into the understanding and appreciation of different cultures'.[7]

Professor Vivian Curran refers to the method of 'immersion comparison',[8] which carries a similar meaning. Pierre Legrand 'appears to believe that legal philosophy is the key to understanding law in society'.[9] Alan Watson rejects Pierre Lagrand's approach and characterises it as old-fashioned; instead, he advocates the method of 'comparative legal history'.[10] Despite having famously disparaged comparatists for their relentless search for proper methodologies, Zweigert and Kort developed a 'functional method' to comparative law.[11] The list goes on.

Building on existing theories on methodology, and consistent with them, this paper argues that the essence of comparative legal studies is always to acquire deep and genuine understanding of different legal systems by overcoming the barriers of cultural differences, while still keeping our understanding undistorted by individual lenses. That is to say, comparative law should have a *cosmopolitan* goal, according to which comparatists need to eliminate biased and prejudiced views and to make genuine understanding of a legal system different than their own as much as possible.[12] Genuine understanding, which I will argue must be obtained through a fusion of feelings with scenes, is, therefore, the prerequisite of comparison and analysis.

Nevertheless, the idea of cosmopolitanism in comparative law is not novel. In fact, early Greek and Roman philosophers created the notion of cosmopolitanism in vision of a global community. But it was not until Immanuel Kant that this idea was applied to comparative law, and thereafter it was constantly applied in comparative studies through methodological tools supplied by sociologists. However, the cosmopolitan goal of comparative law is not always explicit; in fact,

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[7] R Cotterrell, 'Comparatists and Sociology', in P Legrand & R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 131, 151.

[8] See generally: V G Curran, *Comparative Law: An Introduction* (2002).

[9] See Watson, above n 1.

[10] See generally: Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

[11] See generally: K Zweigert & H Kört, *An Introduction of Comparative Law* (rev edn, 1998).

[12] However, by specifying the cosmopolitan goal of comparative law, I do not intend to conceal or negate the limits of human cognition and the impossibilities of attaining perfection; I do intend to say that the cosmopolitan goal is inherent in the mission of comparative law, and comparatists should always strive for it, regardless of how distant their studies are from this goal. Thus, instead of 'goal', it might be more accurate to phrase this idea as the 'ideal' of comparative law. But, after considering that the word 'ideal' sounds too unrealistic, I decided to primarily use 'goal'.

what remains at a more visible level of modern comparative law is the concept of *rationality*.[13] The relationship of the cosmopolitanism goal, or ideal, to rationality can be described in the same way that Professor Annelise Riles explains the latter. Riles writes '[i]t is the rationality of the comparison […] that overcomes the particularity of the comparativist's perspective on such a contentious issue'[14], and 'comparative law cannot exist, that is, it cannot work, without this idea (rationality)'.[15] In terms of overcoming prejudices and individuality, the concept of cosmopolitanism and that of rationality are functionally equivalent.

However, even the notion of rationality does not completely free comparatists from biases and prejudice. Eliminating them means to resist subjectivity and personality, since the aim is to learn how other people think of themselves, and not to be informed about the researchers' own views. But, as Max Horkheimer's critical distinction between 'objective' and 'subjective' reasons suggests, 'subjective reason […] limits itself to the determination of the efficiency of means in their relation to ends not themselves capable of rational judgment or justification'.[16] Therefore, as the notion of rationality fails on its end to overcome prejudice, it is better for comparatists to remove the deceiving mask of 'rationality' and elucidate the cosmopolitan goal of their discipline.

The Cornell Common Core Project was undertaken at Cornell Law School in the 1960s under the leadership of Professor Rudolf B Schlesinger. The aim of this project was to *discover* if there is a common essence to the world's major legal systems. Contracts law was chosen to be the subject of the project. The project is seen as an ambitious one in the history of comparative law due to the wide range of legal systems it covered and a large international group of legal scholars it engaged. Nevertheless, the project's theoretical position in comparative law remains somewhat under-discussed, and the methodological importance of it is not fully disclosed.

The paper points out that in fact, the Cornell Common Core Project deserves higher esteem in the field of comparative law, given its high degree of adherence to the cosmopolitan goal/ideal of comparative law, which is rarely seen in other previous comparative studies. This is why the paper attempts to re-evaluate the Project and its attainment of the cosmopolitan goal.

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[13] See A Riles, 'Introduction', in A Riles (ed), *Rethinking The Masters of Comparative Law* (2001) 1, 15 (emphasis added).

[14] Ibid, 16.

[15] Ibid.

[16] Arthur E Murphy, 'Review of Book: Eclipse of Reason by Max Horkheimer' (1948) 57 *The Philosophical Review* 190, 190–1.

Such an adherence to the cosmopolitan goal of the Project can be analyzed from three perspectives: the project's aim, method and the composition of the participants. Unlike its predecessors, the Project distinguished itself in its aim to *discover* the legal principles shared by major legal systems in the field of contracts law. Such an aim is cosmopolitan in nature, in the sense that it aimed to break down traditionally perceived boundaries between legal systems and penetrate the existing prejudice with respect to their similarities and differences. In achieving this aim, the Project not only invented a 'factual' method to examine the legal solutions offered by different legal systems to similar legal problems in order to avoid parochialism, but also convened a group of legal scholars who were either born in, or highly acquainted with, the legal systems under study.

However, shattering parochial perspectives (i.e. bias and prejudice) in comparative law is hardly an easy task. Having affirmed the project's significance, the paper then argues that the project also has limitations, in terms of its methods and aim, that threaten inconspicuously to destroy the cosmopolitan nature of the Project. Moreover, the cosmopolitan ideal of comparative law itself may well encounter the danger of misinterpretation, and one of the consequences of this is to give rise to the kind of 'legal eschatology', i.e. critiquing one legal system solely on the basis of it not possessing certain features and structures of the other system that one admires or idealizes. After describing the danger of 'legal eschatology', the paper concludes by discussing some new methodological developments in the practice of comparative law.

Therefore, the paper is organized as such: Part 2 describes the partialities and biases embedded in existing comparative legal studies, and the consequences of this for the discipline. Part 3 elucidates what I consider to be the 'cosmopolitan' goal of comparative law, and explains the development of this idea's theoretical basis as well as its relationship to the notion of rationality that is expressed in the language of modern comparative law. Part 4 introduces the Cornell Common Core Project and its cosmopolitan goal from three perspectives: its aim, its methods and the composition of its participants. By identifying the advantages offered by the Project to comparative legal methodologies, the paper explicates how other theories fall short of the Project in terms of attaining the cosmopolitan goal of comparative law. Part 5 and Part 6 discuss the limitations of the Cornell Common Core Project inherent to its methodologies and aims, and then the danger of misinterpreting the cosmopolitan goal of comparative law into a kind of legal eschatology. Part 7 briefly introduces some new development in the practice of comparative law at Cornell Law School.

2 The Shackle of Partiality and Parochialism in Comparative Law

Jane Austen once said in *Pride and Prejudice*, '[v]anity and pride are different things, though the words are often used synonymously. A person may be proud without being vain. Pride relates more to our opinion of ourselves; vanity to what we would have others think of us'. To read this famous saying differently, the difference between pride and vanity underscores the fact that the way that others view a person is not identical to the way in which the person views him or herself. However, which view is more accurate is not easy to tell, because both may be inevitably colored and biased by the individual perspectives of the viewers. On the one hand, an insider of a story is always partial, since his vision is confined by his own role; on the other hand, an outsider does not necessarily see things more clearly even from a distance, since they might be blind in their own muse and deceived by various preconceptions.

An insider's view is often incomplete. For example, the ancient imperial China, during the period of the 'close-door policy' at the end of Qing Dynasty, became increasingly isolated. At that time, the Chinese empire naively believed they were the 'God's favored one' (*tina zhi jiao zi*) and that they were the rulers of all the lands in the world (*si hai zhi nei jie wei huang tu*). But, such beliefs are just fantasies created by isolation, and they were disillusioned when the invading troops of the Eight Powers assaulted Beijing and occupied the Summer Palace in 1900. However, an outsider also tends to be narrow-minded. This is because of the insurmountability of factors like personal and emotional preferences, inconstant perspectives and alike, which often come at the expense of distorting the reality. Another important cause of distorted perception applies to both the insiders and outsiders, and that is the fact that reality is constantly changing, but experience is always limited, and thus knowledge becomes out of fashion quickly. Just as what Ray Huang said in *China: A Macro History*, '[i]n sum, the China that we are dealing with is more a phenomenon under a movement than a settled entity. Robust with energy and never averted from experiment, it is by no means devoid of self-contradictions. We know that the mass has been stirred up, but we are not so sure where it is heading […] One is likely to be carried away by his first impression and sentiments'.[17] Contrary to the fast changing reality, however, human perception is constantly subject to limitations. Therefore, our reflection upon the reality is inevitably fraught with partiality and tainted views.

[17] Ray Huang, *China: A Macro History* (1997) 23.

Given the imperfection of human nature, it is unavoidable that comparative law has to deal with the problem of partiality and parochialism. However, since comparative law is a discipline based mainly on understanding, this problem becomes fatal to it. In *Lawrence v Texas*, the US Supreme Court Justice Scalia once said, 'this Court […] should not impose foreign moods, fads, or fashions on Americans'.[18] On the one hand, from a comparatist's point of view, Justice Scalia's sharp and disdainful tone represents the pervasively parochial mind-set of American legal scholarship. The words, 'impose' and 'foreign', sound irritating to the ears of others. But on the other hand, they do serve as a warning to comparatists of the embarrassment they might face, every time when they try to impose certain foreign values mechanically upon domestic legal practices without first proving the validity of such actions. Put together, these two aspects of Justice Scalia's assertion against foreign elements in the US courtrooms characterise two forms of the perennial problem of parochialism in the field of comparative law: the former denotes the exclusive narrow-mindedness of insiders, while the latter points out the self-centeredness of outsiders.

Such parochialism significantly undermines the vitality and integrity of comparative law. As has already been explained, an indispensable part of what comparatists do is to seek proper ways to understand one or more legal systems different than their own. In this sense, the seemingly incurable problem of parochialism has essentially become an Achilles' heel of comparatists in general, and even the works of the greatest comparatists could be jeopardized by the evil it generates.

Dating back to the Enlightenment period, Montesquieu's remarkable and classic work, *The Spirits of The Laws*, describes the peculiarity of law and society and he thereby set a pessimistic tone for comparative law. His famous saying goes like this:

> They (the laws of a country) should be relative to the nature and principle of the actual, or intended government; whether they form this principle, as in the café of political laws, or whether they support it, as may be said of civil institutions. They should be relative to the climate […] they should have a relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, number, commerce, manners, and customs, as also with their origin, with the object of the legislator, and with the

[18] *Lawrence v Texas*, 123 S Ct 2472, 2495 (2003).

> order of things on which they are established, in all which different lights they ought to be considered […][19]

But it can be said that now Montesquieu's assertions can no longer be justifiably applied to comparative law.[20] The narrow-minded relativism embedded in his assertions is unwelcome in modern comparative law. For example, Montesquieu spilled much of his ink in deriding Chinese government and society as what he called 'despotic'[21]. Such a definition, regardless of how justified it can be, is nevertheless made in an intrinsically prejudiced manner, since his interest in China is purposefully related to his concern for European and French politics.[22] Moreover, Montesquieu's disdain for values, such as virtues and social manners, which were traditionally cherished by the ancient Chinese society, emanated from his personal preference on liberty, individual initiative, and political virtues such as separation of powers. Thus, how Montesquieu characterised Chinese society and Europe reflects what they looked like to him. His characterisation of Chinese society appears to be parochial in the sense that it makes it difficult for him to appreciate the important role played by various social mechanisms in ancient China outside of the legal sphere, and in this way the value of his comparative work is greatly reduced.

Let me add another example. John Dawson's ambitious comparative work, *The Oracles of The Law*, serves as an excellent example of how modern comparatists' work could influence and reshape people's understanding of others' and even their own legal systems.[23] In Dawson's case, it is Dawson, the American comparatist, whose work was so fundamental and influential that it shaped the way that the French themselves thought of the French legal system.[24] In his book, Dawson's work successfully produced an enduring, powerful and stereotypical portrayal of a strictly formalist French legal system. And this image has domi-

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[19] C Montesquieu, 1 *The Spirits of The Laws. Translated from the French of M. de Secondat, Baron de Montesquieu* (1794) <http://find.galegroup.com/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=cornell&tabID=T001&docId=CW3324479092&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE> [accessed on 1 March 1 2014].

[20] See Riles, above n 13, 16 .

[21] See Montesquieu, above n 19, 396.

[22] See Simon Kow, 'The Idea of China in Modern Political Thought: Leibniz and Montesquieu' (2005) <http://www.cpsa-acsp.ca/papers-2005/kow.pdf> [accessed 12 March 2014].

[23] This is an example of the phenomenon that Professor Annelise Riles called 'the network inside out'; see generally: A Riles, *The Network Inside Out* (2000).

[24] See M Rheinstein, 1 *Collected Works* (1979) 88–9.

nated both the French and American legal minds ever since Dawson's work came out.[25]

Having emphasised the formalist aspect of the French legal system, Dawson's characterisation of the French judiciary as opposed to the American one appeared to be single-dimensional and unilateral. According to Dawson, the French judiciary functions stagnantly: given its complete civil law tradition, which bases the entire legal system completely on written civil laws, the French judicial system operates in a purely instrumental way and acts as an organ, which mechanically applies legislative texts to real cases. However, as Professor Mitchel Lasser points out in his analysis of Dawson's comparative work, such a description hardly represents the complete picture of the French judiciary, since in reality it operates on two different dimensions: it does not operate only on an 'official' dimension, but also on an 'unofficial' one. What's problematic is that the latter dimension has long remained unnoticed by traditional studies.[26]

The parochialism embedded in Dawson's portrayal of the French judicial system corresponds to his parochial and incomplete vision; however immense and extensive his knowledge and observations are, he couldn't produce a more complete description of the French legal system without keeping a cosmopolitan goal in mind. The consequence of Dawson's parochialism is the distortion of both the author's and the readers' understanding of that classic system. Lasser explains, the stereotypical and prevailing 'official' portrait of the French courts, represented by Dawson's theory, constitutes a 'skewed account' of them,[27] and it 'masks'[28] the fact that French judiciary, in some way, does operate as effectively as its American common law counterpart, i.e. through a 'hermeneutic' mode of interpretation of the French codes, which requires French judges to 'interpret the Code in terms of sociopolitical theories that are extrinsic to the Code's grammar'.[29]

The parochialism embedded in Dawson's work can also be attributed firstly to the influence of the then prevailing legal discourse in the United States, i.e. American legal realism, and then to Dawson's common law-centric ideology.[30] By describing the French jurisprudence as rigid and formalistic, and the French

[25] See Mitchel Lasser, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1995) 104 *Yale LJ* 1325, 1326.
[26] Ibid, 1329.
[27] Ibid, 1326.
[28] Ibid, 1327.
[29] Ibid, 1328.
[30] Ibid, generally.

courts as a 'distrustful',[31] 'instrumental',[32] 'parsimonious'[33] and 'subordinate'[34] organ, whose sole job is to mechanically apply written codes, Dawson concludes that the operation of the French legal system severely hampers the development of a pragmatic American style case-law system. Dawson's obstinate attitude towards the French judicial system emanated from his self-centered common-law background, which is completely incompatible with the civil law tradition. Such a mentality expressed in his comparison of the French judiciary to the American one can be summarized as a 'whatever-is-different-is-bad' mindset, which has fundamentally undermined the quality of understanding in previous comparative works.[35] To use Professor Reimann's words, this is a kind of 'arrogance'[36] that often presides in comparative scholars' minds.

The kind of standing one takes in favor of the features resembling those of his own system as displayed in Dawson's work hardly exists only among American comparatists, because to some extent, one's conception of law is significantly shaped by one's legal background and will inevitably be incorporated into one's judgment on any legal system. For example, According to Professor Vivian Curran, the criticism of American legal realists made by the prestigious German legal theorist, Kantorowicz, reflects his personal conception of law, which is civilian in nature.[37] Kantorowicz saw more value in the objectivity and systematization of a legal system than in its ability to focus on facts. Such a preference reveals a deep influence of the civil law tradition to his understanding of law.

Similarly, conflicting ideas sometimes best serve to exemplify how understanding can be coloured by tainted eyes. For example, in traditional Chinese society, the official law only regulated criminal actions, whereas customary laws dealt with what we now think of as civil law issues. Regarding the nature of these

[31] J P Dawson, *The Oracles of The Law* (1968) 376.
[32] Ibid, 411.
[33] Ibid, 411
[34] Ibid, 378.
[35] According to Lasser, the same applies to John Merryman's characterization of the French judicial system, as Merryman used terms like 'interpretation', 'very much like judge-made law' and concluded that '[t]he principle that judges cannot make law had many other implications', see, Mitchel Lasser, 'Comparative Readings of Roscoe Pound's Jurisprudence' (2002) 50 *AJCL* 719, 720–1.
[36] P G Monateri, *Methods of Comparative Law* (2012) 89.
[37] See generally V G Curran, 'Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism', in A Riles (ed), *Rethinking The Masters of Comparative Law* (2001) 66, 66–91.

customary laws in ancient China, there have been disagreements between Western scholars and Chinese scholars: whereas the former, such as Professor William P Alford, argued that the imperial Chinese government did have the authority over civil law matters and local customs functioned as a tool of the government to exercise this authority, Chinese scholars, e.g., Liang Zhiping, insisted that such a conception of custom laws was traditionally inconsistent with Chinese culture, according to which the notion of law referred particularly to penal laws, and there was no such a thing as civil law in ancient Chinese society as understood in the West.[38]

In short, to understand a foreign legal culture is difficult, particularly when the observer is severely biased by preconceptions; nevertheless, the danger of parochialism produced as a result of such biases is always lurking in comparative law. However, this fact does not mean that achieving genuine understanding and appreciation of different legal systems is entirely impossible. On the contrary, through diligent learning of and 'immersing' themselves in different legal cultures, comparatists can obtain a high degree of understanding and knowledge of the legal systems they study. However, to do this, it is essential for comparatists to possess a kind of professional spirit, i.e. a cosmopolitan spirit, which helps keep them alert of the danger of being biased and encourages them to develop knowledge and methods that are capable of avoiding parochial views. Otherwise, comparative law will always be haunted by the shadow of parochialism.

3 The Cosmopolitan Goal of Comparative Law

This paper therefore argues that comparative law should establish a paramount goal of cosmopolitanism, according to which comparatists should always bear in mind that the goal of their work is to seek genuine understanding of different legal systems and to try to avoid distorting their understanding by biases and prejudice embedded in their perceptions. This requires them to understand a foreign legal system from the perspectives of the people who live in there, and not from their own perspectives. For comparative studies, how the local people think of their own legal system is more important than what the system looks like in the comparatists' eyes.

[38] See generally: William P Alford, *To Steal a Book is an Elegant Offence: Intellectual Property Law in Chinese Civilisation* (1995); and Liang Zhiping, *The Pursuit of Harmony in Natural Orders: A Study on Chinese Traditional Legal Culture* (1997) 249.

But, as already recognized, no one is perfect and parochialism is a fault deeply inherited in human nature. Thus, what this paper argues is that comparatists need to first be sober of the tendency towards bias and then keep on working toward the cosmopolitan goal; how much they could achieve is another question. It may be better to call such spirit an 'ideal' rather than a 'goal'. However, the author prefers the word 'goal', since an 'ideal' may seem so impossible that it discourages people from pursuing it. Having a cosmopolitan goal is more like a kind of professionalism for comparatists than a delusional vexation. According to this goal, it is the job of comparatists to remain critical to both their and others' works and act actively against parochialism.

It should be noted in the first place that the idea of 'cosmopolitanism' is hardly a novel one. It originated from the Greek and Roman philosophies. Later, Immanuel Kant introduced this concept to comparative law. In his *Perpetual Peace*, Kant advocated the 'cosmopolitan right', the right of an alien not to be treated as an enemy upon his arrival in another country. Such a right is based on the logic that people belong to the same global community so they cannot treat each other unfairly. Moreover, to respect the cosmopolitan right, people have to use 'reasons'; thus, those, who could be hospitable and tolerant to people from outside of their community, are called 'rational' beings. It follows that, underlying Kant's construction of the cosmopolitan right, there is a link between cosmopolitanism and rationality: the latter is the means, whereas the former is the end.

The relationship between cosmopolitanism and rationality is further elaborated by Max Weber, who contends that understanding, or *verstehen*, is the proper way to study social phenomena and 'hermeneutics' is a good tool for this purpose. Weber believes social actions can be classified into four ideal types: means-ends rational action, value-rational action, affectual action, and traditional action. He thinks while values play important roles in understanding social actions, they must be kept outside of researchers' interpretations of these actions. Weber's idea of rationality in social science adds tremendous value to comparative law, since it urges comparatists to avoid the tendency towards bias and prejudice. To study a foreign legal system, one is inevitably inclined to impose his own conception of law in his study of it, or to use his own preference to judge it. Rationality, however, tells him to overcome the influence of individual perspectives.[39] Rationalism also encourages comparatists to flush out old and canonical ideas and to emancipate their minds from the fetter of stereotypes. It is amazing to see how Weber himself disregarded the traditionally perceived boundaries of national states in search of

[39] See Riles, above n 13, 16.

formalism and rationalism.

Having said that, it is easy to understand why rationality has become the precept of modern comparative law—by taking into account the meanings that actors attribute to their own actions, comparatists put themselves in other peoples' positions in order to understand them. In this way, comparatists do not need to turn on personal preferences and emotions, and they could, thereby, be unaffected by individual perspectives and reflect a foreign legal system unbiasedly. However, even rationality cannot resist the tendency towards biases and prejudices. As in Weber's case, rationality is undermined by his pursuit of formal rationalism. Weber sought to establish formal rationalism as the ultimate destination of both social and legal reasons but such efforts were made at the expense of sacrificing objectivity and 'historicity'.[40] Thus, viewed from this lens, rationality displays itself in a very instrumental fashion; if comparatists insist solely upon this doctrine, they then run the risk of creating a new kind of parochialism masked by the irrationality hidden under the superficial name of 'rationality'.

Therefore, although comparative law benefits greatly from rationality, it nevertheless fails to completely get rid of parochialism and often deceives people about its existence. No wonder comparatists frequently express their concern about the state of comparative law: '[i]nstead, comparatists, unable to escape the 'system' into which they were institutionalized, have simply projected onto the international scene the positivism that they were used to practicing within their own law',[41] and 'then she (the comparatist) cannot walk away from her own situatedness'.[42]

Given the limitations of rationality, this paper argues that comparatists should elucidate the *cosmopolitan* goal (or *tenant*, *precept*, *ideal*) of comparative law. Recognizing the difficulty of arriving at such a goal does not, and should not, stop comparatists from pursuing genuine understanding, nor should it dampen their enthusiasm in seeking such understanding. Looking back, comparative law has achieved remarkable development both in terms of the scope of legal systems under study and in terms of the maturity/diversity of the methodologies it has employed. As the world becomes more integrated and states more interactive, both opportunities and demands for cultural exchanges are aggrandized. Under such a context, genuine understanding is becoming increasingly possible. To

[40] See Otto B Van Der Sprenkel, 'Max Weber on China' (1964) 3 *Hist & Theory* 348, 351.

[41] Pierre Legrand, 'Siting Foreign Law: How Derrida Can Help' (2011) 21 *Duke JCIL* 595, 598.

[42] Mitchel Lasser, 'The Question of Understanding', in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 197, 219.

reiterate Riles's words, '[w]e are far away, by now, from Montesquieu's assertion that the law suitable to one people is probably not suitable to another'[43].

4 The Cornell Common Core Project and Its Cosmopolitan Goal

The Cornell Common Core Project was a huge comparative work conducted in the 1960s at Cornell Law School under the leadership of Professor Rudolf B Schlesinger. It sought to examine the similarities and differences in the law of contracts in major legal systems, including the American and English legal systems, the common law systems in other countries, and the civil law systems in countries such as France, Germany, Switzerland and Italy, as well as some socialist legal systems and the legal system in South Africa.

At the first sight, the project looks like a normal comparative contracts law study, which attempts to examine the differences and similarities in contracts law among different legal systems, *albeit* a large-scale one. What has not been noticed, or at least not explicitly pointed out, however, is that the project distinguishes itself from other comparative studies by the *cosmopolitan* goal embodied in its methods of study. The innovative 'fact-oriented' questionnaire method combined with the intellectually collaborative approach that the project used in the course of study contributed significantly to comparative law and its methodological pool, because they are apt to get over the individual perspectives that predispose comparatists to work with parochial views.

The Project's primary purpose is to '[ascertain] […] the extent to which there exists common ground, or a common core, among a major portion of the world's legal systems'.[44] To describe it in a more instructive way, they wanted to *discover* whether or not there are common cores of law existing among the world's major legal systems and if so, what are they. To search for the common cores, their entry point is contracts law, which has similarities that seemed easier to detect.

However, by defining this purpose, they did not intend to discover only similarities while ignoring or denying the existence of differences in these legal systems. Rather, the aim was to 'discover'—different from mere 'description' and not amounting to 'constructing' or 'reinventing' something that was not actually there—the existence of the common core in multiple legal systems. As

[43] See Riles, above n 13, 16.

[44] R B Schlesinger (ed), 1 *Formation of The Contracts: A Study of the Common Core of Legal Systems* (1968) 2.

Schlensinger puts it, the project was all about 'identification' and 'formulation' of 'elements of similarity as well as dissimilarity'.[45]

To express it in another way, there was no presupposition that these common grounds did, or must, exist, and the Project tried to be open to the discovery of both similarities and differences without bias. The gist of the word, 'discover', is that the project sought to conduct *'true comparison'*,[46] which is to obtain deeper understanding than previous works did, and it did so by distinguishing its approach from mere 'compilation' and 'juxtaposition'.[47] Thus, the aim of the Project is in nature *cosmopolitan* in at least two senses: on the one hand, it seeks to transcend the borders between different legal systems, which were traditionally regarded as 'impenetrable'; on the other hand, it emphasises the need to eradicate preconceptions and biases.

In essence, the project consequentially *re-defines* and *revives* the normative nature of comparative law as a discipline of *true comparison*. Moreover, the participants in the project astonishingly exhibited a high degree of awareness and cautiousness of the danger of being biased and parochial: 'the similarities and dissimilarities often are so obvious to trained eye that mere juxtaposition becomes an implicit comparison; indeed, *mere description* of a foreign approach of several legal systems *may sometimes imply a comparison with certain elements in the reader's own legal system*'.[48] Such struggles against presupposition and superficiality can be found throughout the course of the study, as described by Schlensinger, 'the participants in the Cornell Project asked themselves the agonizing question often prompted by social science research: did we merely demonstrate the obvious?'[49]

Admittedly, awareness and cautiousness do not always work to eliminate biases; apparently knowing this, the project employed methods that are especially effective in reducing individual perspectives, i.e. the factual method and the teamwork method.

On the one hand, the project is an intellectually collaborative work undertaken by a group of lawyers from different legal backgrounds and with diverse knowledge. Each of the participants chosen were 'thoroughly familiar with doctrine and practice in one or more of the legal systems chosen'.[50] Given the lim-

[45] Ibid, 3.
[46] Ibid, 2 (emphasis added).
[47] Ibid.
[48] Ibid, (emphasis added).
[49] Ibid, 41.
[50] Ibid, 30.

itation of individual perspectives as well as the tendency of human nature to be biased, and the collaborative nature of this project was apparently the result of a highly conscious and intentional action of design aiming to avoid parochialism:

> Whoever undertakes multilateral comparative research must adjust his methods to a fundamental and unalterable fact: that no single human being, however learned, possesses enough knowledge of diverse legal systems to assemble and correctly to understand all of the theoretical and practical information on national laws which forms the necessary raw material for comparison. Teamwork of a number of lawyers, each of whom must be thoroughly familiar with doctrine and practice in one or more of the legal systems chosen, thus seems to be indispensable.[51]

It is now necessary to take a closer look at the composition of the research team. Specifically, it was composed of: Ishwar Chandra Saxena, Dean of the Faculty of Law, University of Rajasthan, who is responsible for the writing of the English reports, Johannes Leyser, Dr jur in Freiburg and LLB and Reader in Comparative Law and Public International Law at the University of Melbourne, for the Annotations on Australian-Canadian-New Zealand Law and the English-Australian-Canadian-New Zealand Reports and South African Reports, W J Wagner, LLM in Warsaw and dr en Droit in Paris, SJD from Northwestern Law School, and then Professor of Law at Indiana University, for Communist Legal Systems Annotations and Polish Reports and Annotations, I R Macneil, Professor at Cornell Law School, and R B Schlesinger, Professor at Cornell Law School, for the American Reports, P Bonnassies, Professor of Law at the Law Faculty of the University of Aix-Marseille, for the French Reports, K H Neumayer, Professor of Law at the Universities of Lausanne, Switzerland, and Würzburg, Germany, for the German-Swiss Reports with Austrian Annotations, G Gorla, Professor of Law at the University of Rome, Italy and Professor-at-Large at Cornell University, for the Italian Reports and Annotations, and W Lorenz, Professor of Law at Cornell University, for the Austrian-German-Swiss Reports.

The process of the teamwork was rather prolonged. It took ten years for them to come up with the final Individual National Reports and General Reports. In doing the teamwork, each participant first received a set of Working Papers, which contained the same questions asking about the legal

[51] Ibid.

positions of legal systems covered with respect to a similar set of factual issues described thereof. Participants then drafted their own Individual/National Reports and Annotations, explaining the legal positions of the legal systems that they represented, in response to the Working Papers. After collecting all individual reports, the participants together contributed to the compilation of the General Reports, which analysed the results of their findings. Each participant was, therefore, individually responsible for the national reports and annotations, but they bore joint responsibility for the general reports.

The diverse background of the participants enabled the project to come up with a cosmopolitan view of the subject under study. Through oral discussions and meeting, the participants exchanged ideas and perspectives that supplemented each other's view by supplying knowledge of different legal systems and different conceptions of law. Thus, the result of their collective work was in nature a multi-lateral comparison. This is in accordance with the aim of the project, which was to obtain and verify a high degree of 'multinational validity'.[52]

More importantly, although not explicitly indicated, the research of the participants was not restricted to the 'formal' rules of contracts in their legal systems. Granted, the subject of contracts law implies that the major part of the research was on a bunch of formal laws, i.e. the contracts law or commercial code, and cases and judgments. However, in the course of study, the researches also examined 'informal' laws/rules, which influence contractual behavior either in the case of legal vacancy or as supplement to formal laws. For example, in the absence of legal authorities concerning the legal status of contracts in self-service enterprises, there was generally a lack of both statutory and judicial authorities, so most researchers referred to relevant legal literature to determine the situations of their legal systems, including the opinions stated in the notes attached to specific legal provisions. Based on such literature, for example, Neumayer concluded that in German '[t]he view prevails that the customer makes his offer at the cash register, and that the cashier accepts it on behalf of the storekeeper'.[53] Such references to the informal source can be found in many other places.[54] Also, when participants engaged in legal analysis, they sometimes inevitably incorporated their own experience in and knowledge of particular cultural and societal background into their research.[55]

[52] Ibid, 3.
[53] Ibid, 373.
[54] Ibid, 334 & 387.
[55] See e.g. ibid, 338–9 & 382; See also above nn 47 & 48.

Given the huge number of legal systems covered as well as the complexity of the legal and social structures underlying the legal issues under study, the collaboration of a group of lawyers, who were well acquainted with the legal systems covered, appears to be utterly important. One should be informed that legal phenomena are not isolated but inter-connected with each other in systematic ways. Knowing a part is not knowing the whole. This reality necessitates the kind of intellectual collaborations in the Project to be conducted in comparative law. Thus, by requiring collective investigations and group discussions, the teamwork method is the only way to collect knowledge of each legal system under study that can go beyond the individual lenses of the comparatists. This explains why Schlesinger was so decisive and confident, when he said that 'teamwork of a number of lawyers [...] thus seems to be indispensable for comparative studies'.[56]

In addition to the teamwork method, the Project takes pride in its 'fact-oriented questionnaire method', which has often been applauded by later comparatists.[57] In order to reconcile the inconsistencies embodied in the legal systems covered, especially in their legal treatments of particular legal issues, e.g. whether a particular issue has legal relevance or is justiciable in a country's court, or whether a scheme is conceived as a legal system, the Project invented the 'factual' approach[58].

At first, the participants received the same set of Working Papers, which contained contracts cases with detailed factual descriptions.[59] Each of them then set out to conduct investigations in the legal system assigned to him and then explained the legal positions of that legal system in National Reports. In doing this, they had to pinpoint not only the specific legal authorities supporting their legal positions, but also legal remedies corresponding to them.[60] Then, the National Reports were gathered together, and all of them sat together to discuss and clarify the positions in their reports. For each oral discussion, there was a

[56] See Schlesinger, above n 50.

[57] See Ugo Mattei and Mauro Bussani, 'The Common Core Approach To The European Private Law' (1997–1998) 3 *Columbia JEL* 339–56.

[58] See Schlesinger, above n 44, 30–3.

[59] These cases were selected from judgments in various states, but mainly from common law countries, as a practical matter.

[60] Questions to be answered by participants in their reports included: 'How would the legal system or systems covered by you react to this fact situation? Would the court hold in favor of the plaintiff or the defendant? If for the plaintiff, what would be the kind and measure of relief awarded to him? What are the authorities supporting your conclusion, and what is its doctrinal basis?' See Schlesinger, above n 44, 32.

general reporter to present the result of the collective work: the similarities and dissimilarities thereof. And they then came up with the General Reports based on these results.

Furthermore, to ensure that each participant dealt with the same facts, individual reports were labeled with specific symbols, such as A1, A2 and B2, and these symbols identified the subjects under consideration. In this way, '[a]ll of the Individual reports bearing the symbol A-3 deal with the same subject as the General Report on A-3; all these Individual Reports appear together, in the alphabetical order',[61] and 'within each individual report, again the same organizational scheme is adopted as in the related General Report. Thus, subsection II G of the French Report on B-5 deals with the same subtopic as the corresponding sub-section of the General Report on B-5'.[62]

The factual approach was designed to avoid conflicting situations, in which a legal issue has different legal implications in different countries. For example, many issues that are regulated by law in one legal system have no legal relevance in the other. Thus, by framing the question in factual terms, the working papers were not designed in the presupposition of legal relevancy under any of these legal systems. Also, the factual approach opened doors to both formal and informal rules. By formulating questions in factual terms, the Working Papers did not confine the scope of answers to the formal dimension of a legal system. Rather, they allowed the comparatists to pursue the genuine knowledge of the legal systems concerned beyond their formal sphere.

In addition to the way the factual approach avoided biases towards a particular legal system, as Giovanni E Longo, Professor of Law at Rome and one of the participants, later recalled, the factual approach was actually operated in an even more complex way. He gave an example of how the factual approach solved the problem concerning the different legal treatments of the 'effects of "an agreement contemplating a writing"'.[63] In that case, because the civilians took into consideration a different element in determining whether or not a pre-contractual oral agreement should be binding on the parties, i.e. the civilians relied on the purposes of the contractual parties, and this element was absent in other legal systems, they further divided the fact into two sub-parts, each containing a different hypothesis regarding the parties' intention.

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[61] Ibid, 60.

[62] Ibid.

[63] Giovanni E Longo, 'The Cornell Project on the Common Core of Legal Systems: Views of a Civilian' (1965–1966) 4 *Columbia JTL* 1, 6.

The factual questionnaire method, thus, enabled the Project to discover the existence of agreements and disagreements underlying the various legal systems under study without biases and parochial views. It also facilitated cultural exchange and communication. As Schlesinger stated in the beginning, '[i]t was clear from the outset that these questions had to be formulated in such a way that our colleague from India would understand them in the same way as our colleague from Italy. If the questions had been asked in abstract legal terms, each participant might have read particular notions of his own legal system into such terms, and the result would have been the complete lack of a common focus'.[64]

The combination of the teamwork method and the factual approach in the Project thus was an extraordinary methodological invention in comparative law history, and it generated enormous inspirations to future comparative legal studies. As already mentioned, over time, every piece of great comparative work cannot resist the subjectivity of the individual lens and preferences of the authors. That is one of the reasons why David Kennedy concluded that comparative law has its own politics.[65] However, by permitting the collaboration of individuals and the exchange of their perspectives, the Project enabled the compensation for the limitations of their views; and by replacing legal terms with factual terms, it made sure that everyone was on the same ground before they started out understanding. As Sacco later acknowledged, 'I observed that Schlesinger had approached those misleading circumstances that the superficial comparatist neglects (different mentalities, different, tacit assumptions) and has found the correct procedure to overcome them'.[66] The groundbreaking method of the Project made a great start for comparative legal studies to pursue the cosmopolitan goal.

The project generated enormous influence upon later studies. Ugo Mattei and Mausino Bruno were inspired by the Project and they later set out to carry out their own 'common core' project on European Private Law. It is said that the two authors 'stood on the shoulder of the giant, Rudolf Schlesinger'.[67] Rudolfo Sacoo supplemented the common core project by subsequently formulating the theory of 'legal formants'. Schlesinger and Sacco together are called 'the unquestioned

[64] See Schlesinger, above n 44, 31.

[65] See generally: David Kennedy, 'On The Methods and Politics of Comparative Law', in P Legrand & R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 345.

[66] Ugo Mattei, 'The Comparative Jurisprudence of Schlensinger and Sacco', in A Riles (ed), *Rethinking The Masters of Comparative Law* (2001) 238, 251.

[67] Vivian G Curran, 'On The Shoulders of Schlensinger: The Trento Common Core of European Private Law Project' (2002) 2 *GlobalJurist Frontiers* 1, 1.

methodological and theoretical godfathers of the Common Core Project'.[68] In fact, Schlesinger has foreseen such a huge influence, and he hopes that the project has the potential to benefit a variety of legal activities, including professional education and national and international legislations.[69] But such a pragmatic nature of the Project does not in any way undermine the extraordinary methods that it employed in pursuing cosmopolitan understanding.

In short, the cosmopolitan aim and methods of the Project deserve to be re-accounted and re-addressed at the present time, when comparative law is still in search of proper ways to understand various legal systems. In terms of its groundbreaking innovation in methods, the Project serves as an incomparable inspiration for future comparative legal studies to pursue cosmopolitan understandings.

Also, the Project deserves extra credit, since it stood independent from the parochial debates engaged in by previous comparatists, and it remained exceptionally sober-minded during its own time. Given the historical background of the Project, it's surprising to find that the Project retained its integrity in the midst of competing American legal discourses: legal realism, anti-formalism, and law and sociology, and so on. Specifically, the project was undertaken during a period when comparative law practices on both sides of the Atlantic had to fight against the realist-inspired conceptions and methodologies. Legal realism was so dominant in American legal thought that many assumptions were taken for granted in comparative legal studies by comparatists in the United States. European comparative law, sometimes, defended their legal theories against the assaults made by American scholars. So, the result was that both sides ended up dealing with the parochial views caused by each other's indigenous legal discourse.

Such struggles could be exemplified, on the American side, by Dawson and Merryman, as previously discussed, both reflecting a mindset that law is 'meaningful only when located in the total context in which they are being used—in the community process in which people are using these doctrines to effect, or justify, some specific distribution of values'[70]; on the Continental side, by Kantorowicz's defense for his 'free law' theory, previously mentioned, too, which criticized the American realists of denying the positive form of law.[71]

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[68] Monateri, above n 36, 124.

[69] Schlesinger, above n 44, 5–11.

[70] Myres S McDougal, 'The Law School of the Future: From Legal Realism to Policy Science in the World Community' (1947) 56 *Yale LJ* 1345, 1345.

[71] However, some attributed Kantorowicz's critique on American legal realism to his civilian background: see generally above n 37.

It should be noted that other attempts at searching for new methodologies in American comparative law have also been made. They were all successful comparative projects in one way or another, but neither of them surpassed the Cornell Common Core Project in terms of the methodology that is up to the cosmopolitan standard. For example, Roscoe Pound and Mirjan R. Damaska both tried to transcend the boundaries of legal families or legal systems traditionally laid down by comparatists: the former sought to search for the 'ideal elements'[72] underlying all legal systems, where the latter wanted to formulate a new taxonomy of 'justice and state authority'.[73] Nevertheless, these two figures' giant works could hardly be replicated, since they relied too much on the 'cosmopolitan erudition'[74] of the comparatists. Zweigert and Körz developed the functional approach of comparative law in *An Introduction to Comparative Law*. This approach has exerted fundamental influence upon the methods of comparative law, and it fits the cosmopolitan end of comparative law in the sense that it stimulates deep social inquiries in comparative legal studies. But, its proposition of functionality presupposes the existence of functional equivalences in different societies, and it's influence on comparative law stays only on the micro-level.[75] The legal historian, Alan Watson, in developing his legal transplants theory, displayed so much optimism that many questioned whether it was realistic enough. The optimistic mood of this theory might mislead the comparative legal studies in some way or another into the celestial bliss. In comparison, the Project really provided the discipline with a groundbreaking methodology that moves it closer towards its cosmopolitan goal.

5 A Captious Assessment of the Cornell Common Core Project and Its Limitations

The Project, as already explained, selected participants, who were 'qualified' to represent the legal positions of particular legal systems. Such a qualification was based on the fact that all participants had 'insiders' knowledge' of the legal systems under study. Such an insider's knowledge was obtained either

[72] See generally: R Pound, *The Ideal Element in Law* (1958, reprinted 2002) <http://oll.libertyfund.org/titles/671> [accessed 10 February 2014].

[73] See generally: M R Damaska, *The Faces of Justice and State Authority* (1991).

[74] See Lasser, above n 35, 727.

[75] See Ralf Michaels, 'The Functional Method Of Comparative Law', in M Reimann & R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 339.

because the participant was born in a society subject to that legal system, or through becoming acquainted with the doctrine, theories and practices of the legal system. The acquaintance of a particular legal system could be achieved by both learning and the so-called 'immersion', which means to study 'not just legal rules but what attaches to them: values, beliefs, traditions and collective memories, understandings, aspirations and emotions'.[76]

Nevertheless, the 'insider' approach is problematic. The Project delegated the task of investigations solely to scholars who had the insiders' knowledge; therefore, its result might be tainted by a different set of biases and parochialism, which could be called 'internal biases', or 'internal parochialism'. The existence of such internal biases is hardly deniable, since the way that an insider presents his own legal system depends heavily on his individual conception of law and society as well as the breadth and depth of his knowledge. Also, the significance of internal biases depends on the extent to which his view could represent the general understanding of other insiders. After all, '[d]ifferent Italians will deal differently with the same topic. There is no immaculate perception nor is there such a thing as immaculate representation'.[77] Thus, it would be wrong to assume that an insider's view reflects the authentic situations in a given legal system: 'prisoners so conditioned do not see the prison any more'.[78]

Furthermore, it has been noted that the Project was aimed to discover both similarities and differences among the legal systems under study, so, as the name of the project misleadingly suggests, the Project did not intend to deny the existence of differences across legal systems. It was also stated at the outset of the Project that it was not an effort for legal harmonization, regardless of the effects it has had upon other projects.

However, in spite of its superior methodology, the Project might be similarly influenced by its main author's ideology and preference. As one might already know, the general editor, leader and main organizer of the Project, Rudolf B Schlesinger, was himself explicit about the preference he gave to discovering similarities over differences, and he even forecast that the future of comparative law belonged to the investigation of similarities as opposed to differences.[79] Such a tendency of seeking commonalities may unfortunately lead to the creation and construction of them.

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[76] See Curran, above n 8.

[77] See Legrand, above n 3, 54.

[78] Ibid, 181.

[79] See generally Rudolf B Schlesinger, 'The Past and Future of Comparative Law' (1995) 43 *AJCL* 477.

Thus, if one reads the Project carefully, there might be situations where the General Reports gave favor to similarities rather than differences. A cursory comparison of the General Reports and the Individual Reports gives the reader a hint of the disguised bias towards commonality against differences. In the General Report A-1, for example, it is stated in footnote 2, that 'it is assumed that the proposal meets the applicable standard of definiteness (see A-3); if it does not, it will not be recognized as an offer. As to cases in which the parties contemplate that their agreement will be reduced to writing or otherwise embodied in a formal document, see C-2'.[80] However, in the American Report A-1, it's pointed out that the decisive language used in this footnote was so absolute and simplified that such a 'dichotomy' of situations might not exist in the judicial practice in the US.[81]

Such an inconsistency between the General Report and an Individual Report, although subtle and well recognised in the book, reveals a desire of the reporter to extract similarities out of the complexity embroiled in multilateral comparisons. And because of the influence of the commonality-inspired comparatists, it is actually in a Project's nature to wrap around and strangle dissimilarities in order to get more evidence of similarities. Such a disguised bias towards similarities silently obscured the existence of differences in different legal systems. The perceived similarities and the obscuration of the existence of differences, therefore, destroy the cosmopolitan nature of the project.

6 The Danger of Misreading: 'Legal Eschatology' in Comparative Law

Following the analysis of the cosmopolitan goal of comparative law and the Cornell Common Core Project, the paper argues that there is a danger of turning the legal cosmopolitanism into what the author calls 'legal eschatology'.[82] Serious misinterpretation of the conception of legal cosmopolitanism in comparative law unjustifiably equated it with legal 'assimilation', which may ultimately lead to legal eschatology.

However, the two conceptions are radically different. Legal cosmopolitanism aims at fostering unbiased understanding and appreciation of other legal systems and eliminating prejudice and parochialism in comparative studies; while legal

[80] See Schlensinger, above n 44, 77.
[81] Ibid, 323.
[82] For example, see generally, Barry Smith, 'Law and Eschatology in Wittgenstein's Early Thought' (1978) 21 *Inquiry* 425.

eschatology starts from an unjustified presupposition that all legal systems should ultimately move towards a single mode. This ideology of eschatology distinguishes an idealistic world from a realistic world. It creates an idealistic rule of law, typically based on a particular Western legal order that one admires in particular, and then critiques, based on this ideal, a legal system, which departs from this ideal. For example, Chinese legal practices receive frequent critiques from scholars, who honor the Western legal order and values. Their critique of a Chinese legal system is often a 'whatever-is-different-is-bad/ineffective/failed' one.

Legal eschatology leads legal cosmopolitanism astray, because it distorts the situations of the legal systems being critically analysed, and often at the expense of ignoring the importance of local culture and customs. Such an ideology, on the one hand, harms the diversity of legal culture, and on the other hand, creates extremely biased and parochial views. Moreover, it might cause the self-alienation and non-autonomy of legal scholarship and harm the healthy development of the rule of law in the legal system under criticism.

Therefore, legal eschatology is a serious distortion of the concept of cosmopolitanism, which values both unity and diversity. However, such a distortion is a common hazard in comparative law, especially among those comparatists who are unsatisfied with existing legal and institutional arrangements. Comparatists who share the cosmopolitan goal, on the contrary, are able to prevent themselves from making such mistakes. In order not to follow this misunderstanding, comparative studies must be constructed without disrespecting local culture. Identifying the problem to be solved in a particular society in the study before making any comparison is very important, if the researchers still want to take advantage of what they learn from outside, because the same problem might not be found in a different society, and thus, a comparison between the two legal systems will lose its significance.

7 Some New Approaches to the Cosmopolitan Goal Developed at Cornell Law School

American comparative law likes to look back and look forth.[83] Since 1990s, globalization has led to significant cultural diffusions as well as institutional convergence worldwide. Under this circumstance, comparative law practices have been constantly evolving so as to adapt to the changes of the world. Now, it is attempting to free itself from the dichotomy of international law and domestic law and to develop methodologies that allow comparative studies to transcend the boundaries of space and time.

To understand the implications of such changes in comparative studies, it is necessary to compare past studies with the current ones. Therefore, the paper concludes with a comparison between the Cornell Common Core Project and another comparative project that is currently occurring at Cornell Law School, i.e. the Meridian 180 Program. A practical reason that the paper chooses to make such a comparison is that both projects are initiated at Cornell Law School, both of which contribute to the methodological advancement of comparative law. Moreover, the author is lucky enough to have participated in the latter project as a part-time student research assistant and has witnessed its operation in person. Based on what the author has learnt and considered, both projects provide enlightening ideas for comparatists to produce innovative research methods, and they illuminate the cosmopolitan goal of the discipline. Furthermore, the latter program serves as an improvement of the Cornell Common Core Program, in the sense that its inter-disciplinary and interactive method and transpacific coverage make up for what the Cornell Common Core Project lacks, and all of these three features enhance the ability of comparatists to approach a cosmopolitan understanding.

The Meridian 180 Program is a comparative project under the leadership of Professor Annelise Riles at Cornell Law School and some senior scholars from outside of the law department and even outside of the US. Since its launch in 2012, the project has attracted hundreds of participants. Most of its current members are from the transpacific region, such as China, Japan, Korea, the US and Australia. The aim of the Program is to facilitate a Pan-Pacific dialogue

[83] See e.g. Ugo Mattei, 'An Opportunity Not to Be Missed: The Future of Comparative Law in the United States' (1998) 48 *AJCL* 709; Christopher A Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' (2010) 2009 *Brigham Young ULR* 1879; Clifford Larsen, 'The Future of Comparative Law: Public Legal Systems' (1998) 21 *Hastings ICLR* 847; Schlesinger, above n 79.

that provides solutions to important regional issues. Those who participate contribute to the diversity and vitality of the Program by mobilising the resources in their knowledge reservoir and introducing their local ethnographical practices to the Pan-Pacific panorama of the Program. The focus of the Program, i.e. the transpacific area, successfully subverts the West-centric, or trans-Atlantic feature of traditional comparative law practices. The Cornell Common Core Project, although trying to be inclusive, sadly falls within the traditional category. Carried out in the 1960s, when cross-transpacific communications were not facilitated and cultural contradiction was significant, the Cornell Common Core Project was constructed mainly as a bridge between the two banks of the Atlantic.

Moreover, it's noteworthy that to call the Meridian 180 Program a comparative 'law' project is not entirely accurate, because the Program is extremely interdisciplinary in nature: not only do its members come from different departments and have different professions—they include renowned legal scholars, anthropologists, lawyers, and economics, etc.—the topics covered also extend widely beyond pure legal issues, from trade issues, financial governance, social movements, environmental issues, cultures and traditions, legal reforms, to political elections and commonwealth issues, etc.

From the perspective of comparative law, the interdisciplinary method employed in the Meridian 180 Program is in accordance with its cosmopolitan goal. Understanding a legal system is impossible, if the observer lacks the knowledge of its legal culture and social tradition. Thus, the diversity of topics and subjects covered by the Program makes it possible for comparatists to have in-depth insights into the indigenous culture of the legal systems discussed. Such an approach resembles what Professor Vivian Curran called the 'immersion comparison',[84] which means 'studying not just legal rules but what attaches to them: values, beliefs, traditions and collective memories, understandings, aspirations and emotions'.[85]

The Cornell Common Core Project, however, as previously explained, appears to have a tunnel vision: it only sees problems of law from a pure legal perspective, and thus lacks what is the cultural and what is the social. Although the Project also contained a cultural part,[86] that part was too thin and only ancillary to the legal issues under investigation. Part of this was due to the fact-specific case-study method that the Project employed in the course of study.

[84] See Curran, above n 8.
[85] See Cotterrell, above n 7.
[86] As noted above n 55.

While the factual method enabled genuine communication across different legal systems to be carried out, it constrained the scope of the study to pure legal issues. Such lack of sophistication seriously undermines the value of the Project in general. To use Sacco's term, 'legal formants', i.e., the cultural aspect of legal issues, are important, because to know 'only one formant (statute, case, explicit description of a local academic [...])' would be against the cosmopolitan goal of comparative law, and the knowledge obtained thereby 'could not avoid being unilateral and crippled'.[87]

In addition to the interdisciplinary method, the Meridian 180 Program sets up an extremely interactive online platform for multilateral dialogue. Unlike traditional face-to-face meetings, the members of the Program interact with each other in online discussions. Usually, members put down their comments concerning an active topic on the online forum and then exchange their views with others back and forth, until everyone fully expresses their views. Moreover, every piece of their post is translated into four different languages, i.e., English, Chinese, Japanese and Korean, before being sent to other members to read. In case of disagreement or confusion, members can write new posts in response to each other. In the end, the posts and discussions will be compiled into forum summaries, which will then be published publicly after getting the consensus of each commentator involved. In addition, the Program conducts interviews and organises conferences regularly in the transpacific area, and the reports of these events are posted online as well.

Through translation and communication, the Program enables the elements of languages and technologies to get full play, and once awakened, these elements function to enhance the kind of cross-cultural understanding that is underscored in comparative studies. It has been noticed in the Cornell Common Core Project that since English is not the native language of many participants, there were moments that miscommunication impeded proper understanding. The Meridian 180 Program, however, eliminates the problem of language with the advantages offered by legal translation. Specifically, the Program employs young scholars from different East Asian countries to be responsible for the translation job, and all of them have excellent legal educational background and high linguistic fluency in two or more of the four languages mentioned above. Moreover, as a practical matter, the online tools of the Program further expedite the communication among the geographically dispersed members, whereas inability to show up often caused a member to quit from the Cornell Common Core

[87] See Mattei, above n 66.

Project.

In short, comparing the Cornell Common Core Project to the Meridian 180 Program, three points can be made: first, the latter distinguishes itself from traditional comparative studies, including the former, by its transpacific focus, which is no longer West-centric; second, comparative legal studies increasingly call for good interdisciplinary methodologies to enrich the cross-cultural understanding; and third, linguistic and technological tools employed by comparative studies help generate dynamic environments for cross-cultural communications to take place by eliminating cultural obstacles and facilitating inter-regional dialogues. Nevertheless, the pioneering methods invented by the Cornell Common Core Project still have profound implications for comparative studies today, and the awareness of problem-identification reflected in the Project is extremely essential to comparative law. Juxtaposing the two projects, one can surprisingly find that in spite of the fifty-year interval, the Meridian 180 Program still uses the collaborative method as used in the Cornell Common Core Project. This seems to have proved the assertion of Schlesinger that for multilateral comparisons, collaboration seems 'indispensable'. If what remains is always true, then, as Riles said recently with the same tone, '[t]oday […] it is not comparison but collaboration that stakes the most powerful claim as a scholarly method'.[88] However, what calls for the collaboration is, in fact, the cosmopolitan goal of comparative studies.

8 Conclusions

The invention of the factual method and the teamwork method of the Cornell Common Core Project sheds light on the problem of understanding in comparative law. Given the fact that parochialism is inevitable, comparative law, whose fundamental mission is to obtain genuine understanding across legal systems, should have a cosmopolitan goal. The cosmopolitan goal requires comparatists to pursue understanding of foreign legal systems without biases and prejudices. Such a goal, however difficult to perfectly achieve, has been implied in comparative studies over generations. Rationality, for example, has influenced comparative law to overcome parochialism. However, it cannot eradicate the tendency of comparative studies towards being biased, but it runs the risk of obscuring

[88] See Annelise Riles, 'From Comparison to Collaboration: New Directions in the Ethnography of Law' (*Collateral Knowledge*, *5* March 2014) <https://blogs.cornell.edu/collateralknowledge/tag/meridian-180/> [accessed 6 March 2014].

irrationality in reality. Thus, comparative law should be explicit about its cosmopolitan goal.

The Cornell Common Core Project provides illuminating approaches to the pursuit of cosmopolitan understanding. Both the factual method and the teamwork method invented by the Project suggest more effective ways to overcome individual perspectives in comparative legal studies, especially for comparative projects involving multiple legal systems, languages and cultures. However, the Project is not flawless in terms of how it seeks cosmopolitan understanding, because it limited the scope of its understanding by delegating the jobs to 'insiders' and by driving its orientation towards seeking similarities over differences. The Meridian 180 Program is a new comparative project that is also taking place at Cornell Law School. Compared to the Cornell Common Core Project, the transpacific scope and the inter-disciplinary and interactive method of the Meridian 180 Program promises more possibilities of cosmopolitan understanding for comparative law. Although easily misinterpreted—into legal 'eschatology', for example—the cosmopolitan goal of comparative law should be the primary standard in evaluating methodologies and practices of comparative legal studies.

DOI: 10.7574/cjicl.03.03.228
Cambridge Journal of International and Comparative Law **(3)**3: 825–852 (2014)

INVESTMENT TREATY ARBITRATION POST-*ABACLAT*: TOWARDS A TAXONOMY OF 'MASS' CLAIMS

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Abstract
This article examines the jurisdictional awards in two pending ICSID cases against Argentina—*Abaclat* and *Ambiente*—that allowed a multitude of Italian bondholders affected by Argentina's sovereign debt default to collectively use the investment treaty arbitration process, without requiring any additional or specific consent from the state.

Such collective proceedings raise complex issues in relation to the state consent-centric paradigm of international investment law. The article considers the following distinct, but nevertheless interrelated, matters arising from the *Abaclat* and *Ambiente* awards, in an attempt to identify a taxonomy of collective or multi-party claims in international investment law: (i) characterisation of the nature of the proceedings; (ii) whether a host state's general consent to arbitration can be taken to include consent to being sued by multiple investors in one and the same arbitral proceeding; (iii) interpretation of the silence regarding the issue of collective proceedings in the current legal framework under the ICSID Convention; and (iv) whether collective proceedings require a certain link or relationship between the co-claimants, their respective investments and/or claims.

Keywords
Investment arbitration, mass claims

1 Introduction

Its critics notwithstanding, investment treaty arbitration provides investors with a unique mechanism for seeking redress for states' internationally wrongful acts.[1]

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[1] For a detailed account of the historical origins of international investment law, see A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) ch 1.

Since the 'baby boom' of investor-state dispute settlement (*ISDS*),[2] foreign investors in a variety of economic sectors have been able to access an international arbitral regime—pursuant to various international investment agreements (*IIAs*)—beyond the domestic legal framework of the host state.

The system of investment treaty arbitration thus represents a far reaching consent-based mechanism for access to the protection of international law. Indeed, a number of commentators have characterised the international investment regime as a type of 'global administrative law'[3] or 'global governance' regime,[4] which 'is concerned with the exercise of public authority by bodies outside the State, and by States in ways that reach beyond the State and its law'.[5]

Although much has been written recently of a backlash against ISDS,[6] the system continues to expand. A recent UNCTAD study indicates that, in 2013, investors initiated 57 new ISDS cases pursuant to various IIAs.[7] In fact, the total number of known treaty-based cases had reached 568 by the end of 2013.[8] Not only does the number of ISDS claims continue to increase under existing IIAs year on year, but new international treaties with ISDS provisions are also being concluded. At the time of writing of this article, negotiations are well underway on the Transatlantic Trade and Investment Partnership, the Trans-Pacific Partnership and various other free trade agreements, many of which might include ISDS provisions.

This article addresses some recent developments that have potentially extended the reach of treaty arbitration, possibly making it available to new investors and in new scenarios. In particular, it examines the jurisdictional awards in two recent cases under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (*ICSID Convention*)[9] against

[2] See S Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals' (2005) 6 *JWIT* 387.

[3] G Van Harten & M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *EJIL* 121.

[4] B Kingsbury & S W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', in A Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (2009) 5, 5.

[5] Ibid, 10.

[6] See e.g. M Waibel, A Kaushal, H-W Chung & C Balchin (eds), *The Backlash against Investment Arbitration* (2010).

[7] UNCTAD Issues Note, *Recent Developments in Investor-State Dispute Settlement*, UN Doc UNCTAD/WEB/DIAE/PCB/2014/3 (7 April 2014) 2.

[8] Ibid, 7.

[9] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

Argentina—*Abaclat*[10] and *Ambiente*[11]—that allowed a multitude of Italian bondholders affected by Argentina's sovereign debt default to collectively use the investment treaty arbitration process, without requiring any additional or specific consent from Argentina.

Such collective proceedings raise complex issues in relation to the state consent-centric paradigm of international investment law. This article does not purport to be a comprehensive examination of all the relevant issues. Instead, it is confined to an examination of the following distinct, but nevertheless interrelated, matters arising from the *Abaclat* and *Ambiente* awards, in an attempt to identify a taxonomy of collective or multi-party claims/proceedings in international investment law: (i) characterisation of the nature of the proceedings; (ii) whether a host State's general consent to arbitration can be taken to include consent to being sued by multiple investors in one and the same arbitral proceeding; (iii) interpretation of the silence regarding the issue of collective proceedings in the current legal framework under the ICSID Convention; and (iv) whether collective proceedings require a certain link or relationship between the co-claimants, their respective investments and/or claims.

In particular, this article does not deal with the issue of collective or class proceeding in the context of contract-based commercial arbitrations, which may be subject to different interpretative techniques. A comparative analysis of the national law jurisprudence relating to mass or collective arbitrations is also beyond the scope of this article. Finally, the authors do not express any views on broader questions relating to the propriety of mass or collective claims in international investment arbitration, or the appropriateness of treaty arbitration in the context of sovereign debt restructuring.

[10] *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5 (Decision on Jurisdiction and Admissibility, 4 August 2011); *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011).

[11] *Ambiente Ufficio SPA and others v Argentine Republic*, ICSID Case No ARB/08/9 (Decision on Jurisdiction and Admissibility, 8 February 2013); *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Santiago Torres Bernardez, 2 May 2013).

2 *Abaclat* and *Ambiente*: Extending the reach of treaty arbitration?

2.1 Factual background

The *Abaclat* and *Ambiente* cases arose out of the same factual background when, as part of its efforts to restructure its sovereign debt following its 2001 financial crisis, Argentina offered to exchange existing Argentine debt instruments (including bonds) for new debt instruments valued at around 35% of the value of the original debt instruments.[12] The claimants in *Abaclat* and *Ambiente* cases are Italian bondholders who refused to accept this offer.

Both claims were commenced under the ICSID Convention pursuant to the ISDS provisions in the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments, signed on 22 May 1990 (*Argentina–Italy BIT*). The *Abaclat* claimants were represented in the proceedings by Task Force Argentina (*TFA*), an association of eight major Italian banks established in 2002, while the *Ambiente* claimants were also represented by a third-party, the North Atlantic *Société d'Administration* (*NASAM*).[13]

On 4 August 2011 and 8 February 2013, respectively, the ICSID Tribunals in *Abaclat*[14] and *Ambiente*[15] issued majority decisions on jurisdiction and admissibility, accepting to hear claims by about 60,000 (*Abaclat*) and 90 (*Ambiente*) Italian bondholders.[16] These majority decisions were followed by strong dissenting opinions.[17]

[12] A third case arising out of Argentina's 2001 sovereign bond default, *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No ARB/07/8, has yet to reach a decision on issues of jurisdiction and admissibility.

[13] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) paras 273–78.

[14] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011).

[15] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013).

[16] Following Argentina's second exchange offer in 2010, the number of claimants pursuing the *Abaclat* arbitration decreased from 180,000 to approximately 60,000, and the number pursuing the *Ambiente* arbitration from 119 to 90.

[17] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011); *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Santiago Torres Bernardez, 2 May 2013).

2.2 Characterisation of the proceedings

Before delving into the jurisdictional and admissibility objections made by Argentina, the tribunals in both *Abaclat* and *Ambiente* first sought to characterise the precise nature of the collective actions before them.

2.2.1 *Abaclat*

The manner in which the majority in *Abaclat* characterised the arbitration proceedings was a key plank of its reasoning in respect of jurisdiction and admissibility. It began by noting that there was no 'uniform terminology concerning the various kinds of proceedings involving a high number of parties'.[18] It was, therefore, only for the 'sake of simplicity and clarity' that the majority described the claim as 'mass proceedings', where that term was to be understood as 'referring simply to the high number of claimants appearing together as one mass' and not as any 'prejudgment of the procedural classification' of the arbitration.[19]

The majority then proceeded to classify mass claims into two main categories of 'collective proceedings', namely:

- Representative proceedings: Where high number of claims arise as one single action; for instance, an action brought by a representative in the name of a class composed of an indeterminate number of unidentified claimants. The most well-known example is that of class actions in the US.

- Aggregate proceedings: Where claims are aggregated judicially and managed together. The majority gave the example of the English Group Litigation Order, whereby the court requires a large number of claims arising out of the same fact pattern to be tried before a single judge in the interests of procedural efficiency.[20]

In the majority's view, the proceedings did not fall squarely within either category. It noted that the proceedings appeared to be aggregate proceedings in which each individual claimant was aware of and consented to the ICSID arbitration. As such, given that the number and identity of claimants was

[18] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 480.
[19] Ibid.
[20] Ibid, para 483.

established, the proceedings could not be compared to a US class-action.[21] However, the majority also found that some of the features of the proceedings' conduct resembled a representative action. Although each claimant made an 'individual and conscious choice' to participate in the arbitration, thereafter that participation was passive because a third-party (TFA) represented its interests and made decisions on its behalf in relation to the conduct of the proceedings. Further, because of the number of claimants, that representative could not consider the individual interests of particular claimants but rather was limited to the defence of interests common to the entire group.[22]

Ultimately, the majority concluded that the proceedings were a 'hybrid kind of collective proceedings', which started as 'aggregate proceedings' but then continued with 'features similar to representative proceedings'.[23]

The majority's characterisation attracted scathing criticism in Arbitrator Abi-Saab's dissenting opinion, who colourfully described the 'hybrid' as a 'brain-child of the majority award's legal imagination'[24] and 'legal genetic engineering' which risked 'producing a monster'.[25] In his view, the various claims continued to retain their 'individualized' character even after aggregation, and were thus not capable of being treated judicially as one claim.[26]

2.2.2 *Ambiente*

The *Ambiente* majority noted that, insofar as the terms 'collective action' or 'aggregate proceedings' were not technical terms with a fixed meaning (at least within the framework of the ICSID Convention), it had no principled objections against using these terms.[27]

However, the majority expressly rejected any characterisation of the dispute as a 'class' action.[28] It considered that, despite the existence of a joint representative (NASAM) for all the claimants, the proceedings did not incorporate any aspects of a representative proceeding, given that the claimants were clearly

[21] Ibid, para 486.
[22] Ibid, paras 486–7.
[23] Ibid, para 488.
[24] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011) para 145.
[25] Ibid, para 130.
[26] Ibid, paras 139–40.
[27] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 121.
[28] Ibid, paras 115–18.

identified individuals acting in their own names and that the Tribunal's findings would only be binding upon the claimants and not on any third-party, including NASAM.

The majority also departed from the 'mass' claim characterisation adopted in *Abaclat*.[29] It noted that the term 'mass' was not a technical term, and noted that it could not be precisely defined when a multitude of claimants turns into a 'mass' of claimants.[30] In particular, the majority was influenced by the difference in magnitude of the disputes in *Abaclat* and *Ambiente*. It made pains to stress that, insofar as the terms 'mass' claim or proceeding might imply that the 'sheer number of claimants in itself calls for modifications or adaptations of the procedural arrangements to guarantee the manageability or fairness of the case', it saw no such implications arising from the number of claimants in the *Ambiente* proceedings.[31] To avoid any confusion, it preferred to characterise the *Ambiente* proceedings as a 'multi-party' action.[32]

For the purpose of this article, and without using these terms in any technical sense or drawing any conclusion as to the appropriateness or relevance of such labels, we will use the broad expression 'collective proceedings' to refer to such large-scale arbitrations, which may, depending upon context, refer both to 'mass' (as in *Abaclat*) and to 'multi-party' (as in *Ambiente*) claims or proceedings.

2.3 Host state's consent to collective proceedings

In relation to the matter of collective proceedings, both the *Abaclat* and *Ambiente* tribunals had to consider objections to jurisdiction based on the respondent state's consent to ICSID arbitration. In particular, the tribunals examined the question whether, in the absence of any explicit reference to collective proceedings, Argentina's general consent to ICSID arbitration under the Argentina–Italy BIT was sufficient to encompass consent to claims by multiple claimants being brought against it in one single arbitration proceeding.[33]

[29] Ibid, paras 119–22.

[30] Ibid, para 119.

[31] Ibid, para 120.

[32] Ibid, para 122.

[33] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 489 ('The only remaining question is whether a specific consent regarding the specific conditions in which the present arbitration would be conducted is required, i.e., regarding the form of collective proceedings'); *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 145, noting that the pertinent question was 'whether, within the framework of the ICSID Convention, the original submission of multi-party claims requires a specific or

2.3.1 Majority view

The majority in *Abaclat* answered this question in the affirmative on the basis that:

> Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could lose such jurisdiction where the number of Claimants outgrows a certain threshold. First of all, what is the relevant threshold ? And second, can the Tribunal really 'lose' a jurisdiction it has when looking at Claimants individually ?[34]

The majority in *Ambiente* endorsed this approach. It also undertook a textual examination of the ICSID Convention[35] and the Argentina–Italy BIT,[36] as well as an analysis of the *travaux preparatoires* of the ICSID Convention,[37] commentaries[38] and past multi-party ICSID arbitrations,[39] before concluding that 'the ICSID Convention, the Argentina–Italy BIT and other applicable rules in the present dispute are not opposed to a plurality of claimants jointly submitting a claim to the Centre'.[40] The majority also emphasised that it was unnecessary to require a specific or additional consent on the part of Argentina beyond the prerequisite of written consent under Article 25(1) of the ICSID Convention, because the dispute did not constitute a consolidated or joined proceeding[41] and because no other investment dispute that was initially filed as a multi-party

additional act of consent on the part of the Respondent beyond the general consent requirement pursuant to Art 25(1) of the Convention'.

[34] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 490.

[35] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 130: 'While it is true that the provision [Article 25 ICSID Convention] speaks of national of [a] Contracting State in the singular, nothing would force the Tribunal to conclude that this wording could not also encompass a plurality of individuals'.

[36] Ibid, para 131.

[37] Ibid, para 132.

[38] Ibid, paras 142–3.

[39] Ibid, paras 135–1.

[40] Ibid, para 146.

[41] Ibid, paras 123–5, citing G Kaufmann-Kohler et al, 'Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently? – Final Report on the Geneva Colloquium held on 22 April 2006' (2006) 21 *ICSID Rev—FILJ* 59, and distinguishing between a multi-party proceeding where plurality of investors together commence one single arbitration against the host State, and 'consolidation' in its traditional sense which covers joinder of two or more separate proceedings that already are pending before different courts or arbitral tribunals (which the Majority admitted required a specific consent of the parties). For a recent instance of consolidation with parties' consent see

proceeding required separate consent to establish the propriety of multi-party proceedings.[42]

In addition, both the *Abaclat* and *Ambiente* Majority considered that, insofar as sovereign bonds qualified as investments under the relevant BIT providing for ICSID arbitration, it was in their nature (because they are held by a large number of investors) to lead to collective proceedings and, hence, any consent to ICSID arbitration in such BITs should be treated as encompassing the form of arbitration (including collective proceedings) necessary to provide effective protection to such investments.[43]

2.3.2 Dissenting view

The majority in *Abaclat* had reasoned that the 'mass' aspect of the proceedings was a question of admissibility, which pertained to the 'modalities and implementation of the ICSID proceedings' and not to the issue as to whether the respondent state had consented to ICSID arbitration.[44] In contrast, in Arbitrator Abi-Saab's dissenting view in *Abaclat*, Argentina's objection went to the scope of its consent to arbitrate. Drawing on the recent US Supreme Court decisions on class arbitrations in *Stolt-Nielsen SA v AnimalFeeds Int'l Corp*[45] and *AT&T Mobility LLC v Concepcion*,[46] he found that there was a fundamental difference between regular bilateral arbitration and mass proceedings that 'changes the nature of arbitration',[47] and concluded that:

> […] in conformity with what is followed both on the national law level, including in international commercial arbitration, and on the international law level, which is the applicable law in the present

Churchill Mining Plc v Republic Indonesia and *Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case Nos ARB/12/14 & ARB/12/40 (Procedural Order No 4, 1 March 2013).

[42] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 141: '[I]t is evident that multi-party arbitration is a generally accepted practice in ICSID arbitration, and in the arbitral practice beyond that, and that the institution of multi-party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration'.

[43] Ibid, para 144; *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 518.

[44] Ibid, paras 491–2.

[45] 130 S Ct 1758 (2010).

[46] 131 S Ct 1740 (2011).

[47] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011) paras 146–53.

> case, a mere acceptance to arbitrate does not cover collective mass claims actions (regardless of the denomination) and that a special or secondary consent is needed for such collective actions.[48]

In his dissenting opinion in *Ambiente*, Arbitrator Santiago Torres Bernárdez observed that 'representative' mass proceedings fell outside the framework of the ICSID system in light of the silence of the ICSID basic texts, which could not be remedied even by the consent of a given respondent state.[49] However, in the case of an 'aggregate proceeding' (namely, a proceeding allowing due process examination of each individual claim forming part of the multi-party action), the silence in the ICSID texts and in the relevant BIT regarding the admissibility of collective forms of action was capable of being 'remedied by an ad hoc additional manifestation of consent to the "multi-party proceeding" concerned on the part of the respondent'.[50] However, he found that, in the *Ambiente* case, the silence had not been remedied by an additional consent of Argentina as the respondent State, either in its offer to arbitrate contained in the Argentina-Italy BIT or in any *ad hoc* manner.[51]

Both dissenting opinions also concluded that, in ICSID practice, cases of multi-party arbitration had either proceeded with the 'clear agreement' of the parties or without objection from the respondent state (which amounted to implied consent), and hence, 'the rule of "secondary consent" was consistently upheld in multi-party arbitration'.[52]

2.3.3 Analysis

The Majority view in *Abaclat* and *Ambiente* in relation to the question of the host State's consent to collective procedures has been criticised by some commentators.[53] For instance, one commentator has noted:

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[48] Ibid, para 190.

[49] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Santiago Torres Bernardez, 2 May 2013) paras 99, 104.

[50] Ibid, para 100.

[51] Ibid, para 101.

[52] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011) para 175; *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Santiago Torres Bernardez, 2 May 2013) para 105.

[53] See e.g. D Leavitt, 'Disputing The Dispute: Amending International Arbitral Tribunal Rules To Require Secondary Consent For Class Arbitration' (2013) 4 *Creighton ICLJ* 15, noting that *Abaclat* assumption, which assumes 'consent' to individual arbitration simultaneously constitutes class

> The majority approach [in *Abaclat*] to the issue of consent overlooks two fundamental aspects of international law. First, consent to arbitrate does not of itself mean consent to consolidation or consent to be sued by multiple parties in a single arbitration. Consent (particularly consent to consolidation), therefore, should be a matter of jurisdiction alone, not a matter of both admissibility and jurisdiction. Second, […] by refusing to enquire as to whether Argentina had actually consented to mass proceedings (and considering instead whether such claims were simply permissible), the majority's approach ignores the object and purpose of the BIT/ICSID Convention.[54]

However, other commentators have endorsed the majority's approach by reference to the fundamental differences between commercial and investment treaty arbitration. According to this school of thought, consent in commercial arbitration arises from a direct contractual agreement between specific and identifiable parties and, absent evidence of a prior meeting of the minds between the parties for purposes of formation of the agreement to arbitrate, there is no consent and thus no jurisdiction. Conversely, the nature of consent in investment treaty arbitration is entirely different. An investment treaty is not a contractual relationship between the state and certain specific individual investors identified in the treaty itself. On the other hand, great majority of investment treaties contain a host state's consent to arbitrate (in the form of a unilateral, standing offer) that is capable of acceptance by any investor meeting the conditions specified in the treaty. Where more than one investor accepts the state's unilateral offer to arbitrate, investment treaties do not contain any provision stating that the offer is invalidated or made subject to a further jurisdictional hurdle. The host state's offer to arbitrate is thus 'inherently' directed to a multitude of potential qualifying investors (i.e., all investors with protected investments) and it is, therefore, 'inherent' in this consent mechanism that the state parties can be confronted with multiple claimants for disputes arising out of the same factual situation.[55]

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arbitration, is flawed.

[54] M Weiniger & M McClure, 'Looking to the Future: Three "Hot Topics" for Investment Treaty Arbitration in the Next Ten Years' (2013) 10(4) *TDM* 1, 4.

[55] For a succinct summary of this line of argument, see A Newcombe, 'Mass claims and the distinction between jurisdiction and admissibility (Part II)' (*Kluwer Arbitration Blog*, 16 December 2011) <http://kluwerarbitrationblog.com/blog/2011/12/16/mass-claims-and-the-

In addition, the majority view has been supported by some commentators by emphasising the 'temporal asymmetry' in terms of the timing of expression of consent to investment arbitration by each of the investor and the host state: the host state generally gives its consent to arbitration before the dispute has arisen (by way of its 'open-ended', standing offer to arbitrate), whereas the investor regularly expresses its consent after the dispute has broken out (by accepting the host state's standing offer, which is generally done in practice by filing a request for arbitration pursuant to the arbitration rules envisaged in the relevant treaty). For instance, based on this asymmetry, one commentator has opined that, while 'secondary consent may make sense where the arbitration agreements are already concluded when the disputes arise' (for instance, in case of commercial multi-party arbitrations), such secondary consent is 'not really necessary' in investment treaty arbitration when multiple investors decide to claim jointly in one single proceeding. This is because:

> [T]he request of a special/secondary consent would clearly 'overturn the equilibrium' of investment arbitration, where the host State's consent to arbitration 'given in advance' has to be seen as a procedural guarantee for stimulating and protecting foreign investments. Indeed, the special/secondary consent would de facto amount to 'a counteroffer made by the investors' to the host State 'after' the investment has been done and 'after' the dispute has arisen. The host State would then be able to accept or reject this counteroffer. The risk is that the foreign investors could lose the possibility of having their dispute resolved through arbitration in a neutral forum, as the State could reject the investors' counteroffer; in that case, it would as a matter of fact be cost prohibitive for many Claimants to file individual claims […].[56]

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distinction-between-jurisdiction-and-admissibility-part-ii/> [accessed 30 April 2014]: 'Although the [*Abaclat*] majority's decision on consent is certainly controversial, it is sound in principle. Unlike an arbitration clause in a typical commercial contract, offers to arbitrate in investment treaties are open to the world of qualified investors. The offer to arbitrate is made to investors with investments. In principle, this offer to the world should be able to be accepted by a multitude of investors. If there is consent to arbitrate where one shareholder holds 100,000 shares, why is there not equally consent when there are 100,000 shareholders each holding one share?'.

[56] A M Steingruber, 'Case Comment, Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings' (2012) 27 *ICSID Rev—FILJ* 237, 245.

We also note that the dissenting opinions in both the *Abaclat* and *Ambiente* cases emphasised the possible need for the respondent state's additional and explicit consent to collective procedures by referring to a principle of 'secondary consent',[57] which they appeared to derive from the following passage from a law review article by Strong (who has written widely on mass and class claims in arbitration):

> […] the first question raised in every arbitration is whether the parties have agreed to arbitrate this particular dispute. This issue – which can be termed 'primary consent' – is usually not directly challenged in class arbitration, since all the parties have signed agreements indicating their consent to arbitrate their disputes. Instead, class arbitration focuses for the most part on what can be called 'secondary consent', meaning consent to this particular type of procedure. This concept is by no means unique to class disputes, since traditional multiparty arbitrations are also required to establish secondary consent in cases where the arbitration agreements are silent or ambiguous as to multiparty treatment .[58]

However, in a recent case comment, Strong has clarified that 'both dissents failed to recognize that the phrase "secondary" was not used in [her] law review article to mean "additional", but was instead used as a synonym for "subordinate"'.[59] Strong emphasises that, given that most jurisdictions accept that even core 'primary consent' issues (such as whether to arbitrate) can be demonstrated by implicit means,[60] the principle outlined in her original article suggested that 'it would be illogical to require a more rigorous standard of consent in situations involving matters of secondary (i.e. subordinate) concern

[57] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011), para 173; *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Santiago Torres Bernardez, 2 May 2013) para 103.

[58] S I Strong, 'Does Class Arbitration the Nature of Arbitration? *Stolt-Nielsen*, *AT&T*, and a Return to First Principles' (2012) 17 *Harvard Negotiation LR* 201, 251–2 (citations omitted).

[59] S I Strong, 'Case Comment: Ambiente Ufficio SpA and others v Argentine Republic: Heir of Abaclat? Mass and Multiparty Proceedings' (2014) 29 *ICSID Rev—FILJ* 149, 151.

[60] For example, non-signatories can be brought into an arbitral proceeding through reliance on principles based on implicit consent, including those based on agency, assumption, alter ego, piercing the corporate veil, estoppel, incorporation by reference and the group of companies doctrine.

than in cases involving matters of primary concern'.[61] Thus, in her view, if questions regarding mass or collective proceedings were to be viewed as secondary concerns (i.e. procedural in nature), then it is neither necessary nor desirable to subject such questions to a stricter rule of construction than exists with respect to the agreement to arbitrate and such questions should equally be amenable to implicit consent, if not more so.

On this question of consent, this article does not purport to undertake a detailed analysis of the soundness of the reasoning of the majority and dissenting opinions in the *Abaclat* and *Ambiente* cases, and of their respective proponents and opponents. No matter what view one adopts in this debate, these contrasting views essentially reflect differences of opinion regarding the propriety of strict construction versus a more purposive interpretive approach. By emphasising the need for explicit, secondary consent to collective procedures in investment treaty arbitration, the dissenting panelists seem to have adopted a 'strict constructionist' approach.[62] This approach views the decision to proceed as a group as something more than procedural, and as a core concern that is inextricably linked to the decision to arbitrate. On the other hand, the majority appears to have viewed questions regarding mass or collective proceedings as procedural in nature (i.e. question of 'how' the claims are to be resolved), and thus sought to interpret the relevant arbitration agreement in a way that was likely to establish an effective machinery for the settlement of disputes relating to investments covered by the relevant BIT.

It appears unlikely that consensus will ever be achieved on this issue. As one commentator has noted, these types of interpretative distinctions reflect 'deeper uncertainties underlying international investment law', which may not be 'susceptible to technical or doctrinal solutions' alone.[63]

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[61] See Strong, above n 59, 151, noting that the idea was based on the theory of 'concentric circles' of consent posited by A S Rau, 'Arbitral Jurisdiction and the Dimensions of "Consent"'(2008) 24 *Arb Int'l* 199, 203.

[62] See S I Strong, 'Class, Mass and Collective Arbitration in National and International Law' (University of Missouri School of Law Legal Studies Research Paper No 2012-35, 10 December 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185084> [accessed 1 May 2014] para 4.9.

[63] A Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 *JIEL* 469, 503. See also S I Strong, 'Mass Procedures as a Form of "Regulatory Arbitration" – Abaclat v Argentine Republic and the International Investment Regime' (2013) 38 *J Corp L* 259.

2.4 Interpreting the silence in the ICSID Convention

In the case of an ICSID arbitration, the claims must also satisfy the additional jurisdictional requirements set out in Article 25(1) of the ICSID Convention, in addition to meeting any jurisdictional requirements of the applicable investment treaty.[64] Accordingly, in *Abaclat* and *Ambiente*, the claimants had to demonstrate that the tribunals had jurisdiction under both the Italy–Argentina BIT and Article 25 of the ICSID Convention.

However, the ICSID Convention is silent on the issue of mass claims or collective proceedings. The Majority and Dissent in both *Abaclat* and *Ambiente* adopted widely divergent views of the nature of the silence in question and the power of the arbitral tribunal to address that silence.

2.4.1 Majority view

The majority in *Abaclat* recognised that the current ICSID framework contained no reference to collective proceedings as a possible form of arbitration, but gave limited weight to this silence, holding that 'it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a 'qualified silence' categorically prohibiting collective proceedings'.[65] It concluded that this silence was to be interpreted as an unintended 'gap', which the tribunal had the power, in principle, to fill.[66] In particular, the majority noted that, at the time the ICSID Convention was concluded, mass proceedings were 'quasi inexistent' and that the discussions that took place with regard to multi-party arbitrations at the time were inconclusive on the intention to either accept or reject multi-party arbitrations or the admissibility of collective proceedings.[67] Further, it observed that ICSID provides a standard arbitration mechanism and that, where an investment protected under a BIT providing for ICSID arbitration

[64] See e.g. C McLachlan, L Shore & M Weiniger, *International Investment Arbitration: Substantive Principles* (2007) MN6.06.

[65] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 519. This was endorsed by the majority in *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 146: 'Nothing has emerged from the preceding legal analysis that would militate in favour of interpreting the of the ICSID Convention as standing in the way of instituting multi-party proceedings'.

[66] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 520. The tribunal in *Ambiente*, by contrast to *Abaclat*, did not see the need to fill any gaps in the ICSID Rules. The number of claimants (90) could be dealt with under the normal ICSID arbitration framework.

[67] Ibid, para 519.

showed certain particular characteristics, those characteristics may lead the tribunal to make certain adaptations to the standard procedure to give effect to the choice of ICSID arbitration.[68]

Similarly, the *Ambiente* majority noted that 'some discussions took place at the time of conclusion of the ICSID Convention in regard to multi-party proceedings', which, whilst 'not conclusive as to the intention to either accept or refuse multi-party arbitrations', nonetheless weakened Argentina's claims that 'accepting multi-party arbitrations would extend the jurisdictional basis way beyond the horizon of foreseeability of the drafters of the ICSID Convention'.[69]

2.4.2 Dissenting opinion

However, in his dissent in *Abaclat*, Arbitrator Abi-Saab noted that the 'argument of the majority award based on the unforeseeability of collective actions at the time of drafting the Convention, paradoxically bears in favour of interpreting the silence of the ICSID Convention as not extending to cover such an extraordinary type of judicial activity as representative proceedings or class actions'.[70]

Similarly, the dissenting opinion in *Ambiente* noted that interpreting the silence in favour of existence of jurisdiction was not warranted as a matter of public international law.[71]

2.4.3 Analysis

The dissenting view has been supported by some academics. For instance, one commentator has opined that, under international law, consent to jurisdiction is the exception and not the default rule and that, when the ICSID Convention is silent as to whether the parties consented to jurisdiction, the tribunals should have found that there was no consent and therefore no jurisdiction.[72]

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[68] Ibid. However, the majority noted that any adaptations made to the standard procedure 'must be done in consideration of the general principle of due process and must seek a balance between procedural rights and interests of each party'.

[69] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 132.

[70] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011) para 166.

[71] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Santiago Torres Bernardez, 2 May 2013) para 76.

[72] See A Raviv, 'ITA-ASIL 2014: Mass and Class Claims in Arbitration' (*Kluwer Arbitration Blog*, 22 April 2014) <http://kluwerarbitrationblog.com/blog/2014/04/22/ita-asil-conference-mass-and-class-claims-in-arbitration> [accessed 30 April 2014], discussing Michael Waibel's views.

Again, a detailed analysis of this debate is beyond the scope of this paper. However, the authors note that it is not entirely clear from the analyses in the *Abaclat* and *Ambiente* cases and in academic commentary whether any specific conclusions on the issue of admissibility of collective proceedings can be derived from the drafting history of the ICSID Convention.

First, it appears that discussions on multi-party arbitrations at the stage of drafting of the ICSID Convention are inconclusive, as evidenced by the above discussed disagreement between the majority and dissenting opinions in *Abaclat* and *Ambiente* cases.

Secondly, whilst in the initial stages of the drafting of the ICSID Convention litigation by way of an association of persons was envisaged,[73] this reference to an 'association' no longer appeared by 1964.[74] Some commentators have questioned whether any significance can be attached to this abandonment.[75]

Finally, at the stage of drafting, there was also a proposal that any claims brought before ICSID have a *de minimis* value of US$100,000.[76] This proposal did not make it to the final draft but may be seen as evidence of an initial aversion to small claims of the sort in *Abaclat*. However, given that no limit was ultimately imposed, it is also possible to argue that multiple small claims should be possible under the ICSID framework.[77]

See also Weiniger & McClure, above n 54, 4, noting that there was no need to interpret the silence in the ICSID Convention as a 'gap', since this silence related to the issue of multi-party arbitrations which was considered in negotiations at the time of the drafting of the ICSID Convention.

[73] The commentary to the definition of 'national' in the 9 August 1963 draft of the Convention stated that 'nationals' include both natural and juridical persons as well as associations of such persons': see ICSID, II-1 *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1968) 170.

[74] By 1964, the draft (which by that stage was closer to the Convention as it was ultimately adopted) no longer has the comment referred to above: ibid, 610–45.

[75] See H van Houtte & B McAsey, 'Case Comment, Abaclat and others v Argentine Republic: ICSID, the BIT and Mass Claims' (2012) 27 *ICSID Rev—FILJ* 231, 235.

[76] See ICSID, above n 73, 487.

[77] See van Houtte & McAsey, above n 75, 235.

2.5 Group examination and relationship between claims

2.5.1 *Abaclat*

According to the majority in *Abaclat*, Article 44 of the ICSID Convention[78] and Rule 19 of the ICSID Arbitration Rules[79] provided the Tribunal with the authority to make procedural adaptations necessary to hear mass claims. The majority found that the necessary adaptations concerned only the method of examination of claims and the manner of representation of the claimants, rather than the substance or the object of the Tribunal's examination.[80] Although the majority recognised that the procedural adaptations would make it difficult for Argentina to respond to each individual claim, and that each claimant would likely be unable to present a full case, it considered that these limits on the rights of both parties were justified in the interest of overall fairness.[81]

In its attempt to find the 'balance' between restricting certain procedural rights of the parties and adopting a method of examination that could give actual effective protection to the investments, the majority considered the conditions under which it was 'acceptable to change the method of examination from individual to group treatment'.[82] It opined that group examination of claims was acceptable only 'where claims raised by a multitude of claimants are to be considered identical or at least sufficiently homogeneous'.[83] It also drew a distinction between treaty and contractual claims, and held that 'the identity or homogeneity requirement applies to the investment and the rights and obligations deriving therefrom based on the BIT and not to any potential contractual claims'.[84] Thus, in the majority's view, the 'specific circumstances surrounding individual purchases by Claimants of security entitlements',[85] and the question of whether the claimants had 'homogeneous contractual rights to repayment by Argentina of the

[78] 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.'

[79] Rule 19 of the ICSID Arbitration Rules states: 'The Tribunal shall make the orders required for the conduct of the proceeding'.

[80] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) paras 529–33.

[81] Ibid, paras 536–9.

[82] Ibid, paras 538–9.

[83] Ibid, para 540(i).

[84] Ibid, para 541.

[85] Ibid, para 542.

amount paid for the purchase of the security entitlements',[86] were irrelevant. For it, the only relevant question was 'whether Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT'.[87]

On the facts of the case, the majority found that the claimants' 'claims deriving from the BIT' were sufficiently homogenous on the basis that: (i) the rights deriving from the claimants' investments and Argentina's obligations to protect those rights were the 'same' with regard to all claimants 'to the extent they derive from the same BIT and the same provisions'; and (ii) each claimant's individual claim arose from the same basic type of financial instrument/investment, each of which was affected in the same way by the same post-default measures undertaken by Argentina.[88]

In his dissenting opinion, Arbitrator Abi-Saab noted that the claims continued to retain their 'individualized character' and it was accordingly not possible for the tribunal to treat those claims judicially as one claim or 'identical fungible claims'.[89] He criticised the majority's 'sufficient homogeneity' test for conveniently ignoring the specificities of the claims concerning the security entitlements (in terms of price, date of purchase, place of purchase, currency, applicable law, chosen forum, etc.),[90] and queried how it was possible, for example, for a tribunal to 'evaluate a treaty claim for compensating damages caused to an asset, without knowing (or while making abstraction of) the time the asset was acquired, the price paid for it and the currency of denomination'.[91] In his view, while the level of homogeneity resulting from the fact that the claims arose of the 'same fact pattern' (i.e. Argentina's economic crisis which led to Argentina's default) was 'sufficient for aggregating and registering them for purposes of pretrial management', it was not sufficient for what the majority award referred to as 'group examination', i.e. their examination as if they were one claim.[92]

[86] Ibid, para 541.
[87] Ibid.
[88] Ibid, para 543.
[89] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011) para 140.
[90] Ibid, paras 141–3.
[91] Ibid, para 143.
[92] Ibid, para 144.

2.5.2 *Ambiente*

For the majority in *Ambiente*, while there was no requirement for a specific consent on the part of the respondent state as regards the possibility of multi-party proceedings as such, '[a] different question [was] whether multi-party proceedings in ICSID arbitration presuppose a certain link or relationship between the would-be co-claimants'.[93]

In fact, it appears that the claimants in the *Ambiente* case conceded that there should be a 'reasonable and significant link' between the claims of the persons seeking to bring a multi-party action, and that 'totally unrelated' claims could therefore not be adjudicated in the same arbitration.[94] In this context, the majority also expressed doubts about whether completely unrelated claims could be brought by a plurality of investors in one and the same arbitration proceeding.[95]

However, in response to Argentina's objection based on the absence of a pre-existing contractual relationship among the claimants, the majority considered a number of earlier ICSID decisions involving multi-party arbitrations, and found that the ICSID legal framework could not be interpreted to require that 'the claimants in a multi-party proceeding must be necessarily connected by a contractual link among themselves'.[96]

Ultimately, the *Ambiente* majority found that a necessary link existed among the claimants in terms of the treaty claims that they sought to pursue jointly, insofar as: (i) they complained about the same illegality allegedly committed by Argentina; (ii) their claims were based on the same provisions of the Argentina–Italy BIT as well as the ICSID Convention; (iii) they had made identical prayers of relief for indemnification for Argentina's measures; and (iv) the factual background on the basis of which they sought to establish their treaty claims was virtually the same for all the claimants.[97] Although some variation existed in the factual circumstances surrounding the various bonds (as was the case in *Abaclat*), the *Ambiente* majority, like its counterpart in *Abaclat*, considered these variations to be irrelevant because they related to the claimants' contractual claims but not to the treaty claims before the Tribunal.[98] On this analysis, the *Ambiente* majority

[93] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 143.
[94] Ibid, para 152.
[95] Ibid, para 153.
[96] Ibid, para 155.
[97] Ibid, para 161.
[98] Ibid, para 162.

concluded that the claims in question were capable of being decided upon in one single multi-party arbitration, and that the Tribunal's competence to decide the case could not be called into question due to a presumed lack of necessary link between the claims that were being brought jointly.[99]

2.5.3 Analysis: Towards a 'taxonomy' of multi-party proceedings

Related multi-party arbitrations are well-established in investment treaty jurisprudence. Typically, a 'related multi-party arbitration' encompasses claims emanating from one investment operation and arising as a consequence of, *inter alia*: (i) related investors claiming jointly (for instance, a multi-party claim brought by joint venture partners in relation to their respective shareholdings in the same locally incorporated special purpose vehicle);[100] (ii) companies claiming jointly with their parent companies or subsidiaries;[101]or (iii) the assignment, in part, of the investor's rights to an additional investor.

Where one of these relationships pertains between the claimants or their investments, the number of claimants, of itself, has not historically been problematic.[102] This is the case even where the claims were brought by claimants of different nationalities under one or several treaties or other legal instruments. For instance, in *Noble Energy v Ecuador*,[103] Noble Energy, a US company, and MachalaPower, a subsidiary of Noble Energy incorporated in the Cayman Islands, jointly brought claims against Ecuador in one ICSID arbitration under the US–Ecuador BIT, an investment contract and a concession contract, each of which provided for ICSID arbitration. Ecuador argued that scope of its consent to ICSID arbitration did not extend to an agreement to resolve all these disputes in one arbitration. The tribunal found 'an obvious interdependence between the different disputes', insofar as they stemmed from 'the same facts, the same overall economic transaction, and the same measures',[104] and held, after reviewing a

[99] Ibid, para 163.

[100] See e.g. *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17 (Decision on Liability, 30 July 2010).

[101] See e.g. *AES Corporation and Tau Power BV v Kazakhstan*, ICSID Case No ARB/10/16 (Final Award, 1 November 2013).

[102] For a recent example, see *Guaracachi America Inc and Rurelec PLC v Bolivia*, PCA Case No 2011-17 (Award, 31 January 2014).

[103] *Noble Energy Inc and Machalapower Cia. Ltda v Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12 (Decision on Jurisdiction, 5 May 2008).

[104] Ibid, para 192.

number of factors,[105] that there was 'an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration'.[106]

However, in collective actions other than such related multi-party arbitrations, where it is difficult to identify a clear corporate relationship or sufficient unity of interest among the claimants, the issue of what test(s) a tribunal should apply to decide whether the claims submitted to it should—or, indeed, are capable of being—resolved in a single arbitration appears to remain open.

As discussed above (and as recognised expressly by the *Ambiente* majority[107]), the concept of 'homogeneity' originated in *Abaclat* as a means of justifying the various procedural adaptations to the method of examination of claims that were being contemplated as a result of the 'mass' nature of the dispute. It may thus be difficult to derive from this case any general requirement of 'connection' or 'link' between the would-be claimants, their respective claims and/or investments that would need to be satisfied by multiple investors in order to bring their claims in one single arbitration proceeding against a host state.

The *Ambiente* majority also 'left open' the issue as to whether, under Article 25 of the ICSID Convention, there was a requirement of a necessary link between the claims in a multi-party proceeding and, if so, whether such link had to meet some 'minimum standard'.[108] In particular, the majority did not consider it 'necessary' or 'useful' to: (i) elaborate, in the abstract, on the question of whether the claims were required to be 'homogeneous', or whether it was sufficient for the claims to be 'sufficiently comparable', etc.; and (ii) try to devise a general standard or threshold in that regard.[109]

There are also certain pre-*Abaclat* cases in which unrelated claimants instituted claims which had in common only the fact that they all contended to have been harmed by the same allegedly unlawful acts of the respondent State. For example, in *Funnekotter and others v Zimbabwe*,[110] 14 Dutch investors, who directly or indirectly owned large commercial farms in Zimbabwe, jointly brought a claim against Zimbabwe, alleging that its land acquisition programme breached its obli-

[105] Ibid, paras 198–205.
[106] Ibid, para 194.
[107] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 159.
[108] Ibid, para 154.
[109] Ibid.
[110] *Bernardus Henricus Funnekotter and others v Zimbabwe*, ICSID Case No ARB/05/6 (Award, 22 April 2009) (*Bernardus v Zimbabwe*).

gations under the Netherlands–Zimbabwe BIT. In this case, as the claimants in *Ambiente* reasoned, '[t]he only existing link between the individual claimants and their respective claims was that all of them had suffered the same harm by virtue of the measures adopted by the host State, which deprived each one of them of its investment without a just compensation'.[111] During the proceedings, the parties agreed that the Tribunal had the jurisdiction to hear the dispute.[112] Nevertheless, the Tribunal stressed the 'special competence granted to arbitral tribunals to determine their jurisdiction' and consequently, on its own initiative, carried out an analysis of a number of jurisdictional issues.[113] As the majority in *Ambiente* emphasised, '[w]hile the *Funnekotter* Tribunal thus actively assured itself of its jurisdiction, in no way whatsoever was the issue of the claimants having no contractual relation between themselves or of their jointly brought claims not being sufficiently linked to each other addressed by the Tribunal'.[114] There is therefore some arbitral practice confirming that there is no obstacle to unrelated claimants bringing a multi-party claim arising of the same events or circumstances in the host State.

However, in each of the *Funnekotter*, *Abaclat* and *Ambiente* cases, all members of the relevant claimant group were of the same nationality and brought their claims under the same BIT. At least in the *Abaclat* and *Ambiente* cases, this fact appears to have had a bearing on the conclusion of the majority that the treaty claims being brought before them were 'homogeneous' or 'linked' and, accordingly, capable of being adjudicated upon in one single arbitration.[115] A question then arises as to how an investment treaty tribunal would deal with a scenario in future large-scale collective claims where, for example, several claimants of multiple nationalities seek to bring their claims under multiple investment agreements jointly in the same arbitration proceeding.

The ability of claimants of different nationalities to jointly pursue a single arbitration under two separate investment agreements was considered recently in *Guaracachi v Bolivia.*[116] In this case, the claimants—Guaracachi (a US company)

[111] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013), para 158.

[112] *Bernardus v Zimbabwe* (Award, 22 April 2009) para 94.

[113] Ibid, paras 93-95.

[114] *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 158.

[115] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 543; *Ambiente v Argentine Republic* (Decision on Jurisdiction and Admissibility, 8 February 2013) para 161.

[116] *Guaracachi America Inc and Rurelec PLC v Bolivia* (Award, 31 January 2014).

and Rurelec (a UK company)—commenced a claim against Bolivia jointly under the US–Bolivia and UK–Bolivia BITs, respectively. Rurelec indirectly owned Guaracachi, and together they owned a 50.001% shareholding in Empresa Electrica Guaracachi SA,[117] which they alleged had been nationalised by the Bolivian State.[118]

Whilst Bolivia did not object directly to the number of claimants, it sought to argue that the claimants were not entitled to bring claims under two separate BITs in a single arbitration because the state had not provided its consent for US and UK investors to do so in the express language of the respective BITs.[119] The claimants argued that the lack of express wording in the BITs was insufficient to exclude Bolivia's consent.

In analysing whether Bolivia had in fact provided its consent, the Tribunal explained the traditional concept of how arbitration provisions in BITs provide an open offer which—when accepted by investors—constitutes a binding arbitration agreement. In this case, the Tribunal found that the offers of arbitration in the UK–Bolivia and the US–Bolivia BITs did not contain any restrictions or conditions that could prevent the claimants from bringing their claims in a single proceeding, and held that silence in the BITs on the issue could not operate so as to limit the scope of Bolivia's consent.[120]

As to the question of a link or relationship between claimants, the Tribunal held that the relevant BITs could not be interpreted as containing some limitation of scope preventing a claimant from submitting an arbitral claim together with another claimant 'when both claims are based on the same alleged facts and on the same alleged breaches although brought under different BITs, provided that each claimant provides its own independent matching consent to arbitration'.[121] It found that it was 'clear that the object of both claims is the same, since the allegedly unlawful action by Bolivia was also a single one',[122] and concluded that, 'given the obvious link between both claimants and the identity of the facts alleged',[123] the claimants were not barred from bringing their claims jointly in a single arbitration proceeding, notwithstanding the fact that those claims were made under different BITs.

[117] Ibid, para 4.
[118] Ibid, paras 151–60.
[119] Ibid, para 164.
[120] Ibid, para 341.
[121] Ibid, para 337.
[122] Ibid, para 338.
[123] Ibid, para 340.

However, it is pertinent to note that, even in the *Guaracachi* case, the multi-party claim under different BITs arose from one investment operation and as a consequence of closely related investors claiming jointly.[124] It remains to be seen whether a tribunal would seek guidance from these decisions and also accommodate claims under different BITs (or under a multilateral treaty such as the Energy Charter Treaty) against the same host state by multiple investors of different nationalities, where such investors are not part of the same corporate group and where they hold investments in different projects in the same economic sector that are affected by the same events or circumstances in the host state.[125]

Finally, whilst such a situation is less likely to occur, it has not yet been tested as to whether it is possible for one or more investors to pursue their claims against several host states (for example, claims arising in relation to large scale or trans-boundary investments such as inter-state pipelines) in one single arbitration proceeding.

In fact, some recent events suggest that it may be the relationship between the claimants, their claims and/or their investments, as much as the number of claimants, which could be the new jurisdictional battleground in investment treaty arbitration.

For instance, in May 2013, a bloc of ten foreign investors filed a joint request for arbitration against the Czech Republic relating to various measures allegedly affecting their investments in the photovoltaic sector. The claimants relied on a number of treaties in their joint request, including the Energy Charter Treaty, as well as Czech BITs with the Netherlands, Germany, Cyprus, Luxembourg and the United Kingdom.[126] The Czech Republic objected to the claimants' effort to consolidate their claims together in a single arbitration, and appointed arbitrators

[124] As noted above, both claimants were entities in the same corporate group holding, directly or indirectly, shares in the same company.

[125] See e.g. S Wilske, 'Collective Action in Investment Arbitration to Enforce Small Claims – Justice to the Deprived or Death Knell for the System of Investor-State Arbitration?' (2012) 5 (2) *Contemp Asian Arb J* 165, 184: 'The result of *Abaclat* could be explored by investors equally affected by similar State measures. For example, multiple investors with small investments in a single sector, subject to a law expropriating their investments, could attempt to pursue aggregated proceedings even though each investor holds a separate investment vehicle'. However, the same author also notes (ibid, 186) that 'if a group of investors had differing claims on the basis of different contracts, property rights or other instruments of investment, aggregation would prove more difficult'.

[126] L Peterson, 'Following PCA decision, Czech Republic thwarts move by solar investors to sue in single arbitral proceeding; meanwhile Spain sees new solar claim at ICSID' (*IA Reporter*, 1 January 2014) <http://www.iareporter.com/articles/20140102> [accessed 1 May 2014].

in what it considered to be six separate cases, only agreeing to the consolidation of claims if the claimants were affiliates or if they had allegedly invested in the same operation.[127]

Similarly, the Turkmenistan has recently raised preliminary objections to a move by a bloc of 22 Turkish claimants, many of whom were alleged to have unrelated business ventures in Turkmenistan, to bring a single multi-party arbitration claim under the Turkey-Turkmenistan BIT. Rather than seeking to block the constitution of a single arbitral tribunal, however, the government agreed to appoint an arbitrator on the condition that the resulting tribunal would first address Turkmenistan's objection to the multi-party nature of the proceeding.[128]

3 Conclusion

Notwithstanding the various vexed issues discussed above, the decisions in *Abaclat* and *Ambiente* may have significant practical implications. Historically, large corporations and high net worth individuals have resorted to treaty arbitration in order to seek redress in relation to typically very large investments. Were the *Abaclat* and *Ambiente* awards to herald the introduction of mass or collective claims into the mainstream of investment treaty practice,[129] ISDS provisions could also become a means for collective redress of wrongs to small shareholders or stakeholders. A 'mass' proceeding by shareholders in a publically listed company against a state in which that company has an investment is but one possible scenario.

Certain commentators espousing the so-called 'liberal internationalist' view of investment law have already made a case that investment arbitration be treated

[127] This approach, which has resulted in six distinct tribunals, appears to have been effectively endorsed by the Permanent Court of Arbitration in its capacity as appointing authority. In an unpublished decision dated 13 August 2013, the PCA rejected the claimants' request for it to appoint an arbitrator on behalf of the Czech Republic in respect of the original multi-party claim.

[128] L Peterson, 'UNCITRAL tribunal will hear Turkmenistan's argument that a bloc of claimants can't band together to bring a multi-party BIT claim' (*IA Reporter*, 8 January 2014) <http://www.iareporter.com/articles/20140108_1> [accessed 1 May 2014].

[129] In particular, commentators have been quick to speculate about the possibility of further mass investment arbitrations resulting from sovereign defaults. See e.g. P Heneghan & M Perkams, 'The Clawback: Can Arbitration Help Greek Bondholders Gain Redress?' (*LegalWeek,* 11 May 2012) <http://www.legalweek.com/legal-week/analysis/2173647/clawback-arbitration-help-greek-bondholders-gain-redress> [accessed 1 May 2014].

as an internationally recognised component of the administrative law system of states.[130] Whatever the merits of such a position, the *Abaclat* and *Ambiente* majority decisions appear to take it a step closer to reality. This is particularly the case in relation to sovereign debt, not least because, rather than facing the difficulty of enforcing foreign court judgments, bondholders may now have access to the more favourable regime for recognition and enforcement of arbitral awards available under the ICSID Convention. This is likely to be attractive given that, at present, there is no international insolvency regime governing sovereign debt defaults. It might not be hyperbole to suggest that one result of these cases might be to introduce a 'brand new battlefield against sovereign debtors'.[131]

In fact, these decisions have the potential to usher in what one commentator has called 'regulatory arbitration',[132] a mechanism whereby private individuals fill certain gaps in the relevant regulatory regime by using arbitration in order to influence future, risk-producing behaviours.[133] The arbitral process would therefore act not as an *ad hoc* supplement to public law, but instead as an essential element of a comprehensive regulatory regime.[134] The bondholders in *Abaclat* appear to have had such a type of regulatory intent in mind. They noted in their submissions that the 'major threat to the efficiency of foreign debt restructuring [is] rogue debtors such as Argentina' and that 'opening the door to ICSID arbitration would create a supplementary leverage against such rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring'.[135] Meanwhile, the dissent explicitly disagreed with the propriety of the claimants' use of investment arbitration as a means of creating 'leverage over sovereign debtors'.[136]

These developments might result in a significant shift in the investment law paradigm, leading to a potentially radical increase in the number and type of investors able to harness the arbitral process to seek redress for breaches of international law. For this reason, *Abaclat* and *Ambiente* have the potential to supercharge investment treaty arbitration's 'cosmopolitanist' credentials as a tool which transcends the conventional nation-state model by providing investors

[130] See e.g. Van Harten & Loughlin, above n 3; Kingsbury & Schill, above n 4.

[131] Y Li, 'Question the Unquestionable Beauty of a Collective Proceeding for All Sovereign Debt Claims' (2013) 22 *Int'l Insolvency R* 85, 90.

[132] Strong, above n 63.

[133] Ibid, 271, citing P Luff, 'Risk Regulation and Regulatory Litigation' (2011) 64 *Rutgers LR* 73, 113.

[134] Ibid, 288.

[135] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, 4 August 2011) para 514.

[136] *Abaclat v Argentine Republic* (Decision on Jurisdiction and Admissibility, Dissenting Opinion, Georges Abi-Saab, 28 October 2011) para 265.

with access to a regime beyond the domestic legal framework of the host state and implies an additional layer of governance that constitutes a limitation on the sovereignty of states in the field of foreign investments.

DOI: 10.7574/cjicl.03.03.227
Cambridge Journal of International and Comparative Law **(3)**3: 853–883 (2014)

USING THE PUBLIC LAW CONCEPT OF PROPORTIONALITY TO BALANCE INVESTMENT PROTECTION WITH REGULATION IN INTERNATIONAL INVESTMENT LAW: A CRITICAL APPRAISAL

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Abstract
Due to the adjudication of a large range of regulatory measures under investment treaty arbitration (ITA), the belief that bilateral investment treaties (BITs) fail to balance investment protection with a host country's right to regulate has gained currency as of late. In order to balance investment protection with regulation, many scholars have advocated for the use of public law principle of proportionality to interpret BITs. This paper critically examines the application of the principle of proportionality in BITs under four heads. First, given the fact that many questions related to independence and impartiality of ITA remain unanswered, the use of proportionality in ITA might further dent the credibility of the system by granting significant discretion to arbitrators. Second, proportionality principle has been applied in a flawed manner by many arbitral tribunals, which raises doubts about its application. Third, one should be very careful in relying on jurisprudence of European Court of Human Rights and the WTO to support the application of proportionality in ITA because of the many contextual differences between the two. Fourth, when interpreting BITs, application of principle of proportionality in many instances will completely ignore the clear textual language and thus violate the rules of treaty interpretation.

Keywords
Investment law, proportionality, right to regulate

1 Introduction

At the heart of international investment law are more than 3,000 Bilateral Investment Treaties (*BITs*), which are regarded as the most important sources of

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law.[1] BITs are treaties signed bilaterally by two countries to protect investments made by investors of both countries.[2] As of the end of 2013, a total of 3,236 BITs have been concluded.[3] This mass of BITs has generated a significant volume of cases arising out of disputes between foreign investors and host states (investment treaty arbitration or *ITA*).[4] In recent years, the ITA system[5] has come under scathing criticism for failing to balance rights of foreign investors (investment protection) with host countries' right to regulate (regulation).[6]

In response to this criticism, some authors argue that conceptualising the ITA system as a public law discipline and interpreting BITs using a public law method, namely comparative public law, will help in balancing investment protection with host countries' regulatory power and thus effectively responding to the criticism

[1] R Dolzer & C Schreuer, *Principles of International Investment La*w (2012), 13; J W Salacuse, 'The Treatification of International Investment Law' (2007) 13 *Law and Business Review of the Americas* 155, 157.

[2] J W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) *International Lawyer* 655. For a general discussion on BITs, see Dolzer & Schreuer above n 1; A Newcombe & L Paradell, *Law and Practice of Investment Treaties* (2009) 1–73; J Salacuse, *The Law of Investment Treaties* (2010); K J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (2010).

[3] This includes ,2902 stand-alone investment treaties and 334 investment chapters in FTAs. See *World Investment Report—Investing in the SDGs: An Action Plan* (2014) 114, <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> [accessed 22 September 2014].

[4] From a negligible number in the early 1990s, the total number of treaty-based cases rose to 568 by the end of 2013. See UNCTAD, *Recent Developments in Investor State Dispute Settlement* (UNCTAD IIA Issue Note 1, 2014) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf> [accessed 22 September 2014].

[5] In this paper, words like 'ITA system', 'international investment law' are used interchangeably—they refer to the network of 3,000-odd BITs.

[6] L T Wells, 'Backlash to Investment Arbitration: Three Causes', in M Waibel et al (eds), *The Backlash Against Investment Arbitration* (2010) 341. See also S Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 *Va JIL* 57, 69, who states: 'the extent to which investment treaties limit a state's regulatory powers and subject the exercise of such powers to liability claims by foreign investors may become the litmus test for the future viability of the system'. See also S D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham LR* 1521; G Van Harten, *Investment Treaty Arbitration and Public Law* (2007); A Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime' (2009) 50 *Harvard ILJ* 491; R Howse, 'Sovereignty, Lost and Found', in W Shan et al (eds), *Redefining Sovereignty in International Economic Law* (2008) 72–3; B Choudhary, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt JTL* 775; S Spears, 'The Quest for Policy Space in New Generation of International Investment Agreements' (2010) 13 *JIEL* 1037.

of the ITA system.[7] On the other hand, some authors question this by asking how 'to properly structure a methodology of identifying, sorting, and weighting comparative sources' for applying the comparative public law method.[8] Also, it is argued that the wisdom of prioritizing domestic public law (in the name of comparative public law method) over public international law to interpret BITs is open to question.[9] This is because domestic public law methods are rooted in a particular sociopolitical and economic context, and thus, if one is not sensitive enough about these different contexts, it could result in crude transplants of principles and practices of one legal regime to another.[10]

The focus of this paper is not the 'comparative public law method' of interpreting BITs. Instead, the focus of this paper is much narrower: it deals with the application of the public law principle of proportionality in ITA.[11] The principle of proportionality has its origins in German administrative and constitutional law,[12] and is defined by Kingsbury and Schill as 'a method of legal interpretation and decision making in situations of collisions or conflict of

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[7] See C N Brower & S Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 *Chi JIL* 471; Schill, above n 6; S Schill, 'International Investment Law and Comparative Public Law – An Introduction', in S Schill (ed), *International Investment Law and Comparative Public Law* (2010). See also S Montt, *State Liability in Investment Treaty Arbitration* (2009).

[8] J Kurtz, 'The Shifting Landscape of International Investment Law and its Commentary' (2012) 106 *AJIL* 686, 693.

[9] Ibid.

[10] Ibid. Vadi has argued that one needs to be careful while adopting the comparative method to the ITA system: V Vadi, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration' (2010) 39 *Denver JILP* 67. It has also been argued that the public law paradigm of the investment treaty system, because of the focus on investor-state regulatory relationship, ignores the underlying state-state treaty relationship. See A Roberts, 'Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *AJIL* 45.

[11] B Kingsbury & S Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality', in S Schill (ed), *International Investment Law and Comparative Public Law* (2010) 75; A S Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 *Law and Ethics of Human Rights* 47; U Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 *JWIT* 717; A Kulick, *Global Public Interest in International Investment Law* (2012) 168–220; C Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15 *JIEL* 223; E M Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2012) 3 *JIDS* 95.

[12] Kingsbury & Schill, above n 11, 80. See also D Grimm, 'Proportionality in Canadian and German Constitutional Law' (2007) 57 *U Toronto LJ* 383, 384–7; M P Singh, *German Administrative Law in Common Law Perspective* (2001) 160.

different principles and legitimate public policy objectives'.[13] The proportionality test will have three steps[14] which must be assessed cumulatively.[15] First, whether the measure is suitable for the legitimate public purpose; this will require a causal link between the measure and its object.[16] If the measure satisfies the first step, the second step will be to find out whether the measure is necessary i.e. whether there is a less restrictive alternative measure that will achieve the same objective.[17] If indeed the measure is 'necessary', then the third step (also known as proportionality *stricto sensu*) will involve balancing the effects of the measure on the right that has been affected with the public benefit sought to be achieved by the measure.[18] It is argued that the use by an arbitral tribunal of the proportionality analysis mentioned above when interpreting BIT provisions like expropriation will enable tribunals to resolve conflicts between competing rights and interests of foreign investors, on the one hand, and host states on the other.[19] Thus, and following this argument, the use of proportionality analysis by arbitral tribunals will effectively respond to the criticism that BITs do not balance investment protection with regulation.[20]

This paper critically examines whether the public law principle of proportionality, which is espoused as an important interpretative method to balance investment protection with regulation, can be applied in BITs. In order to set the stage for assessing the application of proportionality in ITA, the paper first provides a background and context of the debate on investment protection and regulation by mapping the backlash against the ITA system (Section 1). The paper then argues that structure of the ITA system does not support the adoption of a proportionality-type analysis in the adjudication of disputes (Section 2). This is followed by discussing the flawed and often truncated application of proportionality principle in ITA. (Section 3). Next, and by taking the example of expropriation provision and provisions on monetary transfers, the paper also argues that the language of substantive provisions in many BITs does not support the use of proportionality analysis (Section 4). In Section 5, the paper argues that ex-

[13] Kingsbury & Schill, above n 11, 79.
[14] H Xiuli, 'The Application of the Principle of Proportionality in *Tecmed v Mexico*' (2006) 6 *Chinese JIL* 635, 636-37; Kingsbury & Schill, above n 11, 85-88; Kulick, above n 11, 186–9.
[15] Leonhardsen, above n 11; J H Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239, 240–1.
[16] Jans, above n 15, 240.
[17] Jans, above n 15, 240; Kingsbury & Schill, above n 11, 86–7.
[18] Jans, above n 15, 241; Kingsbury & Schill, above n 11, 87–8.
[19] Kingsbury & Schill, above n 11; Sweet (2010); Kulick, above n 11.
[20] Kingsbury & Schill, above n 11.

treme caution should be exercised in relying on jurisprudence of the WTO and European Commission (*EC*) to support proportionality analysis in the ITA system. Merely critiquing the proportionality analysis is not sufficient and thus in Section 6 the paper proposes what an arbitral tribunal should do when faced with situations involving a clash of investment protection with host countries' right to regulate. Finally, the paper concludes by observing that the debate on use of proportionality analysis in ITA fits well in the larger debate in international investment law as to how to address conflicts between investment protection and host countries' regulatory power. The primary responsibility to address this conflict should be with countries, the makers of international law, and not with party-appointed arbitrators.

2 The Backlash Against International Investment Law

As mentioned above, there has been a significant increase in investor-state disputes in international investment law covering a wide array of regulatory measures such as environmental policy;[21] sovereign decisions regarding privatisation;[22] regulatory issues related to the supply of drinking water;[23] urban policy;[24] monetary policy;[25] laws and policies related to taxation;[26] policy related to the re-organisation of public telephone services;[27] industrial policy related to

[21] *Metalclad Corporation v United Mexican States,* ICSID Case No ARB(AF)/97/1 (Award, 30 August 2000); *Methanex Corporation v United States of America* (2005) 44 ILM 1345.

[22] *Eureka BV v Poland,* ICSID Case No ARB/01/11 (Award, 19 August 2005).

[23] *Biwater Gauff Ltd v Tanzania,* ICSID Case No ARB/05/22 (Award, 24 July 2008).

[24] *MTD Equity v Chile* (2005) 44 ILM 91.

[25] *CMS Gas Transmission Co v Argentina*, ICISD Case No ARB/01/8 (Award, 12 May 2005); *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8 (Annulment, 25 September 2007); *Enron Corporation v Argentina*, ICSID Case No ARB/01/3 (Award, 22 May 2007); *Enron Creditors Recovery Corp v Argentina* ICSID Case No ARB/01/3 (Annulment, 30 July 2010); *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16 (Award, 28 September 2007); *Sempra Energy International v Argentina,* ICSID Case No ARB/02/16 (Annulment, 29 June 2010); *LG&E Energy Corporation v Argentina*, ICISD Case No ARB/02/1 (Award, 25 July 2007); *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9 (Award, 5 September 2008).

[26] *Occidental Exploration and Production Co v Ecuador*, LCIA Case No UN 3467; *EnCana Corporation v Ecuador*, LCIA Case No UN3481; *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1 (Award, 16 December 2002).

[27] *Telenor Mobile Communications v Hungary*, ICSID Case No ARB/04/15 (Award, 13 September 2006).

sectors like media;[28] financial services;[29] banking;[30] energy;[31] public postal services;[32] electricity services;[33] motorway construction;[34] and tourism.[35] Furthermore, there have been instances where a host country's important public interest measures like health measures[36] have been challenged by foreign investors as a potential breach of a BITs. The most sensitive have been the ITA cases against Argentina,[37] where foreign investors challenged Argentina's regulatory measures to safeguard its economy from a complete collapse as violation of Argentina's obligations under different BITs. There have also been cases where ITA tribunals have adjudicated on the actions of the judiciary.[38]

Foreign investors challenging the sovereign actions of host states under BITs should not come as a surprise because that is what BITs are meant to do—to hold states accountable for the exercise of their public power while dealing with foreign investment. However, the adjudication of such a wide gamut of sovereign regulatory measures by ITA tribunals on potential breaches of BITs, and the awarding substantive damages to foreign investors[39]—resulting in diversion of taxpayer's money to foreign investors—have generated a backlash against international investment law. This backlash has been further fueled by instances arising where a similar set of facts,[40] or even the same provision of a BIT,[41] are

[28] *CME Czech Republic BV v Czech Republic*, UNCITRAL (Partial Award, 13 September 2001); *R S Lauder v Czech Republic* (2001) 9 ICSID Rep 66.

[29] *Fireman's Fund Insurance Company v Mexico*, ICSID Case No ARB(AF)/02/01 (Award, 17 July 2006).

[30] *Saluka Investments v Czech Republic*, UNCITRAL (Partial Award, 17 March 2006).

[31] *Duke Energy Electroquil Partners v Ecuador*, ICSID Case No ARB/04/19 (Award, 18 August 2008).

[32] *United Parcel Service of America v Canada*, UNCITRAL/NAFTA (Award, 24 May 2007).

[33] *Nykomb Synergetics v Latvia*, SCC (Award, 16 December 2003).

[34] *Bayindir Insaat Ticaret VeSanayi AS v Pakistan*, ICSID Case No ARB/03/29 (Award, 27 August 2009).

[35] *Waguih Elie George v Egypt*, ICSID Case No ARB/05/15 (Award, 1 June 2009).

[36] *Philip Morris Asia Ltd v Australia,* UNCITRAL, PCA Case No 2012–12.

[37] *CMS v Argentina,* ICSID Case No ARB/01/8; *Enron Corporation v Argentina,* ICSID Case No ARB/01/3; *Sempra Energy International v Argentina,* ICSID Case No ARB/02/16; *LG&E Energy Corporation v Argentina,* ICSID Case No ARB/01/01; *Continental Casualty Company v The Argentine Republic,* ICSID Case No ARB/03/9.

[38] *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/7 (Award, 30 June 2009).

[39] See 'Former Yukos Shareholders awarded US $ 50 billion in damages against Russia' (*FT World,* 28 July 2014) <http://www.ft.com/cms/s/0/f5824afa-1623-11e4-8210-00144feabdc0.html#axzz3G9R5v900> [accessed 22 September 2014].

[40] The most commonly stated example of this is the 'Lauder cases' where two arbitration tribunals gave different decisions within ten days of one another to essentially the same set of facts for disputes brought under two different BITs: see above n 28.

[41] The Argentine cases on Article XI of the US–Argentina BIT are a good example of such

interpreted differently by different tribunals.

One of the chief reasons for a wide range of sovereign decisions of host states being caught in the broad net of investor-state dispute settlement is often the vague and broad language of BITs.[42] For example, imprecise and broad provisions like Fair and Equitable Treatment (*FET*) become suitable candidates for broad and inconsistent treaty interpretations.[43] The textual indeterminacy of BITs has resulted in divergent and inconsistent legal conclusions.[44] Such indeterminacy has given a fair degree of discretion to ITA tribunals to interpret the terms occurring in BITs and hence indulge in 'law-making' activity,[45] which is deeply problematic because the job of an arbitral tribunal is to 'interpret the law made by countries' and not to 'make law for countries' in the name of interpretation.

The backlash against the ITA system is evidenced by state practice.[46] Some states have terminated their BITs and thus pulled out of international investment law.[47] One such country is Ecuador, which has witnessed third-highest claims by foreign investors after Argentina and Venezuela.[48] In 2008, Ecuador denounced nine of its BITs.[49] In July 2009, the Russian Federation terminated the provisional

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inconsistency: see above n 25.

[42] See Schill, above n 7, 67–8; Wells, above n 6, 342; Spears, above n 6, 1040; J E Alvarez & K Khamsi, 'The Argentine Crisis and Foreign Investors', in K Sauvant (ed), *Yearbook on International Investment Law and Policy* (2009) 379, 472–8; M A Clodfelter, 'The Adaptation of States to the Changing World of Investment Protection through Model BITs' (2009) 24 *ICSID Rev—FILJ* 165.

[43] For example, Vandevelde, writing on the FET provision, states that 'because the language by its terms can apply to virtually any instance of host-state conduct, it is potentially a basis for recovery in any situation': Vandevelde, above n 2, 203.

[44] For a detailed discussion on such inconsistent decisions, see Franck, above n 6, 1558–82. See also A Reinisch, 'The Future of Investment Arbitration', in C Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 894, 905–8.

[45] S W Schill, 'System Building in Investment Treaty Arbitration and Lawmaking' (2011) 12 *German LJ* 1083, 1092–3.

[46] O E Garcia-Bolivar, 'Sovereignty vs. Investment Protection: Back to Calvo?' (2009) 24 *ICSID Rev—FILJ* 464, 470–4. See also the public statement issued by many leading academics on ITA: <http://www.osgoode.yorku.ca> [accessed 22 September 2014].

[47] Even if a country terminates its BITs, customary international investment law (i.e. the law of diplomatic protection) will continue to apply for the protection of foreign investment: J Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012) ch 28.

[48] Allen & Overy, *Ecuador Establishes Commission to Audit its Bilateral Investment Treaties* (13 November 2013) <http://www.allenovery.com/publications/en-gb/Pages/Ecuador-establishes-Commission-to-audit-its-Bilateral-Investment-Treaties.aspx> [accessed 22 September 2014].

[49] UNCTAD World Investment Report, *Global Value Chains: Investment and Trade for Development* (2013) 108. Ecuador has also established a commission to audit its BITs: Allen & Overy, above n 42.

application of the Energy Charter Treaty.[50] In September 2012, South Africa terminated its BIT with Belgium and Luxembourg, and the following year the same state terminated BITs with Spain and Germany.[51] These decisions were taken after a review of South Africa's entire BIT programme in light of an investment treaty arbitration challenge from foreign investors for South Africa's Black Empowerment Programme.[52] Similarly, Venezuela sent a notice terminating its BIT with Netherlands because it felt that the particular BIT interfered with the implementation of policy changes in its energy sector.[53] Recently, Indonesia expressed the intention to terminate all 67 of its BITs.[54] India is re-thinking its BIT programme after a spate of ITA notices issued by foreign investors challenging decisions of the Indian Supreme Court and the Indian Parliament.[55] There have also been instances of countries denunciating the convention on the International Centre for Settlement of Investment Disputes (*ICSID*). Bolivia and Ecuador gave up their membership of ICSID[56] and in 2012, Venezuela sent a notice to the World Bank denouncing the ICSID convention.[57]

This contestation against ITA is not restricted to developing countries. State practice amongst developed countries also shows concerns about investment treaties encroaching upon host state's regulatory power. For example, in response

[50] A Hadfield & A Amkhan-Banyo, 'From Russia with Cold Feet: EU-Russia Energy Relations, and the Energy Charter Treaty' (2013) 1 *International Journal of Energy Security and Environmental Research* 1.

[51] S Woolfrey, 'Another BIT Bites the Dust' (*Tralac*, 30 October 2013) <http://www.tralac.org/discussions/article/5342-another-bit-bites-the-dust.html> [accessed 1 July 2014].

[52] *Piero Foresti, Laura de Carli & Others v South Africa*, ICSID Case No ARB(AF)/07/01.

[53] L E Peterson, 'Venezuela Surprises Netherlands With Termination Notice of BIT' (*IA Reporter*, 16 May 2008) <http://www.iareporter.com/articles/20091001_93> [accessed 22 September 2014].

[54] C Tevendale & V Naish, 'Indonesia Indicates Intention to Terminate all of its Bilateral Investment Treaties' (*Lexology*, 20 March 2014) <http://www.lexology.com/library/detail.aspx?g=96317cf9-e366-4877-b00c-a997ed3389c5> [accessed on 29 September 2014]

[55] For more on India's BIT programme and the re-think, see P Ranjan, 'India and Bilateral Investment Treaties – A Changing Landscape' (2014) 29 *ICSID Rev—FILJ* 419.

[56] ICSID, *List of Contracting States and other Signatories to the ICSID Convention*, <https://icsid.worldbank.org> [accessed 22 September 2014]. For a detailed discussion on the legal effect of these denunciations see A Tzanakopoulos, 'Denunciation of the ICSID Convention under the General International Law of Treaties', in R Hoffmann & C J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (2011) 75. Bolivia has faced three ITA disputes so far: *Aguas del Tunari SA v Bolivia*, ICSID Case No ARB/02/3; *Guaracachi America Inc (USA) and Rurelec PLC (UK) v Bolivia*, PCA Case No AA406; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia*, ICSID Case No ARB/06/2.

[57] ICSID, *Venezuela Submits a Notice Under Article 71 of the ICSID Convention* (Press Release, 26 January 2012) <https://icsid.worldbank.org> [accessed 22 September 2014].

to the notice given by Philip Morris (Asia) Limited challenging Australia's tobacco regulations,[58] Australia decided not to have investor-state dispute resolution mechanism but only an inter-state dispute settlement mechanism.[59] Similarly, in 2001, the NAFTA Free Trade Commission (*FTC*)—a body composed of the representatives of all the three NAFTA states—issued a note of interpretation aimed at limiting and rejecting the expansive interpretation given by arbitral tribunals on the meaning of FET.[60] Canada, in response to concerns expressed as to the effect of investment treaties on Canada's regulatory power, adopted a new model BIT in 2004.[61] In sum, the backlash against ITA has been global.

3 Can Proportionality be allowed under the Unique Structure of ITA?

Against this background of backlash against ITA, let us discuss whether the unique structure of ITA allows for the application of proportionality analysis. Using proportionality analysis as the method of review in ITA will grant arbitrators a significant discretion to second guess the regulatory measures adopted by host states by weighing and balancing the benefit of these measures with the effect on foreign investment. Thus, the concern is that such weighing and balancing by the arbitral tribunal runs the risk of very important public policy objectives being trumped by interests of investors in situations where the arbitral tribunal is of the view that costs of the effect outweigh the benefit. However, the question to be asked is that if judges in domestic legal systems can undertake proportionality analysis to adjudicate disputes that involve conflict between, say, right of an individual and a governmental regulatory measure to pursue a public

[58] 'Philip Morris sues Australian Government over Tobacco Laws' (*The Guardian*, 21 November 2011) <http://www.theguardian.com/world/2011/nov/21/philip-morris-australia-tobacco-laws> [accessed 22 September 2014].

[59] US–Australia FTA does not contain investor-state dispute resolution. See Australian Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to more Jobs and Prosperity* (Policy Release, April 2012) <http://www.acci.asn.au> [accessed 22 September 2014]. Note however that the new Australian government led by Tony Abbott has decided that it will decide on investor-state dispute settlement provisions on a case-by-case basis, thus signaling a change in the previous policy: L Nottage, 'Investor-State Dispute Settlement Back for Australia's Free Trade Agreements' (*University of Sydney Blog*, 17 December 2013) <http://blogs.usyd.edu.au/japaneselaw/2013/12/isds_back.html> [accessed 22 September 2014].

[60] Salacuse, above n 2, 225.

[61] A Newcombe, 'Canada's New Model Foreign Investment Protection Agreement' (*ITA Law*, August 2004) <http://italaw.com/documents/CanadianFIPA.pdf> [accessed 1 September 2014].

objective that allegedly infringes the individual's right,[62] then why not arbitration tribunals in international investment law?

The answer to this question lies in the structure and nature of ITA. It is important to note that key characteristics of domestic legal system such as institutional safeguards and constitutional features like 'independence of the judiciary', 'appellate review', 'separation of powers', and a written constitution that gives judges the right to decide which compelling interest should prevail, are all absent in ITA. ITA is a unique system of resolving disputes between foreign investors and host states where only one party (the foreign investor) can in the ordinary course of events bring claims (against a host state)[63] and where the private law adjudicative model followed in international commercial arbitration is used to check the sovereign regulatory power of host states.[64] This system is characterised by party-appointed *ad hoc* arbitrators, who, unlike the judges of domestic courts, are not embedded in the political and social system of the communities whose disputes they decide[65] and have inadequate knowledge of the overall legal, political and social context related to the dispute.[66] Consequently, these party-appointed arbitrators are less suitable to adopt a method of review that would require them to weigh and balance complex value-laden regulatory objectives that host states wish to pursue against the effect on foreign investment.[67] The dangers associated with a significant grant of discretion to arbitration tribunals undertaking proportionality analysis is also recognised by the advocates of proportionality analysis in ITA.[68] The response

[62] See A S Sweet & J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia JTL* 73; M Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 *IJ Const L* 298.

[63] There are only four instances where ICISD has registered claims by state or state entities against foreign investors: see C N Brower and S Blanchard, 'What's in a Meme? The Truth About Investor-State Arbitration: Why it Need Not, and Must Not, be Repossessed by States' (2014) 52 *Columbia JTL* 689.

[64] Van Harten, above n 6, 103.

[65] W W Burke-White & A V Staden, 'Private Litigation in a Public Law Sphere: Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale JIL* 283, 323; V Lowe, 'Regulation or Expropriation' (2002) 55 *Current Legal Problems* 447, 464–5. Even those who advocate the use of proportionality test in ITA accept this criticism of the proportionality test. See Kingsbury & Schill, above n 11, 104.

[66] It is also argued that ITA arbitration is heavily influenced by the style and culture of ICA and the arbitrators are not grounded in public international law or trained to settle public law questions. See T Walde, 'Interpreting Investment Treaties: Experiences and Examples', in C Binder et al (eds), *International Investment Law for the 21st Century* (2009) 724, 725–6.

[67] Burke-White & Staden, above n 65, 323.

[68] Kingsbury & Schill, above n 11, 104; Kulick, above n 11, 171–3.

to overcoming these problems is not very satisfactory as they mostly relate to the correct adoption of the proportionality test.[69] However, as we will discuss below, ITA tribunals have often faltered in applying the three-step proportionality test.

Also, questions are often raised about how impartial and independent the ITA system is. For example, it has been argued that that appointment of arbitrators is influenced by the positions taken by them in other arbitrations and in academic writings.[70] There are also issues related to conflicts of interest and independence where, for example, an individual may act as an arbitrator in one dispute and as counsel in another dispute at the same time,[71] or where an individual, wishing to win future appointment as an arbitrator, seeks to safeguard their reputation amongst investors or host states.[72] It has also been argued that there is statistically significant evidence to show that arbitrators favour 'the position of claimants over respondent states' and favour 'the position of claimants from major Western capital-exporting states over claimants from other states' thus evidencing a systemic bias.[73] Another interesting empirical study, on dissenting opinions in ITA, shows that in 34 out of 150 arbitral awards where a dissenting note was given, nearly 100 per cent of dissents favoured the party that appointed the dissenting arbitrator, thus, raising concerns about neutrality.[74]

The objective here is not to be unnecessarily alarmist about the ITA system and argue for sweeping changes such as elimination of investor-state arbitration

[69] Kingsbury & Schill, above n 11, 104.

[70] B Pirker, 'Seeing the Forest Without the Trees – The Doubtful Case for Proportionality Analysis in International Investment Arbitration' (Society of International Economic Law, 2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926166> [accessed 25 August 2014].

[71] P Sands, 'Conflicts and Conflict in Investment Treaty Arbitration: Ethical Standards for Counsel', in C Brown & K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2010) 19.

[72] Van Harten, above n 6, 167–74. See also Walde, above n 66, 731–2. According to one study, certain arbitrators are repeatedly appointed either by the state or by the foreign investor based on their reputation of being pro-state or pro-investor. According to this study, 15 arbitrators have decided 55 percent of the known investment treaty disputes as of 2012. See Corporate Europe Observatory, 'Who Guards the Guardians? The Conflicting Interests of Investment Arbitrators' (Paper, 2012) <http://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators> [accessed 8 October 2014].

[73] G Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 *Osgoode Hall LJ* 211.

[74] A J Van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', in M Arsanjani et al (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (2011) 821. See also J Paulsson, 'Moral Hazard in International Dispute Resolution' (Lecture given at the University of Miami School of Law, 29 April 2010) <http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf> [accessed 8 October 2014].

as some others do.[75] However, the issues flagged here cannot be dismissed altogether[76] and they do raise questions about the independence of the ITA system to impartially adjudicate disputes between investors and host states. Whether on the basis of these concerns, can one conclude that there is systemic bias[77] in ITA against host states and in favour of foreign investors is a question that cannot be addressed here.[78] Nevertheless, the fact that many states have started contesting the ITA system, as discussed above, and that there is more and more talk of improving and reforming the investor-state dispute settlement system,[79] shows that the concerns flagged above have some merit.[80] Consequently, in a system of dispute resolution where questions are raised about impartiality and independence of arbitrators, arguing for the use of proportionality analysis, which grants significant discretion to arbitrators to judge complex value-laden policy objectives of host states and thus play the role of an activist, could further dent the credibility of the system.

4 Proportionality in the ITA System

Now, let us critically look at how ITA arbitral tribunals have applied the principle of proportionality. ITA tribunals that have so far applied the principle of proportionality have not always followed the analytical three-step structure

[75] See, e.g., 'Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement' (Letter, 8 May 2012) <http://tpplegal.wordpress.com/open-letter/> [accessed 10 October 2014]

[76] Some dismiss these concerns as rhetorical by often citing empirical work in defense of the ITA system: see Brower & Blanchard, above n 63. However, those who critique the ITA system also rely on empirical studies: see Van Harten, above n 73; Van den Berg, above n 74. Thus, it is not appropriate to call these concerns as rhetorical—the better approach would be to deal with the criticisms and improve the system.

[77] It is important that systemic bias is distinguished from actual bias. The argument here is not that arbitrators have an actual bias against host states or in favour of foreign investors.

[78] See the debate between S Frank and G Van Harten in K Sauvant (ed), *Yearbook on International Investment Law and Policy* (2010-11) 859.

[79] A full issue in *Transnational Dispute Management* focusses on the question of how to improve the investment treaty arbitration system: <http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=52> [accessed 8 October 2014]. See also UNCTAD, *IIA Issues Note 2: Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (24 May 2013) 1–2, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4-en.pdf> [accessed 12 October 2014].

[80] Even those who defend the ITA system recognise the concerns and critiques flagged above and thus offer 'interpretative' solutions like use of public law method including the use of principle of proportionality in interpreting BITs: Schill, above n 6, 57.

mentioned above, which shows the problematic application of this method by tribunals.

One of the first ITA disputes which made somewhat elaborate reference to the principle of proportionality is *Tecmed v Mexico*.[81] The tribunal cited the jurisprudence of the European Court of Human Rights (*ECtHR*)[82] to support the proportionality test when determining indirect expropriation.[83] The tribunal held that 'there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure'.[84] While most commentators who support proportionality analysis in ITA cite the *Tecmed* decision in support of their argument, Henckels (who also advocates proportionality in ITA) has argued that the *Tecmed* tribunal's methodology to apply the proportionality test was flawed.[85] For example, the *Tecmed* tribunal proceeded directly to a strict proportionality review without undertaking the suitability and necessity stages, which is deeply problematic because benefits from the measure are being weighed and balanced against the restriction of the investor's right without deciding whether the regulatory measure is suitable or whether less restrictive alternative measures are available to the host country.[86] Also, the tribunal 'essentially discounted responding to concerns [of community pressure to shift the landfill] as a legitimate objective' to be pursued by Mexico.[87] This shows the inherent dangers with a proportionality analysis where the *ad hoc* arbitral tribunal gets to decide which public objectives are legitimate and worth pursuing—not the state.

Other tribunals have endorsed the approach adopted by the *Tecmed* tribunal.[88] For example, the tribunal in *El Paso v Argentina* cited *Tecmed* and said

[81] ICSID Case No ARB(AF)/00/2 (Award, 29 May 2003).

[82] *Mellacher and Others v Austria* [1989] ECtHR App 10522/83, 11011/84, 11070/84, 24; *Pressos Compañía Naviera and Others v Belgium* [1995] ECtHR App 17849/91, 19; *James and Others v UK* [1986] ECtHR App 8793/79, 19–20.

[83] *Tecmed v Mexico*, para 115.

[84] *Tecmed v Mexico*, para 122.

[85] Henckels, above n 11, 232. See also Leonhardsen, above n 11.

[86] Henckels, above n 11, 233.

[87] Ibid, 232. See also *Tecmed v Mexico*, paras 133–48.

[88] *LG&E v Argentina*, para 195; *Azurix v Argentina*, ICSID Case No ARB/01/12 (Award, 14 July 2006), para 312; *El Paso v Argentina*, para 241; *Joseph C Lemire v Ukraine*, ICSID Case No ARB/06/18 (Decision on Jurisdiction and Liability, 14 January 2010), para 285; *Deutsche Bank AG v Sri Lanka*, ICSID Case No ARB/09/2 (Award, 31 October 2012) para 522; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No. ARB/06/11 (Award, 5 October 2012), paras 402–4. The arbitral tribunal in *Fireman's Fund v Mexico,* below n 162, said after noting that the principle of proportionality was used by the *Tecmed* tribunal, 'The factor is

that 'proportionality has to exist between the public purpose fostered by the regulation and the interference with the investors' property rights'.[89] However, there was no mention of steps of suitability and necessity preceding this strict proportionality review. Also, the tribunal's analysis on determining indirect expropriation does not show, in a clear and rigorous way, how the tribunal applied the strict proportionality review.[90] Even in cases related to determination of violation of a FET provision, the proportionality principle—whilst referred—has often been applied in a truncated manner,[91] raising doubts about whether it is fully established in ITA.[92]

One recent arbitral tribunal that used the principle of proportionality is *Occidental v Ecuador.*[93] The core issue in this case was whether issuance of *caducidad* (termination) of the contract between the claimant (Occidental) and Petroecuador[94] by the Ecuadorian government amounted to breach of the BIT between the US and Ecuador.[95] The tribunal examined the legality of this regulatory measure by undertaking a proportionality analysis, which was couched in the following terms: first, whether any meaningful alternative short of declaring *caducidad* was available to Ecuador (whether there were alternative measures); and second, whether in any event issuance of *caducidad* was a proportionate response.[96] The tribunal did not talk of the suitability stage of the proportionality review, and found that there were alternative measures available to Ecuador and thus the measure adopted was not necessary.[97] It further went on to find out whether the measure was proportionate and concluded that it was not.[98] It is submitted that this is an incorrect application of the proportionality review where step three (proportionality *stricto sensu*) should be

used by the European Court of Human Rights [...] and it may be questioned whether it is a viable source of interpreting Article 1110 of the NAFTA'.

[89] *El Paso v Argentina*, para 243.

[90] Ibid, paras 244–8.

[91] See *EDF (Services) v Romania,* ICSID Case No ARB/05/13 (Award, 2 October 2009) para 293. See also R Klager, *Fair and Equitable Treatment in International Investment Law* (2011) 244–5.

[92] Klager, above n 91, 245. See also E Crawford, 'Proportionality', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (online edn, 2011) MN25.

[93] Above n 88.

[94] See *Occidental v Ecuador*, paras 186–200.

[95] For the facts of this case, see B Sabahi & K Duggal, '*Occidental Petroleum v Ecuador*: Observations on Proportionality, Assessment of Damages and Contributory Fault' (2013) 28 *ICSID Review—FILJ* 279.

[96] *Occidental v Ecuador*, para 426.

[97] Ibid, paras 428–36.

[98] Ibid, paras 442–52.

pursued only when the second step (necessity) has been satisfied. If the impugned regulatory measure is not necessary, then undertaking proportionality *stricto sensu* is superfluous.

5 Proportionality and the Text of BITs

We now turn to showing that use of proportionality analysis in interpreting BITs will violate the clear textual language of the treaty and thus not be in consonance with the customary rules of treaty interpretation.[99] It can be safely said that an ITA tribunal is bound to interpret a BIT using the customary rules of treaty interpretation, which are codified in the Vienna Convention on Law of Treaties (*VCLT*). These rules of treaty interpretation, after an 'initial silence'[100] and 'ensuing hesitation',[101] have been fully recognised by the International Court of Justice (*ICJ*).[102] The World Trade Organization's (*WTO*) Appellate Body has frequently affirmed the customary character of the VCLT.[103] A system whose neutrality is under doubt will gain credibility if it applies the widely recognised rules of treaty interpretation (where the text is the single most important of the analysis) to interpret BIT provisions in a rigorous manner rather than trying to be activist or undertaking value-driven interpretation.[104] This paper takes

[99] See J Calamita, 'International Human Rights and the Interpretation of International Investment Treaties – Constitutional Considerations', in F Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (2013) 164.

[100] T Bernardez describes the period from 1970–80 as the period of 'initial silence' where the ICJ did not make references to VCLT: S T Bernardez, 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties', in Gerhard Hafner et al (eds), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (1998) 721, 723.

[101] Bernardez describes the period from 1980–90 as the period of 'ensuring hesitations' of the Court with regard to VCLT: ibid, 727–9. .

[102] R Gardiner, *Treaty Interpretation* (2008) 14–15. See also *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, ICJ Reports 1991 p 53, 69–70; *Avena and other Mexican Nationals (Mexico v United States of America)*, ICJ Reports 2004 p 12, 48.

[103] For more on treaty interpretation by the Appellate Body of the WTO, see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009). For a debate on VCLT rules for treaty interpretation see M McDougal 'The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus' (1967) 61 *AJIL* 992.

[104] For a discussion on how international tribunals actually interpret treaties and what explains the divergence, see J Pauwelyn & M Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals', in J L Dunoff et al (eds), *Interdisciplinary Perspectives on International Law and International Relations* (2013) 445. In context of the WTO treaty it has been argued that the AB applies the VCLT rules comprehensively, often going through each and

the example of expropriation provisions and provisions on monetary transfer to show that this will be the case.

5.1 Conceptual difficulty in using the proportionality principle to determine indirect expropriation

The use of a proportionality test in the determination of indirect expropriation will lead to conceptual obfuscation by ignoring clear treaty language[105] in those BITs where the textual focus, to determine indirect expropriation, is on the 'effect' of the regulatory measure on investment.[106] Let us take Article 5(1) of India–Germany BIT as a representative example of such expropriation provisions found in many BITs:

> Investments of investors of either contracting party shall not be expropriated, nationalised, or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other contracting party except in public interest, authorised by the laws of that party, on a non-discriminatory basis and against compensation.

Giving ordinary meaning to the words occurring in the above provision on expropriation in accordance with VCLT Article 31(1) it is clear that host state is not precluded from expropriating a foreign investment. However, a host state can adopt regulatory measures tantamount to expropriation if the objective is to achieve some public purpose, provided the regulatory measure is non-discriminatory and due compensation is paid to the foreign investor. In other words, the text clearly recognises that a non-discriminatory regulatory measure aimed at achieving a public purpose could still amount to expropriation.[107] Ultimately, it is the payment of compensation that will make this expropriation lawful or unlawful. Thus, to prove whether the above provision has been breached, two

every step or interpretative guideline given in the VCLT: see G Abi-Saab, 'The Appellate Body and Treaty Interpretation', in M Fitzmaurice et al (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 99.

[105] On how international tribunals actually interpret treaties and what explains the divergence, see Pauwelyn & Elsig, above n 104.

[106] There are other BITs which also mention factors other than 'effect' to determine indirect expropriation.

[107] Vandevelde, above n 2, 302.

things have to be satisfied: first, the state should have expropriated foreign investment (i.e. expropriation has taken place); and second, this expropriation should not be in public interest, or if it is in the public interest, should not have been duly compensated (i.e. should be unlawful).

Since a proportionality test will involve weighing and balancing the effect on foreign investment with the public purpose that the host state wishes to achieve, it will involve taking 'public purpose' into account to determine indirect expropriation although the phrase 'measures having effect equivalent to nationalisation or expropriation' contains only 'effect' as the criterion to determine indirect expropriation. In the above provision on expropriation, 'public purpose' exists as a criterion to determine whether expropriation is lawful and not to determine expropriation *per se*,[108] which is the first of the two analytical steps to be performed in interpreting the expropriation provision. Using public purpose to determine whether foreign investment has been expropriated will result in a strange situation where, on the one hand, the treaty requires that foreign investment should not be expropriated unless there is public purpose and accompanied by compensation, and, on the other hand, the argument that regulatory measures tantamount to expropriation would not give rise to a claim for compensation if adopted for public purpose.[109]

Reliance on 'public purpose' to determine indirect expropriation, even if the expropriation provision in the BIT mentions only 'effect', is often achieved by arguing that under customary international law a state does not commit an expropriation and is not liable for adopting general regulatory measures that are commonly accepted as part of states' police powers.[110]

While many authorities support the right of the host state to regulate for *bona fide* public purpose even if it considerably affects foreign investment;[111]

[108] Ibid. See also A K Hoffmann, 'Indirect Expropriation', in A Reinisch (ed), *Standards of Investment Protection* (2008) 151; *Fireman's Fund Insurance Company v Mexico*, para 174; *Corn Products International v Mexico*, ICSID Case No. ARB(AF)/04/01 (Decision on Responsibility, 15 January 2008), para 89. See also *Siemens* at para 270, which said that purpose is a criterion to determine whether expropriation is in accordance with the BIT and not for determining whether expropriation has taken place. The arbitral tribunal in *Chemtura* adopted the same approach as tribunals in *Fireman Fund Insurance* and *Corn Products*. See *Chemtura Corporation v Government of Canada*, UNCITRAL/NAFTA (Award, 2 August 2010) para 257.

[109] See also *Azurix v Argentina*, para 311; Kulick, above n 11, 205–6.

[110] Henckels, above n 11, 225; Kingsbury & Schill, above n 11, 90–91; *Saluka v Czech Republic*, paras 254–62.

[111] *Saluka v Czech Republic*, paras 254–62; *Methanex v Mexico*, para 410; *Feldman v Mexico*, paras 103, 112. See also *Sedco Inc v National Iranian Oil Co*, Interlocutory Award (1985) 9 Iran–US CTR 248,

what is challenging is to answer whether this right has any limits. According to the proponents of the proportionality principle, this limit will be crossed if the effect on foreign investment is disproportionate to the importance of the public purpose pursued by the state. Apart from the complications of whether enough institutional safeguards exist in the system for tribunals to decide this question, this could lead to situations where this right will have no limits such as in cases where the alleged public interest to be pursued is very high. In other words, any effect including 'substantial deprivation' of foreign investment will not be expropriation as long as this effect is proportionate to the significance of public interest pursued by the host state. This would defeat the very purpose of having expropriation provisions in BITs.[112] The purpose of expropriation provision in BITs is to prohibit host states from shifting the burden of realising a public purpose onto foreign investors alone.[113] It has also been argued that 'historically, police powers have never been meant to cover regulations amounting to expropriations, except perhaps in situations where there is a state of emergency or a state of necessity'.[114] In other words, it is one thing to state that a host state has the right to adopt non-discriminatory regulatory measures for public purpose; quite different to decide how this will be applied in light of the fact that this very host state has accepted restrictions on its right by entering into a BIT containing the above-mentioned expropriation provision.[115] The tribunal in *ADC*

275; L B Sohn & R Baxter, 'Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *AJIL* 545; G C Christie, 'What Constitutes a Taking of Property under International Law' (1962) 33 *BYIL* 307; Newcombe & Paradell, above n 2, 357–8.

[112] Vandevelde, above n 2, 296.

[113] Ibid; T Weiler, 'Methanex Corp v USA – Turning the Page on NAFTA Chapter Eleven?' (2005) 6 *JWIT* 903, 919. See also J Paulsson & Z Douglas, 'Indirect Expropriation in Investment Treaty Arbitrations', in N Horn & S M Kröll (eds), *Arbitrating Foreign Investment* (2004) 145, 157.

[114] F Vicuna,'Carlos Calvo, Honorary NAFTA Citizen' (2002) 11 *NYU Environmental LJ,* 19, 27. See also B Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Australian ILJ* 267, 273. The *Restatement Third of the Foreign Relations Law of the United States* states that a 'state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if not discriminatory.' It is important to note that phrases like 'loss of property' and 'economic disadvantage' refer to those situations that are below the threshold of substantial deprivation. There is difference between 'economic disadvantage' and 'substantial deprivation'.

[115] The concern that non-inclusion of public purpose into determination of expropriation will reduce the regulatory space of host countries to adopt measures in public interest is not correct if one adopts the 'substantial deprivation' test for determination of indirect expropriation. In other words, it is not any adverse 'effect' on foreign investment that will constitute expropriation

v Hungary[116] said that while a sovereign nation possesses the inherent right to regulate its domestic affairs, the exercise of this right must have its boundaries.[117] The tribunal recognised that the relevant BIT provided such boundaries.[118] The *Azurix* tribunal found the criterion that 'host state is not liable for economic injury that is the consequence of bonafide regulation within the accepted police powers of the state' insufficient to determine indirect expropriation and recognised that a legitimate measure serving a public interest could give rise to a compensation claim.[119]

Another difficulty regarding the use of the proportionality principle when determining indirect expropriation will arise with differing language of the expropriation provision in different BITs. For example, compare the language of the above-mentioned provision with the language of some other BITs on expropriation, which provide an annex for interpreting expropriation provisions like India-Singapore BIT. The annex states:

> The Parties confirm the following understanding with respect to the interpretation and/or implementation of Chapter 6 on Investment of the India-Singapore Comprehensive Economic Cooperation Agreement (the 'Agreement') […]
>
> (d) the determination of whether a measure or series of measures of a Party in a specific factual situation, constitute measures as referred to in paragraph (b) above requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the measure or series of measures, although the fact that a measure or series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that measures having effect equivalent to nationalization or expropriation, has occurred;

but only that 'effect' that results in 'substantial deprivation' of foreign investment. This high threshold will allow ample space to the host state to adopt a number of regulatory measures for public purpose. It is only justifiable that if any regulatory measure crosses the high threshold of 'substantial deprivation', the host state should pay compensation to foreign investor. See R Moloo & J Jacinto, 'Environmental and Health Regulation: Assessing Liability under Investment Treaties' (2011) 29 *Berkley JIL* 1, 24; Mostafa, above n 114, 282–4; see also *Impregilo v Argentina*, para 270.

[116] *ADC v Hungary*, ICSID Case No ARB/03/16 (Award, 2 October 2006).

[117] *ADC v Hungary*, paras 423–4.

[118] Ibid.

[119] *Azurix v Argentina*, para 310.

> (ii) the extent to which the measure or series of measure interfere with distinct, reasonable, investment-backed expectations;
>
> (iii) character of the measure or series of measures, including inter alia, their intent, objectives, purpose, and degree of nexus between the measures and outcome or effects that forms the basis of the expropriation claim.[120]

Thus, the annex provides that in the determination of the expropriation provision, one has to take into account not just the economic impact of the measure on foreign investment but also the character of the measure and its purpose. In other words, this provision provides a clear indicator that both effect and purpose should be taken into account in determining indirect expropriation.[121] This language is very different from the language of the expropriation provision in the India–Germany BIT discussed above. In the India–Singapore BIT, there is textual support to have some kind of weighing and balancing or undertake proportionality-type analysis whereas there is no such indication in the text of the expropriation provision in India–Germany BIT. Using same method of review (i.e. proportionality in both India–Germany BIT and India–Singapore BIT), ignores the difference in language of the two treaty texts and thus is not in accordance with the canons of treaty interpretation recognised in the VCLT.

5.2 Proportionality Analysis in Monetary Transfer Provisions (MTPs)

MTPs in BITs regulate the transfer of funds related to investment in and out of a country. A typical MTP in a BIT identifies the 'transfer' or 'payment' to which the provision applies and also provides the conditions governing such transfers such as whether the transfer is to be made in foreign currency and whether the transfer can be made promptly.[122] In most BITs, MTPs cover all 'transfers' or 'payments' related to investment.[123] Further, depending on the treaty language, MTPs cover

[120] Such expropriation provisions are also to be found in the US–Chile FTA, Chapter 10, Annex D, No 4(a); the 2004 US Model BIT Annex B; and the Australia–Chile FTA, Annex 10-B, No 3(a).

[121] It has been argued that expropriation provisions of this nature have created confusion: Montt above n 7, 287. Also Kurtz has argued that presence of such expropriation provisions in Australian BITs, which reflect a crude transplant of US Supreme Court decision in *Penn Central Transportation Co v New York City,* 438 US 104, 124 (1978) is puzzling: Kurtz, above n 8, 693.

[122] Vandevelde, above n 2, 317.

[123] Ibid.

both inflows and outflows of funds.[124] These 'transfers' include: additional capital to maintain and increase investment; net operating profits, including dividends; repayment of any loan including interest; proceeds from sales of their shares, etc.[125] Most MTPs are worded broadly and are unqualified, as is Article 7 of the Indian Model BIT,[126] which states that India shall permit transfers of all funds related to investment and does not provide any exception or deviation from this obligation.

Thus the following question arises: if India were to impose restrictions on transfers or payments by foreign investors for any public policy concern and if a foreign investor challenges this as a violation of the MTP, how will an arbitral tribunal decide? On the basis of the argument that under customary international law, countries have the right to impose restrictions on transfers of funds,[127] (similar to the one used in expropriation) advocates of proportionality will contend that a tribunal should decide this question by using the three-step proportionality test, which would include weighing and balancing the benefit of the regulatory measure imposing restriction with the cost imposed on foreign investor. Thus, if the benefit flowing from restricting the transfer of funds is proportional to the restriction imposed on the right of the investor, then the

[124] Ibid, 319.

[125] See Article 7, Indian Model Text of Bilateral Investment Promotion and Protection Agreement, <http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp> [accessed 1 October 2014]

[126] For example, the MTP in Article 7 of the Indian Model BIT is worded in a very broad fashion:

> Repatriation of Investment and Returns:
>
> (l) Each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred, without unreasonable delay and on a non-discriminatory basis. Such funds may include:
>
> (a) Capital and additional capital amounts used to maintain and increase investments;
>
> (b) Net operating profits including dividends and interest in proportion to their share-holdings;
>
> (c) Repayments of any loan including interest thereon, relating to the investment;
>
> (d) Payment of royalties and services fees relating to the investment;
>
> (e) Proceeds from sales of their shares;
>
> (f) Proceeds received by investors in case of sale or partial sale or liquidation;
>
> (g) The earnings of citizens/nationals of one Contracting Party who work in connection with investment in the territory of the other Contracting Party.

[127] A Turyn & F P Aznar, 'Drawing the Limits of Free Transfer Provision', in M Waibel et al (eds), The *Backlash Against Investment Arbitration* (2010) 51.

impugned measure should be held legal.

However, the use of such proportionality analysis would go against the language of the text, making it clear that the obligation on the host country is to permit 'all' transfers 'freely' and 'without delay'. No exception is recognised in the treaty with respect to this provision. These words show that the countries have 'contracted out' of general international law, maintaining the right to impose restrictions on transfer of funds as far as bilateral flows between the two countries are concerned.[128] Similarly, arguments for using proportionality analysis can also be made by relying on the argument that the International Monetary Fund (*IMF*) Articles allow countries to impose restrictions on transfer of capital accounts.[129] However, the MTP in a BIT is *lex specialis* in relation to both the IMF provisions and the customary international law provision because it deals only with those aspects of transfer of funds that relate to investment.[130] Conversely, the IMF Articles and customary international law on monetary sovereignty deal with the issue of transfer of funds on all transactions not just related to foreign investment.

Another problem with respect to use of proportionality in MTPs, like the expropriation provision, will arise with differing treaty language. For example, some BITs allow host country to adopt restrictions on transfer of funds provided they are 'necessary' to deal with problems related to balance of payments.[131] The treaty however does not define when it can be said that it is 'necessary' to restrict the rights of the foreign investor to freely transfer funds in and out of the country. This puts the onus on the arbitral tribunal to decide what is 'necessary'. Provisions such as these provide some textual basis to undertake proportionality analysis although even here the argument could be for a less restrictive alternative measure test. The more important point for our purposes is that if proportionality analysis is used even in MTP provisions of the kind present in the Indian Model BIT, then that would erode the textual difference between

[128] For more on 'contracting out' of general international law, see J Pauwelyn, *Conflict of Norms in Public International Law* (2004).

[129] See Article VI.3, IMF Articles; see also J Gold, 'Exchange Contracts, Exchange Control, and the IMF Articles of Agreement: Some Animadversions on Wilson, Smithett & Cope Ltd v Terruzzi' (1984) 33 *ICLQ* 777, 778–9.

[130] P T Muchlinski, 'Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate: the Issue of National Security', in K Sauvant (ed), *Yearbook of International Investment Law and Policy* (2010) 35, 60; *Continental Casualty v Argentina*, paras 243–4.

[131] See Article 17(2)(b) of the Korea-Japan BIT: 'Measures referred to in paragraph 1 of this Article […] shall not exceed those necessary to deal with the circumstances' given in Article 17(1) which related to protection of country from balance of payments crisis or situations of extreme financial difficulty.

such provisions and MTPs of the kind present in Korea–Japan BIT.

Kingsbury and Schill, who advocate for the use of proportionality in the ITA system, argue that this method of review 'is not proposed as an alternative to the rules on treaty interpretation under the VCLT'.[132] However, as the above discussion shows, use of proportionality in those provisions on expropriation where the focus is solely on 'effect', will actually end up ignoring the clear language of the text and thus not be in consonance with the rules of VCLT. Moreover, Kingsbury and Schill argue that the proportionality analysis should be used by tribunals in situations where the rules of treaty interpretation do not indicate priority of one right or interest over the other.[133] However, the discussion above shows that rules of treaty interpretation indicate which right should prevail in cases of expropriation where 'effect' is the sole factor provided by the text (once the 'effect' crosses the threshold of substantial deprivation, which right should prevail is clearly recognised by the treaty) and where the MTPs are broadly worded without any exceptions.

6 Reliance on EC and WTO Jurisprudence to Support Proportionality in ITA?

Most scholars who advocate for proportionality in investment treaty arbitration rely heavily on the jurisprudence of European courts, such as the ECtHR, and the WTO.[134] As has been discussed, the *Tecmed* tribunal supported the use of proportionality in investment arbitration through reliance on the jurisprudence of ECtHR.[135] However, there are certain aspects not highlighted in these writings which crucially show that one has to be very careful in cross-regime reliance, otherwise it could amount to unfinished transplants of legal principles from one system to another without appreciating the contextual and institutional differences.

First, the use of proportionality in the WTO jurisprudence on GATT Article XX[136] has a textual basis. GATT Article XX(b), for example, states that a

[132] Kingsbury & Schill, above n 11, 78.

[133] Ibid.

[134] See Schill, above n 7; Henckels, above n 11; Kulick, above n 11.

[135] See *Tecmed v Mexico,* paras 115–22.

[136] GATT Article XX allows member countries to deviate from their WTO obligations in order to pursue certain non-trade goals provided certain conditions are satisfied. Further: M Trebilcock et al, *The Regulation of International Trade* (2012), 681–4; S Lester et al, *World Trade Law: Text, Materials and Commentary* (2012), 363–73.

WTO member country can adopt measures for protection of public health provided it is 'necessary' to do so.[137] The WTO appellate body, in order to interpret the word 'necessary'[138] has developed a two-tier test involving both proportionality and less restrictive alternative measure reasonably available.[139] The test involves, first, the proportionality or the weighing and balancing test, which will compare different factors like the importance of the regulatory value pursued, the contribution made by the challenged measure to the regulatory value and the restrictive effect of the measure on international trade; second, if the first step yields a preliminary conclusion of the measure being 'necessary', then the second step should compare this measure with other least trade restrictive measures which are reasonably available to the importing country.[140] Whether 'necessary' connotes proportionality or only less restrictive alternative test can be debated, however, the presence of the word 'necessary' in GATT Article XX gives some textual basis to argue for proportionality test.

Similarly, the ECtHR has also relied on words like 'necessary' found in the text of the European Convention on Human Rights to use proportionality as a method of reviewing state action.[141] In investment treaty arbitration, arguments for using

[137] GATT Article XX provides: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (b) necessary to protect human, animal or plant life or health [...]'

[138] The word 'necessary' can also be interpreted using the less restrictive alternative measure test.

[139] See C Bown & J Trachtman, 'Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act' (2009) 8 *World Trade Review* 85, 87. For WTO jurisprudence on 'necessary' in GATT Article XX see Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161 and 169/AB/R (11 December 2000) (*Korea – Beef)*; Appellate Body, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes,* WTO Doc WT/DS320/AB/R (25 April 2005) (*Dominican Republic – Cigarettes*); Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WTO Doc WT/DS285/AB/R (7 April 2005) (*US – Gambling*); Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO DocWT/DS332/AB/R (17 December 2007) (*Brazil – Tyres*).

[140] A D Mitchell & C Henckels, 'Variations on a Theme: Comparing the Concept of Necessity in International Investment Law and WTO Law' (2013) 14 *Chi JIL* 93; M M Diu, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?' (2010) 13 *JIEL* 1077, 1093. The word 'necessary' can also be interpreted by using the less restrictive alternative measure test.

[141] In *James and Others v United Kingdom* Article 1 of Protocol No 1, which was to be interpreted, contains the word 'necessary'. Similarly, in *Handyside v United Kingdom* [1976] ECtHR App 5493/72, a case involving censorship, the provision to be interpreted was ECHR Art 10(2), which contains the word 'necessary', which was used by the ECtHR to adopt a proportionality analysis.

proportionality analysis are often made without any textual basis. For example, in the expropriation provision given in the India–Germany BIT, or in the MTPs of the kind laid out in the Indian Model BIT mentioned above, there is no mention of the word 'necessary' and thus no textual basis to use proportionality.

Second, the proponents of proportionality in ITA, while relying on the jurisprudence of GATT Article XX , do not point out that use of weighing and balancing by the WTO Appellate Body is not without its share of criticism. The proportionality test in WTO has been critiqued for encroaching onto the host country's sovereignty because it allows the WTO adjudicator to compare trade and non-trade values and, based on this assessment, the adjudicator can replace the importing country's assessment with his/her own assessment.[142]

Third, there are key differences between EU treaties and the network of BITs. For example, the normative values that bind the EU cannot be cross applied to the network of 3,000 BITs, which have different goals such as providing protection to foreign investment in return for greater foreign investment inflows.[143] Kurtz has argued that the use of proportionality test in the context of the EU is to further the normative goal of positive integration of the EU and is in fact a part of judicial activism,[144] itself being a response to the failure of the legislative arm of the EU to further this goal.[145] No such normative goal is to be pursued by BITs.

[142] Bown & Trachtman, above n 139, 85; D H Regan, 'The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit balancing' (2007) 6 *World Trade Review* 347; J Kurtz, 'Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis' (2010) 59 *ICLQ* 325, 366–8.

[143] J W Salacuse and N P Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain' (2005) 46 *Harvard ILJ* 67. It has been argued that BITs do not necessarily result in more foreign investment inflows: E Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation', in K Sauvant et al (eds), *The Effect of Treaties on Foreign Direct Investment* (2009) 395; L Poulsen, 'The importance of BITs for foreign direct investment and political risk insurance: revisiting the evidence', in K Sauvant (ed), *Yearbook on International Investment Law and Policy* (2009–2010) ch 14. However, that is a separate point. The real issue here is what is the object and purpose of the BIT as reflected in the treaty. If it is attracting foreign investment by providing protection to investors, then the treaty interpreter has to take this context into account notwithstanding its desirability from a normative point of view.

[144] On judicial activism of the ECtHR, see G Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 *EJIL* 509, 518–20.

[145] Kurtz, above n 142, 373. See also M P Maduro, *We the Court: The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty* (1998); C Button, *The Power to Protect: Trade, Health and Uncertainty in the WTO* (2004), 211-212; C Henckels, 'Balancing Investment Protection and the Public Interest: The Role of Standard of Review and Importance of Deference in Investor-State Arbitration' (2013) 4 *JIDS* 197, 203–4.

7 What Should the Tribunal do? Is a Deferential Proportionality Analysis an Answer?

If one rejects the argument that tribunals should undertake a full-fledged intrusive proportionality analysis or, in other words, a proportionality analysis which is not deferential to the host state, then the obvious question will be what should the tribunal do? Can it adopt a deferential proportionality analysis? Henckels, while conceding to some of the criticisms leveled against the use of principle of proportionality in ITA, has argued that these problems can be overcome by an arbitral tribunal according deference to host countries while undertaking proportionality analysis.[146] She argues that 'a deferential approach to strict proportionality is preferable to an intrusive approach whereby arbitrators substitute their own opinions as to the appropriate balance which requires understanding of the society whose authorities' measures are at issue'.[147] In other words, according to Henckels, tribunals in the third step of the proportionality analysis related to strict proportionality should interfere only if the regulatory measure is 'manifestly disproportionate in light of its expropriatory effect'.[148] In this residual review, weighing and balancing will not take place for every impugned regulatory measure as long as the requirements of suitability and necessity have been satisfied but only for the 'obviously disproportionate' cases. This might give rise to the question whether the third analytical step is illusory. Henckels argues that this residual review of strict proportionality is not illusory because not proceeding to this stage may result in the measure being adjudged lawful even if the impact of the measure on investment is severe 'relative to the importance of the measure and its objective or where the measure and its objective could not reasonably be regarded as significant and important *vis-à-vis* its expropriatory effect'.[149]

The residual review of the strict proportionality stage appears to be better than arbitral tribunals undertaking proportionality *stricto sensu* in each case without according much deference to the host state. Henckels' proposal will ensure that arbitral tribunals stay away from undertaking proportionality *stricto sensu* for impugned regulatory measures except for cases falling in the category of 'obviously or manifestly disproportionate'.

However, the question to be asked is how will different arbitral tribunals decide the 'obviously disproportionate' category of cases? One way of doing this

[146] Henckels, above n 11.
[147] Ibid, 252.
[148] Henckels, above n 11, 253. See also *LG&E v Argentina*, para 195.
[149] Ibid, 254.

could be to determine whether the impact on foreign investment is severe (e.g. the substantial deprivation of foreign investment). However, arbitral case law on expropriation, shows that tribunals differ from each other on when can it be said that impact on foreign investment is severe or that foreign investment has been substantially deprived.[150] Some arbitral tribunals have adopted the legal approach (e.g. control over investment) to determine the question of substantial deprivation.[151] On the other hand, some arbitral tribunals have emphasized the "economic approach" (e.g. substantial deprivation of the economic value of investment) to determine substantial deprivation of foreign investment.[152] In other words, determination of severity of impact will hinge on discretion and subjective assessment of different arbitral tribunals.[153] Absence of any appellate review mechanism means that there is no body that could, harmonize these inconsistent approaches or decisions or as Kurtz puts it, 'discipline unprincipled judicial activism'[154] of ITA tribunals. This, in turn, will only aggravate the existing ITA jurisprudential maze.

Further, it is not just severity *per se* of the impact that will matter. This severity will have to be assessed in relation to the importance of the objective or the public purpose pursued by the state. In other words, the tribunal will indulge in proportionality *stricto sensu* even when the interference is not severe *per se* but 'severe' in relation to the importance of the public purpose pursued. The tribunal would reach such conclusion despite there not being any other alternative measure reasonably available to the host state to achieve the aforementioned public objective. Again, as discussed before, this is fraught with problems because it gives wide discretion to arbitral tribunals.

In sum, restricting strict proportionality to 'obviously disproportionate' cases, on the face of it, appears to accord deference to the host state and limits

[150] See Montt, above n 7, 260–262; T Walde & A Kolo, 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2001) 50 *ICLQ* 811, 837–8.

[151] See *Enron v Argentina*, para 245. Similarly, in *CMS v Argentina* the tribunal held 'control over investment' as integral to determining substantial deprivation (para 263). See also *PSEG Global Inc v Republic of Turkey*, ICSID Case No ARB/02/5 (Award, 4 June 2004) para 278.

[152] *Telenor v Hungary* required 'a major adverse impact on economic value of the investment' (para 64) and *Parkerings-Compagniet v Lithuania*, ICSID Case No ARB/05/8 (Award, 11 September 2007) requiring substantial decrease in the value of the investment as one of the requirements to determine indirect expropriation (para 455). See also *Total SA v Argentina*, para 195.

[153] The only exception to this could be the impact of the regulatory measure that results in total deprivation of foreign investment. However, in real life, most cases would not have reached this highest threshold and thus the challenge will be how to identify that the impact of the regulatory measure on investment is severe.

[154] Kurtz, above n 142, 368.

the discretion of the arbitral tribunal during the balancing stage. However, difficulties surrounding determination of 'obviously disproportionate' cases will mean that in reality there will be less deference accorded to host state, and arbitral tribunals could end up undertaking strict proportionality for most impugned regulatory measures. Additionally, the critique related to absence of textual basis to undertake proportionality analysis and the risk of ignoring the clear textual language, as discussed above, is also applicable to the deferential proportionality review.

The focus of the arbitral tribunal should be on the text of the BIT. So, if the text of the expropriation provision in the BIT clearly states that the focus should be only on 'effect' on foreign investment to determine indirect expropriation or where the MTPs in a BIT clearly state that host state is under an obligation to transfer 'all' funds related to investment without exception, the evidence clearly is that the states, as makers of international law, have decided where the balance should lie. There could be debates on whether this is 'correct' balance or not.[155] However, an ITA tribunal has no textual or institutional mandate to ignore the text and re-do this balance by undertaking a proportionality analysis.

There could be certain issues, which tribunals shall have to decide on their own because of lack of textual clarity such as questions related to standard of review (most BITs do not provide any textual basis for what should be the standard of review).[156] However, as Henckels has argued, a distinction needs to be made between standard of review and method of review.[157] Proportionality is not a standard of review but a method of review because, depending on the deference accorded to the host state, it could be strict or deferential.[158] The method of review should have close resemblance to the text. Thus, in situations where the text provides that the tribunal has to determine whether the regulatory measure adopted is 'necessary' to achieve a particular objective, the method of review should be 'least restrictive alternative measure' test or the necessity

[155] See generally H Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard LR* 44.

[156] On standard of review in ITA see Henckels, above n 145; J Arato, 'Margin of Appreciation in International Investment Law' (2014) 54 *VaJIL* (forthcoming). Also see generally, F Ortino, 'The Investment Treaty Arbitration as Judicial Review' (2013) 24 *American Review of International Arbitration* 437, 462; Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *EJIL* 907.

[157] Henckels, above n 145. Kulick argues, for example, that margin of appreciation can be used to fine-tune necessity and proportionality *stricto sensu* analysis: Kulick, above n 11, 195. Cf Burke-White & Staden, above n 65.

[158] Henckels, above n 145.

test. The tribunal should first ask whether the regulatory measure adopted is suitable to achieve the public interest or objective identified by the state. If yes, then the second step will be to find out whether there is an alternative measure less-investment restrictive or less-restrictive of the rights of foreign investor that will achieve the same public interest. This alternative measure should not be a mere theoretical possibility, but should be reasonably available to host state.[159] In other words, adopting the alternative measure should be something that is within the means (technical, economic) of the state. If the answer to the second question is 'no', then the impugned regulatory measure should be held 'necessary' and thus, legal.

Some difficulty might arise as to what should be the method of review in cases where either the language of the text is too vague and imprecise, as is the case with most FET provisions, and thus no textual indication of where the balance between investment protection and host state's regulatory power should lie, or in cases where the text does not provide any guidance (i.e. no mention of words like 'necessary' or any other nexus requirement linking measures with regulatory objective—this will happen while interpreting non precluded measures provisions in BITs).[160] In such cases also, necessity review should be used by arbitral tribunals because it will involve less discretion and thus no second-guessing about the significance of the public interest that a host state wishes to pursue.

It is argued that not proceeding to the third analytical stage of actual weighing and balancing 'would allow the severe restriction of a right in order to protect a negligible public interest'.[161] But then, this is precisely the point: who decides whether the public interest is negligible, the host state or arbitrators? Host state is best judge whether the public interest is negligible or important because an arbitral tribunal cannot fully comprehend and appreciate the actual conditions in which the host state identified the public interest to be pursued. Also, if the tribunal's concern is that host state should not abuse its regulatory power, which is indeed a legitimate concern, then, as Henckels herself admits, this can be addressed at the stages of suitability and necessity.[162] One admits that there could be an odd case where indeed the impact on foreign investor could be

[159] See also *US – Gambling*, paras 309–11.

[160] See e.g. W Burke-White & A Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 *Va JIL* 314.

[161] Kingsbury & Schill, above n 11, 87; Henckels, above n 11, 254.

[162] Henckels, above n 11, 254.

disproportionate. However, this is a cost that one will have to bear in a system characterised by many imperfections.[163]

8 Conclusion

This paper has endeavoured to raise some questions regarding the use of proportionality in the ITA system characterised by *ad hoc* arbitration and scattered substantive law with no common or broad-based institutional framework. One recognises the significant role that proportionality analysis, as an important interpretative method, plays in domestic legal systems and in more coherent and developed legal systems like the EC or WTO to balance competing interests. However, one is unsure whether the same can be cross-applied to the ITA system, given the concerns related to neutrality and independence of ITA. Also, as the paper has shown, in many BITs, the application of proportionality test could in fact ignore the textual language of the BIT. One also has to be careful when relying on jurisprudence of European courts or the WTO Appellate Body to promote proportionality in ITA because of significant contextual differences between the two systems.

The ITA tribunal should be guided by the text of the BIT in interpreting treaty provisions using customary rules of treaty interpretation. In situations where a method of review has to be chosen to make a choice between compelling interests, the arbitral tribunal should use the least restrictive alternative measures test (i.e. the necessity test). This test will be deferential to the state's regulatory power by not second-guessing the significance of state's public interest. At the same time, by requiring host state to show that the measure adopted is suitable and that it is least-investment restrictive i.e. no other alternative measure is reasonably available to host state that would achieve the same public interest, the tribunal will also safeguard foreign investment from abusive regulatory measures. Consequently, this will result in improved decision making and bring more rigour in the interpretative process. Given the legitimacy concerns often associated with ITA, arbitral tribunals should be true to the text, be deferential to the state, and not undertake judicial activism.

The debate on proportionality analysis in ITA is part of the larger debate on who has the onus to balance investment protection and regulation in international investment law: arbitrators or states? The fact of the matter is that a large majority of BITs contain provisions whose plain and ordinary meaning show that

[163] Van Harten, above n 6.

preference is to be given to investment protection over regulation (as in the case of broad and unqualified MTPs discussed in this paper). There are limits as regards the extent to which treaty interpretation and judicial review can correct such imbalance between investment protection and regulation. The onus to rebalance investment protection with regulation should be on countries, the subjects and makers of international law. Recent state practice provides clear evidence of countries taking up this challenge. Countries have, slowly but surely, started entering into newer treaties or replacing extant treaties with a new generation of treaties which are more detailed, balancing investment protection with regulation and thus also reducing the scope for arbitral discretion.[164] It is this new and emerging state practice that will eventually address the concern over existing BITs failing to balance investment protection with host country's regulatory power.

[164] P Muchlinski, 'Towards a Coherent International Investment System: Key Issues in the Reform of International Investment Law', in R Echandi & P Sauvé (eds), *Prospects in International Investment Law and Policy* (2012) 411; K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013) 351–72.

DOI: 10.7574/cjicl.03.03.235
Cambridge Journal of International and Comparative Law **(3)**3: 884–906 (2014)

'A JUSTIFIABLE SELF-PREFERENCE'? JUDICIAL DEFERENCE IN POST-9/11 CONTROL ORDER AND ENEMY COMBATANT DETENTION JURISPRUDENCE

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Abstract
This paper is an examination of the level of judicial deference, or scrutiny, of executive decision making in the war on terror in the United States and the United Kingdom. What kind of judicial process is available before those the executive deems a threat, are deprived of their civil rights? And how is the threat they pose determined within each jurisdiction?

Keywords
Judicial review, deference, national security, Human Rights Act, Bill of Rights, due process

1 Introduction

Justice Oliver Wendell Holmes of the United States Supreme Court wrote:

> [A]t the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing.[1]

Here is an unsentimental description of why and how the state justifies—independent of legal sanction, philosophical coherence, or historical importance of sovereignty—the treatment of a threat with unboundedness unfathomable by any measure of universal human dignity. Does and should the state treat 'others' with a similar impulse when it is threatened? Or is such a basic instinct trumped by a legal process meant to facilitate a clear and legal accounting?

This paper is an examination of the level of judicial deference, or scrutiny, of executive decision making in the war on terror in the United States and the

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[1] Oliver Wendell Holmes, *The Common Law* (1881) 44.

United Kingdom. What kind of judicial process is available before those the executive deems a threat, are deprived of their civil rights? And how is the threat they pose determined within each jurisdiction? The powers under consideration are those which threaten individual liberty and rights through a preventative regime constructed to address the threat from international terrorism after the attacks of 11 September 2001. It is the detention/control order/TPIM regime in the United Kingdom and Guantanamo detention in the United States. At some point, a justification is offered as to why 'they' should not, cannot, be subject to the regular police powers of the state. The justification usually does, and ought, to provide a definition of who 'they' are and why the harm they pose is categorically different, why the regular balance struck between liberty, security, and certainty is no longer adequate. But what does the comparative look tell us about the strength of the judicial process meant to justify this self-preference?

The difference in the level of judicial review is significantly connected to the framing of the limitation on executive authority, whether the emphasis is on institutional competence or individual rights. One, the United States, connects the legislative act empowering this special legal regime to an enumerated constitutional power: a declaration of war or authorization for the use of military force. The Constitution requires a legislative determination moving the state into a recognizable legal relationship with another state, or entity, and their members.[2] The justification for the alternative legal order is premised on a state of affairs writ large: it's us against them. And even more importantly, that state of affairs has a set of rules, international laws governing armed conflict and domestic rules which recognize legal powers of the executive premised on the extraordinary needs during a state of armed conflict. The armed conflict approach is preoccupied with categories. The detention regime operating at Guantanamo Bay, and the litigation it has spawned, is tied to determining the scope and limits of the executive's authority to detain the enemy in an armed conflict. This means the questions of due process, the nature of individual rights, and the role of the judiciary are defined through a very specific lens. The institutional powers

[2] Constitution of the United States of America, Art I, s 8 ('declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, …[and to] make rules for the government and regulation of the land and naval forces.') See also *Hamdi v Rumsfeld,* 542 US 507, 519 (2004) (*Hamdi*) (O'Connor J): 'In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakeably authorized detention in the narrow circumstances considered here.'

occupy an altered prominence when the state power being exercised is one of war.

The other system, the United Kingdom, offers a more flexible justification, prudentially tailored. It is built on statutory authorization, like any other, permitting wide discretion to the executive but subject to regular judicial review. And so, the limit on the authorized power of the executive comes directly from the rights provided for in the European Convention of Human Rights[3] (*ECHR*) and not from broader constitutionally enumerated or implied limits on institutional powers. Questions of institutional competencies do arise but they do so in the context of the particular circumstances of the case. And according to the proportionality review which accompanies ECHR rights, the courts are directly engaged in weighing the government interests against the imposition on individual rights for each person, according to their circumstances. While both systems display a quality of diminished judicial confidence in challenging the executive determinations of necessity and risk, the difference in the main source of judicial oversight does impact the quality and strength of judicial review and process.[4]

The level of judicial engagement has meant significant differences in the substantive analyses. The separation of powers concerns that permeate the DC Circuit's handling of detention review is preoccupied with safeguarding that sphere of executive discretion which may be necessary or reasonable for successful military operations. And the DC Circuit has been able to do this, without deep doctrinal conflict or judicial assertion of authority to engage with the balancing at stake by avoiding the balancing all together. There has been no articulation of either the exact state interests at stake in any given case or the severity of the deprivation for the individual. The central question is whether there is any possible interpretation that would lead the relevant executive officer, a soldier in the field or an intelligence officer, to believe this person is a 'part of' al-Qaeda, the Taliban, or an associated force. If so, then the executive is operating within his domain and any further judicial involvement is an unacceptable intrusion. If rights are a peripheral, if all together an absent, element in the

[3] 4 November 1950, 213 UNTS 221.

[4] The judicial deference which informs the handling of policy and risk determinations of the state is the result of traditional designation of national security as s distinct subject matter, worthy of some deference, which is often a companion of, but not doctrinally, exclusively, or constitutionally tied to war. The legitimacy of such deference is premised on relative institutional competencies which acknowledges the superior expertise and knowledge of the executive officers to assess risk.

US analysis, they are much more central in the UKs. The reason for that is the prominence of the ECHR and the Human Rights Act 1998 (*HRA*) in the design of the statutory authorization as well as in the judicial interpretation. No doubt, the UK Parliament included mechanisms of judicial oversight beyond what it may have done absent the requirements of the ECHR. But the courts also interpreted a wider scope for judicial review than the statutory language intended.[5] As a result, the UK High Court and the Court of Appeal have been engaged in sophisticated substantive analysis of the competing interests at stake and how much the imposing preventative measures are justified by the circumstances in each case.

2 Justifying Self-preference and Judicial Review: Institutional Powers or Individual Rights

If we could say that the US Constitution was, solely, exclusively, and reductively, a compact between citizens of the state and their government, the answer of where threats from non-members fit may be fairly straightforward, and not too dissimilar to the sentiment expressed by Justice Holmes that the Constitution creates a bond between the people and their government which 'justifies' the preferential privileges it provides. If you are a citizen you have full rights, if not, then your rights are contingent and limited. But more than a mere contract based on reciprocity, the Constitution is also the very source of legitimate exercises of power and so it regulates the governments conduct depending on the kind of state power at issue.[6] In his concurrence in *Verdugo-Urquidez*, Justice Kennedy implied just such a distinction in principle:

> We should note, however, that the absence of this relation does not depend on the idea that only a limited class of persons ratified the instrument that formed our Government. Though it must be beyond dispute that persons outside the United States did not and could not assent to the Constitution, that is quite irrelevant to any

[5] A Tomkins, 'National security and the role of the court: a changed landscape?' (2010) 126 *LQR* 543, 555: 'Even if s 3(10) does not provide on its face that older, lighter-touch standards should no longer apply, the interpretative obligation placed on courts by s 3 of the Human Rights Act should be borne in mind'.

[6] See C Keitner, 'Rights Beyond Borders' (2011) 36 *Yale JIL* 55, 57 (discussing three approaches to rights: country or territory based systems, compact or citizenship based systems, and conscience or government structure and authority reasons).

> construction of the powers conferred or the limitations imposed by it.[7]

In other words, the Constitutional protections are not solely about the person's ties or rights, it is also, and often, about the structural scope of or limits on uses of any particular branches power.[8] And this has been especially true of the Guantanamo jurisprudence. Structure, not rights, is at the heart of the struggle to find a proper balance. The general ordering of institutional competencies which frames substantive analysis of any given exercise of state power varies depending on which source of national power the state hopes to use. If it is the criminal justice power, then the alienage of the defendant or the seriousness of the crime will have no impact on the application of Constitutional criminal justice rights.[9] Immigration powers certainly provide a lesser set of rights and procedural protections, but this power has not been as heavily relied upon, at least since the immediate reaction after 9/11.[10] But the United States government has

[7] *United States v Verdugo-Urquidez*, 494 US 259, 275–76 (1990) (Kennedy J, concurring) (*Verdugo-Urquidez*): 'The absence of local judges or magistrates available to issue warrant, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country'.

[8] Whether Justice Kennedy meant to suggest a complete separation between the structural limits on state power and those imposed by the Bill of Rights by way of a grant of rights to the people, this has to some extent been the result.

[9] Constitutional criminal procedure does not change based on who the defendant is and how the state classifies him. When the commission of the crime, or the investigation, is carried out extraterritorially, the application of constitutional limits on investigative powers is tailored to account for the practical realities of the reach of state power. For an evolution of legal reasoning addressing the reach of the Bill of Rights in cases of extraterritorial commission, apprehension, and investigation of crime see: *Verdugo-Urquidez*, above n 7; *Ross v McIntyre*, 140 US 453 (1891); *Reid v Covert*, 354 US 1, 6 (1957): 'The United States is entirely a creature of the Constitution. Its power and authority have no other source. […] When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land'. See generally J A Cabranes, 'Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of US Constitutional Law' (2009) 118 *Yale LJ* 1660; B W Horn, 'The Extraterritorial Application of the Fifth Amendment Protection against Coerced Self-Incrimination' (1992) 2 *Duke JCIL* 367.

[10] For more examples of the use of immigration powers in the name of national security see: *Glavan v Press*, 347 US 522 (1954), concerning a Mexican immigrant who, between 1944 and 1946, had become a member of the local branch of the Communist Party, an organization that the US government deemed to be hostile to the interests and security of the nation and grounds for deportation according to the Internal Security Act of 1950. The Court held due process

predominantly relied on executive powers in time of war to justify preventative detention. The prominent role played by structural analysis places the emphasis on institutional domains. The Article II commander in chief clause is the doctrinal rooting for claims of flexible and broad executive discretion. Article I section 8 'to declare war' and 'make rules concerning captures on land and water' clauses place the legislative branch as the ultimate authority.[11] And finally, the principle of separation of powers and the judicial role in safeguarding against executive overreaching has meant a constant call for some judicial involvement.[12]

In the United Kingdom, the main limit on the Secretary of State's authority to address the risk from those engaged in 'terrorism related activity' is one from ECHR rights of those who would be affected.[13] The judicial role envisioned in the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, and the Terrorism Prevention and Investigation Measures Act 2011 is meant to satisfy the UK's obligations under the ECHR and the HRA. The statutory

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was satisfied without judicial determination of threat because Congress has made an explicit determination of the significance of membership to national security. D Cole, 'In Aid of Removal: Due Process Limits on Immigration Detention' (2002) 51 *Emory LJ* 1003; S C Blum, '"Use it *and* Lose it": An Exploration of Unused Counterterrorism Laws and Implication for Future Counterterrorism Policies' (2012) 16 *Lewis & Clark LR* 677 (a discussion of the US government powers under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) to detain aliens indefinitely, which it has never used).

[11] *Hamdi*, above n 2, 519: '[i]n light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakeably authorized detention in the narrow circumstances considered here.'

[12] Ibid, 536: '[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nation or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake'.

[13] This has not always been the case. Traditionally, because Parliamentary permission in matters of national security has been extremely broad, the constitutional union of Parliamentary Sovereignty and the rule of law in providing legislative justification or judicial review proved, for most of the 20th century, to be nominal at best. As Lord Atkinson put it in *R v Halliday* [1917] AC 260, 271: '[however] precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war'. And again in *Liversidge v Anderson* [1942] AC 206, 220, the House of Lords, this time during World War II, dismissed the involvement of the judiciary in supervising the decisions made under executive discretion: 'I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law'. See also: *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 (GCHQ).

schemes are meant to comply with ECHR Article 6 fair trial requirements and afford some judicial review of executive decision making.[14] Nevertheless, the language still provides for significant executive discretion. It is worth noting that even though Parliament is technically free to create a much more unbounded system, the political and legal pressure to comply with ECHR rights has led to statutorily sanctioned judicial review.[15] And the courts have employed the requirements of proportionality analysis to substantively engage with the particular interests and restrictions of rights involved in each case and expand the role of judicial review of executive decision making beyond what the statutory language implies.[16]

What the look at the lower court decisions of each country putting the regime into practice demonstrates is a significant difference in judicial process and judicial deference. In the United States, the emphasis on the scope of institutional powers, or domains, has resulted in a highly deferential review. In the United Kingdom, the limit on executive power does not come from abstract and generalized determinations of institutional domains but from ECHR rights, the result of which is judicial analysis of the particular context of the case and how the various interests and powers interact to either justify the measures imposed or demand their termination.

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[14] Anti-Terrorism, Crime and Security Act 2001, s 25: 'A suspected international terrorism may appeal to the Special Immigration Appeals Commission against his certifications under section 21 […] the Commission must cancel the certificate if—(a) it considered that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b)'); Prevention of Terrorism Act 2005, s 3(10): 'the function of the court is to determine whether any of the following decisions of the Secretary of State was flawed'.; Terrorism Prevention and Investigation Measures Act 2011, s 9: 'the function of the court is to review the decisions of the Secretary of State that the relevant conditions were met and continue to be met'.

[15] Even before the passage of the Human Rights Act 1998, the decisions of the Strasbourg court had begun to place pressures on Parliament to develop statutory schemes which implicated Convention rights with adequate safeguards in mind. *Chahal v United Kingdom* (1997) 23 EHRR 413 found the UK deportation system, and appeal process through judicial review, failed to satisfy Arts 5(4) and 13 of the European Convention on Human Rights. To comply with the decision of the European Court of Human Rights, UK Parliament passed the Special Immigration Appeals Commission Act 1997 and established the Special Immigration Appeals Commission (SIAC). SIAC's decisions, procedures and standards of review have been extremely influential.

[16] The proportionality review is implicated because even if the individual's liberty interests aren't directly implicated, other, qualified, Convention rights often are. For example the Art 8 right to respect for private and family life or the Art 9 right to freedom of thought, conscience and religion. See generally J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *CLJ* 174; T Hickman, 'The substance and structure of proportionality' [2008] *Public Law* 694; T R S Allan, 'Judicial deference and judicial review: legal doctrine and legal theory' (2011) 127 *LQR* 96.

3 United States: Due Process of War

Following the attacks of 11 September 2001, and more specifically, the ground war in Afghanistan, the President, operating with congressional authority under the Authorization for the Use of Military Force (*AUMF*),[17] began capturing and detaining 'enemy combatants'. Guantanamo Bay houses mostly third-state detainees who were captured either by US forces in Afghanistan or handed over to the United States by allied powers, most notably the Northern Alliance in Afghanistan, and Pakistani officials who scooped up a great many people fleeing Afghanistan in the early days of the invasion.[18] The AUMF authorizes the President

> [T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.[19]

War powers, argued the Bush Administration, displace the regular institutional ordering. Congress has no authority to 'place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response'.[20] This conclusion derived from a broader institutional claims that 'the constitutional structure requires that any ambiguities in the allocation of a power that is executive in nature, such as the power to conduct military hostilities, *must* be resolved in favour of the executive branch',[21] or that 'the Constitution makes clear that the process used for conducting military hostilities is different from other government decision making'.[22] Or, in the metaphor Justice Holmes used, thrusting off the enemy is not

[17] Authorization for Use of Military Force 2001 (AUMF). See also USA PATRIOT Act.

[18] See *The Report of the Constitution Project's Task Force on Detainee Treatment*, <http://detaineetaskforce.org/report/> [accessed 28 September 2014].

[19] AUMF, 224.

[20] J C Yoo, Deputy Assistant Attorney General, 'The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them – Memorandum Opinion for the Deputy Counsel to the President' (25 September 2001), extracted in K L Greenberg & J L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 3.

[21] Ibid (emphasis added).

[22] Ibid.

done through the regular process of rigorous institutional power, or decision, sharing. The need for swift and unified action means one branch decides. The Courts have rejected this argument in its extreme, insisting on enforcing structural constitutional limits. As Justice O'Connor wrote in her plurality opinion in *Hamdi v Rumsfeld*: 'Whatever power the United States Constitution envisions for the Executive in its exchanges with other nation or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake'.[23] But the result is continued emphasis on such institutional concerns.

Rasul v Bush[24] and *Hamdi v Rumsfeld* were two cases decided in the third year of the conflict in Afghanistan. The cases concerned detainees captured in Afghanistan. In *Rasul* the detainees were aliens; in *Hamdi* the detainee was a US citizen. They had been apprehended in an active conflict zone overseas and were being detained by the Commander in Chief. Because Hamdi was a US citizen the Court had to directly confront the scope of rights which would reach a person caught in the executives war powers. No one opinion commanded the majority but Justice O'Connor's plurality opinion and Justice Scalia's dissent differed fundamentally on the question of how Bill of Rights protections could operate in this conflict and how the structural considerations ought to influence the answer to the first question. Justice O'Conner, in her opinion for the Court, held the AUMF to be an act of Congress authorizing the detention of combatants in the ground war in Afghanistan. Hamdi's detention fell within executive prerogative, necessarily authorized as incident to the execution of war.

> In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force', Congress has clearly and unmistakeably authorized detention in the narrow circumstances considered here.'[25]

But this was no straightforward matter. Hamdi was not a citizen of an enemy state, nor his association with a foreign military apparatus beyond dispute. He was entitled to have his status determined, as part of his constitutional

[23] *Hamdi*, above n 2, 536.
[24] *Rasul v Bush*, 542 US 466 (2004) (*Rasul*).
[25] *Hamdi*, above n 2, 519.

right to due process, before finding himself wholly within executive control.[26] Instead of wholly deferring to the executive, Justice O'Conner placed the Court in the position to balance the extraordinary constitutional demands on both sides of the case: 'the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process'.[27]

If an impassioned defence of both constitutional safeguards of individual liberty and institutional overreaching needed a voice, in this case it found a champion in Justice Scalia's dissenting opinion:[28] '[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive'.[29] The Due Process Clause is how this great freedom is protected, and the Suspension Clause is how the Constitution accommodates measures made necessary by grave threats.[30] Absent such an emergency and a suspension, there is no judicial fashioning allowed to fill gaps of Executive illegality.[31] Justice Scalia took great issue with robbing due process of its substantive content. It is an approach premised on functionality of judicial enforcement of constitutional rights which Justice Scalia has long opposed, generally:

> [Flexibility] might be a persuasive argument if most of the 'growing' that the proponents of this approach have brought upon us in the past, and are determined to bring upon us in the future, were the

[26] Ibid, 526: 'Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict'.

[27] Ibid, 529.

[28] Ibid, 554: 'When the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art I, §9, cl 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge.'

[29] Ibid, 555.

[30] It is worth noting that while Justice Scalia takes great issue with the court's disregard of clear constitutional rules, he does not sustain it when it is an alien-combatant who seeks similar access to due process: see *Hamdan v Rumsfeld*, 548 US 557 (2006).

[31] A Scalia, *A Matter of Interpretation* (1997) 41.

> elimination of restrictions upon democratic government. But just the opposite is true.[32]

Now, the strong rights protective and rights focused argument that Justice Scalia defends is premised on a bright line distinction which would permit unbounded authority of the executive on the other side of the line. That line is citizenship. If the individual is an American, he gets all the rights due him under the Constitution. If not, then no rights are implicated and the Courts have no role to play. This approach was rejected by the courts in *Rasul* and *Boumediene.*

In *Rasul,* writing for the majority, Justice Stevens' opinion asks, in a particularly pointed section, why the presumption against extraterritorial reach of US law should stop the writ from applying to aliens at Guantanamo if it applied to citizens in the same circumstances.[33] These detainees were not citizens of a country at war with the United States, and they had not been found guilty of taking up arms against the US or coalition forces. What justified the use of the claimed war powers?[34] While the court had treated citizenship as a salient factor in war powers in the past,[35] especially assuming certain categorical justifications based on alienage,[36] the nature of the threat from international terrorism means the same underlying logic requires significant judicial investigation before it can be made to apply. The relevant question had become the person's ties to the organizations implicated by the AUMF.

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[32] Ibid.

[33] *Rasul*, above n 24, 497.

[34] Ibid, 475–76, 486, citing the six '*Eisentrager* factors': 'he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.'

[35] In *Johnson v Eisentrager*, 339 US 763 (1950) (*Eisentrager*), Jackson J took particular notice of the nature of modern warfare to determine the scope of the laws of war. How it demands complete allegiance from citizens. This allegiance, to a foreign nation at war with the United States, was the basis for leaving the case to military authorities. 'Conscription, compulsory service and measures to mobilize every human and material resource and to utilize nationals—wherever they may be—in arms, intrigue and sabotage, attest the prophetic realism of what once may have seemed a doctrinaire and artificial principle': *Eisentrager*, above n 35, 772–73.

[36] Ibid, 775: 'The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his pleas for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, court will not inquire into any other issue as to his internment.'

However, unlike Justice Scalia's argument in *Hamdi*, the Court in *Boumediene v Bush* made clear it was not going to determine the substance of the rights these detainees enjoyed or how the Bill of Rights applied to them.[37] The Suspension Clause and the separation of powers concerns it raised was the show everyone had come to see. At issue was the role of the judiciary, without which liberties won and codified after centuries of fight, failure, and fortitude, would be lost: '[the] protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights'.[38] In *Boumediene v Bush,* the detainees were all aliens, but none of them were nationals of a state at war with the United States.[39] They had all been found by Combatant Status Review Tribunals (*CSRT*) to qualify as enemy combatants, but they continued to deny their membership in both al-Qaeda and the Taliban. Looking to World War II case law as well as the Court's own Suspension Clause jurisprudence, Justice Kennedy produced the following three factors to evaluate the wisdom of judicial involvement:

> (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and the detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[40]

Finding the CSRT procedures wanting, their process inadequate, the Court overruled the congressional removal of judicial jurisdiction. Absent a suspension, the writ is available. The great writ protects a person from being detained illegally. Whether someone is detained pursuant to law depends on what law governs. The Suspension Clause cannot go on its own to Guantanamo without bringing some law with it. Justice Kennedy focused on the extraterritorial reach of the writ, not the extraterritorial reach of the law which either protects the detainee or makes his detention legal.

What these cases reveal is that the Supreme Court is working to apply a familiar set of legal principles to the challenges posed by the current conflict.

[37] *Boumediene v Bush* 553 US 723 (2008) (*Boumediene*).

[38] Ibid, 731.

[39] Ibid, 723: 'We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue'. See also S Vladeck, '*Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers' (2009) 84 *Notre Dame LR.*

[40] *Boumediene*, above n 37, 759–60.

But more than a focus on directly how the individual rights provided by the US Constitution may apply or the reality of the impact it has on the people subject to this power, the court has instead focused on defining the scope of institutional domains. There is no simple soldier/civilian distinction around which the Court can determine an all or nothing reach of the Bill of Rights. There is no direct connection between the civilians within any state and the *de facto* regional authority (or powerful international terrorist organization) operating within the borders. Justice O'Connor, in her opinion in *Hamdi* noted just this challenge:

> [W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.[41]

The Fifth Amendment right to due process prior to a deprivation of life, liberty, and property is the constitutional hook for judicial scrutiny of how the executive negotiates these new realities. Due process explicitly requires the weighing of interests asserted by the government against the loss suffered by the individual detainee. But if the only question is one of proper placement of an individual within a category of either full judicial oversight or complete executive discretion, the court is not actually engaging with the due process right to liberty but instead, it is engaged in a boundary drawing exercise which ultimately diminishes the courts enforcement of individual rights.

4 United Kingdom and Proportionality

After the attacks of 11 September 2001, the UK Parliament enacted Anti-Terrorism, Crime and Security Act 2001 (*ATCSA*). Section 23 of this Act gave the government power to indefinitely detain aliens, who posed a risk to national security, if deportation was not possible (due to risk of torture if sent back to their home country or some other practical hindrance). The government had issued a Derogation Order in order to sustain the suspension of ECHR Article 5 right to

[41] *Hamdi*, above n 2, 521.

liberty and security. Nine non-nationals designated a risk to the national security of the United Kingdom were detained but could not be deported. They appealed their indefinite detention to SIAC. The commission found there was a public emergency but that section 23 of the Act was not strictly required to confront that threat especially if British nationals with similar ties and intentions were left free to roam. Lord Bingham explained the role of the judiciary: the courts would not look too closely, or challenge, the merits of the governments declaration that there was a state of emergency,[42] but, because derogation was only permitted so far as it was strictly necessary, the courts would look at the measure, the statutory authorization, to determine whether the powers conferred were strictly necessary to combat the emergency. In other words, was the indefinite detention of non-nationals suspected of being involved in international terrorism strictly necessary for, or reasonably related to, neutralizing the threat?[43]

For a conflict on a global stage, an enemy without a state, how would removing any one suspected individual from the United Kingdom remove the threat? The zone of human rights free discretion was not the right size. The court is searching, asking questions of the political branches but for the majority of the bench the questions surrounding the existence and gravity of the emergency is not of particular judicial competence or concern.

There was a great deal of prophesying of what would come next. If the discretion to detain were extended to include British subjects, would the courts back off? Would such a broadening of scope for executive power be better, even if the scope was less discriminating? But, instead of an expansion in the use of indefinite detention, the government switched to a new tool: control orders.

Under the Prevention of Terrorism Act 2005 the Secretary of State was empowered to issue a control order pursuant to a determination that there are 'reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity.'[44] Under section 3(1)(a) of the Act, the Secretary of State can apply to the court for permission to make a non-derogating order, which the court can grant or quash after considering 'whether the Secretary of

[42] In *A v Secretary of State for the Home Department* [2004] UKHL 56, para 29, Lord Bingham, while deploying the proportionality analysis, did acknowledge the importance of recognizing the 'relative institutional competence' or the branches involved. For the question of whether there is a public emergency 'that great weight should be given to the judgment of the Home Secretary […] because they were called on to exercise a preeminently political judgment. It involves making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did.'

[43] Ibid, para 30.

[44] Prevention of Terrorism Act 2005, s 2(1).

State's decision that there are grounds to make that order is obviously flawed'.[45] This power could be used against citizens and aliens alike. Between 2005 and 2011, a total of 52 people were subject to control orders, 24 of whom had British citizenship. When the control orders were introduced, they were only used against aliens, those who had been subject to detention under the ATCSA.[46] In 2011 the control order system was replaced by Terrorism Prevention and Investigation Measures Act (*TPIM*). What the following cases show is the courts grappling with the task of independently determining the weight of the interests at stake through a context specific analysis filled with executive assessment and claims of executive expertise, if not institutional superiority. But the independent emphasis on ECHR rights that they do apply has had a significant impact on overcoming the pull, or the appeal, of complete deference. Rights are the proper domain of the judiciary and they need not, cannot, abdicate their duty to enforce them.

In *Home Secretary v MB*, the House of Lords had to consider whether a control order that relied on closed material (material not available to the person challenging the control order imposed upon them) violated the fair trial requirements of ECHR Article 6.[47] The House of Lords decision focused on the question of minimum procedural rights necessary for the guarantee of fair trial to be satisfied. However, it is the Court of Appeal decision that took on the question of how to give effect to proportionality review while still respecting the expertise and proper institutional competence of the executive. What is the proper level of deference the court should show to the Secretary of State? The Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect and, for this reason, a degree of deference must be paid to the decisions taken by the Secretary of State'.[48] This sentiment from Lord Phillips is not unfamiliar to

[45] Ibid, s 3(2)(a).

[46] D Anderson QC, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (2012) 30.

[47] *Secretary of State for the Home Department v MB* [2008] 1 AC 440, 472 (Lord Bingham): 'the application of the civil limb of article 6(1) does in my opinion entitle such person to such measure of procedural protection as is commensurate with the gravity of the potential consequences'. See also *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42, where the evidence that AT remained a member of the Libyan Islamic Fighting Group (*LIFG*) after his arrest, prosecution, and conviction, was in closed material, the process imposing the control order violated the requirements of fair trial.

[48] *Secretary of State for the Home Department v MB* [2007] QB 415, 438–9, citing *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153.

the kind of deference the courts have shown to the executive when the case is wrapped up in national security policies. And, the statutory language does not indicate a more searching review. Section 3(2) of the Prevention of Terrorism Act (*PTA*) empowers the courts to review the decisions of the Secretary of State. It states 'the function of the court is to consider whether the Secretary of State's decision that there are grounds to make that order is obviously flawed.'[49] But Lord Phillips went on. 'Notwithstanding such deference', he wrote, 'there will be scope for the court to give intense scrutiny to the necessity for each of the obligations imposed on an individual under a control order, and it must do so.'[50]

The courts have gone on to interpret the intensity of judicial scrutiny under section 3(10) of the PTA, evaluating whether the individual has participated in 'terrorism related activity', so as to require the reviewing judge:

> to make up [his own] mind whether there are reasonable grounds for the necessary suspicion, having considered all the evidence put before [him]. The test is an objective one: it presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have been involved in terrorism-related activity.[51]

It is at the next stage of analysis, reviewing whether the measures imposed are proportionate to the ongoing threat posed by the person, which requires the courts to walk the fine line between deferring to the Secretary of State on assessments of risk and dangerousness while still providing a significant level of protection for the individuals involved. That balance is not an easy one especially since the kind of conduct alleged will strongly compel a certain belief of dangerousness which intern justifies the restriction on individual civil rights, as it did in the case of *Secretary of State for the Home Department v CD*.[52] Where the gravity of the alleged terrorism related activity influenced the interpretations of

[49] Prevention of Terrorism Act 2005, s 3(2).

[50] *Secretary of State for the Home Department v MB* [2007] QB 415, 439.

[51] *R (on the application of Secretary of State for the Home Department) v Bullivant* [2008] EWHC 337 (Admin), para 11 (Collins J). See also A Tomkins, 'National security and the role of the court: a changed landscape?' (2010) 126 *LQR* 543, 555: 'The effect of the Court of Appeal's decision in *MB*, as subsequently summarized by Collins J in *Bullivant*, is deliberately to overlook that difference and to re-conceive of the courts' powers under the 2005 Act as if they are the same as were SIAC's powers under the 2001 Act'.

[52] *Secretary of State for the Home Department v CD* [2012] EWHC 3026 (Admin), para 22 (Ouseley J).

the court of the relative inactivity on the part of the controlee to mean continued intent to engage in TRA rather than the opposite, the court agreed that:

> [the] more realistic assessment is not that he never was engaged in such activities or that he has changed his mind about their merits; it is that the effect of the Control Order, inclusion the removal to Leicester, the temporary experience of custody in Belmarsh, and now the TPIM, have made him decide to keep a low profile, and to behave more normally for a while.[53]

On the other hand, in *Secretary of State for the Home Department v Al Saadi* Justice Wilkie revoked a control order finding that given the passage of time and the controlees statements that he wished to return to a normal life, there was not sufficient evidence to create a reasonable suspicion that he posed an ongoing threat.[54]In fact, Justice Wilkie acknowledged 'that in coming to this judgment I am, to an extent, not accepting the assessment of risk of the Security Service and the Secretary of State, to which I am obliged to show some deference'.[55] But, the fact that the most recent activities which raised the suspicion of ongoing risk were ambiguous at best meant that 'whilst he remains disaffected from the state and mainstream UK society and may well adhere to a view of Islam with which many would feel uncomfortable, this does not of itself justify the degree of intrusion involved in a control order'. The judgment demonstrates that difference between that 'thin veneer of legality' which in practice allows the decision to be made by the Secretary of State and one subject to 'effective judicial supervision'.[56] If ECHR Article 6 rights are to have real effect, providing for an independent decision maker, then undue deference ought to be avoided. When the elements of the analysis cannot be so cleanly separated as to permit the assessment of risk by one branch and determination of rights by the other, the judge must turn to justifying,

[53] Ibid.

[54] *Secretary of State for the Home Department v Al Saadi* [2009] EWHC 3390 (QB), para 185.

[55] Ibid, para 186.

[56] *Re MB* [2006] EWHC 1000 (Admin), para 103. See also *Secretary of State for the Home Department v AV* [2009] EWHC 902 (Admin), para 22: 'developments, [the negotiations between the rebels and the Libyan government], pose the critical question in the case: is the decision of the Secretary of State that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to continue the control order in force, flawed? For the reasons already explained, the only section of the public which it may be necessary to protect from a risk of terrorism associated with AV is that identified in the "manifesto": the Libyan government and its security organs.'

holistically/contextually, why the outcome best accommodates all the interests at stake.

5 Due Process: Rights or Institutional Powers?

Contrast the level of judicial analysis involved in balancing the proper need for deference against the need for judicial definition and protection of convention rights under the control order jurisprudence against the US courts' analysis under Fifth Amendment due process test. Justice O'Connor, in *Hamdi*, named the interests at stake for those subject to executive detention as 'the most elemental of liberty interests—the interest in being free from physical detention by one's own government'.[57] How the right is defined matters, especially when it comes to due process. Because the Due Process Clause is not a prohibition on depriving someone of life, liberty, or property, but a requirement that it be done in a way that minimizes an erroneous deprivation, the weight of the interests on each side of the balancing matters a great deal.[58] Unsurprisingly, the right to be free from wrongful imprisonment is more fundamental than the right of individuals captured in the field of battle to be properly classified as enemy combatants. These rights will have different pedigrees in case law and different weights for determining judicial deference. The same is true of the governmental interest at stake. Again, Justice O'Connor in *Hamdi* defined it as 'the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States'.[59] This interest is significantly different than the broader, and presumably much weightier, one of 'winning the war against global terrorism'.

[57] *Hamdi*, above n 2, 529. The opinion cites the following cases supporting the Court's modifications to the traditional due process guaranteed to individuals facing deprivation of liberty: *Mathews v Eldridge*, 424 US 319 (1976) (pre-deprivation hearing for the loss of social security benefits); *Heller v Doe*, 509 US 312 (1993) (involuntary commitment for mentally ill or mentally handicapped); *Zinermon v Burch*, 494 US 113 (1990) (voluntary commitment to mental health facility while intoxicated); *United States v Salerno*, 481 US 739 (1987) (pre-trial detention of defendants determined to pose a danger); *Schall v Martin*, 467 US 253 (1984) (pre-trial detention of juveniles); and *Addington v Texas,* 441 US 418 (1979) (*Addington*) (involuntary commitment of a patient raised from 'preponderance of the evidence' standard to 'clear and convincing' evidence)

[58] See e.g. *Addington*, above n 57, 427: 'The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.'

[59] *Hamdi*, above n 2, 531.

After the Supreme Court's decisions in *Hamdi* and *Boumediene,* the D.C. district and circuit courts were left to work out the details of judicial review of CSRT designations of enemy combatant status and the requirements of due process balancing. Quickly, the court began identifying the category of people who were subject to detention, this became the whole of the judicial analysis, it served as a substitute for balancing the interests in each case. If the individual could be reasonably considered a member of 'enemy forces', then the balance of interests was satisfied through an appeal to a constitutionally pre-determined balancing. The underlying assumption is that the constitution has already performed the balancing of interests when it vested the Commander in Chief powers in the Executive. The courts are therefore not empowered to look into the specific interests of the state in each case and the harm which the individuals suffer because that would mean conducting this balancing anew. But if the courts cannot engage in any real analysis of the different interests and rights at stake because the constitution has already done so, it becomes difficult to defend or assert judicial review. This perspective is starkly stated by Judge Silberman of the DC Circuit when he described the Supreme Court's handling of Guantanamo cases as a 'defiant—if only theoretical—assertion of judicial supremacy'.[60]

As the courts worked through the substance of the applicable law, and therefore the limits on executive autonomy, the core of the analysis was driven by arguments of implied limits on institutional powers. At the outset, the main body of law that promised some substantive elements for judicial enforcement was the law of armed conflict. In *Hamlily v Obama*, the DC District Court held '[t]he President also has the authority to detain persons who are or were part of Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States'.[61] The standard is not ongoing dangerousness. Why? Under the laws of war, or more specifically the Geneva Conventions, the requirement for detention is not individualized dangerousness, but status. Soldiers, members of enemy armed forces, can be detained until the 'cessation of active hostilities'.[62] Since authorization from Congress is a declaration of war, the power it authorized is the accepted war powers of the state in domestic

[60] *Esmail v Obama*, 639 F 3d 1075, 1078 (DC Cir, 2011) (Silberman J, concurring).

[61] *Hamlily v Obama*, 616 F Supp 2d 63, 78 (DDC, 2009) (*Hamlily*); adopted by the DC circuit in: *Al-Bihani v Obama*, 590 F 3d 866, 872 (DC Cir 2010) (*Al-Bihani*); *Barhoumi v Obama*, 609 F 3d 416, 432 (DC Cir, 2010).

[62] *Al-Bihani*, above n 61, 874. *Awad v Obama*, 608 F 3d 1 (DC Cir, 2010) (*Awad*): '*Al-Bihani* makes plain that the United States' authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of threat of hostilities'. See also Statement by Harold Hongju Koh, Sterling Profes-

and international law. The government and petitioner in *Hamlily* made claims based on analogizing the current conflict with the kinds of conflicts which are the subject of international laws of war, i.e. international armed conflict and non-international armed conflict. However, in navigating these claims the court acknowledged that 'the government's position cannot be said to reflect customary international law because, candidly, none exists on this issue'.[63]

As the cases reached the DC Circuit, the lack of clear authority, clear custom, in international armed conflict took on a particular significance. Not long thereafter, the DC Circuit abandoned the use of international law, generally, as a limit on the President's commander in chief powers:

> There is no indication in the AUMF [...] that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for US courts.[64]

There is the concern that too rigorous a review based on judicial analysis, whether driven by judicially created standards or through an appeal to international law, will mean overstepping into the law making function and thereby hamper the needed flexibility of the military authorities. The DC Circuit opinion in *Al-Bihani* went on to point out, that part of the legislative power to make law for the United State meant that 'Congress had the power to authorize the President in the AUMF and other later statutes to exceed [the] bounds [of customary international law of armed conflict]'.[65] This statement of possible legislative action has the predominant effect of limiting judicial review. The court does not go on to ask whether the standards of customary international law should inform the due process analysis but understands from their 'fluidity' a wide berth for executive discretion. This is the central preoccupation of the separation of powers

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sor of International Law, The Yale Law School, before the Senate Foreign Relations Committee (21 May 2014) <http://www.foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf> [accessed 6 November 2014].

[63] *Hamlily*, above n 61, 74.

[64] *Al-Bihani*, above n 61, 871.

[65] Ibid: '[t]herefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks [...], their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers'.

rhetoric, safeguarding the domain of Presidential war powers.[66] As Judge Brown put it, '[these] cases present hard questions and hard choices, ones best faced directly. Judicial review, however, is just that: *re*-view, an indirect and necessarily backward looking process'.[67]

The DC Circuit has gone on to perform their review through engaging in case by case functional determination of membership. If an individual can be said to be a 'part of' al-Qaeda, the Taliban, or associated forces, then they are detainable until the end of the conflict pursuant to the President's war powers.[68] Whether someone is part of one of these groups is not ascertained through formal proof of membership or evidence of having been part of the hierarchy of the organization. The standard is flexible.[69] Without a body of law to define the preventative detention powers of the President, either statutory or customary, the judiciary has found deference a more compelling institutional response.

In addition to the substantive berth, the procedural rules adopted by the DC Circuit have substantially relaxed the evidentiary and procedural review. The courts have not required clear and convincing evidence but held preponderance of the evidence standard more than satisfied constitutional due process.[70] In fact, preponderance of the evidence may be more than is required, which is reflected in the courts 'some evidence' approach in practice.[71] And the evidence relied upon need not be evaluated individually so as to isolate the basis of the detention to independently reliable evidence, the courts have turned to the 'conditional

[66] Ibid, 878: 'placing a lower burden on the government defending a wartime detention—where national security interests are at their zenith and the rights of the alien petitioner at their nadir—is also permissible'.

[67] Ibid, 882 (Brown J, concurring). See also S Vladeck, 'The DC Circuit After *Boumediene*' (2011) 41 *Seton Hall LR* 1451.

[68] *Al-Bihani*, above n 61, 873: 'The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war'.

[69] *Awad*, above n 62; *Bensayah v Obama*, 610 F 3d 718 (DC Cir 2010) (the case of an Algerian citizen arrested in Bosnia for suspicion of planning an attack against the US embassy, when the Bosnian police failed to find enough evidence, the Court ordered his release, at which time he was handed over to US forces); *Salahi v Obama*, 625 F 3d 745 (DC Cir 2010) (*Salahi*).

[70] *Al-Bihani*, above n 61; *Al Odah v United States,* 611 F 3d 8 (DC Cir 2010). See also *Addington*, above n 57, 425: '[i] n cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty"'.

[71] *Al-Adahi v Obama,* 613 F 3d 1102, 1105 (DC Cir 2010) (*Al-Adahi*): 'we are aware of no precedents in which eighteenth century English courts adopted a preponderance standard. Even in later statutory *habeas* cases in this country, that standard was not the norm. For years, in habeas proceedings contesting orders of deportation, the government had to produce only "some evidence to support the order."'; *Almerfedi v Obama*, 654 F 3d 1 (DC Cir, 2011).

probability analysis' instead.[72] As the court in *Al-Adahi v Obama* explained, the District Court had erred by considering the weight of each piece of evidence instead of recognizing a key difference in the reasoning involved in these cases: '[t]he key consideration is that although some events are independent (coin flips, for example), other events are dependent: "the occurrence of one of them makes the occurrence of the other more or less likely"'.[73]

The Supreme Court has not taken up the questions of what law or what standards apply in reviewing CSRT findings since *Boumediene*. In a recent memorandum accompanying a denial of certiorari in the case of *Hussain v Obama*, Justice Breyer stressed that mere membership in the Taliban or al-Qaeda may not be enough to authorize executive powers of military detention. Quoting the language from *Hamdi,* Justice Breyer points out the statutory limits on executive power to detain individuals pursuant to the AUMF, that the individual be 'part of or supporting forces hostile to the United States or coalition partners *in Afghanistan* and *who engaged in an armed conflict against the United States there*'.[74] Such a purposive reading would certainly limit who can be detained under this authorization. Whether the Supreme Court would narrow the domain of executive discretion or re-focus on re-asserting the importance of the rights of the individuals subject to this power would raise different issues. The former would mean judicial assertion of power to define the proper scope of institutional powers in an armed conflict, a less deferential version of the current case law. The latter would entail a reassertion of both higher procedural requirements and tighter fit between the interests of the state and the necessity of detaining this particular individual.

6 Conclusion

The scenario provided by Justice Holmes to explain zealous state action in response to a threat is, like most explanatory metaphors, imperfect. For an

[72] *Al-Adahi*, above n 71, 1105; *Salahi*, above n 67.

[73] *Al-Adahi*, above n 71, 1105: '[t]hose who do not take into account conditional probability are prone to making mistakes in judging evidence. They may think that if a particular fact does not itself prove the ultimate proposition (e.g., whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist.'

[74] *Hussain v Obama*, 572 US, 2 (2014) (cert denied) (Breyer J) (emphasis added). See also *Uthman v Obama*, 637 F 3d 400, 403 (DC Cir 2011): 'demonstrating that someone is part of al Qaeda's command structure is *sufficient* to show that person is part of al Qaeda. But it is not *necessary*.'; *Awad*, above n 62, 11: 'Nowhere in the AUMF is there a mention of command structure'.

individual it is a justification based on an immediately known reality and sufficiently precisely presented choice. This raft will sink if this stranger is not thrust off. But for a state, those elements must be provided for through some legal process meant to approximate the choice and present reliability and impartiality of the decision, that it is in fact the case that the raft will sink and that it is necessary to push *this* person off. The justification is contingent on a close fit between the circumstances and the necessity of the action. What the analysis of the quality of judicial review in the control order and Guantanamo cases has sought to show is how much the courts are involved in investigating that fit and thereby moving closer to an impartial justification.

DOI: 10.7574/cjicl.03.03.236
Cambridge Journal of International and Comparative Law **(3)**3: 907–928 (2014)

MEASURING COSMOPOLITANISM IN EUROPE: STANDARDS OF JUDICIAL SCRUTINY OVER THE RECOGNITION OF RIGHTS TO NON-CITIZENS

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Abstract
The paper aims at answering two research questions, the first concerns standards of judicial scrutiny national and supranational courts apply when deciding cases involving the recognition of rights to non-citizens, while the second regards how and why the differences among such standards of judicial scrutiny impact cosmopolitan theories. Authors supporting cosmopolitanism envisage the progressive construction of a cosmopolitan legal order in the recognition of rights irrespective of the status of citizenship, at least with regard to the European Courts' attitude. Indeed supranational courts challenged the theories that make the recognition of (at least some categories of) rights contingent upon the status of citizenship (ECtHR, *Koua Poirezz v France*; CJEU, *Kadi v UK*) in cases involving third country citizens. European domestic courts adopted the same approach in a number of cases (House of Lords, *R v SSHD ex parte Limbuela*; French Constitutional Court, Decision No 89–269). Analysing judicial argumentation techniques, the Author argues that there are differences in the standards of judicial scrutiny applied by supranational and domestic courts, which in turn express distinctive views of cosmopolitanism as well as different understandings of the minimum content of the cosmopolitan citizenship.

Keywords
Cosmopolitanism, Europe, Judicial Scrutiny, Rights, Non-Citizens

1 Cosmopolitanism and *cives nec cives* in Europe

Studies on the protection of fundamental rights in Europe generally envisage the progressive construction of a cosmopolitan legal order in the recognition of

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rights irrespective of the status of citizenship, at least within European borders, or more precisely within the borders of those states that are signatory members to the European Convention on Human Rights (*ECHR*).[1] These analyses owe much to the theory of the *constitutionalisation* of international law, that is, a theoretical framework maintaining the gradual affirmation of the binding nature of fundamental guarantees, originally born within the international legal system: the possibility of identifying an axiological foundation of international norms.[2]

There are at least two reasons why asserting cosmopolitanism and identifying it within the relationship between citizens of the ECHR Member States and the ECHR system is questionable. The first is that cosmopolitanism postulates the need to overcome the notion of membership with a view to replacing it with the idea of commitment to rights protection beyond the boundaries of a particular polity. The ECHR, stemming from the Council of Europe, is a specific legal order that aims at protecting rights primarily within its own jurisdiction.[3] From this perspective, it is a 'bland brand' of cosmopolitanism in the sense that it still conceives of a form of membership, though not of a political kind and broader than that feasible within a national jurisdiction.[4] The second and prevailing reason is that cosmopolitanism is *something more*[5] than (while not

[1] See A Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 *Global Constitutionalism* 53.

[2] J L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (2010) xv. See also H Jarmul, 'The Effect of Decisions of Regional Human Rights Tribunals on National Courts' (1996) 28 *NYUJILP* 311, 334. On the ethical foundation of international law see also T Nardin, 'Realism, Cosmopolitanism and the Rule of Law' (1987) 81 *ASIL Proc* 416.

[3] This assumption does not exclude the hypothesis of extraterritorial application of human rights treaties, especially of the ECHR: see M Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

[4] The synergy between the supranational legal order and national legal systems is supposed to unleash an expansive force of rights that primarily embraces citizenship rights: see N McCormick, 'Beyond the Sovereign State' (1993) 56 *MLR* 1, 17, who argues that integration among different legal systems should be interpreted as the creation of a plurality of institutional systems 'each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which for most purposes can operate without serious mutual conflict in areas of overlap'. Through supranational protection, citizenship rights would enjoy not only an additional channel for protection, consisting of supranational courts, but also a 'reinforced' ideological foundation that constitutes a bulwark against any attempt at disownment. This argument seems to be supported both by D Held, 'Citizenship and Autonomy' in D Held (ed), *Political Theory and the Modern State* (1989) and B S Turner, *Citizenship and Social Theory* (1993) 14.

[5] See R Tinnevelt & T Mertens, 'The World State: A Forbidding Nightmare of Tyranny. Habermas on the Institutional Implications of Moral Cosmopolitanism' (2009) 10 *German LJ* 63, 64, who

something completely different from) a theory of human rights,[6] even though it is indisputable that the latter is a theoretical construction which contributes to the development of a cosmopolitan theory.[7]

Cosmopolitanism indeed requires transcendence beyond the nation state and, in parallel, an effort to stretch the concept of membership to the extent that it loses its original understanding and coincides with belonging to a borderless community that does not make the recognition of rights contingent on any form of 'affiliation'.[8] Cosmopolitanism, however, does not intend to blur identities, differences and memberships in a single universal identity. On the contrary, it assumes that differences can be identified, expressed[9] and finally accommodated

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argue that 'taking the equal moral status of individuals seriously does not imply the commitment to some form of world state or global citizenship'. See also R Fine, 'Cosmopolitanism and Human Rights' (2007) 1 *Law, Social Justice and Global Development* 3, who argues that 'cosmopolitanism imagines a world order in which the idea of human rights is a basic principle of justice and in which mechanisms of governance are established for the protection of human rights'.

[6] Although 'human rights' refers to a common concept within the theory of rights, it is appropriate to define them as they differ from both constitutional and fundamental rights, being defined as absolute subjective claims, valid *per se* and regardless of recognition within states by means of statutes or constitutions: see R Dworkin, *Taking Rights Seriously* (1977); J Raz, 'Rights and Politics' (1995) 71 *Indiana LJ* 27, tracing the difference between human rights as universal claims and constitutional rights as particular and specific claims.

[7] See S Vertovec & R Cohen, *Conceiving Cosmopolitanism. Theory, Context, and Practice* (2002) 4. The authors define cosmopolitanism as follows: 'Cosmopolitanism suggests something that simultaneously: a) transcends the seemingly exhausted nation state model; b) is able to mediate actions and ideals oriented both to the universal and to the particular, the global and local; c) is culturally anti-essentialist; and d) is capable of representing variously complex repertoires of allegiance, identity, and interest'.

[8] J Waldron, 'What is Cosmopolitan?' (2000) 8 *J Pol Phil* 227. There is symmetry, as already suggested by Rawls, between the principle of equality between individuals and that of equality between peoples. Indeed, Rawls' theory of justice acknowledges a duty of assistance for richer societies in favour of the poorest. However, the achievement of a global justice is incorporated into the more general theory of peace between peoples and is therefore conditional on the objective of guaranteeing the international order: see J Rawls, *The Law of Peoples with The Idea of Public Reason Revisited* (1999). It must be emphasised that these arguments have also been put forward by philosophers who, starting from Rawlsian principles of justice, link the problem of global justice with that of the weak subjects in contemporary states and, in doing so, presuppose an ethic of care that is sensitive to all possible manifestations of social justice: see M C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006) 30, 230. With specific reference to the duties of material assistance applying on a global scale, see M C Nussbaum, 'Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy' (2000) 8 *J Pol Phil* 176.

[9] See T W Pogge, *World Poverty and Human Rights. Cosmopolitan Responsibilities and Reforms* (2002) 169; I Trujillo, *Giustizia globale* (2007) 164–6.

in any given polity that recognises, accepts and synthesises them.[10] In other words, the cosmopolitan attitude of a legal system is to be assessed starting with the ability of its political and judicial institutions to overcome the logic of belonging without neglecting the need for conciliating different affiliations and loyalties, rather than assimilating them within a global institutional project.[11] This approach characterises cosmopolitanism as opposed to universalism or globalism, as it has been argued by both David Held[12] and Sheila Benhabib.[13]

Despite the common semantic denominator, different versions of cosmopolitanism coexist.[14] For the purpose of this study, cosmopolitanism is interpreted as a theory that supports the need to transcend the national dimension when it comes to guaranteeing the equal treatment of all human beings, without necessarily implying the creation of global institutions intended to completely replace domestic jurisdictions.[15] Adhering to this notion, this article tests the cosmopolitan attitude of European states, considering them both as domestic legal orders and as part of the ECHR, and argues that while the European Court of Human Rights (*ECtHR*) shows a form of *idealist* (or *pure*) *cosmopolitanism*, domestic consti-

[10] Vertovec & Cohen, above n 7. See also H P Glenn, *The Cosmopolitan State* (2013) 176–7.

[11] J Habermas, *Postnational Constellation* (2001) 104, discussing the need for a 'world domestic policy without a world government'. See also Glenn, above n 10, 290, arguing that the ECtHR's doctrine of the margin of appreciation provides a good example of the functioning of a cosmopolitan legal order, as through this doctrine the Court 'refuses to construct a univocal or univalent interpretation of the European Convention oh Human Rights […] in order to allow multiple and varied state interpretations of it'.

[12] D Held, 'Principles of Cosmopolitan Order' in G Brock & H Brighouse (eds), *The Political Philosophy of Cosmopolitanism* (2005) 16.

[13] S Benhabib, 'Democratic Iterations The Local, the National, and the Global', in R Post (ed), *Another Cosmopolitanism* (2006) 20.

[14] It is appropriate to mention at least the so-called moral cosmopolitanism as opposed to legal cosmopolitanism. Whilst the former calls for a kind of moral universalism that conceives of a commonality of rules, values, and belief in human dignity (see D Held, 'Principles of Cosmopolitan Order' (2005) *Anales de la cátedra Francisco Suárez* 145, 148; Pogge, above n 9, 169), the latter urges for the creation of global institutions that should bear the responsibility to enforce the law in a truly worldwide legal order (see H Kelsen, *Peace through Law* (5th edn, 2000) 5–6).

[15] The idea of world institutions was objected to even by I Kant, *Zum ewigen Frieden* (1795: tr M J Gregor, 1996) 322. On this point see Tinnevelt & Mertens, above n 5, 4. The idea of global institutions charged with the duty to implement universal laws is supported by those authors upholding a peculiar version of cosmopolitanism that call for a reform of the international legal order: see R Falk, *On Human Governance* (1995); Trujillo, above n 9, 171. See also C J Friedrich, *The Philosophy of Law in Historical Perspective* (1963) 223–4, who argued that the creation of a constitutional order for the whole world is possible on one condition, that is a sufficiently large number of peoples, who participate in the creation of this global constitutional order, living themselves in constitutionally organised legal communities.

tutional courts express a kind of *pragmatic* (or *limited*) *cosmopolitanism*. The former approach aims at achieving a truly cosmopolitan guarantee of rights, whilst the latter ultimately affirms a sort of minimum content of cosmopolitan citizenship. In other words, idealist cosmopolitanism assumes that differing treatment of citizens and non-citizens is always objectionable, while pragmatic cosmopolitanism accepts that nationality matters in the recognition of rights.

This conclusion is based on an investigation of the standards of judicial review that courts resort to when addressing non-citizens' rights. Indeed, in order to test the cosmopolitan approaches, this article analyses the way in which courts, at both the domestic and the ECHR level, concretely realise the cosmopolitan aspirations of contemporary legal systems, that is, how they articulate and synthesise differences in their legal reasoning.[16] The reasons for focusing on standards of judicial review in addressing this issue rest upon the idea that constitutional as well as supranational courts generally use the expansive strength of rights to reach the maximum level of protection,[17] approximating their legal order to a cosmopolitan one.[18] This idea resembles Waldron's theory of harmonisation of fundamental rights laws and interpretation.[19] In other words, cosmopolitanism can be measured starting from courts' argumentation techniques, which in a way provide legal reasoning to a normative theory having moral foundations.[20]

This article looks specifically at the standards of judicial scrutiny that courts apply when deciding cases involving the recognition of rights to non-citizens or, in the case of the ECHR, to third-country nationals. In other words, in order to be consistent with the general premise, this article tests the existence

[16] There are many authors arguing that constitutionalism is inherently cosmopolitan. In other words, overcoming that state-centric conceptualisation of rights is the result of the constitutional soul of contemporary democracy: see V Perju, 'Cosmopolitanism in Constitutional Law' (2013) 35 *Cardozo LR* 711; S Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (2004). See also M Tushnet, 'The Cannon(s) of Constitutional Law: An Introduction' (2000) 17 *Const Comment* 187. Among European scholars see: E Pariotti, *La giustizia oltre lo Stato: forme e problemi* (2004) 43.

[17] See M Loughlin, *The Idea of Public Law* (2009) 130, who argues that contemporary democracies are characterized by the 'expanding culture of rights'.

[18] E A Posner calls this approach 'judicial cosmopolitanism': see E A Posner, '*Boumediene* and the Uncertain March of Judicial Cosmopolitanism' (2007-2008) *Cato Sup Ct Rev* 23; K I Kersch, 'The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law' (2005) 4 *Wash U Global Stud LR* 345.

[19] J Waldron, *Partly Laws Common to All Mankind* (2012) 119.

[20] See R Alexy, *A Theory of Legal Argumentation. The Theory of Rationale Discourse as Theory of Legal Justification* (2011) 14–15.

of a cosmopolitan legal order by focusing on the recognition of rights for those individuals who are citizens of states that are neither members of the ECHR nor (inevitably) the European Union. These individuals have differing levels of affiliation to the political communities in which they reside; the selected case law generally addresses those who are legal residents, though with differing degrees of permanency in the territory of the state, varying from temporary immigrant status to permanent resident status. In any case, they are not qualified to become citizens, and thus they are not members of the political community.

Furthermore, to stress the conceptual autonomy of cosmopolitanism, as opposed to a human rights theory, this article analyses cases involving the controversial category of social rights.[21] Indeed, social rights are commonly believed to bear an impenetrable link to membership in a political community, as they require states to choose how to allocate their own resources. From this perspective social rights can be seen as a litmus test for cosmopolitanism, because they show the extent to which it is actually possible to conceive of a cosmopolitan attitude of legal systems as an effort to make membership more and more irrelevant in the relationship between individuals and states. Whilst the exclusive or prevailing reference to case law concerning civil rights underlines the common core of European values, it strives to identify cosmopolitanism with the culture of human rights. This in turn assumes the universalism of some human beings' claims,[22] but does not necessarily link it to the need for the construction of a global community.[23]

Having set the theoretical premise, this article is organised as follows: Section 2 draws a methodological framework on how the analysis of standards of judicial scrutiny is performed. Section 2.1 develops an inquiry of domestic constitutional court caselaw involving the recognition of social rights of foreign nationals, specifically focusing on models of reasoning. Section 2.2 addresses the decisions of the ECtHR, elucidating standards of judicial scrutiny concerning non-citizens. Moving from the analysis developed in the previous sections, Section 3 systematises the standards of review according to the classical categories of strict, in-

[21] M Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12 *HRLR* 221.

[22] See Raz, above n 6, 41, arguing that only some claims which are interpreted as truly universal deserve to be included in the category of human rights.

[23] The difference is clear in Waldron, above n 19, 133. R Dahrendorf, *The Modern Social Conflict* (1988) 57, arguing that it is fundamental to start from constructing a civilised society of citizens at home. But as long as it is contained within national borders, it will also be accompanied by stances, policies and rules of exclusion that violate the basic principles of civil society. The historical task of creating a civil society will be concluded only when there are citizenship rights for all human beings. Therefore, he concludes by saying '[w]e need a world civil society'.

termediate and rational based scrutiny.[24] Section 4 concentrates on the views of cosmopolitanism that both constitutional courts and the ECtHR seem to support, arguing that courts express different understandings of cosmopolitanism that have consequences in the path to a cosmopolitan legal order. Finally, Section 5 provides concluding remarks, tracing the general framework surrounding the cosmopolitan vocation of Europe as a multilevel legal order.

2 Standards of judicial scrutiny and cosmopolitanism

Before addressing the case law of domestic and supranational Courts, it is appropriate to provide some methodological clarifications about the analysis of the standards of judicial scrutiny. First of all, it has been argued that constitutional or supreme courts tend to converge around a typical (and undeviating) interpretation of the principle of equality, which is the substantial parameter of non-citizen rights litigation.[25] Whilst it is essentially true that courts use common argument methods,[26] it should be emphasised that the intensity of scrutiny (borrowing the US Supreme Court categorisations of strict,[27] intermediate[28] and rational basis)[29], and therefore the weight of rights and interests involved in the adjudica-

[24] For a definition for each of the aforementioned standards see below nn 27–8.

[25] D Beatty, 'Human Rights and the Rule of Law' in D Beatty (ed), *Human Rights and Judicial Review* (1994) 15.

[26] For example, the French Constitutional Court (*Conseil Constitutionnel*) refers to *critères objectifs et rationnels* (objective and rational criteria) to test if a difference in treatment of citizens and non-citizens can be justified; the German Constitutional Court (*Bundesverfassungsgericht*) maintains that justification of different treatments must have a reasonable and persuasive foundation, inferable from the 'nature of things' (*Natur der Sache*). In both cases the argumentative method requires that judges' evaluation is guided by objective considerations see: French Constitutional Court, Decision No 83–164, 29 December 1983, para 10; K Schlaich, *Das Bundesverfassungsgericht* (1985) 233. See also A Frank, 'Les critères objectifs et rationnels dans le contrôle constitutionnel de l'égalité' (2009) *RDP* 84.

[27] That is a kind of scrutiny that requires the governmental interest justifying the different treatment (classification) to be compelling and the classification to be absolutely necessary to fulfil the compelled interest: see *Korematsu v United States*, 323 US 214 (1944).

[28] That is a kind of scrutiny that requires the governmental interest justifying the different treatment to be important and the classification to be substantially related to the public interest: see *Craig v Boren*, 429 US 190 (1976).

[29] That is a kind of scrutiny that requires a legitimate governmental interest and a reasonable correlation between the classification and the interest it is supposed to realise: see *McCulloch v Maryland*, 17 US 316 (1819).

tion, vary even across a relatively harmonised legal culture such as that in Europe. Secondly, standards of judicial scrutiny are crucial in deciding hard cases; that is, when judicial decisions have political consequences or imply judgement of a political nature, such as those concerning the treatment of individuals who are not members of the political community.[30] Indeed, standards attempt to provide a reasonable justification to courts' decisions, hence circumscribing judges' discretion, especially in the most controversial cases.

In order to identify standards of judicial scrutiny, this article investigates constitutional courts' and ECtHR decisions in a twofold perspective, looking at: (a) the identification of the grounds upon which the different treatment of non-citizens can be justified; and (b) the recognition of 'untouchable areas', i.e., cases in which there is no admissible justification for treating citizens and non-citizens differently.

This methodological framework guides the analysis of decisions with the goal of understanding what kind of cosmopolitanism courts support.

2.1 The horizontal dimension of the case law analysis: domestic courts' approach to non-citizens rights

Critics have raised methodological objections against cosmopolitan theories that argue for the recognition of rights irrespective of citizenship. These critics maintain that cosmopolitanism tends to destroy the conceptual tools that constitutional lawyers traditionally used to explore the topic of rights—first and foremost the hendiadys 'rights-citizenship', which considers membership in a political community to be the basis for entitlement to rights.[31] From this point of view, cosmopolitanism calls into question the political dimension of the protection of rights under constitutional law, and more specifically the role of

[30] See G Agamben, *Homo Sacer* (2005) 7.

[31] See M Sandel, *Liberalism and the Limits of Justice* (1982). Among Italian scholars see S Veca, *Della lealtà civile: saggi e messaggi nella bottiglia* (1998) 79. In *The Origin of Totalitarianism* (1951: tr A Guadagnin, 2004) 412, Hannah Arendt argued that the use of instruments to deprive people of their citizenship was one of the hallmarks of the totalitarian state. Forced migrations, mass expulsions and systematic exclusion from the *status civitatis* were used as instruments in order to strip individuals of all legal protection and to relegate them to a condition of absolute weakness. By removing the individual from his social existence, the stateless status substantiates the exclusion from the rest of humanity. Ultimately, being part of a community represents a vehicle for the recognition of human dignity.

the political process in their recognition.[32] Cosmopolitanism indeed supports the recognition of rights without linking it to the ordinary path of democratic processes, in which claims are stated and finally upheld within the dialectic between citizens and their political representatives. According to this approach, claims for universal rights within a given polity, irrespective of how basic or fundamental the rights are, reach political recognition without demanding the participation of the potential recipients.

On the contrary, scholars who support cosmopolitan theories maintain that studies of citizenship as membership in a specific political community limit themselves to identifying and classifying the relationship between individuals and the legal orders to which they belong, ignoring the transformation faced by contemporary states.[33] There is no doubt that the decline of the nation state due to the internationalisation of political and economic relations has resulted in a certain weakening of the logic of belonging, and thus paved the way for a 'secular' idea of citizenship. Accordingly, within more recent studies, the historical and cultural link fades and ceases to represent the principal element qualifying the idea of citizenship. National identity is to be redefined on bases other than those strictly cultural. At the same time, the concept of citizenship as membership expresses a trend towards the inclusion of different members of society with a view to resolving tensions and conflicts within modern pluralist democracies. It is precisely the historical emancipatory function of citizenship which leads to the conclusion that any merely ethno-cultural connotation of belonging must be rejected.[34] In other words, citizenship can be interpreted as an on-going process of the construction of civil cohabitation that is perfectly compatible with the cosmopolitan attitude of states.[35]

This theory, originally elaborated by Sheila Benhabib, seems to have circulated in Europe and to have transformed the concept of citizenship in judicial

[32] M V Tushnet, 'New Forms of Judicial Review and the Persistence of Rights-And Democracy-Based Worries' (2003) 38 *Wake Forest LR* 813, 825.

[33] L Bosniak, 'Constitutional Citizenship through the Prism of Alienage' (2002) 63 *Ohio State LJ* 1285, 1306.

[34] A C Guelzo, 'The Most Awful Problem that Any Nation Ever Undertook to Solve. Reconstruction as a Crisis in Citizenship' (2009) 12 *Chap LR* 705. See also Z Bauman, 'The Fate of Humanity in the Post-Trinitarian World' (2002) 1 *JHR* 283, 285, according to whom the emancipation from the concept of belonging of the most strictly historical and cultural elements is however anything but certain. The communitarians interpret citizenship in the light of the concept of belonging to the same 'historical community of destiny', or to a specific form of political organisation that represents the constitutive element of the identity of its citizens: see Sandel, above n 31.

[35] Benhabid, above n 13.

litigation; paving the way for theses that do not exclude foreign nationals, even from the enjoyment of inherently citizenship-related rights.[36] Indeed, European domestic courts have adopted an approach akin to the aforementioned theory in a number of cases involving the rights of foreign nationals.[37] European constitutional or supreme courts generally support the idea that some categories of rights deserve to be protected irrespective of citizenship.[38] This thesis would not have been a novel outcome if it had not applied to (at least) social entitlements usually reserved for citizens. As previously touched on in the introduction, social rights have a nexus with the concept of citizenship as they imply the allocation of public resources, which is normally guided by the principle of *preference for countrymen*.[39]

This line of reasoning of constitutional courts (and, in the UK case, the Supreme Court) is grounded in the scrutiny of the reasons for differentiating treatment of foreigners from that of citizens. From the courts' perspective, they must identify a strictly rational correlation between the distinctive factor (being citizens versus being non-citizens) and the purpose a rule is intended to achieve. For example, the Italian Constitutional Court argued that if a law establishes the right to free circulation in public transportation services for disabled persons, it cannot exclude individuals from its enjoyment on the basis of citizenship. The only goal for which the law can reasonably aim is the protection of vulnerable people. Therefore, differentiating between individuals because of their citizenship status is not logically consistent with the purpose of the law, even

[36] Ibid.

[37] See *R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66, para 77 (Baroness Hale) (*Limbuela*); French Constitutional Court, Decision No 89–269, 22 January 1990.

[38] For the purpose of this study, decisions of constitutional courts are analysed in countries such as Italy, Germany, France and Spain where there is a specialised court charged with the judicial review of legislation. In the case of the UK, the Supreme Court case law is considered.

[39] See R Nozick, *Anarchy, State and Utopia* (1974) 283, arguing that a state's public resources should be destined for the sole benefit of its citizens. See also M Adler, 'What States Owe Outsiders' (1993), 20 *Hastings Const LQ* 267, 391. On the reasons for preferring countrymen to others, see the analysis of D Miller, 'Justice and Global Inequality' in A Hurrell & N Woods (eds), *Inequality, Globalization and World Politics* (1999) 187; Trujillo, above n 9, 33–4. Discussing the same issue M Walzer, *Spheres of Justice* (1983) 42, 60 justifies the regulation of immigration by the need to preserve the cultural identity of the host society. Nevertheless, he argues that in cases involving lawfully resident workers, the rules requiring exclusion from some citizenship rights should be tempered, taking into account requirements of a distributive nature. Against the principle of preference for countryman, see B Ackerman, *Social Justice in the Liberal State* (1980) 419.

considering the need to take account of available resources.[40]

Courts generally acknowledge that legislators can classify individuals as far as the entitlement of rights is concerned. The classification however needs to be rationally justified. The German Federal Constitutional Court solves the problem of reasonable justification in a different way:[41] any differentiation addressing citizens and non-citizens deserves a presumption of legitimacy,[42] which is negotiable[43] only in cases involving fundamental rights expressly recognised in favour of all human beings (*Jedermannsrechte*).[44] In other words, in these specific cases different treatment is arbitrary because no persuasive and reasonable grounds, arising from the nature of the differentiation (national origin), can be given to justify diverging treatment.[45] The Federal Constitutional Court clarified that there is a fundamental right to a dignified minimum existence to which Germans and foreign nationals who reside in Germany are equally entitled.[46] The legislator can consider the characteristics of specific groups of individuals (i.e., citizens as opposed to non-citizens) when determining the dignified minimum existence; however it can only differentiate treatment on the basis of individuals' residence status if the need for existential benefits significantly diverges among the targeted groups.

The Spanish Constitutional Tribunal developed the same line of reasoning and argued that the equal treatment of foreigners and citizens is constitutionally

[40] Italian Constitutional Court, Decision No 425 (2005).

[41] The methodological approach of the German Constitutional Court has been extensively discussed by legal scholars: see *ex multis* J Bomhoff, *Balancing Constitutional Rights: The Origin and Meanings of Postwar Legal Discourse* (2013) 199.

[42] D Schefold, 'Aspetti della ragionevolezza nella giurisprudenza costituzionale tedesca' in *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale* (1994) 124; A Somek, 'The Deadweight of Formulae: What might Have Been the Second Germanization of American Equal Protection Review' (1999) 1 *U Pa J Const L* 284, 311.

[43] In the area of equal treatment, the position of the German constitutional judges can be synthesised by referring to one of their most famous cases, where they maintained that it is 'not the concern of the Federal Constitutional Court to consider whether the most just or appropriate rules have been adopted, but simply whether the outermost limits have been respected': see German Constitutional Court, BVerfG 17, 319 (330), 14 April 1964, available at <http://opinioiuris.de/entscheidung/1348> [accessed 2 November 2014]; R Alexy, *A Theory of Constitutional Rights* (2010) 269.

[44] C Kannengießer, 'Art. 2. Allgemeines Freiheitsrecht', in B Schmidt-Bleibtreu & F Klein (eds), *Kommentar zum Grundgesetz* (1999) 146.

[45] Alexy, above n 43, 266–7.

[46] German Constitutional Court, 1 BvL 10/10, 18 July 2012, available in English at <http://www.bundesverfassungsgericht.de/entscheidungen/ls20120718_1bvl001010.html> [accessed 2 November 2014].

mandatory only for universal human rights.[47] Differentiations in other cases should be subject to reasonable scrutiny and sanctioned only when the law cannot provide a rational justification for the classification. This approach has been followed by the French Constitutional Court. It maintained that the legislator can differentiate between nationals and foreigners for constitutionally justified purposes, which are essentially connected to the concept of public policy (*ordre public*).[48] However, the diverging treatment cannot affect fundamental rights and liberties (*les libertés et droits fondamentaux de valeur constitutionnelle*), among which social rights have been included at least since 1993.[49]

More recently, the requirement of reasonableness in classification has been interpreted in quite a flexible fashion, defined in terms of the absence of *erreur manifeste* by legislators.[50] This construction extends the legislators' margin of appreciation in the sense that diverging treatment is unconstitutional only when it is the result of an evidently inconsistent choice for the purpose of the objects/means test.

Within the UK, in a different legal tradition, the pivotal case *ex parte Limbuela* clarified that there is a limited set of social entitlements that must be recognised irrespective of the status of citizenship, because doing otherwise would infringe upon the basic rights enshrined in the ECHR and incorporated by the Human Rights Act 1998.[51] The standard of scrutiny over foreigners' rights is strict only where certain categories of rights are concerned. The Law Lords indeed considered whether the denial of social entitlements amounted to a violation of Article 3 of the ECHR, which prohibits inhuman and degrading treatment, hence including in the scrutiny only those entitlements that fulfil basic rights.[52]

This overview of constitutional and supreme court decisions concerning the rights of non-citizens demonstrates that there are generally no reasonably justifiable grounds for differentiating between citizens and foreign nationals

[47] Spanish Constitutional Court, Decision No 107 (1984); I Gutiérrez Gutiérrez, 'Los derechos fundamentales de los extranjeros en la Constitución y en las leyes españolas' (2003) *Boletín de la Facultad de Derecho UNED* 19.

[48] French Constitutional Court, Decision No 93–325, 13 August 1993.

[49] Ibid, para 3.

[50] French Constitutional Court, Decision No 2006–539, 20 July 2006.

[51] See *Limbuela* [2005] UKHL 66, 77 (Baroness Hale). See also P Billings & R Edwards, '*R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department*. A case of "Mountainish Inhumanity"' (2006) 12 *J Soc Sec L* 167.

[52] See also *EM (Lebanon) (FC) v Secretary of State for the Home Department* [2008] UKHL 62, in which the House of Lords seems to reiterate the distinction between guarantees of fundamental importance and the other rights.

when it comes to the enjoyment of fundamental rights. In other words, courts are reluctant to allow legislators to classify individuals using the criteria of membership as far as basic rights are concerned.

The category of fundamental rights however is highly controversial; in most cases it tends to correspond to civil/first generation rights. Only occasionally do courts expressly recognise that social rights deserve to be labelled as fundamental.[53] More frequently, courts hold that some social guarantees contribute to the enjoyment of basic rights and thus deserve to be recognised for all individuals.[54] As a consequence, the protection of social rights irrespective of citizenship always involves claims pertaining to the category of fundamental rights or to selected social entitlements accomplishing fundamental rights. In any case, the crucial consequence is that they are included in the essential content of the cosmopolitan citizenship envisaged by constitutional court judges. In contrast, when it comes to those rights that represent social entitlements not fulfilling any fundamental right,[55] constitutional courts apply a sort of rational basis scrutiny.[56] In these cases, constitutional judges will strike down a law not recognising a social right for non-citizens only if it is blatantly irrational or arbitrary.

Focusing for a moment on a rough synthesis of a far more problematic issue (explored in more details hereinafter), it can be argued that citizenship still matters for constitutional courts: it remains a status that entitles individuals to the full enjoyment of rights. Thus cosmopolitanism is interpreted as an ideal that cannot be completely achieved without a political decision. In its place, courts uphold a sort of *minimal cosmopolitan citizenship*, which entails the recognition of (some) typically citizenship-related rights.

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[53] French Constitutional Court, Decision No 89–269, 22 January 1990, qualifying social rights as human rights. On this issue, see I Hare, 'Social rights as fundamental human rights' in B Hepple (ed), *Social and labour rights in a global context: international and comparative perspectives* (2002) 176; J F Akandji-Kombé, 'The Material Impact of the Jurisprudence of the European Committee of Social Rights' in G de Búrca & B de Witte (eds), *Social Rights in Europe* (2005) 90.

[54] Italian Constitutional Court, Decision No 306 (2008). For the French case, see French Constitutional Court, Decision No 93–325, 13 August 1993, para 3; E Aubin, *Droit des Étrangers* (2009) 221.

[55] Italian Constitutional Court, Decision No 148 (2008).

[56] See J C Escarras, 'Conseil constitutionnel et ragionevolezza: d'un rapprochement improbable à une communicabilité possible' in *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale* (1994) 212. See also French Constitutional Court, Decision No 2005–528, 15 December 2005, paras 11–9.

2.2 The vertical dimension of the case law analysis: the European Court of Human Rights' approach to rights

Both the ECtHR and the Court of Justice of the European Union (*CJEU*) have challenged the theories that make the recognition of (at least some categories of) rights contingent upon citizenship in cases involving third-country nationals.[57] The ECtHR case law is interesting for the purpose of this article, because the Court's attention to social rights (which are not expressly enshrined in the ECHR)[58] impacts the theory of cosmopolitanism, and tends to reshape the conceptual tie between rights and citizenship, paving the way for a peculiar version of cosmopolitanism.

The ECtHR interprets the ECHR as extending its guarantees into the sphere of social rights and covering claims of third-country nationals.[59] In doing so, the

[57] *Koua Poirez v France* [2003] ECtHR App 40892/98 (*Koua Poirez*); Case C-402/05 P, *Kadi v UK* [2008] ECR I-6351.

[58] In its decision *Airey v Ireland* (1979) ECHR Ser A No 32, para 305, the ECtHR clarified that: 'the mere fact that an interpretation of the Convention may extend into sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention'. Valuing to the maximum extent the content of the Convention and, at the same time, renouncing to the rigid classical distinction between civil and social rights, the ECtHR developed an interesting case law concerning social rights. They have been interpreted as the specification of some of the guarantees enshrined in the Convention. The clearest example is workers' right to have their collective agreements implemented, which is derived from the freedom to assemble and join trade unions, recognised by Art 11 ECHR. See *Demir and Baykara v Turkey* [2008] ECtHR App 34503/97. The topic has been deeply analysed by scholars: see Hare, above n 53; L Clements & A Simmons, 'European Court of Human Rights: Sympathetic Unease', in M Langford (ed), *Social Rights Jurisprudence* (2008) 409. As for the CJEU's case law, which is not addressed in this article, it should be mentioned that there are a limited number of decisions specifically addressing the issue of third-country citizens' social rights. Furthermore, those cases concern only the specific and purely transnational circumstances under which the foreign national can actually claim the recognition of social entitlements before the CJEU. In general, on the CJEU's case law on social rights: see K Lenaerts & P Foubert, 'Social Rights in the Case-Law of the European Court of Justice. The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law' (2001) 23 *Legal Issues of European Integration* 267.

[59] International law scholars argued that courts should extensively interpret first generation rights in order to afford protection also to social and economic rights: see D Beatty, 'The Last generation: when rights lose their meaning', in D Beatty (ed), *Human Rights and Judicial Review* (1994) 326. The author argues that 'first generation bills of rights can provide […] as much protection for the social and economic spheres of people's lives as they have for their political and civil liberties'. See also F Sudre, 'La protection des droits sociaux par la Cour européenne des droits de l'homme: un exercice de "jurisprudence fiction"?' (2003) *Revue trimestrielle des droits de l'homme* 755.

Court experimented with a form of genuine cosmopolitan legal order, providing legal argument to the need to treat citizens and non-citizens equally even with respect to rights typically connected with citizenship. The cosmopolitan attitude of the ECtHR has been discussed primarily regarding whether it actually fostered the harmonisation of rights protection throughout the ECHR Member States. The case law however shows that the Court went beyond this, specifically addressing the situation of marginalised individuals, mainly through a substantial recourse to the principle of equality enshrined in Article 14 of the ECHR.[60]

In the decision *Gaygusuz v Austria*,[61] the ECtHR clarified that states cannot discriminate on the basis of nationality in the enjoyment of social entitlements. The case arose when Mr Gaygusuz, a Turkish citizen, brought a complaint regarding the Austrian authorities' refusal to grant him emergency assistance because he did not have Austrian nationality. The Court unanimously found that the denial of a social security benefit to an individual on the sole ground of his foreign nationality violated Article 14 of the ECHR, together with Article 1 of Protocol 1 guaranteeing enjoyment of possessions. The reasoning of the ECtHR judges proceeds as follows: states are not compelled to recognise such a category of rights, except to the extent which they actually contribute to the fulfilment of rights expressly guaranteed under the ECHR.[62] However, once states decide to safeguard social rights, their enjoyment shall be protected under Article 14. In other words, the merits of the allocating decision are not within the province of the ECtHR, but the judgment over the selection of recipients is a matter for the Court, and must respect the principle of non-discrimination. Consequently, the selection of individuals entitled to rights is not fair if it assumes citizenship as a discriminatory criterion, even if the rights concerned are commonly understood as citizenship-related claims.

The judgments in the cases *Koua Poirrez v France*[63] and *Andrejeva v Latvia*[64] provide further examples of the same line of reasoning. The ECtHR in both circumstances reiterated that social entitlements must be equally allocated irrespective of the citizenship status of the claimant. The first case concerned a

[60] Glenn, above n 10, 107, maintaining that the protection of marginalised people and minorities was not in the contemplation of the founders.

[61] *Gaygusuz v Austria* [1996] ECtHR App 17371/90, paras 36–7, 41 (*Gaygusuz*). On this decision, see M-B Dembour, 'Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *HRLR* 689.

[62] See for example judgments *G N v Italy* [2009] ECtHR App 43134/05; *Larioshina v Russia* [2002] ECtHR app 56869/00.

[63] *Koua Poirez* [2003] ECtHR App 40892/98, ECtHR 2003

[64] *Andrejeva v Latvia* [2009] ECtHR App 55707/00 (*Andrejeva*).

Côte d'Ivoire citizen claiming entitlement to a disability allowance under French law. The ECtHR opined that if the purpose of the entitlements is to afford social protection to individuals in need, there are no reasonable grounds for weighing the needs of citizens and foreigners differently; they are in the same position for the purpose of welfare policy. The second decision addressed the case of a permanent resident of Latvia demanding to be treated equally to citizens in the application of state social security law. The Court expressly rejected the government's argument that the financial burden and limited capacity of the national budget prevented the extension of social rights. So, the principle of equality has been interpreted as an absolute rejection of the 'preference for nationals' doctrine even in the circumstances of the economic crisis.[65] In other words, states cannot give preference to their own citizens over foreigners because of financial and fiscal constraints originating from the economic crisis. This kind of policy challenges both the social cohesion and the principle of equality.

The case law of the ECtHR has had a limited influence on domestic courts as far as non-citizens' social rights are concerned.[66] Indeed, even if they generally find that the exclusion of foreign nationals from social entitlements is without an 'objective and reasonable justification', they limit this conclusion to fundamental rights or, as may be the case, social entitlements fulfilling a fundamental right.[67] On the contrary, there is no sign in the ECtHR's decisions of this idea of an essential or minimal content of cosmopolitan citizenship and a margin of complete discretion for legislators to discriminate between citizens and foreigners in the recognition of rights other than those labelled as fundamental. It is crucial in this respect to notice that the ECtHR's judgments clarify that once a specific right or entitlement is established, there is no space for discrimination on the basis of nationality, no matter the 'quality' of the right concerned.

[65] Besides *Andrejeva*, see *De Souza Ribeiro v France* [2012] App 22689/07. Certain judges stressed that the policy of denying non-citizens' equal access to civil and social rights in times of unemployment and fiscal constraints 'not only challenges social cohesion in European countries, but goes to the heart of the principle of equality' (Judges Pinto De Albuquerque, joined by Judge Vučinič).

[66] Even though a direct inspiration may be expressly traced in the French case: see Aubin, above n 54. See also Dembour, above n 61, 690, arguing that '*Gaygusuz* has not triggered tremendous changes to policy and/or legislation either in Austria or elsewhere. Nor has it generated a quantitatively or qualitatively important case law at Strasbourg'.

[67] *Gaygusuz* [1996] ECtHR App 17371/90, para 42.

3 Systematising standards of judicial review over non-citizens' rights

Before addressing how the case law on recognition of social rights for non-citizens impacts theories of cosmopolitanism, it is appropriate to systematise the standards of judicial review employed by courts at both the national and the supranational level. Indeed, legal argumentation theory examines courts' reasoning from the perspective of the techniques employed in order to organise and explain the grounds for a given decision. Using the theory of legal argumentation to explore the case law concerning non-citizens' rights helps to reveal the degree of cosmopolitanism the courts are concretely willing to express. The choice of standards of judicial review depends on either the court's identification of the rights involved in the decision, or on its assessment of the kind of violation under scrutiny. In either case, applying standards inevitably has consequences, or at least theoretical implications, for rights protection. This holds true regardless of the court's mindfulness in the choice of standards, which can be consciously chosen by judges before a decision is taken, or applied as a matter of fact without the willingness to articulate a specific standard of judicial review.

Applying this method to the aforementioned case law, it is possible to maintain that domestic constitutional and supreme courts adopt two different standards, which in turn correspond to the nature of the right under scrutiny. Strict scrutiny is embraced in cases involving the recognition of those social rights that are held to be fundamental. The same standard applies when the decision concerns the essential core of a social right, which is deemed to be essential to the fulfilment of a separate fundamental right.[68] In other words, this diverging treatment concerning fundamental rights easily results in laws being struck down for violating the principle of equality.

The standard of reasonableness, which can also be defined as a quasi-intermediate scrutiny according to the classical American categorisation, is largely employed in any other case (that is non-fundamental rights cases). The main consequence is that a law simply showing reasonable grounds, such as the financial restrictions imposed on public expenditure choices by the amount of available resources, will pass judicial scrutiny on the basis of a rational and objective justification. This is the judicial trend, for example, in German and French constitutional case law. The result of these two different levels of judicial scrutiny is that the nature of the right involved often controls the outcome of the case, be-

[68] *Limbuela* [2005] UKHL 66.

cause the nature of the right determines the standard applied by the courts to resolve the controversy. Fundamental rights or entitlements accomplishing fundamental rights require strict scrutiny, while non-fundamental rights are examined under the reasonableness test.

The ECtHR's approach diverges in both the presuppositions surrounding the judgement and the choice of the standard of scrutiny. Indeed the ECtHR does not distinguish between fundamental and non-fundamental rights for the purpose of performing scrutiny. Even though the distinction is occasionally considered in the ECtHR's case law, it does not affect the kind of scrutiny performed when a violation of Article 14 has been invoked.[69] Consequently, the right involved in the case has no controlling influence *per se* on the standard of scrutiny that judges decide to apply. On the contrary, it is the classification between citizens and non-citizens (that is, the kind of violation of the rights involved) that leads to the identification of the standard. The ECtHR invariably applies strict scrutiny when laws differentiate treatment on the basis of nationality.[70] As a consequence, as the aforementioned case law shows, the economic crisis cannot be used as an argument to justify the preference given to nationals over foreigners.

4 Pragmatic versus idealist: how standards of judicial review impact theories of cosmopolitanism

Analysing the case law on the recognition of rights for non-citizens according to the above-mentioned conceptual grid is helpful in understanding the theoretical implications of courts' decisions. In order to answer to the second research question (that is, how models of judicial scrutiny impact the theoretical framework of cosmopolitanism), standards of scrutiny must be analysed from a different perspective. It is not a matter of how courts construe their legal analysis. It is rather a

[69] See *F v UK* [2004] ECtHR App 17341/03, para 13, in which the Court distinguishes between guarantees of fundamental importance and qualified civil and political rights, arguing that a contracting state 'for pragmatic reasons could not be expected to guarantee such qualified rights for individuals outside the umbrella of the Convention'. See also *N v UK* [2008] ECtHR App 26565/05.

[70] Indeed, some authors argue that the ECtHR uses a due process model of scrutiny to the extent in which it does not call into question whether a social right should be in principle recognised by states. The Court simply states that when national legislators decide to establish that right, it should be guaranteed on an equal basis: on this point see Hare, above n 53. On the contrary, Dembour, above n 61, 691, maintains that the Court performed a strict scrutiny analysis.

matter of linking the legal analysis, synthesised in the *formulae* of standards, to the consequences it has on the relationship between individuals and legal systems.

From this point of view, as was briefly touched on in the introduction, it is possible to retrace two distinctive views of cosmopolitanism or, to be more precise, the kind of cosmopolitanism that contemporary European legal systems have realised. The first can be named *idealist* (or *pure*) *cosmopolitanism* and corresponds to the ECtHR's approach, according to which any differentiation between citizens and non-citizens must be scrutinised under Article 14 and is presumed to be suspect. Diverging treatment based on nationality lacks a reasonable justification. This line of reasoning supports the idea that even rights inextricably related to resource allocation choices must be recognised irrespective of the tie of membership in a political community. This thesis is idealistic in that it assumes the tie of citizenship is substantially irrelevant as far as entitlement to rights is concerned. To put it a different way, this approach assumes that allocation choices should address the polity in a broad sense; that is, they should consider the political community as encompassing both citizens and non-citizens. This approach has received a limited follow-up in the case law of domestic courts, who generally appear reluctant to admit a complete equality between citizens' and non-citizens' status. Some have argued that this form of 'judicial cosmopolitanism', rather than creating a synergic effort with domestic legal orders, yields a backlash because legislators may be tempted not to recognise some entitlements if they are compelled to grant them to everyone.[71]

Constitutional courts, indeed, have developed what can be designated as *pragmatic* (or *limited*) *cosmopolitanism*. They consider that there are circumstances in which different treatment for citizens and non-citizens is reasonably justified and is placed within the legislators' assessment. Nevertheless, constitutional courts maintain an untouchable core of guarantees that must be recognised for everyone, irrespective of status. In doing so, courts envisage a 'minimal cosmopolitan citizenship' which demands entitlement to fundamental rights (including those social claims fulfilling fundamental rights).[72] It may be argued that even if domestic courts do not herald the arrival of a completely cosmopolitan conception

[71] See, for example, the arguments developed by Dembour, above n 61, 695, who seems to believe that the ECtHR's approach did not improve foreigners' status in European domestic legal systems.

[72] On the issue of the recognition of social rights, see J A King, 'The Justiciability of Resource Allocation' (2007) 17 *MLR* 197, 224, who argues that 'the justiciability of resources allocation is now established under human rights law'. See also W Kaguongo, 'Resource allocation towards socioeconomic rights: lessons from domestic courts' (2012) 13 *HRR* 86.

of rights, they succeed in ensuring a set of guarantees to non-citizens.[73] This approach is precisely pragmatic in that, without lingering on a comprehensive theory of cosmopolitanism, it achieves a crucial goal, i.e., the equal treatment of citizens and foreigners, even if only with regard to a limited set of rights. That result is achieved through the use of standards of scrutiny, which helps de-politicise difficult cases such as those dealing with the question of what states owe to those who are not members of their polities.

The two views of cosmopolitanism diverge as the former assumes that equal entitlement to rights is a fundamental principle of justice within any legal order, while the latter acknowledges that there are circumstances in which the choice over entitlement to rights is placed within legislators' (rational) discretion. This conclusion is supported, for example, by the explicit reference to the social cohesion made by the ECtHR in its case law.[74] According to the European judges, giving preference to nationals over foreigners challenges social cohesion (besides violating the principle of equality). This conceptualisation of the polities—under which non-citizens' claims must be taken into account as much as those arising from citizens—demonstrates indeed how the Court conceives of a cosmopolitan principle of justice that should govern the European legal order.

If one rigorously applies the notion of cosmopolitanism as identified in the introduction, the essential conclusion is that the constitutional courts' approach detaches the theory of rights from cosmopolitanism. Rights thus do not contribute to the creation of a cosmopolitan legal order. Being members of the polity is crucial when it comes to the recognition of rights; strict scrutiny is applied only in limited cases, when fundamental rights are concerned. In all the remaining cases, citizenship is still a reasonable discriminatory criterion.

The diverging theories indicate once again that equal commitment to a theory of human rights does not necessarily have equal implications for cosmopolitanism. The theory of human rights is indeed something more than an authentic theory of cosmopolitanism, as entitlements to rights are only one element for a theory of this kind.

[73] K A Appiah,'Global Citizenship' (2007) 75 *Fordham LR* 2375.
[74] See the references above n 58.

5 Concluding remarks: the path to a cosmopolitan legal order

Cosmopolitan thought has grown extensively in the last decade, synthesising and elaborating a cultural tradition with ancient roots. One of the driving forces of this improved scholarship's effort has been the creation and development of integrated legal systems (the EU and the ECHR). They have been studied as models of cosmopolitan legal order because of their commitment to the protection of rights on a legal basis other than that provided by citizenship.[75] In other words, the so-called transnational constitutional legal order has been interpreted as the factual realisation of the ideal *kosmopolis*.[76]

However, the cosmopolitan character of the contemporary state can be more effectively tested by looking at the situation of those individuals without any affiliation, other than residence, with the legal order from which they claim treatment equal to that of citizens. Applying this idea, this article used legal argumentation analysis to synthesise the diverging approaches of the ECtHR and constitutional courts to the recognition of rights for non-citizens, to underline how standards of judicial review impact theories of cosmopolitanism as European courts contribute to its realisation.

The conceptual matrix employed was framed on a two-tier basis: the identification of the grounds upon which different treatment of non-citizens can be justified, and the recognition of cases for which there is no admissible justification for treating citizens and non-citizens differently. Whilst both domestic courts and the ECtHR extensively use strict scrutiny, they attach this model of case examination to different elements. Constitutional courts apply strict scrutiny when fundamental rights are concerned. The ECtHR resorts to this most severe standard of judicial review when deciding cases concerning discrimination between citizens and non-citizens, irrespective of the nature of the right involved in the decision.

The first model of judicial review for non-citizens' rights expresses a pragmatic (or limited) cosmopolitanism that renounces the realisation of complete equality, affording a limited equal protection. Contrastingly, the second model conveys an idealist (or pure) cosmopolitanism that presumes nationality to be an illegitimate criterion in the selection of rights holders.

[75] See Glenn, above n 10, 250.

[76] See E Stein, 'Lawyers, judges, and the making of a transnational Constitution' (1981) 75 *AJIL* 1; Friedrich, above n 15, 224.

In any case, in contemporary Europe, cosmopolitanism is interpreted as a theory that solves the tension between globalisation and the localism of citizen status (with its bundle of rights), without completely superseding the idea of national citizenship. Of course these judicial solutions depend on a multi-level legal order that in some circumstances compensates for the unsatisfactory protection of rights afforded at the domestic level. The ECtHR has indeed afforded protection to foreigners residing in ECHR Member States when constitutional courts failed to do the same.

Ultimately, the progressive construction of a cosmopolitan legal system rests upon the opposing drives of national and supranational courts. The ability to coordinate approaches and the progressive harmonisation of standards of judicial review are crucial elements to forming a *de facto* cosmopolitan transnational polity.[77] At the same time, the cosmopolitan attitude of European courts poses a general test of their ability (and willingness) to reach this final outcome.

[77] Ibid, 78.

DOI: 10.7574/cjicl.03.03.237
Cambridge Journal of International and Comparative Law **(3)**1: 929–960 (2014)

THE RISE AND FALL OF HUMAN RIGHTS: A SCEPTICAL ACCOUNT OF MULTILEVEL GOVERNANCE

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Abstract

The pursuit of universal human rights in the modern era has a dark side. While universal conceptions of rights can keep abusive governmental practices in check, they can also limit the advancement of rights and result in their diminishment. Where a lower level of government has a strong pre-commitment to rights, obligations imposed at a higher level—such as through a national constitution or an international treaty—can act as a ceiling rather than a floor. Left to their own devices, some states or nations would adopt stronger protections for rights than they do when brought into a system of universal standards. Worse, universality provides cover to local reformers interested in cutting back on pre-existing local rights protections: as attention shifts from strong local traditions to less stringent universal standards, rights diminish. When rights weaken locally, a feedback effect, facilitated in part by judicial dialogue, can in turn reduce the scope of universal requirements. As core sets of rights continue to spread around the world, we should thus expect those rights to take on ever-diminishing form. When it comes to protecting rights, localism has benefits over globalism; diverse conceptions of rights may be preferable to common requirements; and the celebrated practice of cross-jurisdictional dialogue among courts (and other actors) may curtail rights rather than advance them.

Keywords

Human rights, multilevel governance, law reform, European Convention on Human Rights

1 Introduction

We are not alone. In every place on the planet where people have created a government, that government does not exist in isolation. Instead, every government exists as a layer in a multilevel system, with governing institutions above it or below it (or both). Every person governed is governed through power lodged at multiple levels. Multilevel governance is the defining structural feature of modern political life. Villages and cities are parts of counties; counties form

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regions and states; these in turn make up nations; and nations are linked together through multilateral and international treaties and institutions. Isolationism is now impossible. North Korea might be lonely but—as a member of the UN, the IMO, ARF, G-77, WIPO and a series of other supranational entities and as a signatory to dozens of treaties—it is not alone.

Multilevel governance has a single ambition: uniformity. It aims to articulate a set of governing principles and apply—impose—them throughout the entire global system. In particular, multilevel governance seeks universal recognition and protection of an identified roster of individual rights. It aims to ensure that whatever differences may exist among the peoples of the world, whatever divides Londoners from Vera Cruzians, Sowetons, and Manhattanites, all have in common a core set of individual rights. With the notion that there are rights that must apply universally deeply engrained, debate occurs only around defining the particular rights to be made universal and the best mechanisms for ensuring that the ambition is fulfilled.[1] These debates arise because multilevel government comes in different forms. Notably, the degree of integration varies and variation produces challenges for achieving rights universalism. In some cases, rights obligations can be neatly coupled with tight political and economic integration. For example, the member nations of the European Union are all parties to the European Convention on Human Rights[2] (*ECHR* or *the Convention*), ratification of which is a de facto requirement for EU membership.[3] In other cases, the quest for uniformity may confront a looser network, raising questions as to how much can be achieved, how quickly, and by what means. For example, most nations in the world are parties to the International Covenant on Civil and Political Rights[4] but those nations do not otherwise all comprise an integrated political union.

One device for universalising rights that accompanies some but not all multi-level systems is a court sitting at the apex with power to enforce a common set of rights against the lower levels of government. The court hears from aggrieved citizens and issues rulings that ensure that the constituent

[1] See generally J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, 2013).

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

[3] For differing perspectives on whether ratifying the Convention is a *legal* requirement of EU membership see: V Miller, 'Is adherence to the European Convention on Human Rights a condition of European Union Membership?' (*UK Parliament Publications & Records*, 25 March 2014) <http://www.parliament.uk/business/publications/research/briefing-papers/SN06577/is-adherence-to-the-european-convention-on-human-rights-a-condition-of-european-union-membership> [accessed 30 July 2014].

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

governments, while free to adopt more generous local protections, do not violate a set of rights that applies across the system as a whole. Thus, in the United States the national constitution sets out rights held throughout the country against all levels of government and enforced ultimately by the Supreme Court. State constitutions, interpreted by state courts, provide separately for state-level rights that may be more generous than federally-protected rights. Likewise, individuals alleging violations of the ECHR may seek relief from the European Court of Human Rights in Strasbourg (*ECtHR*). Signatory states may provide domestically for stronger rights than the Convention imposes but member states may not drop below the floor the Convention sets.

This article offers a sceptical account of multilevel governance and its pursuit of rights universalism. Despite celebrated historical advancements in rights that have accompanied multilevel governance—the post World War II reform of Europe is the obvious example—there is a dark side to this modern system of government and its mechanisms for protecting rights.

Multilevel systems, I suggest, can turn hazardous for individual rights. While universal conceptions of rights can serve to keep abusive governmental practices in check, they can also operate to limit the advancement of rights and, in some instances, result in their diminishment. Structures that historically have facilitated the rise of human rights may in the future lead to their downfall.

Where a lower level of government has a strong pre-commitment to individual rights, rights obligations imposed at a higher-level—such as through a national constitution or an international treaty—can act as a ceiling rather than a floor. That is, a top-level guarantee of rights, designed as the minimum level of protections that must exist, can end up as the maximum level of protection that is viewed throughout the system as necessary or desirable. Localised measures to augment rights beyond those mandated from above risk seeming extravagant or out of place. If, after all, government already meets all of its obligations the multilevel system imposes, why, local actors will ask, is it necessary to go further. Indeed, the stronger the focus on provisions of universal obligations—a focus intensified by monitoring of one's own adherence and that of others—the harder it may become even to imagine other kinds of rights beyond those deemed obligatory.

The problem is that within a multilevel system, however ambitious the highest level of government, it can rarely pursue a maximalist conception of rights. Instead, it must ordinarily settle for a reachable standard so as to ensure that at least some core rights apply everywhere. It is one thing to insist that Nigeria stop torturing people. It would be quite another to tell Nigeria (or for that

matter Finland)[5] to allow two men to marry. Therein lies the difficulty. While in a multilevel system poor local performers can be pressured to raise their game, the best performers might end up slouching. Left to their own devices, without universal rights imposed from above, the best performing states or nations might well adopt stronger protections for rights. Once brought into a common system, however, ambitions drop. Like standardised educational requirements adopted in a vast and diverse school system (nationwide, statewide), multilevel systems pursuing universal rights risk producing, perversely, a uniform mediocrity.

Even worse, universality can provide cover to local reformers interested in cutting back on pre-existing protections for individual rights. Such reformers can pursue this agenda by shifting attention away from their own traditions to less stringent standards required at the higher level. In an age of universality, an appeal to localised traditions can easily seem provincial. Reformers who speak the language of cosmopolitanism can impose changes that leave localised rights worse off.

The risk of diminishing rights may be particularly great when, as is increasingly the case, a court in a multilevel system has power to enforce universal rights all the way down. When courts interpret the meaning of a right they must do so with a view to the effects on every level of the system and on the system as a whole. In performing this role, there are very strong institutional pressures for a court to act with caution: to read rights modestly, avoid undue disruption, minimise costs of compliance, and avoid public backlash (or worse disobedience). Giving enforcement to a top-level court can thus also water down rights.

Finally, there may be a feedback effect: when rights diminish locally, universal requirements may come to be understood more narrowly or be ratcheted down in response. Downgrading at the top may invite further reductions locally. Lather, rinse, repeat.

This article uses a case study to explore the dark side of multilevel governance and universal rights. The case study involves recent changes in the United Kingdom allowing in criminal trials for use of testimony from anonymous witnesses—with a corresponding reduction in the rights of defendants to confront witnesses against them. The case study shows how the ECHR provided a shield for domestic reformers to cut back on a core right of defendants protected for centuries under the common law. The case study also demonstrates that domestic retrenchment has had a feedback effect upon the ECtHR, which has since interpreted the Con-

[5] See *Hämäläinen v Finland* [2014] ECHR 787, para 71: '[T]he Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage'.

vention to permit new incursions upon the rights of criminal defendants.

Before taking up the example of anonymous witnesses in the UK and under the European Convention, the article begins, in the next Part, with a brief discussion of multilevel government and rights universality in the United States. My own past work on the US experience gave rise to the analysis offered in this article.[6] A brief discussion of the US at the outset serves as a useful reminder that the phenomenon the article describes is not limited to the international context, but exists also within national systems; the US experience helps frame the UK/Convention case study; and marking the path that the US has already travelled helps show where the UK and other nations may soon be headed.

2 Background: The US Experience

A commonly asserted virtue of multilevel government—federalism—within the United States is that it promotes liberty. Dividing power keeps power in check. In addition, rights are protected at the national and the state (and local) level. The federal Constitution ensures a minimum level of rights around the country but states (and localities) remain free to provide their own citizens with stronger protections. An accepted corollary to this arrangement, one that ensures national uniformity, is that there is a single court—the US Supreme Court—that is authoritative on the scope of federal constitutional rights. State courts, when called upon to decide issues of federal rights, are (like lower federal courts) bound by the Supreme Court's decisions. On the other hand, a state court interpreting the state constitution acts independently of the US Supreme Court. The state court is free to rule that a state constitutional right renders a state law or state government action invalid even though there has occurred no violation of the federal Constitution. The federal Constitution thus sets a floor for rights but not a ceiling. In theory, this multilevel arrangement should promote rights: everyone enjoys a minimum set of protections and there is no limit on the ability of states to increase rights within their own jurisdictions. Some notable increases in protections for rights have emerged from this arrangement, including in the areas of racial equality[7] and fairness in criminal proceedings.[8] In this sense, multilevel governance and universality have been good for individual rights. At the same

[6] See J Mazzone, 'When the Supreme Court is Not Supreme' (2010) 104 *Nw ULR* 979; J Mazzone, 'The Bill of Rights in the Early State Courts' (2007) 92 *Minn LR* 1.

[7] See e.g. *Brown v Board of Education*, 347 US 483 (1954).

[8] See e.g. *Gideon v Wainwright*, 372 US 335 (1963).

time, these very structural mechanisms operate to limit the development of rights in the United States. Two points bear emphasis.

First, lodging authority over the meaning of federal constitutional rights in a single court that sits in Washington, DC, has a significant curtailing effect.[9] In settling constitutional rights for the entire nation, the Supreme Court proceeds with caution. The Court is rarely ahead of political change and within the range of results they find satisfactory, justices across the spectrum tend to opt for narrow rather than broad outcomes.[10] The justices understand that they are setting rules for a diverse nation, that those rules impose costs on state and local government,[11] and that it is normally better to postpone deciding more than is necessary to dispose of the case at hand.[12] Thus, to return to the two examples above, while the Court has held that the federal Constitution prohibits the states from segregating schools on the basis of race, states need not ensure that students in poor and predominantly minority school districts receive the same quality of education available in richer and predominantly white school districts;[13] while in serious criminal cases the state must provide an indigent defendant with a lawyer, there is no guarantee that the lawyer be particularly good.[14]

Second, state constitutions, interpreted by state courts, have not proven a robust alternative source of rights. Rather than decide independently what provisions of state constitutions mean, modern state courts have tended to hew to the Supreme Court's (cautious) understandings of analogous provisions in the federal Constitution. While the trend is not entirely in one direction, 'systematic studies demonstrate that most state courts, when presented with the opportunity, have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions'.[15] Reasons for this phenomenon may include that because state courts spend so much energy adhering closely to

[9] The Supreme Court did not always play this role. See Mazzone, 'The Bill of Rights in the Early State Courts' above n 6, 19–22 (discussing pre-1914 statutory limits to Supreme Court review of state court decisions on issues of federal constitutional rights).

[10] See generally G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

[11] See R Utter, 'Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds' (1985) 63 *Tex LR* 1025, 1042 (fn 115): 'Due to the size and diversity of the country, the Court must limit its decisions to constitutional norms capable of achievement nationwide'.

[12] See generally C Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

[13] See *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973).

[14] See *Strickland v Washington*, 466 US 668 (1984); E Chemerinsky, 'Lessons from Gideon' (2013) 122 *Yale LJ* 2676.

[15] M E Solimine, 'Supreme Court Monitoring of State Courts in the Twenty First Century' (2002) 35 *Ind LR* 335, 338.

Supreme Court precedent when resolving federal constitutional issues, they have lost capacity for independent analysis that could be brought to state constitutional questions; litigants tend to press claims in terms of federal rather than state rights; and judges and their staff members are trained in nationally-oriented law schools that devote little attention to issues of state rights. Whatever the explanation, the federal floor has to a large degree capped the development of rights at the state level.

The US experience evidences the risks associated with seeking to impose, in an age of multilevel government, universal rights. It shows that mechanisms that promote the development of rights at one time can later on limit how far rights extend. The next part moves from developments that have occurred already in one domestic setting to developments that are occurring right now within an international context.

3 The Case of Anonymous Witnesses

This part uses the case study of testimony from anonymous witnesses to explore how multilevel systems can reduce rights. The UK Parliament has recently cut back on the long-standing common law right of criminal defendants to confront witnesses against them.[16] Through statutory reform, Parliament has authorized reliance in criminal prosecutions on testimony from anonymous witnesses—witnesses whose identities are concealed when they testify at trial—in ways that the common law did not permit. Domestic reformers have justified this departure from the common law tradition by invoking the compatibility of reform with the requirements of the ECHR, as interpreted by the ECtHR. The Convention, however, sets standards for a diverse set of jurisdictions. In particular, the Convention accommodates the inquisitorial criminal justice systems of the continental countries that have not recognised the same kinds of trial rights—including strong rights of confrontation—developed over centuries of practice under the adversarial system. By making the Convention, rather than the common law, the relevant reference point, UK reformers have successfully pursued domestic changes that at one time would have seemed unimaginable.

[16] The significance of common law rights should not be understated: '[T]he common law has come to recognise and endorse the notion of constitutional, or fundamental, rights': *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, para 71 (Laws LJ).

Observing the Convention's impact upon traditional rights, some observers have sounded an alarm. Lord Lyell, for example, has said:

> Although the incorporation of the Convention into our law has done a great deal of good, it is something of a back stop and, in certain areas […] it has led to some lowering of standards. It is to be regretted that we simply go for the back stop and not for our traditional rights. […] [O]ur common law tradition remains of basic, huge importance, in the protection of our liberties.[17]

This article takes no position on whether curtailing confrontation or other rights is desirable. The goal is rather to offer an account of a notable phenomenon now occurring.

The Part begins with a review of the origins and purposes of the right of confrontation. It then outlines the scope of the right under the ECHR before taking up the recent statutory reforms in the UK and the implementation of those reforms by domestic courts. The remainder of the discussion explores relevant subsequent decisions of the ECtHR and the UK Supreme Court and the impact the ensuing dialogue between those courts has had upon the scope of the Convention right.

3.1 Confrontation: Origins and Purposes

The right of accused individuals to confront and cross-examine witnesses against them has roots in Roman law. In England, the right accompanied the emergence of the jury trial in the twelfth century and it was protected in treason prosecutions by statute in 1552.[18] Beginning in the early 18th century, a robust common law right of confrontation developed, with one English court in 1720 declaring it 'the most effectual method for discovering the truth'[19] and Blackstone endorsing the truth-seeking function of confrontation in his *Commentaries on the Laws of England*.[20] Drawing on this common law tradition, the Sixth Amendment to the US Constitution, adopted in 1791, gave a defendant in a federal criminal trial the

[17] HL Debates, 15 July 2008, 703 *Hansard,* col 1104–05.
[18] An Act for the Punishment of Diverse Treasons 1552, 5 & 6 Edward 6, ch 11, s 9.
[19] *Duke of Dorset v Girdler* (1720) 24 ER 238.
[20] W Blackstone, *Commentaries on the Laws of England*, vol 3 (1765–1769) 372–3.

right 'to be confronted with the witnesses against him',[21] and provisions in early American state constitutions secured a similar right in state court prosecutions.[22]

Knowing who the witness is and observing the witness testify have long been central to the right of confrontation. Identifying the witness allows the defence to offer evidence about the witness's character that may undermine the witness's credibility. In addition, it may be more difficult for a witness to lie when required to testify in the presence of the accused.[23] Further, the ability to see and hear the witness testify allows for observation of body language, demeanour, and voice modulation that may help evaluate when a witness is being insincere, is uncomfortable with his or her statements, or shows evidence of being coached. Visibility of witnesses thus aids jurors asked to make factual determinations. More generally, it may enhance the integrity of the trial among public observers.

Nonetheless, the common law right of confrontation has never been absolute and in exceptional cases, particularly those involving terrorism and other national security issues, it has yielded to competing public interests. For example, in 1990, a Belfast trial court in *R v Murphy and Anor* allowed television journalists to testify anonymously in the murder trial of two British soldiers attacked at an IRA funeral. The journalists had filmed the attack and their testimony served to authenticate the video footage used at trial. The trial court found that, under the extraordinary circumstances of the case, an anonymity order was justified because the witnesses feared for their safety and were instrumental to the determination of the defendant's guilt. At trial, the journalists were not identified by name and their faces were screened so that they were visible only to the judge and the lawyers. The defendants were convicted and on appeal, the trial court's order and the convictions were upheld. [24] Thus, while '[t]he right to be confronted by one's accusers is a right [that has been] recognised by the common law for centuries,'[25] the protection has not been unyielding.

3.2 Confrontation and the ECHR

ECHR Article 6 provides generally for a 'right to a fair trial' in criminal cases.[26] Among its specific protections, Article 6 secures the right to 'a fair and public

[21] Constitution of the United States of America, Amendment VI.
[22] See e.g. Constitution of the Commonwealth of Massachusetts 1780, Part I, Art 12.
[23] See *Ohio v Roberts*, 448 US 56, 64 (fn 6) (1980).
[24] *R v Murphy and Anor* [1990] NI 306.
[25] *R v Davis* [2008] 1 AC 1128, 1150 (Lord Bingham).
[26] ECHR Art 6.

hearing,'[27] a presumption of innocence,[28] the assistance of counsel,[29] 'adequate time and facilities' to prepare a defence,[30] and, significantly for our purposes, the right, in Article 6(d) of the witness to 'to examine or have examined witnesses against him'.[31] The passive language—'have examined'—preserves the practices of inquisitorial systems in which judges, rather then defence lawyers, do the examining.[32] Thus, the Convention does not impose the more specific common law right of adversarial cross-examination. In addition, the ECtHR takes the position that in enforcing the subsidiary protections of Article 6, its task is to determine only whether the trial overall was fair.[33] This approach also gives member states leeway over the circumstances of testimony from prosecution witnesses.

In a series of decisions that began in the 1980s, the ECtHR interpreted Article 6(d) to permit the use in criminal trials of anonymous witnesses (as well as of absent witnesses, a topic discussed in greater detail below).[34] In those decisions, the ECtHR sought a balance among the rights of the accused, the interests of member states, and the interests of witnesses themselves.[35] Toward this end, the ECtHR held that witness anonymity could be used (1) when 'strictly necessary,' (2) when the testimony from such witnesses did not constitute the 'sole or decisive' basis for a conviction, and (3) when sufficient counter-balancing measures were implemented to protect the defendant's rights.[36]

Under this rubric, the ECtHR found witness anonymity to be necessary in two circumstances. The first was where a witness feared for his or her safety.

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[27] ECHR Art 6(1).

[28] ECHR Art 6(2).

[29] ECHR Art 6(3)(c).

[30] ECHR Art 6(3)(b).

[31] ECHR Art 6(d).

[32] In the 1990s many European countries adopted domestic criminal law provisions to implement this right, including Italy, which adopted jot-for-jot the ECHR's language in Article 111 of its Constitution.

[33] *Lucà v Italy* [2001] 36 EHRR 46, para 38: '[t]he Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair'.

[34] Ibid, para 39; see also *Al-Khawaja and Tahery v United Kingdom* [2009] 49 EHRR 1, para 35 (summarising earlier cases.).

[35] See e.g. *Van Mechelen v Netherlands* [1998] 25 EHRR 647; *Doorson v Netherlands* [1996] 22 EHRR 330; *Kostovski v Netherlands* [1989] 12 EHRR 434.

[36] *Van Mechelen v Netherlands*, above n 35; *Krasniki v Czech Republic* [2006] 31 EHRR 41; *PS v Germany* [2003] 36 EHRR 61; *Doorson v Netherlands*, above n 35.

Such fear needed to be objectively reasonable but the court did not require proof of actual threats from the defendant (or anyone else).[37] Anonymity could also be a necessary measure to protect victims from the trauma of testifying in the presence of their alleged attackers.[38]

Because the ECtHR has insisted upon counter-balancing measures to safeguard the defendant's rights, anonymity has not typically allowed for a witness to be completely hidden at trial. Instead, the ECtHR has endorsed measures that protect the witness while also promoting a fair proceeding. These include 'using screens, disguising the face or distorting the voice' of the witness,[39] and having the witness testify in court while the defendant and defence lawyer listen via an audio link from a different room.[40]

Doorson v Netherlands stands as a landmark decision on the circumstances under which witnesses may be permitted to testify anonymously. The case involved a defendant convicted of drug trafficking. Two witnesses were examined before an investigating judge in the presence of the defendant's lawyer. The judge, who knew the identity of the witnesses, granted the witnesses an anonymity order after they stated they feared reprisal from the defendant. Pursuant to this order, the defendant's lawyer was permitted to cross-examine the witnesses but was barred from asking questions that could reveal their identities. The ECtHR rejected the defendant's argument that this procedure violated his right to a fair trial. The court found that the witnesses' fears justified the anonymity order and that the trial judge had adopted sufficient measures to protect the interests of the defendant. In particular, the Strasbourg court noted that the trial judge drew attention to the fact that both witnesses were drug addicts, thereby providing the defendant an avenue to challenge their testimony. In addition, the Dutch court did not base its finding of guilt solely on the anonymous witnesses' testimony.[41]

[37] See e.g. *Doorson v Netherlands*, above n 35, para 71.

[38] See e.g. *SN v Sweden* [2002] 39 EHRR 13, para 47.

[39] *Krasniki v Czech Republic*, above n 36, para 49.

[40] *Kok v Netherlands* [2000] ECHR 706. Where an anonymous witness is also absent during the proceedings the ECtHR has at times applied a more stringent requirement such that 'the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when […] [the witness] makes his statement or at a later stage': *Lucà v Italy*, above n 33, para 39.

[41] *Doorson v Netherlands*, above n 35, para 76: '[E]ven when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements'.

3.3 Common Law Reforms

While *Murphy* allowed for anonymous testimony in extraordinary circumstances, in recent years, there has been a more general diminishment of the common law right of confrontation in the UK[42] and a corresponding rise in testimony from anonymous witnesses. This development has occurred as a result of statutory changes adopted by Parliament and justified in large part by the looser approach to confrontation under the ECHR.

3.3.1 A Note on Absent Witnesses

Developments with respect to anonymous witnesses relate to the issue of absent witnesses and some consideration of that issue is therefore necessary. While an anonymous witness testifies at trial (shielded in some manner), an absent witness is not present during the trial proceeding. Instead, the witness's prior statement is read in court and, although hearsay, is considered testimony. Like anonymity, witness absence implicates the right of confrontation. The Criminal Justice Act 2003 (*CJA*) expanded the power of courts to admit hearsay statements when doing so was 'in the interests of justice'[43] as determined by a multi-factor test[44] designed to ensure the statement is 'cogent and reliable'.[45] The CJA particularly specified circumstances under which a court could admit a statement from an 'unavailable' witness, including when 'through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings'.[46] (The CJA provided that the term, 'fear' must be 'widely construed' to include 'fear of the death or injury of another person or of financial loss'.)[47] A statement from an unavailable witness was admissible 'in the interests of justice,' taking into account, among other things, 'the statement's contents' and 'any risk that its admission or exclusion will result in unfairness to any party'.[48]

[42] Scotland, which administers its own criminal justice system, is not subject to the statutory changes discussed in this section.

[43] CJA s 114(1)(d).

[44] CJA s 114(2). The factors are: (1) the statement's probative value; (2) the availability of the information from other sources; (3) the importance of the information; (4) the circumstances under which the statement was made; (5) the declarant's credibility; (6) the statement's reliability; (7) the reason for the witness's unavailability; (8) the difficulty in challenging the statement; and (9) the prejudice to the defendant.

[45] CJA s 114, n 396.

[46] CJA s 116(2).

[47] CJA s 116(3).

[48] CJA s 116(4).

3.3.2 The *Davis* Decision

Within five years after enactment of the CJA, Parliament adopted a wide-ranging statutory scheme authorising courts to allow witnesses to testify anonymously. The trigger was a ruling by the House of Lords in *R v Davis* that the use of anonymous witnesses whose testimony was critical to the conviction rendered a trial unfair.[49] Within a month of the *Davis* decision, Parliament approved the Criminal Evidence (Witness Anonymity) Act 2008 (*WAA*) to overturn the ruling.

The WAA produced a sharp break from common law rules governing anonymous witnesses. To see why, some further discussion of *Davis* is helpful. In *Davis*, a jury convicted a defendant of murder following a trial in which the prosecution's case was based principally on three witnesses who testified anonymously.[50] The witnesses feared for their own safety should their identities be revealed. The trial judge ruled that those fears were genuine and granted protective measures.[51] The witnesses thus testified under pseudonyms, withholding identifying information from the defendant, his attorney, the public and the press;[52] the defendant's attorney was also prohibited from asking questions that could identify the witnesses.[53] In court, the witnesses sat behind a screen so that they were hidden from the defendant, the public, and the press, but visible to the judge, jury, and the attorneys for both sides.[54] The judge and jury heard the witnesses' actual voices but the defendant and his attorney heard a mechanically distorted audio version of the testimony.[55]

The defendant's lawyer contended that the broad anonymity order prevented his client from receiving a fair trial and therefore was inconsistent with the common law and his Convention rights. The defence case had involved a claim that the defendant's former girlfriend was extracting revenge by falsely implicating him in the murders. As a result of the anonymity order, however, the defence could not establish whether one of the witnesses was in fact the former girlfriend or pursue questions that could reveal a nefarious motive for testifying. Hence the shunned girlfriend theory had no traction.

The Appellate Committee of the House of Lords unanimously overturned the conviction, finding that the anonymity measures violated the 'long established

[49] *R v Davis*, above n 25.
[50] Ibid.
[51] Ibid, para 3.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.

[…] common law […] right of an accused to confront his accuser'[56] and violated also the Convention as interpreted by the ECtHR.[57] In reaching its decision, the House of Lords took a robust view of the common law right of confrontation and criticised trial court practices that undermined that right. The House explained that in a small number of 'remarkably recent' cases the common law had developed to allow 'a limited qualification on the right to know the identity of prosecution witnesses' where there existed 'rare and exceptional circumstances' involving 'a clear case of necessity' for a curtailment of the right. Although in each instance courts were exercising their 'inherent jurisdiction' to control proceedings before them, collectively, these decisions had actually produced an outcome that was inconsistent with the common law. Lord Bingham thus stated: '[b]y a series of small steps, largely unobjectionable on their own facts, the courts have arrived at a position which is irreconcilable with long-standing principle'. In essence, the House recognised that while some use of anonymous testimony was compatible with the common law and also with the Convention, the exception had, problematically, become the rule. Lord Brown explained that the decision in *Murphy* was 'close to the limits to which the courts should go in permitting any invasion of the core common law principle that the accused has a fundamental right to know the identity of his accusers'. Any use of anonymity beyond the circumstances in *Murphy* required parliamentary legislation to displace the common law protections.[58] With *Murphy* setting the cap, the anonymity measures in the *Davis* trial were plainly impermissible and deprived the defendant of a fair proceeding.

Reaction to the *Davis* decision was swift and intense. Immediately after the decision, Secretary of State for Justice and Lord Chancellor Jack Straw complained that besides the conviction in *Davis* itself, the House of Lords' ruling jeopardized a series of other criminal cases. Straw said: '[i]n addition to those cases in the prosecution pipeline, there is great concern […] that a number of serious criminals convicted by a jury, whose trials satisfied Article 6 and common law requirements, and whose appeals have failed, would seek to make use of the technicality of their lordships' judgment to have their convictions quashed'.[59] Straw thus announced a plan for emergency legislation to respond to *Davis* and head off its broader effects.

[56] Ibid, para 49.
[57] Ibid, paras 25, 96.
[58] Ibid, para 98 (Lord Mance): '[A]ny further relaxation of the basic common law rule […] is one for Parliament to endorse and delimit and not for the courts to create'.
[59] HC Debates, 26 June 2008, 478 *Hansard*, col 516.

3.3.3 The Common Law Displaced

The resulting statute was the WAA. The statute replaced the courts' common law power to withhold witnesses' identities in criminal proceedings with a standardised and permissive statutory anonymity scheme.[60] Upon request from either party, courts were empowered to grant a 'witness anonymity order' and deploy any of a variety of protective measures the court considered 'appropriate'.[61] Such measures included withholding the name of the witness and other identifying details; allowing the witness to use a pseudonym; prohibiting questions that would identify the witness; use of a screen to hide the witness from the defence and the public; and the use of technology to distort the witness's voice.[62] (The WAA did not permit hiding the witness from the judge or members of the jury or shielding the witness's natural voice from those individuals.)[63] Before issuing an anonymity order, the court was required to find that: (a) 'the measures are necessary […] to protect the safety of the witness or another person or to prevent any serious damage to property, or […] to prevent real harm to the public interest'; (b) the use of the protective measures would be 'consistent with the defendant receiving a fair trial'; and (c) 'it is important that the witness should testify' and 'the witness would not testify if the order were not made'.[64] The WAA also required that the court consider six factors when evaluating whether the above conditions are present.[65] Introduced as emergency legislation, the WAA was a temporary measure in specific response to the *Davis* decision and would

[60] WAA s 1(2), stating that the Bill 'abolished' 'the common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld'.

[61] WAA s 2(1).

[62] WAA s 2(2).

[63] WAA s 2(4).

[64] WAA s 4. The Act further specifies that in determining necessity under (A), 'the court must have regard (in particular) to any reasonable fear on the part of the witness […] that the witness or another person would suffer death or injury, or […] that there would be serious damage to property' as a result of identifying the witness. Ibid.

[65] These factors are (WAA s 5):

> (a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings; (b) the extent to which the credibility of the witness […] would be […] relevant […] [in assessing the weight of his or her evidence]; (c) whether the evidence given by the witness might be the sole or decisive evidence implicating the defendant; (d) whether the witness's evidence could be properly tested […] without his or her identity being disclosed; (e) whether there is any reason to believe that the witness […] has a tendency […] or motive to be dishonest […]; and (f) whether it would be reasonably practicable to protect the witness's identity by any [other] means'.

have expired in 2009. However, the Coroners and Justice Act 2009 incorporated the anonymity provisions of the WAA and those provisions therefore remain in effect.[66]

3.3.4 Debating Reform

The debates that led to the enactment of a statutory mechanism for witness anonymity demonstrate the powerful influence of the ECHR in Parliament's decision to depart from long-standing common law protections. In introducing the WAA on 26 June 2008, Jack Straw framed the bill in terms of Convention standards[67] and spun *Davis* as an invitation to Parliament to adopt anonymity measures that would satisfy Convention requirements.[68] In urging Parliament to act quickly, Straw argued that *Davis* created the risk of other criminal defendants going free on a 'technicality' that the Convention did not endorse.[69] Under this approach, the common law—what Blackstone called 'the settled and invariable principles of justice'[70]—was of little relevance.

[66] Coroners and Justice Act 2009, Part 3, Ch 2, ss 86–89.

[67] HC Debates, 26 June 2008, 478 *Hansard*, col 519.

[68] Ibid, col 515. It is worth quoting at length Straw's discussion because it demonstrates a singular focus on Convention—rather than common law—standards as supplying the proper framework:

> Lord Mance, who extensively reviewed the Strasbourg jurisprudence, said that he did not believe that the Strasbourg Court would 'accept that the use of anonymous evidence in the present case satisfied the requirements of article 6'. However, Lord Mance went on to say that the 'admissibility of evidence is primarily a matter for national law', and that the Strasbourg Court has repeatedly stated that the use of anonymous evidence is 'not under all circumstances incompatible with the Convention'. And importantly, Lord Mance said it is not certain that 'there is an absolute requirement that anonymous testimony should not be the sole or decisive evidence'. In other words, there should be caution about treating the Convention, or apparently general statements by the Strasbourg Court, as containing absolutely inflexible rules. All of their lordships accepted fully what Lord Bingham said was the 'reality of the problem' of witness intimidation, 'vividly described' in the Court of Appeal judgment. Lord Bingham went on to say that, 'this is not a new problem, but it is a serious one. It may very well call for urgent attention by Parliament'. Lord Rodger said: 'Parliament is the proper body both to decide whether such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial'. Lord Mance echoed these views. He […] said that 'it may well be appropriate that there should be a careful statutory modification of basic common law principles. It is clear from the Strasbourg jurisprudence […] that there is scope within the […] Convention for such modification'.

[69] Ibid, col 516. In considering the legislation, Parliament took account of a report of the Crown Prosecution Service on the scale of the use of anonymous witnesses. According to that report, there were 580 pending cases involving anonymity orders (of which 290 cases involved undercover officers purchasing narcotics). See ibid, col 1304.

[70] Blackstone, above n 20, vol 3, 396.

Virtually the entire subsequent consideration of the bill occurred in Convention rather than in common law terms. The House of Lords Select Committee on the Constitution acknowledged that the proposed legislation represented a departure from the common law rules but emphasized that Article 6 of the Convention permitted the change.[71] Likewise, the Joint Committee on Human Rights in its report on the proposed legislation agreed that it was compatible with Convention requirements.[72]

In the House of Commons and in the House of Lords members across the political spectrum repeatedly referred to the bill's compatibility with the European Convention—which, rather than the common law tradition, served as the relevant reference point. Andrew Dismore (Labour) thus stated: 'Strasbourg has not had difficulties with anonymous witness evidence. The real issue is the parameters and the scheme in which the evidence is used'.[73] Invoking the balancing approach of the ECtHR to justify anonymity orders, David Howarth (Liberal Democrat) urged that '[t]he human right to a fair trial is absolute, but whether that right has been violated in a particular case is a matter of degree'.[74] Lord Hunt took the position that 'the scheme set out in the Bill will enable a trial judge to navigate the difficult legal considerations at stake and reach a view, on the circumstances of the particular case, that it would, or would not, be compliant with Article 6 considerations to grant a witness anonymity in that instance'.[75] Lord Grabiner likewise explained that:

> [i]t is important to understand that the Law Lords were not saying that legislation in this area would be incompatible with our obliga-

[71] House of Lords Select Committee on the Constitution, *Report: Criminal Evidence (Witness Anonymity) Bill* (2008) para 15. According to the report:

> The new statutory rules on witness anonymity introduced by the Bill are broader than the existing common law rules. Whereas the common law powers on witness anonymity appear to be limited to protecting personal safety, the Bill will enable anonymity orders to be made where this is necessary to protect serious damage to property and 'real harm to the public interest'. This broadening of the rules […] may lead to greater use of witness anonymity. Article 6 of the ECHR will however continue to provide the minimum guarantees of a fair trial. In this context it is important to note that the Appellate Committee in *Davis* held that the protective measures imposed in that particular case breached the right to a fair trial as well as the common law limits on anonymity. Ibid.

[72] House of Lords Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill* (2008) para 1.9.

[73] HC Debates, 8 July 2008, 478 *Hansard*, col 1317.

[74] Ibid, col 1320.

[75] HC Debates, 10 July 2008, 703 *Hansard*, cols 868–69.

> tions under Article 6 of the Convention. On the contrary, they took the view that legislation was the appropriate way forward so long as the devised structure produced a fair trial for the accused.[76]

Some MPs took the view that by replacing the *ad hoc* approach that had developed under the common law with a standardised set of rules, the proposed legislation in fact enhanced the common law right of confrontation. According to Lord Elystan-Morgan: '[O]ne is seeking to repair an infection in so far as the common law is concerned […]. [T]hat infection was brought about by creeping erosion, step by step, without anyone anticipating that one was doing anything fundamentally wrong'.[77] Maria Eagle (Labour) claimed:

> What is being abolished is not the ancient common-law right to confront one's accusers, but the system that had grown up in the court for creating anonymity orders. That is being replaced by the statute before us. […] [It] is about dealing with the rules for anonymity orders, for which a Judicial Committee of the House of Lords said that there was no common-law power.[78]

Even opponents of the proposed legislation found it hard to resist the Convention's siren call. Cautioning that in practice anonymity orders might become too broad, they argued that conformity with ECHR Article 6 required rejecting the bill.[79] Such arguments had little traction given that the case law of the ECtHR plainly allowed for greater use of anonymous witnesses than did the common law; making the Convention the relevant landmark virtually doomed opposition efforts.

A minority sought to return the debate to common law principles and to highlight the erosion of common law protections for defendants. For example, Douglas Hogg (Conservative) emphasised the 'fundamental principle' that the

[76] Ibid, col 877.

[77] Ibid, col 878.

[78] HC Debates, 16 July 2008, 479 *Hansard*, cols 371–72.

[79] See e.g. HC Debates, 8 July 2008, 478 *Hansard*, cols 1295–6 (David Heathcoat-Amory) (Con) ('We are not dealing with a matter of trivia, but with a constitutional matter. […] Are we certain that a statutory right to anonymity will not gradually be expanded over time, for the convenience rather than the safety of witnesses, and become fairly routine?'); ibid, col 1343 (Douglas Hogg) (Con) (asking 'whether protective measures […] can ever be fair'); ibid, col 1362 (Edward Garnier) (Con) ('Article 6 of the Convention reminds us of our solemn duty to ensure fairness in our trials.[…] The witness cannot produce the ace of personal apprehension to trump the right of the citizen to a fair trial').

'defendant […] know the identity of the witness against him' because otherwise 'when credibility is at issue it is extraordinarily difficult to challenge the Crown's case'.[80] Lord Goodlad sought to highlight the dramatic change the legislation represented. Observing that '[t]he common law […] has for many centuries recognised the right for a defendant in a criminal trial to be confronted by his named and identified accusers', he deemed the proposed anonymity statute 'broader than the existing common law rules'.[81] However, with the Convention offering the virtue of cosmopolitanism as well as an approach that would prevent the guilty from going free, appeals to the common law seemed outdated and unwise. Consider in this regard Baroness Mallalieu's dramatic statement in opposition to the proposed legislation:

> I have been a practising criminal barrister for 38 years […] and I believe that the best way of getting at the truth in a criminal trial is to allow the accused to confront his accusers directly and in public and to cross-examine and challenge them knowing who they are and where they come from. […] We have been down this route before, albeit some time ago. We have given anonymous and secret evidence a whirl in the past. We did it with the Court of Star Chamber and in trials for treason. While those procedures were initially very popular, they came to be regarded as cruel, unfair and oppressive, because they resulted in wrong convictions.[82]

From one perspective, the above plea is simply a balanced reminder of the history of and significance to the common law prohibition on anonymous witnesses. In the summer of 2008, however, to reform the common law was to embrace the ECHR and its safeguards. To resist reform, by invoking the Star Chamber, or for that matter 38 years of practice, was to fail to recognize the healthy step forward the proposed legislation promised.

3.4 Implementation: Anonymity Ascendant

Although justified at enactment in terms of ECHR Article 6, the WAA quickly lost its Convention tether. The Human Rights Act 1998 (*HRA*) requires courts to 'take into account' the decisions of the ECtHR[83] and directs that parliamentary

[80] Ibid, col 1324.
[81] HL Debates, 10 July 2008, 703 *Hansard*, cols 871–72.
[82] Ibid, col 883.
[83] HRA s 2.

legislation 'be read and given effect in a way which is compatible with the Convention rights'.[84] Yet in applying the provisions of the WAA, domestic courts quickly allowed more liberal use of anonymous testimony than that which the ECtHR itself had found to be consistent with Convention rights.

In the very year the WAA was adopted, the Court of Appeal in *R v Mayers* adopted a very broad view of the circumstances under which anonymity orders were appropriate. The court recognised that consistent with decisions of the ECtHR, anonymous testimony could not be the 'sole or decisive' source of evidence against the accused. Yet the *Mayers* court read that limitation more broadly than did the ECtHR, to apply in just one instance: where only *one* witness testifies anonymously. 'By definition', the court explained, 'where two or more anonymous witnesses give important incriminating evidence against the defendant, the evidence of one would not provide either the sole evidence or indeed the decisive evidence against him'.[85] Thus, so long as the prosecution has multiple witnesses, anonymous or not, there is never a risk of running afoul of the sole or decisive bar. The court in *Mayers* also construed broadly the necessity provision of the WAA. First, the court held, the defendant need not represent the source of risk to the witness: 'the threat may come from any source'.[86] Second, the court rejected the argument that if the witness could be relocated and thus protected from harm an anonymity order was unnecessary. Given that 'interference with the life of any such witness would be tumultuous, and would effectively penalise him for doing his duty as a citizen,' the court explained that '[w]itness relocation can only be a practicable alternative in the rarest of circumstances'.[87]

Applying these standards in the consolidated cases before it, the *Mayers* court upheld a murder conviction in which the trial court issued anonymity orders with respect to five eyewitnesses. Four witnesses identified the defendant as the shooter: the trial judge withheld the identities of these witnesses from the defence and allowed them to testify using pseudonyms, screened from the dock and public gallery, and with electronic voice distortion. The fifth witness in the case was protected by a pseudonym and also screened from the dock and public gallery.[88] In upholding the anonymity orders the appellate court noted that the trial judge and the defence had access to various information about the

[84] HRA s 3.
[85] *R v Mayers* [2008] EWCA Crim 2989, para 25.
[86] Ibid, para 28.
[87] Ibid, paras 9, 71.
[88] Ibid, para 66.

witnesses (including transcripts of police interviews with them and reports of police investigations of their associations with the victim and the defendant)[89] and the defendant's lawyer remained able to cross-examine each witness at trial and expose discrepancies among their accounts.[90] Most significantly, because there were multiple witnesses, '[n]one of the eye witnesses provided either the sole or the decisive evidence against the [defendant]'.[91] By contrast, in a second murder case before it, the *Mayers* court vacated the conviction. An eyewitness who had come forward close to trial—without an opportunity for anyone to investigate fully her background[92]—testified with her identity hidden from the defence and her voice distorted. Without this witness's testimony, 'a conviction would have been highly improbable' and thus the trial was unfair.[93]

The *Mayers* court also announced special rules for undercover police officers. Invoking the public interest in shielding the identity of undercover police and brushing aside any countervailing interest on the part of the defendant, [94] the court held that a trial judge was 'entitled to follow the unequivocal assertion by an undercover police officer that without an anonymity order he would not be prepared to testify'.[95] Neither the WAA nor the case law of the ECtHR endorses such absolute deference to any particular classes of witnesses.[96] Nonetheless, the *Mayers* court upheld an anonymity order that permitted police officers to testify using pseudonyms and from behind screens so that they were visible only to the judge, the jury, and counsel.[97]

3.5 Convention Limits

All cases decided by the ECtHR involving the use of anonymous or absent witnesses originated from civil law countries until the 2009 decisions in *Al-Khawaja*

[89] Ibid, para 63.
[90] Ibid, para 73.
[91] Ibid, para 75.
[92] Ibid, para 50.
[93] Ibid, para 52.
[94] Ibid, para 31: 'Knowledge of their true identities can rarely be of any importance to the defendant, who can advance whatever criticisms of the evidence, or indeed the conduct of the officers, while they continue to be known by their false identities'.
[95] Ibid, para 30.
[96] See *Ellis, Simms and Martin v United Kingdom* [2012] ECHR 813, para 76: '[A]ppropriate inquiries must be conducted by the trial court to determine whether there are objective grounds for the fear in question'.
[97] *R v Mayers*, above n 85, para 79.

and Tahery v United Kingdom.[98] These two consolidated cases involved the statements of absent witnesses admitted into evidence in criminal trials pursuant to the Criminal Justice Act 2003 (*CJA*). In the course of reviewing the convictions, the ECtHR discussed also the use of anonymous witnesses in a way that soon led to additional developments concerning criminal trials and anonymity.

In *Al-Khawaja*, a male physician was convicted of indecently assaulting female patients while they were under hypnosis. One of the alleged victims committed suicide before the trial but she had given a statement to the police and had told also friends about the attack. Over the defence's objection, the trial judge admitted into evidence the victim's police statement. The judge determined that the statement was crucial to the prosecution because there was no other evidence of the alleged attack on that victim. In addition, the judge found, the defendant's interests were protected because he could offer contrary evidence about what had happened and because he could explore inconsistencies between the statement the victim gave the police and what she had told her friends. The judge also instructed the jury to keep in mind that the victim's statement had not been subject to cross-examination. The Court of Appeal affirmed the conviction, rejecting the defendant's claim that his trial was unfair under ECHR Article 6(3)(d).[99]

In *Tahery*, the defendant was convicted of wounding with intent in connection with a stabbing incident. A witness of Iranian origin identified only as 'T' told the police he saw the defendant, also of Iranian origin, stab the victim. The prosecution sought to have T's statement read into evidence pursuant to the CJA on the ground T feared reprisal from the local Iranian community if he testified. The trial judge admitted the statement, finding that T's fears were genuine, his statement was of great importance to the case, and the defendant's interests could be protected through rebuttal evidence and by cross-examination of other government witnesses. The judge also advised the jury to take into account that T's statement was not subject to cross-examination and reminded the jurors they lacked an opportunity to observe T's demeanour. Rejecting the defendant's argument that the use of T's statement rendered the trial unfair, the Court of Appeal affirmed the conviction.[100]

Although the admission of these statements was consistent with the requirements of the CJA, the ECtHR ruled that the defendants did not receive fair trials

[98] *Al-Khawaja and Tahery v United Kingdom,* above n 34.
[99] Ibid, paras 8–12.
[100] Ibid, paras 18–21.

under ECHR Article 6 because their convictions were based solely or decisively on testimony from witnesses they could not adequately challenge. In the court's view, the sole or decisive rule was absolute and it could not be overcome by a balancing approach of the kind the domestic court employed. [101] In response to this ruling, the UK requested review by the Grand Chamber.

3.6 Standing Ground: The UK Supreme Court

While the UK's application to the Grand Chamber in *Al-Khawaja and Tahery* was pending, the Supreme Court (which in 2009 assumed the judicial function of the House of Lords) decided *R v Horncastle.*[102] In the course of that decision, the Supreme Court rebuffed the chamber's decision in *Al-Khawaja and Tahery*—thereby setting in motion a remarkable interchange between the domestic judiciary and the ECtHR that led ultimately to a ratcheting down of Convention protections for criminal defendants.

3.6.1 *Horncastle* and Absent Witnesses

Horncastle involved four convicted defendants at whose trials statements by non-testifying victims were submitted to the jury. Two of the defendants were convicted of intentionally causing grievous bodily harm to a victim who died (of unrelated causes) before trial began. A prior statement the victim had given to the police about the incident was read to the jury in accordance with CJA sections 116(1) and (2)(a). The Court of Appeal found the statement was 'to a decisive degree' the basis for the convictions but that admission of the statement was nonetheless proper. The two other defendants in *Horncastle* were convicted of kidnapping a young woman. She left town the day before trial because she was too frightened to testify and in her absence a statement she had made to the police was read to the jury pursuant to CJA sections 116(1) and (2)(e). The Court of Appeal found that in light of other evidence at trial, the victim's police statement was not in fact decisive but the defendants disputed this conclusion before the Supreme Court.[103]

The issue presented to the Supreme Court in *Horncastle* was whether a conviction based 'solely or to a decisive extent' on the statement of an absent

[101] Ibid, para 37, expressing 'doubt[] whether any counterbalancing factors would […] justify the introduction […] of an untested statement which was the sole or decisive basis for the [defendant's] conviction'.

[102] *R v Horncastle; R v Marquis; R v Carter* [2010] 2 AC 373.

[103] Ibid, 379–80.

witness whom the defendant was not able to examine infringes ECHR Article 6. The four defendants argued that the chamber's decision in *Al-Khawaja and Tahery* had set a clear precedent and required the UK Supreme Court to rule that admitting the victim statements rendered their trials unfair. However, the Supreme Court unanimously ruled in favour of the government and rejected the applicability of a sole or decisive bar.

3.6.2 UK Exceptionalism

In reaching this result, Lord Phillips explained that while under HRA section 2 the Court was obligated to 'take into account' decisions of the ECtHR, it was not required to follow decisions that did not adequately account for domestic law. He wrote:

> The requirement to 'take into account' the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.[104]

In other words, a requirement to take into account Strasbourg decisions was not a mandate to follow in all instances those decisions.

Having unhooked the Court from Strasbourg, Lord Phillips next rejected any sole or decisive bar on testimony from absent witnesses. He explained that '[l]ong before […] the Convention came into force the common law had, by the hearsay rule, addressed that aspect of a fair trial that Article 6(3)(d) was designed to ensure'. In addition, he wrote that recently 'Parliament has […] enacted exceptions to the hearsay rule that are required in the interests of justice' and '[t]he regime enacted by Parliament contains safeguards that render the sole or decisive rule unnecessary'.[105] In other words, there was no need to adhere to the ECtHR's own

[104] Ibid, 381.
[105] Ibid, 382.

approach to absent witnesses because domestic safeguards—in the common law and in statutory law—adequately protect the defendant's interests.

Again distinguishing the UK regime, Lord Phillips cautioned that that sole or decisive rule was 'introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions'.[106] In his view, the rule was unnecessary in the UK because the CJA 'contains a crafted code intended to ensure that evidence is admitted only when it is fair that it should be'.[107]

More generally, Lord Phillips explained, long-standing common law rules continue to ensure fairness: the trial judge acts as an evidentiary gatekeeper; '[h]earsay evidence is only admissible in strictly defined circumstances'; the judge warns the jury of the risks of relying on out-of-court statements; and the judge has power to reject a conviction based on unreliable hearsay evidence.[108] Because the sole or decisive rule would create 'severe practical difficulties if applied to English criminal procedure,'[109] including the difficulty of determining whether evidence was actually decisive, the rule could be rejected.[110] In sum, the Supreme Court declined to follow a rule of the ECtHR that ignored the basic features of the UK system.

Turning, then, to *Al-Khawaja and Tahery*, Lord Phillips took the position that while 'the statements [by the absent witnesses] admitted in evidence were central to the prosecution case' in each instance, those statements were 'supported by other evidence' and the interests of the defendants were in fact sufficiently protected.[111] The ECtHR had therefore erred in ruling that the defendants had not received fair trials—and the erroneous ruling did not entitle the four *Horncastle* defendants to relief.

3.6.3 *Horncastle* and Anonymous Witnesses

Significantly, the Supreme Court did not limit itself in *Horncastle* to the issue of absent witnesses that was before it. Having announced it would not apply the ECtHR's rule for absent witness testimony, the Supreme Court went on to

[106] Ibid.
[107] Ibid, 387.
[108] Ibid, 388.
[109] Ibid, 382.
[110] Ibid, 403.
[111] Ibid, 406–8.

reject any sole or decisive rule with respect to anonymous witnesses. The Court explained that the procedural safeguards in the WAA and related statutes along with background common law practices rendered such a rule unnecessary in the UK system.[112]

3.7 The European Court's New Approach: Absent Witnesses

After the Supreme Court's decision in *Horncastle*, the Grand Chamber heard anew and issued its own decision in *Al-Khawaja and Tahery.* Departing from the lower chamber's approach, the Grand Chamber transformed the sole or decisive rule for absent witnesses into a flexible standard. Whereas the lower chamber had ruled that sole or decisive testimony from an absent witness automatically violated ECHR Article 6, the Grand Chamber ruled that such testimony required instead 'searching scrutiny' to ensure fairness to the defendant. The Grand Chamber explained:

> It would not be correct, when reviewing questions of fairness, to apply [the sole or decisive] rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned. […] To do so would transform the rule into a blunt and indiscriminate instrument. […] The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 para 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. […] The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.[113]

The Grand Chamber couched its ruling as consistent with prior case law focused on the general requirement of fairness in criminal proceedings[114] but in

[112] Ibid, 392, 394, 403.
[113] *Al-Khawaja and Tahery v United Kingdom* [2011] 54 EHRR 23, paras 146–7.
[114] Ibid, paras 118–19.

rejecting the lower chamber's analysis there is little doubt that in the specific the Grand Chamber was adopting a new and quite different approach. The Supreme Court's criticism, in *Horncastle*, of the lower chamber's earlier ruling played an obvious role in the turnabout. Although the Grand Chamber lobbied potshots at some of Lord Phillips's criticisms[115] and bristled at times at the notion of English exceptionalism,[116] the ultimate outcome was deference to the Supreme Court's judgment that in the UK legal system the sole or decisive rule was unnecessary.

With respect to Al-Khawaja's case, the Grand Chamber found, as had the lower chamber, that testimony from the absent witness was indeed the decisive evidence supporting the conviction. However, the Grand Chamber also ruled that the interests of justice weighed in favour of admitting the statement at issue; the statement was reliable because it was recorded by the police in proper form before the witness's death; the absent witness provided an account to two friends, who testified at trial, and those accounts were sufficiently similar to the account given to the police, and there was no evidence of collusion; and that there were sufficient countermeasures, including the judge's instructions to the jury, to safeguard the defendant's interests. Therefore, the Grand Chamber held, there was no violation of ECHR Article 6.[117]

In Tahery's case, the Grand Chamber applied its new standard but agreed that the proceeding violated the Convention. The Grand Chamber reasoned that T's testimony 'was, if not the sole, at least the decisive evidence' against the defendant. The Grand Chamber noted that '[e]ven if […] [the defendant] gave evidence denying the charge, […][he] was […] unable to test the truthfulness of T's evidence by means of cross-examination' and T was 'the sole witness who was apparently willing or able to say what he had seen'. Although the trial judge had warned the jury about unduly relying on untested evidence, the Grand Chamber deemed this warning an insufficient 'counterbalance where an untested statement of the only prosecution eyewitness was the only direct evidence' in the case. After '[e]xamining the fairness of the proceedings as a whole', the Grand Chamber found 'there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T's statement'.[118]

[115] Ibid, para 137: 'in the case of *R v Davis* […] the House of Lords appeared to foresee no apparent difficulty in the application of the sole or decisive rule in the context of anonymous witnesses'.

[116] See e.g. ibid, para 130: 'while it is important for the Court to have regard to substantial differences in legal systems and procedures […] ultimately it must apply the same standard of review under Article 6 paras 1 and 3(d), irrespective of the legal system from which a case emanates'.

[117] Ibid, paras 154–58.

[118] Ibid, para 159–65.

The Grand Chamber confined its ruling to the use of absent witnesses, noting that the cases did not present issues of anonymity.[119] That said, the Grand Chamber referenced the UK Supreme Court's discussion of anonymity in *Horncastle,* and observed, 'the two situations are not different in principle' in that 'each results in a potential disadvantage for the defendant' and implicates the defendant's right to 'an effective opportunity to challenge the evidence against him'.[120] The seed was thus planted for a new approach to anonymous testimony as well.

3.8 The European Court's New Approach: Anonymous Witnesses

As described above, decisions of the ECtHR pre-dating *Al-Khawaja and Tahery* permitted anonymity measures under certain circumstances. Importantly, the ECtHR had ruled that a conviction could not be based solely or decisively on an anonymous witness's statement even if the defence had an opportunity to examine the witness. In addition, the court required that even if the witness's statements were not decisive that there be counterbalances to the anonymity measures in order to protect the interests of the defendant.[121] After the Grand Chamber's decision in *Al-Khawaja and Tahery,* therefore, the Convention rules about anonymous witnesses appeared more stringent than those involving absent witnesses.

Yet the Grand Chamber's passing reference to anonymity in *Al-Khawaja and Tahery* soon bore fruit. In *Ellis, Simms and Martin v United Kingdom*[122] the ECtHR extended the principle of *Al-Khawaja and Tahery* to apply also to anonymous witnesses. The case involved a prosecution of three defendants in connection with gang-related murders and attempted murders. The trial judge permitted an eyewitness, who feared for his safety, to testify anonymously in the trial. Pursuant to the judge's order, neither the defendants nor the public were able to see the witness and heard only his distorted voice. The judge, the jury, and the defence lawyers could all see and hear the witness. The judge also cautioned the jury about the risks associated with relying upon anonymous testimony.[123] The defendants

[119] Ibid, para 127.
[120] Ibid.
[121] See e.g. *Doorson v Netherlands*, above n 35.
[122] *Ellis, Simms and Martin v United Kingdom*, above n 96.
[123] Ibid, paras 29, 31.

were found guilty and sentenced to life imprisonment.[124] The Court of Appeal, which had rejected a mid-trial appeal of the judge's anonymity order,[125] dismissed the defendants' appeal.[126]

The defendants argued to the ECtHR that allowing the anonymous testimony violated their Convention right 'to examine or have examined witnesses against' them. In its decision, the ECtHR rejected the argument and dismissed the defendants' complaint. In so doing, the court adopted the same approach to anonymous witnesses that the Grand Chamber in *Al-Khawaja and Tahery* had applied to absent witnesses. After setting out the new approach to determining whether use of testimony by absent witnesses was compatible with Convention rights,[127] the court invoked the Grand Chamber's recognition in *Al-Khawaja and Tahery* that the problems of absent and anonymous witnesses were 'not different in principle'.[128] The court then deemed Convention precedents in cases involving absent witnesses 'consistently [...] similar'[129] to those involving anonymous witnesses because in each instance the court 'insisted upon good reasons for granting anonymity [...] and [...] made reference to the general need for counterbalancing factors [...] and to the "sole and decisive" test'.[130] The only real issue, then, was exactly how that test should apply with respect to anonymous witnesses. The outcome suggested itself: the guidance given by the Grand Chamber in *Al-Khawaja and Tahery* was 'equally applicable'[131] to anonymous witnesses. Thus, the court explained the new approach:

> [I]n assessing the fairness of a trial involving anonymous witnesses [...] this Court must examine, first, whether there are good reasons to keep secret the identity of the witness […]. [A] subjective fear [expressed by the witness] is not sufficient, and appropriate inquiries must be conducted by the trial court to determine whether there are objective grounds for the fear in question […]. Second, the Court must consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction. […] As the Court noted in *Al-Khawaja and Tahery*, an appellate court in the United Kingdom

[124] Ibid, para 52.
[125] Ibid, para 37.
[126] Ibid, para 54.
[127] Ibid, para 73.
[128] Ibid, para 74.
[129] Ibid, para 75.
[130] Ibid.
[131] Ibid.

> is well placed to consider whether untested evidence could be considered to be the sole or decisive evidence against the defendant and whether the proceedings as a whole were fair […]. Third, where a conviction is based solely or decisively on the evidence of anonymous witnesses, the Court must subject the proceedings to the most searching scrutiny. It must be satisfied that there are sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place.[132]

In sum, a single approach now applied to the use of anonymous witnesses and to absent witnesses alike.

Applying this approach in the matter before it, the court first observed that the case involved the very kind of prosecution in which anonymity served an important public interest: 'Allowing witnesses to give evidence anonymously is an important tool in enabling prosecutions to be brought in respect of gang-related murders'.[133] Next, in light of other evidence the prosecution introduced at trial, including telephone records and firearms residue, the anonymous testimony was not the sole evidence that formed the basis for the conviction—but it may have been decisive. Thus, the court went on to examine whether there were adequate counterbalancing factors. In this regard, the court noted that the judge, the jury, and the defence lawyers could all see and hear the witness give evidence and assess his demeanour. In addition, the trial judge properly instructed the jury as to the restrictions the defence faced with respect to the witness.[134] Further, the court noted, the defence had received significant information about the anonymous witness's background (including that he had a gang affiliation himself) that facilitated cross-examination. In light of these factors, there was no violation of the defendant's Convention right.[135]

The ECtHR's decision stands for the proposition that even if anonymous testimony is the sole or decisive evidence against a defendant, there is not necessarily a violation of Article 6 so long as there are sufficient counterbalancing factors to ensure the overall trial is fair. Like the shift in its approach to absent

[132] Ibid, paras 76–78.
[133] Ibid, para 80.
[134] Ibid, para 84.
[135] Ibid, paras 86, 89.

witnesses, the decision represents a broader acceptance of anonymous testimony than prior case law had permitted.[136]

In sum, the UK's broad embrace of testimony by anonymous witnesses quickly had a feedback effect at the Convention level. It prompted the ECtHR to accept as compatible with Article 6 anonymous testimony in ways that prior case law had disallowed. Just as lower Convention standards enabled UK reformers to curtail the right of confrontation, the UK reform facilitated a diminished Convention right. Put differently, judicial dialogue, routinely celebrated for its rights-enhancing effects, in this instance helped ratchet down the right of confrontation under both domestic and European law.[137]

3.9 Summary

A brief recap is in order. In 2003, Parliament provided in the CJA a statutory basis for courts to admit testimony of witnesses who were absent from the courtroom because they were afraid to testify. In 2008, in response to the ruling in *Davis*, Parliament created with the WAA a statutory framework for courts to allow witnesses (out of fear or for other reasons) to testify anonymously. Billed as a temporary emergency measure, the framework was made permanent with the 2009 Coroners and Justice Act. Courts immediately took a broad view of their statutory powers in cases such as *Mayers*. In 2009, in *Al-Khawaja and Tahery*, the European Court of Human Rights found a violation of Convention rights by a conviction based solely or decisively on testimony from an absent witness under the CJA. Yet later that same year, in *Horncastle,* the Supreme Court refused to follow the ECtHR's sole or decisive bar with respect to testimony by absent witnesses. The Supreme Court announced also that it would not follow a sole or decisive rule with respect to anonymous witnesses either. In 2011, the Grand Chamber, hearing anew *Al-Khawaja and Tahery,* abandoned the sole or decisive rule with respect to absent witnesses and suggested that such a rule was also not needed with respect to anonymous witnesses. In 2012, in *Ellis, Simms and Martin v United Kingdom,* the European Court extended the more relaxed approach with respect to absent witnesses to apply also to anonymous witnesses.

[136] Subsequent judgments of the ECtHR have followed the same approach: see e.g. *Pesukic v Switzerland* [2012] ECHR 2031.

[137] See concurring opinion of Judge Bratza in *Al-Khawaja and Tahery v United Kingdom,* above n 113, para 2: '[t]he present cases afford, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention'.

The foregoing events demonstrate that within a decade a remarkable change occurred in protections for defendants to examine witnesses testifying against them. The mechanism of change, one that left defendants worse off, was the structure of government ostensibly designed to secure individual rights. In multilevel systems, constraints at the top set a common floor for protecting rights. Local actors may not go below this floor but they are empowered (and generally expected) to exceed it in ways that are appropriate to their own conditions. Yet the protection in the European Convention of a right to examine witnesses enabled UK lawmakers to reduce safeguards that for centuries existed under the common law. Looser standards at the top provided cover for a localised reduction in rights. Further, the domestic reduction had a feedback upon the Convention as understood by the ECtHR.

4 Conclusion

The pursuit of universal human rights through the structures of multilevel government entails a significant risk of diminished protections for individuals from government abuses. Watered-down rights imposed from above can lead to the displacement of local traditions and a downgrading of rights at the local level. In turn, diminished localised rights can float back up to the top, further stunting the prospects of robust universal protections. In the short term, universality may help secure rights. In the long-term, however, universality itself can provide the means by which rights are cut back. As core sets of rights continue to spread around the world, we should expect those rights to take on ever-diminishing form.

This article points, then, to some under-appreciated benefits of localism over globalism. It suggests that encouraging diversity of rights may be preferable to insisting upon commonalities. It shows that courts—which played a key role in the case study examined—can reduce as well as expand liberties. It demonstrates also that dialogue among courts may generate agreement to curtail rather than enhance protections. These lessons might well sound old fashioned but they are generated from a study of diminishing rights in the very place where—eight hundred years ago next spring—human rights first gained protection with Magna Carta. That is reason enough to pay these lessons heed.

DOI: 10.7574/cjicl.03.03.226
Cambridge Journal of International and Comparative Law **(3)**3: 961–982 (2014)

RESEARCHING GLOBALISATION: LESSONS FROM JUDICIAL CITATIONS

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Abstract

Professor John Bell delivered an abbreviated version of these remarks as the Closing Address to the Third Annual CJICL Conference on Sunday, 11 May 2014 at the Divinity School of St John's College in the University of Cambridge. In them, Professor Bell addresses the assumption of the unifying force of universality and cosmopolitanism and how the citation of foreign laws by national judges affects the validity of such an assumption from the point of view of legal research.

In the conference programme, the organisers made two assertions as the basis of its challenge to the traditional state-centric view of international and comparative law. The idea of *universality* suggests that international law applies equally and indiscriminately across domestic legal systems, and within sub-systems of international law itself. *Cosmopolitanism* conceives of the world as a single entity, with resonances between people irrespective of their location, nationality and culture, and asks how legal actors can access legal regimes beyond their state's domestic framework.

Within a university, such a cross-national approach is typical. Since the Middle Ages, the great universities have been centres to which students of different nationalities have come to study under cosmopolitan teachers. This tendency has increased in recent years, particularly with the growth of postgraduate studies. The question is how far this approach works as a valid assumption for legal research. This paper argues that the national (or sub-national) legal system remains an important feature of legal experience and needs to be factored into any project on globalisation. The challenge for research is to determine a method that reflects both the insight of the conference and the importance of the national legal system. I will take one area of recent comparative law literature to illustrate the limits on how research can cast light on the extent to which the global legal world envisaged by the conference organisers really exists. The topic I have used is the citation of foreign laws by national judges, since this is often used as an indicator of the extent to which national judges conceive of themselves as participants in a global debate about what are appropriate solutions to contemporary problems.

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1 The place of the national legal system

The plausibility of a displacement of the nation state in the contemporary legal world is enhanced by its fragility as an organiser of social affairs. Legal history demonstrates that many 'nation state' boundaries are artificial. Towns on the continent of Europe (as well as in Africa and Asia) have tolerated the imposition of different national governments, often in rapid succession. So there is scope for national law to be displaced by other norms in governing particular situations. Furthermore, in the world after 1945, there has been an increased use of international or regional treaties and organisations to deal with problems. The increased ease of transport and communications have made cooperation across national boundaries an increasingly important part of the handling of issues by national legal orders.

All the same, legal systems that have been produced within nation states have many enduring effects and can create path dependence in the approach to common problems. To begin with, lawyers are formed typically within specific national legal systems and belong to national legal professions. Such qualifications are generally a requirement for acting on an international stage. The prior formation that this provides can lead to such lawyers, whether as advocates, judges or arbitrators, adopting distinctive national approaches to the solution of problems. If there are established ways of doing things, then national lawyers trained in that tradition will be hard to shift. This can be the result, not of conservatism amongst lawyers, but of path dependence.

'Path dependence' suggests that 'established legal approaches to the solution of issues will determine the way in which new situations or new problems are handled in the present and in the future'.[1] As Siems points out, 'path dependence' can take various forms.[2] What he calls the 'weak version' might equally be described as the 'good enough' approach. In this, the solution reached by national law comes to a good enough result or reaches it by a good enough method that there seems to be no great benefit in changing this. His 'semi-strong' path dependency involves recognition that the result or the method is not good, but the cost of doing something different is prohibitive. His 'strong' path dependence is 'why change?' when there is no acceptance that the solution or method are bad. Most of what we encounter is of the first two kinds. Even if we have common objectives, there may not be a single preferable outcome or route to an outcome.

[1] J Bell, 'Path Dependence and Legal Development' (2013) 87 *Tulane LR* 787.
[2] M Siems, *Comparative Law* (2014) 239.

If a plurality of approaches can reach good enough results, then there is no need to adopt a common stance. An obvious area is criminal procedure. Some systems have a judge-led inquiry (at least for serious cases) and then a trial in which the file of evidence accumulated is available to all parties, including the judges. Other systems have a police-led investigation and a need to re-present evidence to the trial judge (and jury). Others have a significant role for the prosecutor. Given that each of the systems produces fair trials most of the time, there is little pressure for change. Lawyers used to working in one particular system do not then change it.[3]

Semi-strong path dependence can be shown by the way in which the procedure for the sale of land in Scotland and England has not been harmonised. It is generally recognised that the English system of accepting an offer on your house 'subject to contract' can lead to undesirable practices whereby the buyer threatens to pull out unless the price is reduced (gazundering) or the seller requires a higher price (gazumping) at a late stage in negotiations. In Scotland, this does not occur, since offers are binding on acceptance. Yet the two countries have continued to operate these distinct systems for centuries, despite the number of people who buy property in Scotland financed by a sale of property in England, or vice versa.[4] So much of the English system of lawyers, estate agents, banks etc. is designed around the current English practice that it would be hard to change.

Situations of sheer incomprehension between legal systems are rarer, and that may be the point of the conference theme. Shared values in relation to shared problems will reduce the situations in which there is incomprehension. One example might be the use of lay judges. The fact that about 95% of all criminal cases in England are resolved by three lay magistrates is frequently greeted with astonishment by lawyers from other countries. How can this be a fair trial? But if you make them sit through a morning at a local magistrates' court, they are satisfied that the trial is fair, but it is not something they would be willing to apply at home. In some other countries, the non-professional judge (also carrying the label 'justice of the peace') has a legal education.[5] Attitudes to the death penalty might be seen as extreme versions of strong path dependence where some systems see nothing wrong with the practice and others see it as both morally and legally

[3] See J Bell, 'The French Pre-Trial System', in C Walker & K Starmer (eds), *Miscarriages of Justice* (1999) ch 17.

[4] Cf R Smith, *Property Law* (8th edn, 2014) 101–7; T Guthrie, *Scottish Property Law* (2nd edn, 2005) 271–3.

[5] See J Bell, *Judiciaries with Europe* (2006) 330; cf ibid, 89–94 (France), 154–8 (Germany) and 207–11 (Spain).

repugnant. These two features of legal systems, professional formation and path dependence, give rise to the hypothesis that problems will not always be solved in the same legal way in every jurisdiction, even if all other features (social culture, political ideology, etc.) remain the same across the different countries.

2 What constitutes globalisation of law?

The organisers of the Conference point to the importance of international law in the regulation of problems. Areas such as crimes against humanity, trade relations between states and the protection of investors are subject to various forms of international law, which have spawned new branches of that discipline and have reduced the scope for autonomous national provisions. In many areas of life, the nation state has to pay heed to the norms of international law. But the organisers go further in suggesting that there has also been a much more extensive globalisation of law that has reduced the significance of national law in other important respects.

Siems presents a number of dimensions of the supranational direction of contemporary law.[6] The first is that national laws are subject to external influences leading to the convergence of legal provisions, if not outright harmonisation. The second is that problems are resolved by regional groupings of states, so there are common regional laws. Thirdly, a problem may be resolved by non-state law that transcends national boundaries, transnational law. In these different ways, the specific national solution gives way to other solutions. The specific rule applied may be a national norm, but it has to be appreciated as part of a more international whole. The analysis is not that the state fades away, but that the state may be less important than other actors in relation to specific problems. Public and private ordering have to be considered as dimensions of contemporary law and that may happen at a number of levels, some of which extend beyond the nation state. The paradigm of state ordering is autonomy in deciding the content and the implementation of the norms that apply to situations within the territory of the nation state.

Furthermore, the conference theme raises the major question whether it is best to focus attention on nation states or legal systems or to focus on particular problems, some of which may be resolved at nation state level (or even infra-state level) and some of which may be resolved by a combination of nation state, regional and international standards, and even by both public sector and private

[6] M Siems, *Comparative Law* (2014) ch 9.

sector norms. Whereas speed restrictions on motor vehicles in residential areas or the duty to provide playground facilities for children under ten may be fully regulated by local or national law, the treatment of asylum seekers may be regulated by a combination of international treaties on rights to asylum, regional rules on the handling of asylum claims, national immigration and social benefits law and local rules on social benefits and legal entitlements under private charitable trusts. Whereas it does not make sense to conceive of all the activities of a national legal order in the light of international law, nor does it make sense always to examine problems with an exclusive focus on the domestic legal system. A number of the studies which will be examined in more depth later in this article conclude that the use of comparative law materials varies from one topic to another. For example, Groppi and Ponthoreau draw a distinction between human rights cases[7] and institutional decisions, those about the operation of the organs of state. They and their colleagues conclude that judges are more likely to cite foreign precedents in cases about human rights than about the institutions of government. Human rights norms have more obvious claims to be universal, not only because there are international law reference points. The human condition and values such as human dignity are not specific to particular countries. By contrast, the roles of presidents and legislators can be very specific. There are lots of other examples. Thus, a more sectorial approach to the place of international and comparative law is the way forward, rather than focusing on grand scale claims about globalisation.

Siems reminds us effectively that, on the one hand it is important to recognise that the nation state is not necessarily the central actor in handling problems in the contemporary world—the problem may be governed by supranational norms of various kinds, or it may even not be resolved by public sector norms at all. On the other hand, the national legal system may have a distinctive path in the resolution of such problems. On the topic of globalisation, one indicator much discussed in the literature is the frequency of the citation of foreign legal sources in judicial decisions. Many studies have examined the extent to which it is permissible for the justifications provided by a national judge to include decisions drawn from another legal system and how far this is practised. Such studies are often ways of assessing how far national legal systems have become more globalised.

[7] T Groppi & M-C Ponthoreau, 'Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future', in T Groppi & M-C Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (2013) 411, 416–18.

A distinction must be drawn between the extent to which judges consider themselves part of an international enterprise because they are applying (mandatory) texts shared in common with other countries, and where they make use of (non-mandatory) texts to help them deal with situations in which national law is lacking, defective or in need of reform. In the former situation, there is plenty of evidence that judges engage with each other in determining the meaning of mandatory texts. Thus, in relation to the challenge for national judges of interpreting the European Convention on Human Rights and European Union law, Mak states:

> The majority of the judges who were interviewed for this book feel that they have been challenged by these changes to develop new strategies concerning the search for and weighing of arguments in their decision-making, and to develop judicial leadership through their engagement as 'partners in a common judicial enterprise'.[8]

But if there is good reason for courts to consider themselves partners with others in the interpretation of the same treaty, does this extend to the solution of legal problems more generally? Former President of the French *Cour de cassation*, Canivet, has argued that it should:

> Citizens and judges of States which share more or less similar cultures and enjoy an identical level of economic development are less and less prone to accept that situations which raise the same issues of fact will yield different results because of the differences in the rules of law to be applied. This is true in the field of bioethics, in that of economic law and liability. In all these cases, there is a trend, one might even say a strong demand, that compatible solutions are reached, regardless of the differences in the underlying applicable rules of law.[9]

This kind of assertion has given rise to some interesting research in recent years that suggests that the picture may be more complex than this sort of quotation suggests.

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[8] E Mak, *Judicial Decision-Making in a Globalised World* (2013) 83; see also ibid, 141–50.

[9] Guy Canivet, cited in M Andenas & D Fairgrieve, 'Introduction: Finding a Common Language for Open Legal Systems', in G Canivet, M Andenas & D Fairgrieve (eds), *Comparative Law Before the Courts* (2004) xxvii, xxxi.

3 Researching globalisation through judicial citations

Much of the recent evidence adduced to demonstrate globalisation comes from the analysis of judicial decisions. There has been writing on this subject for a number of years, not just that triggered specifically by Justice Scalia's comments.[10] Writing in 1994, Ulrich Drobnig noted that there was little evidence of widespread use of comparative law by courts in cases where it was neither necessary (such as when applying general principles of international law or general principles of law) nor where the national rule at issue involved an international element—for example where it was drawn from European law or from an international treaty.[11] In cases where the law in question is purely national, '[t]he weight of foreign solutions is always limited. All reports agree that no court bases its decision solely on a foreign rule. The recourse to foreign law furnishes but a supplementary element for the court's reasoning.'[12]

But, as Mak suggests, if we want to assess the extent of globalisation, we need to distinguish between a number of different issues.[13] One question is whether judges are influenced in their approach to issues by the decisions of courts in other jurisdictions. Do these decisions help them to form a view about the right legal solution? A second question is whether, in the process of discovering the law, they make use of such decisions from other jurisdictions—are they raw material that they seek out within their searches? As I have noted elsewhere,[14] foreign decisions offering different solutions to established domestic law may cause domestic judges to question whether the established solution is really required. The existence of alternative foreign solutions may trigger debate on the right domestic solution, even if the foreign law is not, in itself, a justification for any new solution reached in domestic law. A third question is whether foreign cases find their way into the justifications offered by judges as a result in the case.

The three questions require very different kinds of evidence and research methodology. In particular, there is a significant issue about the causative weight to be attributed to any particular factor. At best, researchers are looking to

[10] See e.g. *Lawrence v Texas*, 539 US 558, 598 (2002) and *Roper v Simmons*, 543 US 551, 622–28 (2005); Basil Markesinis with Jörg Fedtke, *Engaging with Foreign Law* (2nd edn, 2009) 195–203.

[11] U Drobnig, 'General Report', in U Drobnig & S van Erp (eds), *The Use of Comparative Law by Courts* (1999) 3-21.

[12] Ibid, 18.

[13] Mak, above n 8, 215.

[14] J Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 *Utrecht LR* 8, 17.

identify contributing factors that, taken together, create a plausible account of how things work. In particular, it is wrong to think of there being single causes.

3.1 Influences

Bobek rightly notes that comparative law may be cited in novel or complex cases where national rules may be unclear, unsatisfactory or be lacking.[15] Foreign law serves as inspiration in this context. But, if materials are merely inspiration, then they are not essential to be included as references. Reading such materials constitutes intellectual engagement, but citing them has another purpose—it serves to add authority to the decision reached or to the decision-maker. Bobek rightly points out that judges will not always cite everything they have read. For a start, as in France or the Netherlands, Sweden or Slovakia, the conventions of writing judgments may be such that only mandatory sources may be cited. A case can only be cited if it leads imperatively to the solution. Furthermore, even in other systems, inspiration as to principle or approach is less likely to be cited than solutions.[16] If the function of the judgment is to convince the reader that the right decision has been reached according to law, then it is not always necessary to give evidence of all the steps in the reasoning. The legitimacy of a decision may rely essentially on an appeal to authority—the rule laid down by a particular organ of government (the legislature or the executive). Substantive legitimacy, where one persuades the reader of the correctness of that interpretation of the law is a different matter. So the classic authority on writing judgments of the French *Cour de cassation* argues that one should not provide the reasons behind a ruling:

> We consider […] that it is necessary to abstain from 'giving reasons for the reasons', in the sense that, in a judicial decision the inclusion of the essential reasons meets an absolute necessity, the explanation of those reasons departs from the field of law in bringing in considerations which are more or less subjective and contingent […][17]

Furthermore, a court may not have the time or the resources to conduct a proper presentation of foreign law. Transparency serves to encourage consensus

[15] M Bobek, *Comparative Reasoning in European Supreme Courts* (2013) 245.
[16] Ibid, 229.
[17] A Perdriau, *La pratique des arrêts civils de la Cour de cassation* (1993) §1299 (my translation).

and cohesion, but there may be reasons of practicability which limit the full justification of decisions. Without research assistance, courts may have to focus on the essential elements in a judgment—getting the facts right and the essential rule of a decision. The *Cour de cassation* reaches over 28,000 decisions in a year, and maybe as many as 80 cases in a hearing. Even the Advocate General preparing the opinion for the decision will not have the time to examine the implications of all matters. If references to foreign law are auxiliary arguments, then they will suffer from the need for judges to be focused and concise in their decisions. As Bobek puts it, '[a] decision "saying too much" and presenting itself as an intricate web of references, cross-references, considerations, and debates may be as problematic as a decision saying too little'.[18] If the main audience for the decision (other than the parties) is the lower courts, then a ruling that is workmanlike and serviceable may be sufficient. Bobek argues that transparency may give way to pragmatism:

> For […] pragmatic reasons, comparative arguments may be in the end often left out of a judicial decision. Their main role is seen as one of finding a solution and/or for justifying it internally, providing the judges with merely mental comfort that the solution they opted for is not completely unheard of. However, as comparative arguments in instances of non-mandatory uses of foreign law will always be just additional or supporting, and judges may often be uncertain about their correctness as well as the universal appeal of the authority chosen for the inspiration drawn, then why make the decision more vulnerable to challenge by including it?[19]

So, he concludes that there may well be very good reasons why foreign materials that have been read by judges and which may have had an influence on the solution they reach will nevertheless not feature in the judgment.

The study of influence is consequently very diffuse. Influence involves the shaping of opinions and perceptions. That occurs in a variety of ways, not just by reading materials which are presented within the framework of a formal judicial decision. The research conducted on this area has used two different forms of analysis. One involves the study of networks.[20] In this study, Claes and de

[18] Bobek, above n 15, 235.

[19] Ibid, 234.

[20] M Claes & M de Visser, 'Are You Networked Yet? On Dialogues and European Judicial Networks' (2012) 8 *Utrecht LR* 100, 106–12.

Visser explain how associations and internet connections provide the fora for the exchange of ideas amongst judges. Such networks facilitate face-to face meetings, periods of stay or observation in foreign courts. In terms of the use made of these interactions, they distinguish between 'practical' and 'authority' incentives.

'Practical' incentives are concerned with the pressures of globalisation for the actors involved in the judicial business. Participating in networks is not so much a matter of choice but of necessity to make sure that judges are still able to get the job done properly in a changing environment. The internationalised nature of litigation makes knowledge about other legal systems a prerequisite to being able to dispense justice in an individual case. These considerations take on an extra dimension within the European Union (*EU*), with its quest to establish a truly internal market and the ever-expanding reach of EU rules.[21]

By contrast, '"[a]uthority" incentives denote membership of judicial networks for the purposes of borrowing or enhancing the participating court's authority and legitimacy'.[22] Participation in a network may enhance the status of a court in the sight of judges from other countries or it may confer an additional aura of authority in its internal dealing within the legal system—being associated with others may enhance the authority of the domestic institution.[23] Particularly in the European context, they see the network as working alongside more formal structures, such as the preliminary reference to enable national judges to gain a more European perspective on the interpretation of common norms.[24] Supra-national courts such as the European Court of Justice and the European Court of Human Rights foster such informal networking events, at least with national opinion formers, in order to create a common ethos within which individual decisions will be decided. Data is often available on the associations and conferences of which judges are a part. That does permit network analysis of who is meeting with whom and how frequently. But then there is the need for interpretation. It is here that Alan Paterson[25] and Elaine Mak[26] have resorted to elite interviews in order to ascertain the perception of the participants about the significance of such networking and its influence on decision-making.[27] They conclude that national judges seek to influence supranational judges and vice

[21] Ibid, 111.
[22] Ibid.
[23] Ibid, 111-12.
[24] Ibid, 113.
[25] A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013).
[26] Mak, above n 8.
[27] The Conference did include 'in conversation' events with Judge Nussberger of the European Court of Human Rights and Lord Kerr of the Supreme Court, who were asked about the

versa. There is not a one-way street. Supranational judges gain a sense of the importance of particular issues at a national level and national judges gain some sense of why supranational judges take a different view. For example, Mak notes that there were divergent views on the utility of international exchanges amongst the judges to whom she talked. Some thought them important and others did not see how they would change much of what judges ordinarily did.[28] At best, it enabled judges to benchmark their approaches to other systems, especially those that were similar in terms of legal tradition or geography.[29] Certain judges are more likely to take up these opportunities than others. But the conclusions both reach is that the number and variety of such exchanges has increased.

Rather like the meals in the Inns of Court, the effect of informal interaction is to socialise lawyers to be part of a collective effort. This is clearly an important feature of supranational courts such as the European Court of Justice, which organises regular visits from leading judges and others from its different legal systems, so they can understand the approach of the Court and that their concerns can be raised informally. Although this is important and care is put into the various forms of socialisation, it is difficult to demonstrate clearly any effect.

3.2 Sources

If 'inspiration' may appear more elusive to document, then the idea of sources might seem more specific. An account of sources tracks the logic of discovery. It explains how the decision was reached, in contrast to the logic of justification which presents why the wider public ought to treat the decision as rightly decided. Sources may be either 'material sources', what the lawyers present as evidence of the law, such as textbooks, case reports and the like, and 'normative sources' the rules which are found within those statements of the law. Rodolfo Sacco describes how the different formulations of the law, its 'formants', provide the raw material out of which a particular formulation of the law is drawn.[30] On this conception, national law is never completely formulated. In many cases, the task of applying the law involves an element of completing its formulation. This section looks at the foreign materials as possibly containing such formulations of the law.

Drobnig noted the value of comparative material as a source of information, but argued that it was scholarly writing as an indirect source, rather than judicial

relationships, formal and informal, between the two courts.

[28] Mak, above n 8, see especially 104–5, 113.

[29] Ibid, 101.

[30] R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *AJCL* 1, 22.

decisions as a primary source which counted the most:

> Comparative literature written in the court's language is another helpful source of information. The recourse to comparative literature has the additional advantage that one may expect, at least in general, a balanced account of the foreign law in question; that assists the courts to guard against prejudiced, one-sided information.[31]

Writing nearly twenty years later, Bobek comes to a similar conclusion:

> The study of Continental jurisdictions revealed, certainly at least as far as the scholarly and judicial statements were concerned, a clear preference for *scholarly comparisons*. Foreign ideas are most welcome in courts. They should nonetheless first be filtered, discussed, and adapted by the legal scholarship.[32]

There is, no doubt, a difference in the approach of common law countries. They are more used to looking at judicial decisions and would tend to cite them directly, rather than being mediated by textbook writers. But then there will come the concern that the view presented by the parties or researched by the court's own assistants is incomplete and only partly understood. Or it may be argued that judges are choosing one jurisdiction and ignoring another—'cherry picking'. It is here that Markesinis suggests that foreign law needs to be 'packaged' not just with summaries of cases, but with practical information about how the law works in practice and how solutions are provided for individuals.[33]

Since foreign materials may not be in languages read by the individual judges, judges will often rely on translations by others or digests by either counsel or by judicial assistants (where these exist). It is the importance of judicial assistants in recent years that has transformed the capability of higher courts to engage in drawing on foreign materials. The availability of such assistance is variable. Whereas the *Conseil d'Etat* now has a group dedicated to the provision of comparative legal information, other courts have no such assistance.[34] Mak too notes that research is undertaken in courts on foreign legal materials, but this is not systematic and depends especially on the availability of research

[31] Drobnig, above n 11, 19.
[32] Bobek, above n 15, 193 (emphasis original).
[33] Markesinis, above n 10, 294–303.
[34] Bobek, above n 15, 46–7.

assistance and the accessibility of the sources to be consulted (in terms of location and language).[35] But, realistically, the complexity of mandatory foreign legal references (the need in Europe to ensure that there are no decisions of the European Court of Human Rights or the European Court of Justice that are overlooked and the need to examine rulings in relation to international treaties) leaves very limited space for engaging with non-mandatory materials.[36]

Availability, accessibility and reliability are all essential requirements before any material sources of law can be read with profit to discern potential normative principles and solutions against which the otherwise applicable national law can be measured. The studies undertaken do not suggest that the parties' lawyers are able or willing to provide presentations of foreign law which are sufficiently comprehensive and objective. Without the packaging that Markesinis talks about, judges have good reason to be sceptical about the quality of what they are being presented. Greater reliability can be found in the researches conducted in-house by the judge's own assistants or by the court's own documentation team or comparative research unit. Bobek is realistic in his conclusions. Cases in which a court would formulate a fully-fledged comparative argument, establish points of comparison, define the element with respect to which it compares, evaluate the findings, and then integrate its acquired comparative knowledge clearly into its reasoning, are very rare, or rather non-existent.[37]

Even in Germany, the use of comparative law in the courtroom has been described as 'disappointing'.[38] Bobek concludes that in qualitative terms, the process of reading foreign law sources is 'highly *selective* and *non-representative*'.[39] When judges refer to the materials for foreign jurisdictions, they are acknowledging where ideas came from, rather than any scientific objectivity in the analysis of the state of global laws (or even regional laws). If that can be provided by intermediaries, such as scholars or law reform commissions, all well and good, and that adds authority to the decision reached. But that is not an outcome for which the court itself has strived. Indeed, Bobek concludes, like Markesinis, that the responsibility for getting foreign law ideas into the minds of judges lies with the academics: '[t]his primary responsibility cannot be passed onto the judges by declaring that it is now the duty of courts to become places of comparative study'.[40]

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[35] Mak, above n 8, 119.
[36] Bobek, above n 15, 194–5.
[37] Bobek, above n 15, 234–6.
[38] Markesinis, above n 10, 182.
[39] Bobek, above n 15, 247 (emphasis original).
[40] Bobek, above n 15, 287; Markesinis, above n 10, 302–3.

3.3 Justifications

The study of citations might seem more straightforward, but it is actually quite difficult. It is a commonplace that citation practices vary from one legal system to another (and even within legal systems). Some judgments are long and contain references in great detail, others are short and contain almost no references. There is a difference in national style that is well documented. In his recent research, Bobek refines the discussion of the citation of comparative arguments significantly. As he points out, when they cite foreign precedents, judges are seeking inspiration, not authoritative reasons, and so the category of his research focuses on 'non-mandatory' arguments, those where the judge is not obliged to discuss foreign precedents. But mere citation is not comparison.[41] Citation can be a mere adornment to a judicial argument, or a polite acknowledgement of the work of counsel or judicial assistants in the case. Bobek rightly suggests that we need to focus on situations in which there is sufficient engagement with the arguments of a foreign legal system that it constitutes one of the reasons for the instant court's decision. Now this is quite difficult to research.

First, the articulation of reasons for decisions is more elaborate in some systems than in others. Bobek describes systems with justifications limited to mandatory sources as 'dogmatically closed' and others as 'dogmatically open'[42]. If the comparative reasons are not essential, but supportive, then they might well be omitted in a system (like the French) whose judgments focus only on necessary reasons for decisions. This is true, even if one narrows the enquiry to justifications, as opposed to influences on decisions. The work of Mitchel Lasser reminds us that the explicit presentation of policy justifications is not common in the French system and is only present to a limited extent in the ECJ.[43] The function of the judgment is to provide rulings on which parties and lower court judges can rely. The policy justifications may be debated within the court or in wider for a within the legal community, but they do not count as sufficiently essential points to be included in the formal justifications for a decision.

Secondly, practical considerations affect whether a court can really make effective use of these reasons. Do the deciding judges have time to look at the materials or to understand their legal context? Are not judges likely to be criticised for 'cherry picking' in their choice of material from another system?[44]

[41] Bobek, above n 15, see especially ch 10.
[42] Bobek, above n 15, 197.
[43] M Lasser, *Judicial Deliberations* (2004) 157–61.
[44] See Mak, above n 8, 205 for an articulation of this concern by judges themselves.

Especially in supreme courts with a very large throughput of decisions, the discussion of ancillary reasons for decisions is a luxury. In such contexts, however influential such arguments might be, they may well not be turned into formal and explicit reasons for a decision.

Thirdly, evidence is only readily available about 'institutional' reasons, ones provided within judgments or formal preparatory materials. Mak, in her interviews, is able to show that a number of matters, including foreign law, are considered by judges in their deliberations, but do not appear in the judgment.[45] She quotes a French judge who drew the analogy with scaffolding. Foreign law provides inspiration whose presence may be obvious during the construction work, but once the building is complete, the scaffolding is taken down and it leaves no trace of its presence in the structure of the completed building.[46] Her research and that of Alan Paterson was replicated at the Conference when Lord Kerr and Judge Angelika Nussberger explained about the importance of informal conversations between judges helping to shape the way formally decisions of the supreme courts are used. An important feature of this context is the extent to which the domestic judge considers himself as part of a team which extends to include the foreign courts.

Recent studies by Bobek, Groppi and Ponthoreau, and Gelter and Siems all have made use of statistical data on citations, but all are very cautious about the results.[47] The first methodological problem is that explicit citations cannot simply be taken to be the evidence of formal influence within justifications. Bobek's careful study of the use of citations in a number of jurisdictions shows that formal citations are not a reliable guide to the influence of judicial decisions. Indeed Mak concludes 'the experiences of the Dutch and French judges […] provide evidence that the highest national courts consult the case law of courts in other jurisdictions more frequently than might be expected on the basis of an analysis of their published judgments.'[48]

Even with those reservations, there are still issues about what the statistical information reveals. In the Groppi and Ponthoreau collection, each of the authors studying a particular country was asked to generate statistical data on citation

[45] Ibid, ch 5.

[46] Ibid, 159.

[47] These studies have attempted to be more 'scientific' in their approach compared with earlier studies that have mainly involved essays written on particular countries that draw on reflections (often of judges) in relation to particular prominent cases in their jurisdiction: see e.g. Drobnig and van Erp, above n 11; Andenas & Fairgrieve, above n 9.

[48] Mak, above n 8, 198.

in constitutional supreme courts. This produced some wide divergences on the frequency of citation of foreign courts and when this was undertaken. Namibia, South Africa, Canada, India and Ireland were much more frequent in their citation than many other countries. Bobek also notes that certain countries were looking outside for ideas at particular formative points in their constitutional development.[49] The dynamics on which both Groppi and Ponthoreau and Bobek seize are the internal dynamics of a country—where it is in its constitutional development, how many national cases it has on which to draw, and thus where the value-added of citation lies. Whereas there are specific reasons offered why judges in particular countries are 'open' to the use of foreign judicial decisions as justifications, it is far more difficult to generalise.

For the most part, citation data serve to reveal patterns in citation which can then trigger questions about how particular systems operate. The data that Gelter and Siems have developed is more sophisticated than that of Groppi and Pontoreau, but points in similar directions.[50] They looked at all the decisions of ten Supreme Courts in Europe over eight years. They also corrected for the absence of formal citation in French and similar judgments, by looking at opinions of the reporter judge, where available. They also filtered out situations where European law was involved and so citation of other courts was required. But even just looking at areas of law that were common to the courts studied, the pattern of citation was very diverse.[51]

Mak has conducted interviews with judges from a number of supreme courts and concludes that they worry more about finding arguments that they find compelling, rather than about their precise status as authority reasons for a decision.[52] All the same, it does matter whether foreign decisions are used as justifications, because that demonstrates not merely the interconnectedness of legal systems, but also a different attitude to the sources of law. I have suggested that it is best not to seek uses of foreign law as independently weighty justifications for a judicial decision. In most legal systems, single previous decisions do not provide adequately weighty justifications.[53] But consistent lines of case law may well do so. The accumulation of reasons may provide a reinforcement of a particular result. The priority of the national law justifications

[49] Bobek, above n 15, 207–10.

[50] M Gelter & M Siems, 'Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe' (2014) 62 *AJCL* 35.

[51] Ibid, Table 4, 48.

[52] Ibid, 48 (fn 2).

[53] Bell, above n 14, 10.

is not lost, but those justifications are given added lustre if they are embellished by justifications from decisions in other jurisdictions. But the ability of the foreign law to add weight or lustre to available domestic legal arguments will depend on the reputation of the foreign court or legislature as well as the attractiveness of the solution. So it is not so much that a foreign judgment supplants a domestic judgment, but that it enhances the standing of existing domestic options. Mak's analysis based on interviews confirms this picture. She suggests that, on the one hand:

> Judges with an interest to learn about non-binding foreign legal sources can be found in all of the examined highest courts. However, the judges generally consider the usefulness of comparative law for judicial decision-making should not be over-rated.[54]

On the other hand, she does consider that they have some significant influence:

> Although the use of such foreign legal materials is not always easily apparent in the published judgments, the interviews clarify that foreign law is studied and discussed and if not persuasive at least has a guiding role in the deciding of some domestic cases.[55]

So these contextual features serve to determine the use that might be made of foreign law in particular legal systems.

The analysis of citations does, however, reveal some features that are of particular importance to the study of globalisation. The pattern of citation is predominantly to another legal system in the same legal family or that has influenced legal development—so the Austrians cite overwhelmingly Germany and occasionally Switzerland, the Irish overwhelmingly the English, Spain cites Germany. There is a clear clustering of citations.[56] Much of the clustering makes sense in terms of legal families, geographical proximity and language. Not surprisingly, England and Ireland stand apart from some of the other European countries. Legal tradition is a significant feature. Indeed the three major factors in cross-citation are accessibility, the authoritativeness of a court and the similarity of the jurisdiction.[57]

[54] Mak, above n 8, 162.
[55] Ibid, 198.
[56] Gelter & Siems, above n 50, 51.
[57] Ibid, 58–9.

Groppi and Ponthoreau also identify legal tradition and language as having the greatest correlation in determining the foreign countries whose court decisions are cited.[58] Their study includes jurisdictions in Africa, Asia and North America. For them, 'the research shows the absence of explicit transjudicial communication. Not only are there few countries where explicit citations are used, but the number of countries quoted is limited as well'.[59] Courts are seen as good, according to this research, in contextualising their foreign precedents according to their relevance to the constitutional and legal system from which they come. These two analyses suggest that the citation of foreign precedents is not an example of globalisation at work. It is not an example of worldwide problems being tackled by the development of worldwide solutions. Instead, we see courts starting with their own specific legal problems and then looking for accessible decisions from countries with constitutional and legal systems like theirs. The other feature is that comparison is limited to certain fields of law. Groppi and Ponthoreau looked at constitutional courts and, inevitably, human rights was the most prominent for foreign citations, but also novel social problems that were facing a lot of countries.[60] They cite the Austrian courts as having a low rate of citing explicitly foreign judgments. But Gelter and Siems look at private law cases and find that Austrian supreme courts have a very high rate of citation of foreign cases (mainly from Germany).[61] This is particularly common in fields of insurance law and unfair competition, where there are similar legal provisions between Austria and Germany. The clash of conclusions suggests that the interpretation of the data can be quite difficult.

Analysed in terms of clusters and, in the case of Gelter and Siems, by regression analysis to identify correlates, the quantitative research reveals patterns that would not be obvious from the approach of the earlier collections of Drobnig and van Erp or Canivet, Andenas and Fairgrieve. Their more anecdotal approach is more encouraging about the idea of cross-citation as an emerging and significant phenomenon. While the quantitative data is not able to measure the scale of the phenomenon, it is able to reveal patterns and inherent logic in what is occurring. The particular constitutional context and provisions of Namibia and South Africa give a particular impetus to cross-citation in constitutional cases, but this is not a universal phenomenon. The analysis of Europe has to exclude consideration of situations where national courts are simply applying regional norms as

[58] Groppi & Ponthoreau, above n 7, 412–13, 419.
[59] Ibid, 420–1.
[60] Groppi & Ponthoreau, above n 7, 416–17.
[61] Gelter & Siems, above n 50, 60.

determined by courts in Strasbourg or Luxembourg. Most of the data just reveals the importance of legal traditions and the similarities to which they have given rise. They also reveal the importance of cross-citations in smaller jurisdictions like Namibia, Ireland and Austria which do not necessarily have a large pool of domestic cases on which to draw.

Quantitative analysis focuses on the fact that foreign jurisdictions are cited. It does not say much about the significance of their citation. That requires qualitative research. Whilst Bobek and Mak show that there is value in reading individual judicial decisions contextually and interpreting them, greater value seems to be gained by Mak through conducting elite interviews with a few judges and using this as an interpretative device. Her interviewed judges identified several reasons for consulting foreign legal sources:

> The use of non-binding foreign legal sources is considered useful, first, when the case to be decided holds particular public importance. Secondly, comparative legal materials are considered helpful when judges want to obtain better knowledge or a yardstick for the judgment of the case at hand. Thirdly, judges measure themselves with other courts and want to meet the same quality standards as their 'peers' in other jurisdictions. Finally, the research of non-binding foreign legal materials allows judges to spot trends regarding the evolution of the law in other legal systems and to determine their own position regarding these trends.[62]

This suggests that there is evidence of a greater global perspective within which some important judicial decisions are taken by the higher courts. But we need to be cautious about making claims that this demonstrates a major trend towards a system of global justice.

4 Conclusions for globalisation

If we go back to the Conference theme, the evidence from recent research is unanimously more cautious in claiming that there is a trend towards a global justice. Everyone agrees that there are increasing instances of legal rules adopted at international or regional level that require national legal orders to converge on solutions and to be in line with each other. Either through formal institutions

[62] Mak, above n 8, 201.

that have the mission of ensuring uniform application of these common rules, or through informal cooperation, significant areas of social life are subject to global or regional common rules and principles, rather than being governed in many varied ways by national legal systems. This is the area that all the research identifies as the 'mandatory' area of citing external legal materials. But the claim of the conference theme and the suggestions of some comparative lawyers is that there is also a trend to viewing the law, even in non-mandatory areas, as part of a global enterprise of achieving justice. The evidence for this is much less strong. National judges are sometimes looking beyond their own system, but tend predominantly to pay attention to systems that are similar because of legal tradition and language. These are the ones where they are surer of being able to access the materials and to assess the results.

Bobek comments that '[t]he often voiced claims concerning "global" judicial communities and "global" judicial mindset or outlook are therefore not empirically warranted, certainly not in today's Europe'.[63] Mak is more optimistic,[64] but she recognises that comparing foreign legal solutions is less used in non-mandatory cases and is likely to be the subject of more criticism. Both agree that, in areas, such as human rights, where there are either mandatory common legal provisions or there are similar problems not clearly resolved by national law, then foreign law serves as a benchmark and encourages judges to examine best practice in other countries to see if useful lessons can be learnt. All the same, there are numerous limitations to this process. What do we conclude? First, perhaps to be less ambitious in the search for globalisation. Judges remain national actors and apply national provisions that are relatively clear most of the time. Supranational norms are an increasing part of the role, especially in the highest courts, but effort will inevitably concentrate on the essential areas in which foreign law needs to be consulted. But the 'spillover' effect is important. If networks of judges need to exist for essential work on mandatory norms, then conversation will move to other matters as well. The world has not become one single global judicial order, but there are incremental steps. The steps are through adding regional norms to the traditional focus on countries linked by language and a common legal tradition. But it remains true that the use of foreign legal materials is common mainly in some branches of law more than others, in relation to some countries more than others, and by some judges more than others.

[63] Bobek, above n 15, 197.
[64] Mak, above n 8, 230–1, 236.

5 Conclusions for research

What implications for research teams? The problem of globalisation in law is complex because we are not dealing with the search for a universal solution to common problems. National judges are benchmarking national solutions against other national solutions and also against the standards adopted by some regional courts, such as the European Court of Human Rights. Such a situation makes the work of the individual scholar problematic. A lone scholar can tackle a universal problem in broad terms without worrying about the specific circumstances in which it is instantiated. But if the problem involves the interaction of a multiplicity of levels of legal regulation and those multiple levels may have differential results between countries, then it becomes difficult for a single scholar to undertake the necessary research. To go back to our issue of the asylum seeker, even if we confine our attention to Western Europe, then it becomes necessary to examine several jurisdictions. The results of research on England or the Netherlands, may not be replicated in Germany or Spain. The problem of managing asylum claims within the same regional legal framework may yet yield significantly different results between legal systems.

To examine whether this is the case, a number of specific problems have to be studied within a number of legal systems. In my example, someone has to be able not just to read English, Spanish, German and Dutch, but also to be sufficiently familiar with the way problems are resolved in practice to know whether it is sufficient to focus on national rules, or whether it is necessary to examine regional or local rules, or even the place of private sector bodies in providing assistance to asylum seekers. For such a study to be manageable, it is necessary to bring together a team and draw on its expertise. So the universalising or globalising tendency of the conference's theme may actually require a more complex set of research questions that cannot be managed easily by a single person. A personal illustration may make the point. My *Judiciaries in Europe*[65] was the product of seven years of research on one problem (judicial careers) covering five countries. My more recent book with David Ibbetson on the history of tort law, 1850–2000, was the culmination of seven years of research on a range of problems within the broad theme of tort liability covering seven countries and involving 70 researchers and leading to nine books.[66] There are limits to the achievement of the lone scholar. In the recent book, David Ibbetson and I

[65] Bell, above n 5.

[66] J Bell & D Ibbetson, *European Legal Development: The Case of Tort* (2012).

were able to draw on the original research on very specific points undertaken by a wide range of experts reading their own language. In dialogue with each other, they were able to develop an understanding of the broader themes and we could use those materials as the basis for our own thinking. If the theme of the Conference is to be taken seriously, then it requires serious thought about the kinds of research project that can be undertaken and how the relationship between sole and collective research is best structured.

This article has drawn on the work of a number of lone scholars, especially Bobek and Mak.[67] They looked at a few countries and a significant number of languages. They were able to use those particular skills to advance the subject. But they needed to build on the analysis of earlier collections of fairly unsystematic reflections, such of Drobnig and van Erp[68] and Canivet, Andenas and Fairgrieve,[69] which provided thoughtful insights and illustrations of a process. Importantly, the more systematic collective study by Groppi and Ponthoreau[70] and the later work of Gelter and Siems[71] have provided quantitative analysis, but again over a small but significant number of countries. A fuller picture of globalisation requires both coverage of a wide variety of countries and a variety of analyses, statistical, interview-based, and the reading of texts, and an understanding of the contexts out of which these materials are all arising. The different studies each contribute part of the picture. But it is clear that the initial insights in works such as Drobnig and van Erp needed to be subjected to much more rigorous analysis by subsequent scholarship. It is not sufficient to rely on the impressionistic analysis of academics or judges. More recent work shows different ways in which such rigorous analysis can be provided that is 'scientific' in the continental European use of that term. The challenge of the research question set out by the Conference organisers is how to build a multi-linguistic and multi-skilled team drawn from different legal traditions that is capable of delivering a more comprehensive body of evidence to provide a comprehensive answer.

[67] Bobek, above n 15; Mak, above n 8, respectively.
[68] Drobnig, above n 11.
[69] Andenas & Fairgrieve, above n 9.
[70] Groppi & Ponthoreau, above n 7.
[71] Gelter & Siems, above n 50.